
HUMAN RIGHTS QUARTERLY

When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan

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ABSTRACT

The violent conflict that erupted in Darfur, Western Sudan, in 2003 has led to grave violations of human rights and humanitarian law, particularly by militias backed by the Government of Sudan (GoS). This article argues that such grave crimes, which are continuing, justify humanitarian military intervention, as diplomacy has failed to prize the GoS into halting the mayhem. It denounces the apparent posture of neutrality by the international community to these atrocities, stressing that such neutrality helps the killers and not the victims. The article also reflects on the continuing security challenges that face Africa and proffer suggestions towards confronting them.

There are two kinds of injustice: the first is found in those who do an injury, the second in those who fail to protect another from injury when they can.¹

Man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.²

I. INTRODUCTION

Since early 2003, the world has watched with both shock and apathy as Sudan's Arab-dominated government ethnically cleanses its vast western region of Darfur by arming, encouraging, and giving air support to mostly

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1. CICERO, *DE OFFICIIS* I, vii (trans. Michael Winterbottom, 1994).
2. *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 229 (Clayborne Carson ed., 1998).

Arab militias who kill, maim, rape, and rob black Africans. The Darfur crisis combines the worst of everything: armed conflict, extreme violence, sexual assault, great tides of desperate refugees—without even the unleavened bread of a desperate escape, hunger, and disease, all uniting with an unforgiving desert climate. Evidence from numerous sources—governmental, intergovernmental, and nongovernmental—suggests a tragedy that, in nature and scale, follows in the example of the Holocaust. Such atrocious, terrorizing, and hideous acts, coupled with impunity by the Government of Sudan (GoS), present grave challenges to contemporary international law and institutions that the international community has painstakingly fashioned out to preserve modern civilization.

From a global perspective, Darfur is a challenge to the United Nations' (UN) norms on peace, security, human rights, and refugee issues. The UN itself was established, *inter alia*, "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace" and to achieve "international co-operation in solving international problems of [a] . . . humanitarian character."³ Darfur is a challenge, more particularly, to the United Nations Security Council (UNSC), which is mandated to maintain international peace and security⁴ and, to this effect, to determine the existence of any threat to, or breach of, the peace and to make recommendations or decide what measures are to be taken to maintain or restore international peace and security.⁵ Darfur is a challenge to many UN agencies, including the High Commissioner for Human Rights (UNHCHR), established in 1993 to promote and protect human rights throughout the world.⁶ Given the humanitarian issues in Darfur, including the mass exodus of refugees to neighboring states, Darfur is also a challenge to the High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC).

From a regional perspective, Darfur is a challenge to the African Union (AU), established by its Constitutive Act of 2000,⁷ *inter alia*, "to take up the multifaceted challenges that confront" Africa and its peoples,⁸ including the promotion of peace, security, and stability in the continent.⁹ It is a challenge

3. U.N. CHARTER art. 1, ¶ 1,3, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).

4. *Id.* art. 24.

5. *Id.* art. 39, ¶ 1.

6. High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, U.N. GAOR, 48th Sess., Agenda Item 97, U.N. Doc. A/Res/48/141 (1993).

7. Constitutive Act of the African Union (AU), adopted 11 Jul. 2000, CAB/LEG/23.15 (entered into force 26 May 2001), reprinted in 8 AFR. Y.B. INT'L L. 479 (2000) (as amended by the Protocol on Amendments to the Constitutive Act of the African Union, 11 Jul. 2003) [hereinafter AU Act].

8. *Id.* pmb1.

9. *Id.* art. 3(f).

especially to the Peace and Security Council (PSC), which is not merely an organ of the AU¹⁰ but is, more significantly, the “standing decision-making organ for the prevention, management and resolution of conflicts.”¹¹ Of course, Darfur is a challenge to the human rights community in Africa, especially the African Commission on Human and Peoples’ Rights (African Commission), established in 1987 to promote and protect human and peoples’ rights and ensure their protection in Africa.¹²

The Darfur crisis brings to the fore the debate on the “right” to humanitarian military intervention (HMI) in international law,¹³ a debate that this article seeks to reexamine. Do the abuses in Darfur meet any standard required for the use of military force in Sudan; or will such an action amount to a violation of Sudan’s territorial sovereignty, especially as the GoS claims the Darfur crisis is its internal affair? This article argues that, in the context of a military counterinsurgency campaign against rebel groups, the GoS and government-backed ethnic militias have committed grave international crimes—genocide, “ethnic cleansing,” war crimes, and crimes against humanity—in Darfur to justify HMI, particularly because diplomacy has failed to jolt the GoS into halting the mayhem. This article denounces the current posture of neutrality that the international community is taking in Sudan, despite the overwhelming evidence of continuing atrocities and gross violations of human rights in Darfur. Such neutrality helps the killers and not the victims.

This article has four main parts, excluding this introduction and the conclusion. The first part examines the geopolitical background to the Darfur crisis. The second part examines the “doctrine” of HMI in international law. The third part assesses the international community’s response to the Darfur crisis and calls for HMI to force the GoS to listen to its voice of conscience and end its impunity. The last part uses the Darfur crisis as a springboard to examine the larger crisis of peace and security in Africa, calling on the AU to set its house in order and to tackle the problem of

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10. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *adopted* 9 Jul. 2002, [hereinafter PSC Protocol], *available at* www.africa-union.org. The PSC was inaugurated in May 2004, upon the entry into force of its Protocol.
 11. *Id.* art. 2, ¶ 1. See also Nsongurua Udombana, *The Unfinished Business: Conflicts, The African Union and the New Partnership for Africa’s Development*, 35 *Geo. Wash. Int’l L. Rev.* 55, 80–87 (2003).
 12. See African Charter on Human and Peoples’ Rights, art. 30, *adopted* 27 Jun. 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (*entered into force* 21 Oct. 1986), *reprinted in* 21 *I.L.M.* 58 (1982) [hereinafter African Charter]. Sudan ratified the African Charter on 18 Feb. 1986.
 13. The phrase humanitarian military intervention (HMI) is deliberately coined to distinguish it from other forms of humanitarian intervention, such as disaster management. It will be used throughout this article, unless otherwise noted.

conflicts pragmatically. It argues that roadblocks of conflicts and hotbeds of tensions will prevent Africa from walking in the path of sustainable development in the twenty-first century. In the analysis that follows, the article finds support in international law, specifically the UN Charter, AU Act, and PSC Protocol, as well as “subsidiary means for the determination of rules of law,”¹⁴ such as judicial decisions and writings of publicists.

II. DARFUR: THE LAND, THE PEOPLE, THE CRISIS

Sudan is the largest country in Africa, slightly more than one-quarter the size of the United States (US). The Nile and its tributaries dominate Sudan, which has a territory spanning about 2.5 million square kilometers and a population of about 40 million.¹⁵ Sudan borders Egypt in the North; the Red Sea, Eritrea, and Ethiopia in the East; Uganda, Kenya, and the misleadingly renamed Democratic Republic (DR) of the Congo in the South; and the Central African Republic (CAR), Chad, and Libya in the West. Sudan is rich in minerals, including petroleum, small reserves of iron ore, copper, chromium ore, zinc, tungsten, mica, silver, gold, and hydropower.¹⁶ Since it gained independence from the United Kingdom (UK) in 1956, however, the country has been embroiled in a civil war between the Arab-dominated North and the Christian and animist South—a war that is rooted in economic, political, and social factors. The Sudanese conflict is the longest in Africa, with serious human rights abuses and humanitarian disasters.¹⁷

Darfur is Sudan’s largest region, situated on its western border with Libya, Chad, and the CAR. It comprises an area of approximately 250,000 square kilometers—“an enormous region about the size of France”¹⁸—with an estimated population of 6 million persons.¹⁹ Sedentary African farmers, such as the Fur, Masalit, and Zaghawa tribes, predominate Darfur, with the Fur and Masalit as dominant ethnic groups. These dominant tribes have often united in marriage with Arabs and other Africans. The rest of the

14. Statute of the International Court of Justice, art. 38(1)(d), *annexed to U.N. Charter, signed 26 June 1945*, 59 Stat. 1031, T.S. No. 993 (*entered into force 24 Oct. 1945*) [hereinafter ICJ Statute].

15. CENTRAL INTELLIGENCE AGENCY (CIA), *THE WORLD FACT BOOK: SUDAN*, available at www.cia.gov/cia/publications/factbook/geos/su.html [hereinafter CIA FACT BOOK].

16. *Id.*

17. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 Sept. 2004*, 25 Jan. 2005, ¶ 50 [hereinafter *Darfur Commission Report*].

18. HUMAN RIGHTS WATCH, *DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN*, Vol. 16, No. 5(A) (Apr. 2004), at 6 n.1, available at www.hrw.org/reports/2004/sudan0404/.

19. *Darfur Commission Report*, *supra* note 17, ¶ 51.

population of Darfur consists of nomadic Arab tribes. Although both the black African and the Arab tribes are Muslims, they have a long-standing history of clashes over land, crops, and resources.

For years, the central government in Khartoum has favored the Arabs in Darfur, leading to distrust by the Fur leaders. The distrust became exacerbated when the Sadiq El Mahdi government (1986–1989) adopted a policy of arming Arab Baggara militias from Darfur and Kordofan known as “*murahleen*”²⁰ and using them as a counterinsurgency force against the southern-based rebels. Both the El Mahdi government and its military successors have employed these militias for almost twenty years. After taking power in a coup in 1989, the National Islamic Front (NIF), renamed the National Congress, incorporated many of the *murahleen* into the Popular Defense Forces and paramilitaries, who have been involved in attacks against the Fur community in Darfur, raiding, looting, displacing, enslaving, and punishing the Dinka and Nuer civilians.²¹

The present crisis in Darfur commenced in February 2003, largely as a result of actions by rebel forces, notably the Sudan Liberation Army (SLA), and later the Justice and Equality Movement (JEM), the members of whom come primarily from the Zaghawa, Fur, and Masaalit tribes. The SLA and the JEM accused the Arab-ruled GoS of decades of malign, neglect, and oppression of black Africans in favor of Arabs, necessitating their resort to violence to shake off a yoke they would rather not shoulder. They also demanded that the GoS address perceived political marginalization, socio-economic neglect, and discrimination towards African Darfurians by successive federal governments in Khartoum.²² These are common themes in Africa, largely because the post-colonial state structures “tend toward the institutionalization of ethnic entitlements, rights, and privileges, which create differentiated and unequal status of citizenship.”²³ A group consigned to a permanent minority status will never consider the political arrangement as just.²⁴

On 24 and 25 April 2003, the SLA attacked government military forces at El Fasher in north Darfur. Because the GoS apparently was not in possession of sufficient military resources, as many of its forces were still

20. DAFUR IN FLAMES, *supra* note 18, at 7.

21. *Id.* at 7–8.

22. See Situation of Human Rights in the Darfur Region of the Sudan, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, U.N. ESCOR, 61st Sess., Agenda Item 4, ¶ 5, U.N. Doc. E/CN.4/2005/3 (2004) [hereinafter *Situation of Human Rights in Darfur*].

23. Said Ajejumobi, *Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa*, 23 *HUM. RTS. Q.* 148, 148 (2001).

24. See HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE TWENTY-FIRST CENTURY 203 (2002).

located in the south,²⁵ it allegedly sponsored a militia, composed of a loose collection of fighters mostly of Arab background, known as the “Janjaweed,” to respond to the rebellion. With active government support, the militias attacked villages, systematically targeting civilian communities that share the same ethnicity as the rebel groups, killing, looting, forcibly displacing, destroying hundreds of villages, and polluting water supplies. There have been reports of deliberate aggressions against women and girls, including gang rapes, during the invasions, with women and girls abducted, held in confinement for several days, and repeatedly raped. Other forms of sexual violence have been reported, especially during flight and further displacement, including when women have left towns and IDP sites to collect wood or water. Some women and girls have become pregnant as a result of rape;²⁶ and some have been charged with *Zina*—unlawful sexual intercourse, which is a punishable offense under the Sudan Penal Code—for acts in which they did not willingly engage!²⁷ Many children—boys and girls—have been abducted, killed, and generally made to suffer the devastating consequences of the problems caused by adults, acts that clearly violate both customary and conventional law prohibitions of deliberate attacks on civilians.²⁸ More than one million villagers have been forced from their homes, fleeing to refugee camps in Sudan and Eastern Chad.²⁹

It is hard to know the total mortality during the two years of ethnic cleansing in Darfur, partly because the GoS initially blocked the teams from the UN and other agencies from going there to make such an estimate. The Darfur Commission Report also failed to give any kind of death toll from the crisis, despite cataloging hundreds of violent incidents and many eyewitness-

25. *Darfur Commission Report*, *supra* note 17, ¶ 66. See also *id.* ¶ 67.

From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels.

26. *Darfur Commission Report*, *supra* note 17, ¶¶ 334, 336 (confirming these reports).

27. AMNESTY INT’L USA, *SUDAN: CONTINUING HUMAN RIGHTS VIOLATIONS*, AI Index: AFR 54/038/2005, 13 Apr. 2005, available at www.amnesty.org.

28. See, e.g., Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. REP. 226, ¶ 78 (“States must never make civilians the object of attack.”). Cf. Protocol (I) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 Jun. 1977, art. 51(2), 1125 U.N.T.S. 3 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1391 (1977); Protocol (II) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 Jun. 1977, art. 13(2), 1125 U.N.T.S. 609 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1442 (1977).

29. Mikael Nabati, *The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556*, ASIL INSIGHTS (Aug. 2004), available at www.asil.org (further noting the report of the UN Office for the Coordination of Humanitarian Affairs, which estimates that about 2.2 million civilians in Darfur are in urgent need of food, medicine, and shelter).

ness accounts of village massacres. It only established "two irrefutable facts regarding the situation in Darfur": first, that 1.65 million persons have been internally displaced in Darfur, with more than 200,000 refugees in neighboring Chad; and, second, that there has been large-scale destruction of villages throughout the three states of Darfur.³⁰ The current estimates of the number of deaths range between 300,000 and 340,000.³¹ A British parliamentary report, released in 2005, also put the total death toll at 300,000,³² while Jan Egeland, the UN emergency relief coordinator, put the number of those who have died from hunger and disease at 180,000.³³ The death toll is rising by about 10,000 per month.

The cycle of violence in Darfur has continued unabated, even in villages in which there is nothing left to burn and loot; and the fear that it will continue has paralyzed refugees and displaced populations, preventing voluntary returns, trapping them in camps or informal settlements for the foreseeable future. One possible explanation for the very cruel and disproportionate response to the uprising in Darfur may be that the GoS was not in the mood to tolerate further threats to its authority. Thus, as the Commission on Human Rights (CHR) puts it, "what appears to have been an ethnically based rebellion has been met with an ethnically based response, building in large part on long-standing, but largely hitherto contained, tribal rivalries."³⁴ The humanitarian consequences of the conflict have been aggravated particularly by the refusal of the GoS to allow unrestricted access to Darfur by humanitarian agencies. In 2004, the US Agency for International Development reported: "Humanitarian access to conflict-affected populations outside of the state capitals of Geneina, El Fasher, and Nyala was extremely limited until late May due to GOS impediments that blocked humanitarian access and relief operations."³⁵ The GoS, of course, has denied the charges and even described the Janjaweed militias as "criminals," though the police have yet to investigate, let alone prosecute, the bandits. There are even "widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police."³⁶

30. *Darfur Commission Report*, *supra* note 17, ¶ 226.

31. See Russell Smith, *How many have died in Darfur?*, BBC NEWS ONLINE, 16 Feb. 2005, available at news.bbc.co.uk/1/hi/world/africa/4268733.stm (reporting that Eric Reeves, a US academic, estimates the death figure from the Darfur crisis at 340,000 (at the beginning of 2005) while UK-based Dr. Jan Coebergh, who once worked in Darfur, "puts the figures slightly lower at about 300,000").

32. See also *Mild Rebuke for Darfur's Killers*, ECONOMIST, 2 Apr. 2005, at 37.

33. *Id.*

34. Situation of Human Rights in Darfur, *supra* note 22, ¶ 6.

35. US AGENCY FOR INT'L DEV., DARFUR: HUMANITARIAN EMERGENCY FACT SHEET #12 (2004) [herein after USAID FACT SHEET 12].

36. *Darfur Commission Report*, *supra* note 17, ¶ 422.

President El-Bashir himself also reportedly confirmed to the media that, in order to rein in the Janjaweed, these same militias “were incorporated in ‘other areas,’ such as the armed forces and the police.”³⁷

Surely, the testimonies of survivors, international aid workers, foreign observers, and even militia leaders themselves all flatly contradict the lies from Khartoum. The UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions indicated on 29 June 2003 that significant evidence exists to support allegations that the GoS helped perpetuate grave human rights violations in Darfur, stating that it was the GoS’ responsibility to end the cycle of violence and the culture of impunity.³⁸ Human Rights Watch has also shown evidence that the Sudanese military is supporting and aiding the Janjaweed attacks and permitting the militias to maintain at least sixteen camps in the western region of Darfur.³⁹ The Darfur Commission Report removes any iota of doubt regarding the involvement of the GoS in the mayhem. The report established clear links between the GoS and the Janjaweed militias and stated that militias “have received weapons, and regular supplies of ammunition which have been distributed to the militias by the army, by senior civilian authorities at the locality level.”⁴⁰

The next part examines debates on the doctrine of HMI in international law as a framework for considering the international community’s response to the Darfur crisis.

III. IS THERE AN INTERNATIONAL LAW OF HUMANITARIAN INTERVENTION?

“State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.”⁴¹ What happens when a state is unwilling or unable to halt or avert suffering of serious harm by its population as a result of internal war, insurgency, repression, or state failure? Put differently, how should the international community respond to situations of gross human rights denials (famine, displacement, etc.) or violations (ethnic cleansing, genocide, etc.)? What, in the specific context of Darfur, are the responsibilities of the UNSC, or of the AU Assembly and the PSC, in

37. *Id.* (citing transcript of a CNN interview of 31 Aug. 2004).

38. See USAID FACT SHEET 12, *supra* note 35.

39. See, e.g., HUMAN RIGHTS WATCH, *DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN*, Vol. 16, No. 6(A) (May 2004) [hereinafter *DARFUR DESTROYED*], available at hrw.org/reports/2004/sudan0504/sudan0504simple.pdf.

40. *Darfur Commission Report*, *supra* note 17, ¶ 111.

41. INTERNATIONAL COMMISSION ON STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, xi (2001) [hereinafter *THE RESPONSIBILITY TO PROTECT*], available at www.iciss.ca/pdf/Commission-Report.pdf.

the context of the UN Charter, the AU Act, and the PSC Protocol? What should be done in the event of a humanitarian crisis if international authorization for the use of force is not available due to the inability of states to authorize collective action or their unwillingness to contribute troops to an operation?

These questions activate debates on the “right” to unilateral HMI,⁴² defined as “the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.”⁴³ Before the end of the Cold War, the doctrine of HMI was more an academic exercise than a legal doctrine of states.⁴⁴ The few episodes resembling HMIs—Bangladesh (1971), Cambodia (1978), and Uganda (1979)—were justified by the invading states—India, Vietnam, and Tanzania—mainly on self-defense, which is legal under customary and conventional law. In its modern connotation, HMI is associated with collective response through the UN or similar international agencies.⁴⁵ Indeed, the debate has shifted somewhat since the Cold War, such that states, including the UK, now forcefully argue in favor of the use of force to prevent or stop gross violations of human rights and humanitarian law.

As an object analysis in the study of international law and relations, HMI sits at the intersection of the realist and idealist traditions. The dividing line, essentially, is between supporters of sovereign independence and nonintervention, on the one hand, and adherents to humanitarianism or

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42. Terminologically and jurisprudentially, the use of the word “right” in referring to HMI is a misnomer. Human rights law is created for the benefit of individuals and casts “duties” on states to respect, promote, and fulfill those norms, including the “duty” on other states to intervene to stop gross human rights violations in another. For a similar view, see Kithure Kindiki, *Humanitarian Intervention and State Sovereignty in Africa: The Changing Paradigms in International Law*, Occasional Paper No. 3, 2003, at 2 (on file with the author).
 43. ELLERY STOWELL, *INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE* 349 (1931). Among the more recent definitions is one by Wil Verwey, who defines HMI as “the threat or use of force by a state or states abroad, for the sole purpose of preventing or putting a halt to serious violation of fundamental human rights, in particular the right to life of persons, regardless of their nationality, such protection taking place neither upon authorization by relevant organs of the United Nations nor with permission by the legitimate government of the target state.” Wil Verwey, *Legality of Humanitarian Intervention After the Cold War*, in *THE CHALLENGE TO INTERVENTION: A NEW ROLE FOR THE UNITED NATIONS?* 113, 114 (E. Ferris ed., 1992).
 44. See generally FERNANDO R. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988); *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (Richard B. Lillich ed., 1973). See also Edmundo Vargas Carreño, *Humanitarian Intervention*, in *INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION* 339 (1997); S.G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. WEST. INT’L L. J. 117 (1993).
 45. See OLIVER RAMSBOTHAM & TOM WOODHOUSE, *HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT: A RECONCEPTUALIZATION* 3 (1996).

human rights, on the other;⁴⁶ and supporters on either side of the divide invoke relevant international norms to justify their positions. This part examines the contending viewpoints, including the question as to which body has the authority in international law to order intervention, if at all, and what happens when that body fails to exercise authority.

A. In Defense of Sovereignty

The modern international system of sovereign states is often traceable to the Treaty of Westphalia of 1648, which established the equality and independence of states, with the corollary "duty on the part of the states to refrain from intervention in the internal or external affairs of other states."⁴⁷ Intervention in this broad sense connotes "armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic, cultural elements."⁴⁸ Regarding HMI, John Dugard says that "the weight of authority is against the recognition of [such a right]."⁴⁹ What constitutes this "weight of authority"? Exploration of this question entails an examination of customary and conventional law on the matter, in addition to other sources of law.

1. *The Principle of Nonintervention and the Prohibition of the Use of Force under Customary and UN Charter System*

Clearly, customary international law regards intervention in the internal affairs of states as illegal; the use of force is regarded similarly. In the *Nicaragua* case,⁵⁰ the International Court of Justice (ICJ) held that the right of every sovereign state to conduct its affairs without outside interference is "*part and parcel of customary international law.*"⁵¹ It even held the prohibition of the use of force *jus cogens*.⁵² In determining the tenor of customary international law, the ICJ relied, *inter alia*, on the Declaration of

46. See T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 BOST. COL. INT'L & COMP. L. REV. 1, 3 (2002) ("The basic issues in this debate thus posit the problem of sovereignty versus the protection of certain universal human rights").

47. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 293 (5th ed., 2003).

48. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, Supp. No. 14, 25, U.N. Doc. A/6014 (1965).

49. JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 423 (2000).

50. Military and Paramilitary Activities in and against Nicaragua (Merits), 1986 I.C.J. REP. 14 (Jun. 27) [hereinafter *Nicaragua*].

51. *Id.* ¶ 106 (emphasis added).

52. See *id.* ¶ 190.

Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, unanimously adopted by the General Assembly in 1970.⁵³ The Declaration, which reiterates the UN Charter's Article 2(4), proclaims "the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the [UN] Charter."⁵⁴ It deliberately imposes this duty on "[e]very State," not just "[a]ll Members," because all states are now subject to the same rule.⁵⁵

Upon joining the UN, member states agreed to "settle their international disputes by peaceful means,"⁵⁶ meaning that the UN Charter was intended to make resort to war more difficult.⁵⁷ The Charter, however, does not expressly prohibit nonintervention by states in the internal affairs of other states; it precludes intervention by the UN itself "in matters which are essentially within the domestic jurisdiction of any state."⁵⁸ The Charter's principle of nonintervention, which also finds expression in several other treaties, introduces the concept of mutually respected order that characterizes the international society. The principle is seen as a great leap from an anarchical international society to one in which states have "established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements."⁵⁹ Regarding third-party intervention in internal conflicts, some argue that the usually high political sensitivity of issues leading to these conflicts reinforce the sovereignty-related arguments against intervention.⁶⁰

The "weight of authority" against nonintervention also includes the Charter's provisions dealing with interstate relations, which categorically prohibit the threat or use of force between states: "All members shall refrain

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53. See Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted 24 Oct. 1970, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028/ (1970), reprinted in 9 I.L.M. 1292 (1970) [hereinafter Friendly Relations Declaration].
 54. *Id.* ¶ 10. Cf. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc. A/RES/42/22 (1987).
 55. Robert Rosenstock, *The Declaration or Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 717 (1971).
 56. U.N. CHARTER, *supra* note 3, art. 2(3).
 57. David Rivkin, Jr., et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 474 (2005) (discussing the right of anticipatory self-defense).
 58. U.N. CHARTER, *supra* note 3, art. 2(7).
 59. HEDLEY BULL & ADAM WATSON, *THE EXPANSION OF INTERNATIONAL SOCIETY* 1 (1984). See also RAMSBOTHAM & WOODHOUSE, *supra* note 45, at 35 (noting that without the norm of nonintervention, there could not be an international society).
 60. See Marrack Goulding, *The United Nations and Conflict in Africa since the Cold War*, 98 (391) AFR. AFF. 155, 160 (1999).

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."⁶¹ Article 2(4) abolishes the use or threat of force only in the "international relations" of member states, and some interpret this to mean that "intra-State clashes therefore are out of the reach of the Charter's provision."⁶² Article 2(4), nevertheless, must be interpreted to bind both member states and nonmembers of the UN, because the provision is an integral part of customary law.

In arguing against HMI, Jonathan Charney stresses that the phrases "territorial integrity" and "inconsistent with the Purposes of the United Nations" were added to Article 2(4) in order "to close all potential loopholes . . . rather than to open new ones."⁶³ The *travaux preparatoires* of the UN Charter also indicate that the expressions "territorial integrity" and "political independence" were originally not included in the text but were added later for "particular emphasis" because there was no intention to restrict the all-embracing prohibition of force inconsistent with "the Purposes of the United Nations."⁶⁴ Other publicists also doubt the existence of a customary principle of HMI, in view of the lack of a coherent state practice. Simon Chesterman, for example, argues that "writers who claim that state practice provides evidence of a customary international law right of humanitarian intervention grossly overstate their case."⁶⁵ Christine Gray argues that there is a rejection by a majority of states of such a doctrine of humanitarian intervention.⁶⁶

International law generally allows two exceptions to the prohibition of force. The first is individual or collective self-defense, which the UN Charter regards as an "inherent right."⁶⁷ There are fundamental disagreements on the scope of self-defense, especially in relation to the so-called anticipatory or "preventive" self-defense argument and the question of protection of nationals. Some writers insist that self-defense "should be narrowly construed" because it is an exception to the prohibition of the use of force.⁶⁸ The second exception relates to collective security under the authorization of the UNSC. The UNSC is mandated to determine the existence of a threat

61. U.N. CHARTER, *supra* note 3, art. 2(4).

62. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 80 (2001).

63. Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1234 (1999).

64. See Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106, 118 (Bruno Simma ed., 1995).

65. SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 84 (2001).

66. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 97 (2000).

67. U.N. CHARTER, *supra* note 3, art. 51.

68. GRAY, *supra* note 66, at 87; see generally, Frank Przetacznik, *The Right of Self-Defence as an Exception to the Prohibition of War*, 5 SRI LANKA J. INT'L L. 119 (1993); DINSTEIN, *supra* note 62; D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP. L.Q. 366 (1991).

to the peace, breach of the peace, or act of aggression, and to take measures to maintain or restore international peace and security, including the use of force.⁶⁹ Even in these recognized exceptions, the just war principle requires that the use of force have a reasonable likelihood of success; that lives may not be sacrificed and taken in futile causes; and that force should be used only when nonviolent means will not suffice.⁷⁰

2. *The Principle of Nonintervention and the Prohibition of the Use of Force under the African International Legal System*

The principle of nonintervention and the prohibition of use of force also find expression in law-creating regional instruments, including the Charter of the Organization of the American States,⁷¹ providing that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”⁷² Conventional international law in Africa, principally the AU Act and the PSC Protocol, also defends and protects state sovereignty.

The AU Act, which replaces the Charter of the [defunct] Organization of African Unity (OAU),⁷³ enjoins peaceful settlement of disputes among its member states;⁷⁴ prohibits the use of force or threat of force;⁷⁵ and prescribes noninterference in the domestic affairs of other states.⁷⁶ These three principles have always remained pivotal for intergovernmental relations since, at least, the formation of the OAU.⁷⁷ Claude Welch, Jr., argues that the OAU was born in 1963 “in a context of nearly untrammelled state sovereignty, in which heads of states sought sedulously to safeguard the independence so recently won.”⁷⁸

The 2002 PSC Protocol similarly enjoins “peaceful settlement of disputes and conflicts”⁷⁹ and prescribes “non interference by any Member

69. See generally U.N. CHARTER, *supra* note 3, ch. VII.

70. See generally LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (1993).

71. See, e.g., Charter of the Organization of American States, 30 Apr. 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force 13 Dec. 1951), reprinted in 33 I.L.M. 981 (1994) [hereinafter OAS Charter].

72. *Id.* art. 18.

73. AU Act, *supra* note 7, art. 33(1).

74. *Id.* art. 4(e).

75. *Id.* art. 4(f).

76. *Id.* art. 4(g).

77. Charter of the Organization of African Unity (OAU), art. 3(2), adopted 25 May 1963, 479 U.N.T.S. 39 (entered into force 13 Sept. 1963), reprinted in 2 I.L.M. 766 (1963) [hereinafter OAU Charter] (declaring “[n]on-interference in the internal affairs of States” as one of the fundamental principles of the Organization).

78. Claude Welch, Jr., *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 43 (1992).

79. PSC Protocol, *supra* note 10, art. 4(a).

State in the internal affairs of another."⁸⁰ A number of soft law instruments before and after the AU Act and PSC Protocol also proclaim principles of sovereignty, noninterference, and nonrecourse to threats or use of force. An example is the Declaration on a Code of Conduct for Inter-African Relations, adopted in 1994,⁸¹ which declares that "the peaceful settlement of disputes constitutes an essential component of the duty devolving on states to refrain from the use of force or the threat thereof or aggression."⁸² Another example is the Algiers Declaration, adopted in 1999, which reaffirmed the need "to promote the use of peaceful means in the resolution of conflicts, in conformity with the principles of sovereign equality, noninterference, nonrecourse to threats or the use of force, and of the independence, sovereignty and territorial integrity of States."⁸³

More recently, the AU Assembly adopted a Non-Aggression and Common Defence Pact,⁸⁴ *inter alia*, "to promote cooperation among the Member States in the areas of non-aggression and common defence."⁸⁵ The Pact provides:

State Parties undertake, pursuant to the provisions of the Constitutive Act [of the AU], to resolve any differences by peaceful means, in order to avoid endangering peace and security; to refrain from the use of force or threat to use force in their relations with each other and in any manner whatsoever, incompatible with the United Nations Charter. Consequently, no consideration whatsoever, be it political, economic, military, religious or racial shall justify aggression.⁸⁶

80. *Id.* art. 4(f).

81. Declaration on a Code of Conduct for Inter-African Relations, AHG/Decl.2 (XXX) (1994), *reprinted in* 3 AFR. Y.B. INT'L L. 382 (1995) [hereinafter Declaration on Code of Conduct].

82. *Id.* ¶ 11.

83. Algiers Declaration, *adopted* 12–14 Jul. 1999, O.A.U. Doc. AHG/Decl.1 (XXXV) (1999) [Algiers Declaration].

84. African Union Non-Aggression and Common Defence Pact, *adopted* 31 Jan. 2005 (not yet in force), art. 2(b), *available at* www.africa-union.org [hereinafter AU Non-Aggression and Common Defence Pact] (defining "a framework under which the Union may intervene or authorise intervention, in preventing or addressing situations of aggression"). The Pact defines aggression as "the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union." *Id.* art. 1(c). *Cf.* Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 2319th mtg. (1974) [hereinafter Definition of Aggression].

85. AU Non-Aggression and Common Defence Pact, *supra* note 84, art. 2(a)(i). Other objectives of the Pact include promoting of peaceful coexistence in Africa; preventing conflicts of inter-state or intra-state nature; and ensuring that disputes are resolved by peaceful means. *Id.* art. 2(a)(ii)–(iv).

86. *Id.* art. 3(a).

This article will shortly illustrate that, while these instruments remain valid, to the extent that they state general rules of international law in Africa, there are now recognized exceptions to these rules in Africa. These treaty exceptions make Africa a unique case study in relation to the doctrine of HMI *vis-à-vis* the Darfur crisis or, indeed, any other crisis of similar magnitude on the continent.

B. In Defense of Humanitarianism

Some commentators believe that, like the English tort of negligence, the categories of exceptions to the prohibition of force are not closed and that the exceptions can and should be extended beyond self-defense and collective security, especially as new conditions of world order have complicated pre-Cold War priorities regarding the use of force. The post-1945 preoccupation of the international community was with the prevention of international wars, but many of the contemporary challenges to international peace and security arise from intra-national crisis.⁸⁷ The doctrine of HMI has, consequently, been advanced as a legitimate exception to international law and its prohibition of the use of force. This segment examines this doctrine *vis-à-vis* state sovereignty.

1. Should Sovereignty Trump "Humanity"?

There is increasing support for the view that states have a responsibility to protect populations that are being subjected to mass violations of human rights and genocide and that forcible measures in this regard are not only legitimate but also legal.⁸⁸ Michael Smith, writing in defense of humanitarianism, insists that "[i]ndividual state sovereignty can be overridden whenever the behavior of the state even within its own territory threatens the existence of the elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside."⁸⁹ Other commentators believe that HMI is not a new doctrine and that it has been a routine feature of the international system, coexisting with the development of state sovereignties.⁹⁰

87. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT INTERNATIONAL RESPONSE, LESSONS LEARNED 185 (2000) [hereinafter KOSOVO REPORT].

88. See John R. D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 VA. J. INT'L L. 485, 496 (1980–1981).

89. See Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, 12 ETHICS & INT'L AFF. 63, 77 (1998).

90. See, e.g., FRANCIS KOFI ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* 30 (1999).

Those who assert the existence of a customary law of HMI allude to the age-long role of international law in the protection of national, racial, ethnic, and religious groups from persecution, which was invoked to justify military activity on some occasions in the nineteenth century.⁹¹ Even some early treaties contemplated the protection of Christian minorities within the Ottoman Empire⁹² and of francophone Roman Catholics within British North America. The Treaty of Peace Between the United States of America, the British Empire, France, Italy, and Japan, and Poland,⁹³ for example, provides: "Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion."⁹⁴ These treaties, to quote the Permanent Court of International Justice (PCIJ) in the *Minority Schools in Albania* case, were intended to

secure for certain elements incorporated in a State, the population of which differs from them in race, language, or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.⁹⁵

Between 1827 and 1830, Greece experienced military intervention by France, Britain, and Russia. Different scholars have given different justifications for the intervention, including commercial considerations;⁹⁶ but a more plausible explanation seems to be that of Ellery Stowell, who believes that the "motive of the intervention would seem to have been to protect the rights of [Greek] self determination."⁹⁷ Stowell's conclusion is fortified by the fact that the intervention eventually led to Turkey's acceptance of the London Treaty of 1829 and, ultimately, the independence of Greece in 1830.⁹⁸

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91. See *id.* at 47–48; see also Michael Reisman, *Humanitarian Intervention to Protect the Iboes*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 44, 178–83.
 92. See, e.g., Treaty of Edirne (Adrianople) between Russia and Turkey, *signed* 14 Sept. 1829, BFSP XVI, 647, arts. V & VII.
 93. Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland, art. 2, TS 8 [1919].
 94. *Id.* art. 2. See also Treaty of Peace and Friendship between France and Great Britain (Treaty of Utrecht), *signed* 11 Apr. 1713, Dumont VIII, Part I, 339, art. 14; Definitive Treaty of Peace between France, Great Britain and Spain, *signed at* Paris, 10 Feb. 1763, BFSP I, 422 & 645, art. IV; Treaty between the Principal Allied and Associated Powers and Roumania, art. 1, 5 LNTS 336 (1921); Treaty between the Principal Allied and Associated Powers and Czechoslovakia, art. 1, 20 TS [1919].
 95. *Minority Schools in Albania*, 1935 PCIJ Ser. A/B, No. 64, 17 (Apr. 6).
 96. Wil Verwey, *Humanitarian Intervention under International Law*, 32 NETH. INT'L L. REV. 357, 399 (1985) (suggesting that this particular intervention could also have been justified as a protection or as commercial interests).
 97. ELLERY STOWELL, INTERVENTION IN INTERNATIONAL LAW 126 (1921).
 98. See ABIEW, *supra* note 90, at 49.

Advocates of HMI believe that such an intervention is not against “the territorial integrity” of a state, nor does it challenge its “political independence”;⁹⁹ that is to say, the use of force within the boundaries of a foreign state will only constitute a violation of its territorial integrity if a portion of the state’s territory is permanently lost.¹⁰⁰ This is not a recent argument, really; in the *Corfu Channel* case,¹⁰¹ the UK claimed that its use of forcible intervention in Albanian waters to recover evidence that might indicate who was responsible for the destruction of two British warships by mines did not violate Article 2(4) because its action did not threaten the territorial integrity or the political independence of Albania. The ICJ rejected this ingenious argument, holding that it

can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever the present defects of the international organisation, find a place in international law. Intervention is still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the powerful states.¹⁰²

Supporters of HMI also argue that the domestic jurisdiction provision in the UN Charter “no longer precludes humanitarian intervention, provided it is mandated by the [UNSC]”;¹⁰³ indeed, neither the GA nor the UNSC interprets Article 2(7) to prevent action by the UN in serious cases of human rights violations.¹⁰⁴ Some even stretch this right to include national interest-driven interventions based on anticipatory self-defense considerations. Rivkin and others, for example, have argued that “it is not obvious why this humanitarian intervention principle only applies to the protection of foreign nationals, rather than a state’s own citizens. In a post-September 11 world, US actions to destroy terrorist organizations and their sponsors are the equivalent of humanitarian intervention in defense of American citizens.”¹⁰⁵ The present writer will not go that far that fast.

It has also been argued that actions could be taken that defeat sovereignty, based on “considerations of humanity.” References to “principles

99. See, e.g., Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203, 253–54 (1973–1974).

100. See ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 58–59 (1987).

101. *Corfu Channel*, 1949 I.C.J. Rep. 4 (Apr. 9)

102. *Id.* ¶ 34.

103. Richard Falk, *Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall*, 99 AM. J. INT’L L. 42, 46 (2005).

104. See Ocran, *supra* note 46, at 18–19.

105. Rivkin et al., *supra* note 57, at 495–96. See generally Lee Feinstein & Ann-Marie Slaughter, *A Duty to Prevent*, 83 FOR. AFF. 136 (2004).

or laws of humanity" proliferate preambles of international conventions, such as the famous "Martens clause" in the Hague Convention of 1907:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹⁰⁶

Principles of humanity "have obvious connections with general principles of law and with equity,"¹⁰⁷ although they require no particular justification. In the *Corfu Channel* case, the ICJ acknowledged "elementary considerations of humanity, even more exacting in peace than in war."¹⁰⁸ The problem is that there is no general definition of "humanitarianism" in international law; some international instruments, such as the Geneva Conventions, merely "assume, rather than explain, 'principles of humanity.'"¹⁰⁹ Some commentators see the very expression "humanitarian intervention" as "unhelpful and even dangerous, because they lead us to erroneous conclusions that blur perceptions of the distinct character of international humanitarian law and humanitarian action."¹¹⁰

Whatever the viewpoint, it seems sensible to argue that international law is dynamic and that norms such as state sovereignty should be reinterpreted in the light of constitutive changes in order to avoid anachronisms. In its *Advisory Opinion on South-West Africa*, the ICJ indicated the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes to the international legal system.¹¹¹ The

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106. Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), pmbl. The "Martens clause" first appeared in 1899 in Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 BFST 988 (*entered into force* 4 Sept. 1900).
107. BROWNLIE, *supra* note 47, at 27. PETER MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION 55 (1985) (stressing that considerations of humanity have become "the principles of the UN Charter").
108. See *Corfu Channel*, *supra* note 101, ¶ 22.
109. RAMSBOTHAM & WOODHOUSE, *supra* note 45, at 9.
110. Jacques Forster, "Humanitarian Intervention" and International Humanitarian Law, Keynote address presented at the 9th Annual Seminar on International Humanitarian Law for Diplomats Accredited to the United Nations, Geneva (8–9 Mar. 2000), available at www.icrc.org.
111. *South-West Africa—Voting Procedure*, 1955 I.C.J. REP. 77 (Jun. 7). See also Kurt Mills, *Reconstructing Sovereignty: A Human Rights Perspective*, 15 NETH. Q. HUM. RTS. 267, 278–79 (1997); Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990); Thomas Fleiner-Gerster & Michael Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 INT'L & COMP. L. Q. 267, 277 (1985).

UN Charter itself must be interpreted against the legal background in which it was adopted and the extant rules of international law.¹¹² The widespread adoption and ratification of universal and regional human rights instruments by states are indicative of a constitutive shift in emphasis from sovereignty to fundamental rights. Furthermore, the increased prevalence of intrastate conflicts and demands from victims and observers alike for some measure of relief for civilians caught up in the cross-currents seem to set aside considerations of sovereignty and noninterference.¹¹³ As UN Secretary-General Kofi Annan asked in the aftermath of the Rwandan massacre, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"¹¹⁴

HMI, however, is not a catchall affair. It has some qualifications, among which are that violations necessitating intervention must be occurring *before* states can act and that there is a reasonable chance that military action can provide relief and protection to the victim population.¹¹⁵

2. *The International Law of HMI in Africa*

The current legal framework of the AU leaves no one in doubt of the legality of HMI in Africa, whatever may be the position within the UN Charter framework and elsewhere. The two norm-creating instruments that have shifted the international legal paradigm in Africa *vis-à-vis* HMI are the AU Act and the PSC Protocol. The adoption of the AU Act in 2000 was a turning point in the collective desire of African leaders to chart a new course for the continent. Among other things, its architects promised to "promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law."¹¹⁶ The Act makes respect for the sanctity of human life and condemnation and rejection of impunity one of its operational principles.¹¹⁷ Most importantly, the Act permits HMI in respect to breaches of international criminal law; it vests on the AU the right

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

112. Rivkin et al., *supra* note 57, at 474.

113. Tom Keating, *Testing the Limits of Global Governance*, 5 MCGILL INT'L REV. 40, 41 (2005).

114. THE RESPONSIBILITY TO PROTECT, *supra* note 41, at vii.

115. Charlotte Ku, *When Can Nations go to War? Politics and Change in the UN Security System*, 24 MICH. J. INT'L L. 1077, 1088 (2003).

116. AU Act, *supra* note 7, pmb1.

117. *Id.* art. 4(o).

humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.¹¹⁸

The AU Act also permits member states to request intervention from the Union “in order to restore peace and security,”¹¹⁹ a request that is unlikely to be made particularly when the member state in question deliberately creates insecurity to achieve a political purpose, like in El-Bashir’s Sudan or Mugabe’s Zimbabwe.

Like the AU Act, the PSC Protocol gives the AU “the right . . . 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, in accordance with Article 4(h) of the Constitutive Act.”¹²⁰ Indeed, one of the functions of the PSC shall be “humanitarian action and disaster management,”¹²¹ pursuant to which it is empowered, *inter alia*, to recommend intervention in a member state to the AU Assembly, “in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”;¹²² to “approve the modalities for intervention by the Union”;¹²³ and to “implement the common defense policy of the Union.”¹²⁴

The PSC Protocol establishes an African Standby Force to enable the PSC perform its responsibilities with respect, *inter alia*, to intervention pursuant to the AU Act.¹²⁵ The Standby Force “shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice.”¹²⁶ States parties to the Protocol¹²⁷ are obliged to “take steps to establish standby contingents for participation in peace support missions,” as the PSC might decide on, or for intervention, as the AU Assembly might authorize.¹²⁸ The mandate of the Standby Force includes intervention in a member state in respect of grave circumstances or at the request of a member state in order to restore peace and security.¹²⁹ The Force shall also provide

118. *Id.* art. 4(h).

119. *Id.* art. 4(j).

120. PSC Protocol, *supra* note 10, art. 4(j).

121. *Id.* art. 6(f).

122. *Id.* art. 7(1)(e).

123. *Id.* art. 7(1)(f).

124. *Id.* art. 7(1)(h). *Cf.* AU Act, *supra* note 7, art. 4(d) (having the establishment of a common defense policy for Africa as one of the principles of the AU).

125. PSC Protocol, *supra* note 10, art. 13(1).

126. *Id.*

127. There are currently thirty-eight states parties to the PSC Protocol, that is, as of 5 May 2005. Ratification status *available at* www.africa-union.org.

128. PSC Protocol, *supra* note 10, art. 13(2).

129. *Id.* art. 13(3)(c).

humanitarian assistance to alleviate the suffering of civilian populations in conflict areas and support efforts to address major natural disasters.¹³⁰

It is reasonable and logical to conclude that the emergent norms on human rights and on HMI in Africa bind all states parties, including Sudan. Sudan ratified the African Charter, which guarantees rights to life,¹³¹ dignity, and freedom from torture,¹³² on 18 February 1986; it ratified the AU Act on 22 November 2000 and the PSC Protocol on 5 July 2003.¹³³ Sudan, therefore, has no basis to complain if its international responsibility is engaged with respect to its atrocities in Darfur.

3. HMI in Modern International Life

In stressing the *opinio juris* of states in the *Nicaragua* case,¹³⁴ the ICJ did not strive to investigate “the ways in which governments actually behave” where the use of force is concerned,¹³⁵ arguably because intervention, though controversial, is a fact of modern international life.¹³⁶ The ICJ, indeed, acknowledged that examples of trespass against the prohibition of force are not infrequent. A Cold War example was the Tanzanian intervention in Uganda, described as “a *putative* example of forcible humanitarian intervention.”¹³⁷ Field Marshall El-Haji Dr. Idi Amin was responsible for the murder of ten thousand Ugandans during his first year in office. His regime confirmed stereotypes of the perceived instability and brutality of Africa’s post-colonial past. He thereafter embarked upon an increasingly vicious course of pogroms and executions against individuals and groups in Uganda.¹³⁸ The “ill-advised Ugandan occupation of the Kagera salient in Tanzania in October 1978”¹³⁹

130. *Id.* art. 13(3)(f). The Standby Force shall also perform functions as the PSC or AU Assembly might direct, including observation and monitoring missions; other types of peace support missions; preventive 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; and peace-building, including post-conflict disarmament and demobilization. See generally *id.* art. 13.

131. African Charter, *supra* note 12, art. 2.

132. *Id.* art. 5

133. See AU web site (for ratification status), available at www.africa-union.org.

134. *Nicaragua*, *supra* note 50, ¶¶ 99–100.

135. Frederic Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 147 (1987).

136. Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 835 (arguing that the incidence of state-force is so widespread in world affairs that Article 2(4) “mocks us from its grave”).

137. RAMSBOTHAM & WOODHOUSE, *supra* note 45, at 4.

138. Idi Amin died in exile in Saudi Arabia in August 2003, regrettably without ever being brought to justice for crimes against humanity. See HUMAN RIGHTS WATCH, UGANDA: IDI AMIN DIES WITHOUT FACING JUSTICE (2003), available at hrw.org/press/2003/08/uganda081803.htm.

139. RAMSBOTHAM & WOODHOUSE, *supra* note 45, at 6.

provided an opportunity for Tanzanian troops, alongside those of Ugandan exiles, not only to expel the invaders from Tanzanian territory but also to thrust into Kampala and to relieve the Ugandan despot of his job on 10 April 1979.¹⁴⁰ The Tanzanian government based its action on self-defense, although "the humanitarian argument would have been at hand."¹⁴¹

The post-Cold War examples of state-force for humanitarian and human rights reasons started with the US-led coalition that occupied the Kurdish areas of northern Iraq in 1990, in the aftermath of the Iraq-Kuwait crisis. In response to Iraqi repression of the Kurds in northern Iraq and the Shiites and Marsh Arabs in the south, the UNSC passed Resolution 688 asking Iraq to end the repression. Although the resolution was not passed under Chapter VII, it declared that the flow of refugees caused by Iraq's repression of its minority populations was a threat to international peace. The US, UK, and France claimed that Resolution 688, plus earlier resolutions, "were sufficient to build a 'legal bridge' to Operation Provide Comfort (OPC) in northern Iraq and no-fly zones in both the north and south."¹⁴² The OPC was relatively successful. Similar attempts in Somalia and Bosnia in 1992 were ill-fated, although these failures did not prevent the US from leading a coalition to restore a democratically-elected President Jean-Bertrand Aristide in Haiti in 1994, acting under Chapter VII of the UN Charter;¹⁴³ the North Atlantic Treaty Organization (NATO) from intervening in Bosnia and Kosovo;¹⁴⁴ or Australia from intervening in East Timor to stem gross human rights abuses and also to maintain international peace and security.

The synthesis emerging from the above dialectic is that, although principles of sovereignty and nonintervention are essential values of the international society, a state forfeits its domestic legitimacy when it perpetrates outrages against humanity. Some scholars insist that the prohibi-

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140. Typically, some African countries, notably Nigeria and Morocco, expressed concern over Tanzania's action, arguing that it might set a dangerous precedent. But President Julius Nyerere responded that, in the absence of a collective willingness by the OAU to condemn or punish a ruler such as Amin, "then each country has to look after itself." TESON, *supra* note 44, at 166.
141. Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT'L L. 437, 445 (2001) (arguing that the justification of HMI would have been available in both Uganda and Cambodia).
142. Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) as We Know It?*, 15 EUR. J. INT'L L. 813, 821 (2004).
143. The UNSC had authorized the US-led intervention to use "all necessary means to facilitate the departure from Haiti of the military dictatorship, . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti." S.C. Res. 940, U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940 (1994). For an account of the role of the UNSC in Haiti, see DAVID MALONE, *DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI, 1990-1997* (1998).
144. See *infra* for a discussion of HMI in Kosovo.

tion on the use of force may constitute, in the end, a better protection for the weak than its abandonment prompted by an over-enthusiastic belief in the virtues of intervention.¹⁴⁵ But in the post-Cold War era, says Richard Falk, the “strict allocation of authority associated with the Westphalian tradition of world order is gradually being superseded by a system of global governance that erodes and complicates our understanding of traditional categories, but none more than that of sovereignty.”¹⁴⁶

The time is ripe, according to the UN Secretary-General, for the international community to reach a consensus, not only on the principle that massive and systematic violations of human rights must be checked wherever they take place, but also on ways of deciding what action is necessary, when, and by whom.¹⁴⁷ The problem, as Modibo Ocran perceptively noted, “is one of meshing the goals of global conflict-minimizing through avoidance of external aggression with the global protection of human rights.”¹⁴⁸ Balancing these goals will remain a major challenge to the international community in the foreseeable future.

C. Right Authority and Failure to Exercise Authority

Granted that contemporary practice appears to support HMI, the next inquiry is which body has the legal competence to authorize such an intervention. And what happens where authorization fails due to absence of consensus? Yoram Dinstein has argued that

[n]o individual State (or group of States) is authorized to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world [and that] the Security Council—and the Security Council alone—is legally competent to undertake or to authorize forcible “humanitarian intervention.”¹⁴⁹

Experience also has shown that, in cases in which the UN has intervened to protect human rights, it is usually the UNSC that authorizes such interventions. The reason is obvious: The UNSC bears the primary responsibility for the maintenance of international peace and security¹⁵⁰ and exercises overall control over the use of force in contemporary international law. As the

145. See generally Hilpold, *supra* note 141, at 437 *et seq.*

146. Falk, *supra* note 103, at 46.

147. *Speech of the UN Secretary-General to the 54th Session of the General Assembly*, 20 Sept. 1999, SG/SM/7136, GA/9596, available at www.un.org/News/Press/docs/1999/19990920.sgsm7136.html.

148. Ocran, *supra* note 46, at 3.

149. DINSTEIN, *supra* note 62, at 85–86.

150. See U.N. CHARTER, *supra* note 3, art. 24.

International Commission on State Sovereignty puts it: "There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has."¹⁵¹

Determining what constitutes threats to international peace and security and, if need be, authorizing the use force to remove such threats is not always easy. A major reason is that the UNSC must not only decide by a majority votes of its members but also, more significantly, that none of the Permanent Five should apply a veto,¹⁵² which they often do in matters involving their vital state interests. Although the veto is now applied sparingly, since the end of the Cold War, the interest of the US largely defines current UN agenda and its leadership drives the UNSC. So what if any of the Permanent Five or, for that matter, the US decides to veto a UNSC authorization of force in Sudan, "mindful of their own ugly records in terrorizing turbulent provinces?"¹⁵³ In the likely event of such a situation occurring, then three possibilities are open to the international community, each of which will undoubtedly weaken the stature and credibility of the UNSC. The first possibility is the Uniting for Peace Procedure of the UN General Assembly; the second is to utilize regional security arrangement of the AU; and the third possibility will be a coalition of willing states. Each possibility will be briefly noted in turn.

1. The Uniting for Peace Procedure

The UN Charter clearly delineates the functions of the GA and the UNSC. It authorizes the GA to discuss questions relating to the maintenance of international peace and security and to make necessary recommendations,¹⁵⁴ including reference of questions requiring definite actions to the UNSC.¹⁵⁵ It excludes matters that are "relative to the maintenance of international peace and security which are being dealt with by the Security Council,"¹⁵⁶ understandably to prevent clashes between the GA and the UNSC.

The inaction of the UNSC during the Cold War and its failure to perform the role assigned to it in the Charter led the General Assembly to assume a

151. Cf. THE RESPONSIBILITY TO PROTECT, *supra* note 41, at xii.

152. U.N. CHARTER, *supra* note 3, art. 27(3) (requiring the affirmative vote of nine members, "including the concurring votes of the permanent members," in all nonprocedural matters).

153. *Sudan Can't Wait*, ECONOMIST, 31 Jul. 2004, at 11.

154. U.N. CHARTER, *supra* note 3, art. 11(2).

155. *Id.*

156. *Id.* art. 12(2).

role greater than that originally envisaged for it. The Uniting for Peace Resolution¹⁵⁷ was adopted during the Suez Crisis of 1950, when the Soviet Union blocked action in the UNSC. Under the resolution, the GA grants itself authority beyond that ceded to it by the UN Charter. It based this authority on the purposes of the UN, in particular those found in the Charter's Article 1, paragraphs 1 and 2, and its duty to work toward their implementation.¹⁵⁸ Anthony Arend and Robert Beck have, however, argued that the US proposed the resolution in order to use the GA to justify its use of military force in various operations.¹⁵⁹

Under the procedure, if the UNSC fails to maintain international peace, due to the lack unanimity among its permanent members, then the General Assembly "shall consider the matter immediately."¹⁶⁰ For the procedure to be activated, one member state of the UN must request for a meeting and either seven members of the UNSC or a majority of the members of the General Assembly must agree before the emergency special session will be called to discuss such threat to international peace.¹⁶¹

2. Regional Security Arrangements

Chapter VIII of the UN Charter deals with regional arrangements for the maintenance of peace and security. It allows for such arrangements "as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."¹⁶² Regionalism was accepted conditionally;¹⁶³ thus, while the Charter blesses regional, collective actions, it limits states acting "unilaterally," providing that "no enforcement action shall be taken under regional arrangements without the authorization of the Security Council."¹⁶⁴

Chapter VIII arguably provides the normative support for Africa's

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157. *Uniting for Peace*, G.A. Res. 377(V), U.N. GAOR, 5th Sess., U.N. Doc. A/377/V (1950) [hereinafter *Uniting for Peace Resolution*].
158. For a discussion of the legal issues surrounding the Uniting for Peace Resolution, see HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 953-90 (1951) (arguing that either the GA already possessed the power described in the resolution or it represented an illegitimate attempt to amend the UN Charter).
159. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 59-60 (1993).
160. *Uniting for Peace Resolution*, *supra* note 157, ¶ 1.
161. For a fuller discussion of the resolution, see Harry Reicher, *The Uniting for Peace Resolution on the Thirtieth Anniversary of Its Passage*, 20 COLUM. J. TRANSNAT'L L. 1 (1981).
162. U.N. CHARTER, *supra* note 3, art. 52(1).
163. INIS CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 106 (1964) (noting that the final draft of the UN Charter reflected "the premise that the United Nations should be supreme, and accepted regionalism conditionally").
164. U.N. CHARTER, *supra* note 3, art. 53(1).

collective security arrangements, although the AU Act and PSC Protocol do not make any reference to Chapter VIII or, indeed, to the requirement of prior authorization by the UNSC before the use of force. These omissions appear to have been deliberate and some commentators have argued that Africa's current security arrangement is "the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the [UNSC]."¹⁶⁵ Jean Allain believes that the AU's radical departure from the UN framework is borne out of loss of confidence in the UNSC in ensuring stability in Africa.¹⁶⁶ It could also be argued that at no point did the UN Charter reserve to the UNSC or, for that matter, the UN the sole legal authority to authorize military action.¹⁶⁷

Ben Kioko, the AU Legal Counsel, also proffers some reasons for Africa's departure from the UN Charter framework on the collective use of force:

When questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand. This decision [to intervene with authorization of the UNSC] reflected a sense of frustration with the slow pace of reform of the continental order, and with instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa.¹⁶⁸

Kioko may have been alluding to the inability or, more appropriately, failure of the UNSC to take enforcement actions to restore peace and security in such African hot spots as Somalia, Burundi, Rwanda, Liberia, Sierra Leone, Cote d'Ivoire, and the DR Congo. On the few occasions that the UNSC managed to reach a consensus on a particular crisis, help came to the affected country too little too late. Understandably but not justifiably, the setbacks that the UN suffered in Somalia and Yugoslavia made it reluctant to assume the political and financial exposure associated with military interventions, a reluctance that has had a particularly adverse consequence on Africa, as the UN Secretary-General admitted.¹⁶⁹

165. Jean Allain, *The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union*, 8 MAX PLANCK Y.B. INT'L L. 237, 238 (2004).

166. *Id.* at 259.

167. Rivkin et al., *supra* note 57, at 474.

168. Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L COMM. RED CROSS 807, 821 (2003).

169. See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, U.N. GAOR, 52d Sess., Agenda Item 10, U.N. Doc. A/52/871-S/1998/318, ¶ 29 (1998). See also *Report of the Secretary-General on Enhancement of African Peacekeeping Capacity*, U.N. GAOR, 59th Sess., Agenda Item 77, U.N. Doc. A/54/63 (2004).

The 1994 Rwandan genocide remains, in the words of Daniela Krosiak, "a deplorable example of the international community's disinterest in the African continent."¹⁷⁰ An estimated 800,000 Tutsis were killed in Rwanda in 1994,¹⁷¹ in what has been described as "the purest genocide since 1945, and perhaps the single greatest act of evil since Pol Pot turned Cambodia into a killing field."¹⁷² Tragically, the international community failed to forestall the genocide, despite the wide publicity given to it in the world's media, prior to and during the pogrom.¹⁷³ When the genocide started, troop contributors withdrew peacekeepers; the original peacekeeping force of 2,500 was scaled down to an ineffectual squad of 270.¹⁷⁴ Bowing to US pressure, the UNSC failed to respond.¹⁷⁵

The international community's reluctance to get involved in Rwanda may have been "a consequence of America's shambolic intervention in Somalia the previous year."¹⁷⁶ Some claim that the genocide erupted amidst chaos or that the international community was unaware of the magnitude of the approaching holocaust. Others argue that "legal constructs and supportive machinery for the new international order [of HMI] were not yet sufficiently developed" by 1994.¹⁷⁷ These assertions are far from the truth; the failure to stop the genocide was a willful, not fortuitous, ignorance; it

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170. Daniela Krosiak, Book Review, 75 INT'L AFF. 877 (1999) (reviewing ARTHUR JAY KLINGHOFFER, *THE INTERNATIONAL DIMENSION OF GENOCIDE IN RWANDA* (1998)).
171. The exact number of those killed in the Rwandan genocide may never be known; estimates range from 500,000 to 1,000,000 persons. See *Question of the Violation of Human Rights and Fundamental Freedoms, In Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, ¶ 24, U.N. Doc. E/CN.4/1994/7 (1994). See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), U.N. SCOR, U.N. Doc. S/1994/1405 (1994); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. Renè Deqni-Sèqui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1996/68 (1996); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. Renè Deqni-Sèqui, Special Rapporteur, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1995/7 (1995).
172. *Rwanda, Remembered*, ECONOMIST, 27 Mar. 2004, at 11 [hereinafter *Rwanda, Remembered*].
173. For the description of the failure of the international community to forestall the genocide, see *Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, CM 12048 (LXVII), 29 May 2000.
174. See Philip Gourevitch, *The Genocide Fax*, NEW YORKER, 18 May 1998, at 46. See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).
175. See *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY—REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE 34* (2004) [hereinafter *A MORE SECURE WORLD*], available at <http://www.un.org/secureworld/>.
176. *Rwanda, Remembered*, *supra* note 172, at 11.
177. KLINGHOFFER, *supra* note 170, at 5.

was a deliberate failure by states to honor their treaty obligations to suppress genocide,¹⁷⁸ whatever may have been the norms on HMI. As *The Economist* puts it, "The small gang of Hutus who organised the genocide were rational men in pursuit of a rational—albeit evil—objective. They wanted to stay in power, and they harnessed ethnic hatred as a means to that end. *They could have been deterred.*"¹⁷⁹

Some commentators even insinuate that the war crimes tribunal, subsequently established to try those who took part in the genocide,¹⁸⁰ was more an afterthought and that it would not have been established if not for the Yugoslav tribunal established to try war crimes in Bosnia.¹⁸¹ It is, of course, the West's insensitivity to Africa and its glaring double standard that make racial interpretations of its actions believable. It took the cajoling of Boutros Boutros-Ghali, then UN Secretary-General, for the UNSC—dominated by Western countries—to take a deeply flawed action in Somalia, by comparing the lack of action in Africa with UN efforts in the former Yugoslavia.¹⁸² Yet, as Ruth Gordon maintains, "if international law permits humanitarian intervention, then all lives would be equally valuable and worth saving."¹⁸³ The result of all this is that Africa's desire to take urgent actions to stop massacres or serious fighting in the immediate future may trump any commitment to cooperate with the UNSC.

3. Intervention by a Coalition of Willing States

The third possibility, in the event of a failure of the UNSC to exercise due authority in Sudan, is for a coalition of willing states to mobilize force and

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178. See generally LINDA R. MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE* (2000) (depicting the human tragedy that was allowed to unfold in Rwanda and the role of several governments, notably France, in fueling this process); HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999).
179. *Rwanda, Remembered*, *supra* note 172, at 11 (emphasis supplied).
180. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994, *adopted* 8 Nov. 1994, S.C. Res. 955, U.N. SCOR, 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994); amended by S.C. Res. 1165, U.N. SCOR, 3877th mtg., Annex, U.N. Doc. S/RES/1165 (1998) [hereinafter ICTR Statute].
181. Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT'L BLACK L.J. 1, 21 (2003) (concluding: "Perhaps Kosovo was Western atonement for this sin."). See also Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 174 (1997). Mutua also notes that Eastern European Bosnians did not rate the same treatment as Western Europeans and, thus, were left to be slaughtered. *Id.* at 173–75.
182. See Letter dated 29 Nov. 1992 from the Secretary-General addressed to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992) (proposing to the UNSC several courses of action it could take in Somalia and urging a decision).
183. Gordon, *supra* note 181, at 22.

intervene to stop ongoing crimes in Darfur, without prior approval of the UNSC. In normal circumstances, the US and Britain could be expected to lead such a coalition; but things are not normal for these powerful states, as they are presently exhausted by the Iraqi intervention, which itself remains controversial. There is, however, no reason why other powerful nations elsewhere cannot mobilize such a coalition, given the necessary political will.

A controversial HMI through a coalition of willing states was NATO's 1999 intervention in Kosovo, a province in the former Yugoslavia. The rise of Slobadan Milosevic to power in the Federal Republic of Yugoslavia (FRY) led to a new wave of nationalism and to the official adoption of an extremist Serbian agenda.¹⁸⁴ The subsequent attempt to change the ethnic composition of Kosovo and create an apartheid-like society led to brutal conflicts between the Kosovo Liberation Army (KLA) and the FRY in 1998. The UNSC had, in the lead up to the NATO action, passed various resolutions imposing, *inter alia*, an arms embargo but none on the use of force.¹⁸⁵ In the discussions leading up to the adoption of Resolution 1199, Russia warned that "the use of unilateral measures of force in order to settle this conflict is fraught with the risk of destabilizing the Balkan region and all of Europe and would have long-term adverse consequences for the international system which relies on the central role of the United Nations."¹⁸⁶

Nevertheless, given "the danger of a humanitarian disaster in Kosovo," as NATO's Secretary-General, Javis Solana was quoted to have said,¹⁸⁷ NATO resorted to force and launched a series of air strikes on Serbian targets in Kosovo beginning 24 March 1999. NATO's action generated much heat, due to the legal and moral issues it raised.¹⁸⁸ Although there was

184. KOSOVO REPORT, *supra* note 87, at 1.

185. See, e.g., S.C. Res. 1160, U.N. SCOR, 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998) (calling for the withdrawal of Serbian forces from Kosovo); S.C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/Res/1203 (1998); S.C. Res. 1239, U.N. SCOR, 4003rd mtg., U.N. Doc. S/Res/1239 (1999).

186. Minutes of the Security Council's 3930th Meeting, U.N. SCOR, 3930th mtg., U.N. Doc. S/PV.3930 (1998). Cf. Minutes of the Security Council's 3937th Meeting, U.N. SCOR, 3937th mtg., U.N. Doc. S/PV.3937 (1998) (wherein Russia again maintained, in the debate leading to Resolution 1203, that "[e]nforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly or indirectly sanction the automatic use of force, which would be to the detriment of the prerogatives of the Security Council under the Charter").

187. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 7 (1999).

188. See generally Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330 (2000); Aaron Schwabach, *Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention*, 27 SYRACUSE J. INT'L L. & COMM. 77 (2000); Abraham

no express authorization of the UNSC or an appeal to the General Assembly Uniting for Peace Resolution, NATO put forward, in justification, a mixture of implied authorization and humanitarian arguments before the ICJ, in the *Legality of Use of Force* case.¹⁸⁹

A day following the commencement of NATO's air strikes in Kosovo, the Special Committee on Peacekeeping Operations of the UN General Assembly noted, in a press release, that NATO acted without authorization of the UNSC and, therefore, was in clear violation of the UN Charter.¹⁹⁰ Others question the legality of the Kosovo intervention on the ground that, unlike the current legal framework in Africa, NATO's constitutive treaty did not provide any clear legal basis for recourse to force, other than the use of force to protect the territorial integrity and political independence of its member countries. Some commentators, however, have argued that the UN participation in the negotiations to end NATO's use of force, after the intervention,¹⁹¹ "added a sense of *ex-post* legitimacy of the operation."¹⁹² The failure of the General Assembly either to condemn or support NATO also suggested "a willingness to turn a blind eye matched by an unwillingness to announce that is what is going on."¹⁹³

The Non-Aligned Movement (NAM) and other Third World countries and institutions maintained noninterventionist stances after Kosovo, apparently because they feared that the precedent could be turned on them or their allies in the future.¹⁹⁴ In an apparent show of solidarity with the UN, the OAU noted,

with grave concern, the growing marginalisation of the United Nations and its role under the [UN] Charter for the maintenance of international peace and security and the promotion of international cooperation for development [and] declare[d] that the unilateral use of force in international relations, outside the

Sofaer, *International Law and Kosovo*, 36 *STAN. J. INT'L L.* 1 (2000); Louis Henkin, Editorial Comment, *NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 *AM. J. INT'L L.* 824 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 *EUR. J. INT'L L.* 23 (1999).

189. *Legality of Use of Force (Yugoslavia v. Belgium)*, 1999 *I.C.J. Rep.* 124 (Jun. 2) (Provisional Measures).

190. See Press Release, U.N. Special Committee on Peacekeeping Operations, *Peacekeeping Operations Should Be Implemented in Strict Compliance with Charter Principles, Representatives in Peacekeeping Committee Stress* (25 Mar. 1999), GA/PK/160, available at www.un.org/News/Press/docs/1999/19990325.gapk160.html.

191. See, e.g., S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/Res/1244 (1999).

192. Kindiki, *supra* note 42, at 37 (arguing, however, that the legality of NATO's action "is somewhat shaky").

193. Johnstone, *supra* note 142, at 822.

194. *Id.* (noting: "Paradoxically, this strategy shows that legal rhetoric is not infinitely manipulable, because the notion of precedent assumes there is some basis for issuing credible judgments that like cases are (or are not) being treated alike.").

duly conferred mandate of the United Nations Security Council, opens the way to practices inimical to world peace and security.¹⁹⁵

Such sentiments could explain the AU's continued reluctance to tear apart the baggage of *reserve domain* doctrine—as the Darfur neutrality demonstrates—despite clear provisions on the use of force in the AU Act, PSC Protocol, and sundry legal instruments. The Kosovo incident, in any event, demonstrates that HMI is lawful with UNSC authorization and unlawful without it, although intervention without authorization may be excused in rare cases; hence, the verdict of the Independent International Commission on Kosovo described NATO's action as “illegal but legitimate.”¹⁹⁶

IV. THE CRISIS OF HUMANITARIAN INTERVENTION IN SUDAN

The general part of this Article considered several aspects of HMI in international law. This part attempts to apply the general principles to the particular case of Darfur. It examines the question of whether it is legal and/or legitimate for the international community to use military force to ensure the physical safety of the Darfur population and to protect their human rights, particularly in the light of continuing war crimes, crimes against humanity, and ethnic cleaning, even if not genocide. Specifically, it examines some of the measures that the international community, in particular the UNSC and the AU, has adopted to induce the GoS to rein in the Janjaweed militias and to end the atrocities in Darfur. It notes, with concern, that the response of the international community to the uprooting and slaughter of tens of thousands of Darfurians in Sudan has so far been to adopt pious resolutions and to wring its hands. The logic of the international community, in particular the UNSC and the AU, seems to be that diplomacy and other nonforceful measures will compel the GoS to act sensibly. Predictably, none of these measures has achieved any positive result, because they are more of carrots than sticks.

This article argues that the use of more sticks, in particular forceful military intervention, in Sudan is potentially the most effective weapon that could end the impunity in Khartoum.

A. Measures Taken by UN Organs and Agencies

It is only fair to say that the international community has made some attempts at solving the Darfur crisis, though these attempts are less than

195. Algiers Declaration, *supra* note 83.

196. KOSOVO REPORT, *supra* note 87, at 4.

satisfactory. As early as 30 June 2003, the UN Secretary-General, Kofi Annan, visited Khartoum for a three day mission focused on the Darfur situation. He also visited neighboring Chad where there are thousands of Darfur refugees. All of this was part of Annan's official trip to the Middle East, Africa, Asia, and Europe. On 1 July, Annan visited the Zam Zam IDP camp, south of El Fasher, and held private discussions with IDPs, assuring them that they would not be forced to return home without guarantees of security and protection.¹⁹⁷

In April 2004, the UNHCHR took up the Darfur crisis, but it could only manage "a softly worded draft resolution of concern,"¹⁹⁸ which Sudan supported, because there was no naming and shaming of Khartoum. This was to be expected, because Sudan, arguably the world's worst human rights serial offender, sits on the fifty-three member Commission, along with such human rights disasters as China, Saudi Arabia, Cuba, Indonesia, Mauritania, and Zimbabwe!¹⁹⁹ As Michael Dennis wrote, "many UN member states, where human rights are not properly accepted and implemented, have realized that the best way to protect oneself from scrutiny is to be elected to the Commission and divert attention from implementation."²⁰⁰ In 2003, in fact, Libya was elected to chair the Commission, "as if the inmates took over the asylum."²⁰¹ The CHR seems not to realize that such disgraceful collaboration with evil regimes will weaken, if not damage, the credibility and legitimacy of human rights institutions in the long run.

The UNHCHR has also shown concern with regard to Darfur, as have the UNHCR and ICRC, which have borne great humanitarian burdens of catering for the huge flow of refugees and internally displaced persons (IDPs). In May 2004, the UNHCHR issued a report on the situation of human rights in the Darfur region of the Sudan, addressed to the Commission on Human Rights.²⁰² In a letter accompanying the report, the Acting UNHCHR "emphasize[d] the importance of the Sudanese authorities' bringing the militias in Darfur under immediate control; taking immediate measures to prevent the recurrence of the criminal violations of human rights that have taken place; acting immediately to alleviate the plight of the

197. See USAID FACT SHEET 12, *supra* note 35.

198. Don Habibi, *Human Rights NGOs and the Neglect of Sudan*, 2 Jul. 2004, available at www.discoverthenetwork.org/articles/NGO-Human%20Rights%20NGOs%20and%20the%20Neglect%20of%20Sudan.htm.

199. For a list of current members of the UN Commission on Human Rights, see available at www.unhchr.ch/html/menu2/2/chrmem.htm.

200. Michael Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT'L L. 364, 385-86 (2003).

201. Habibi, *supra* note 198, n.8.

202. See Situation of Human Rights in Darfur, *supra* note 22.

refugees and displaced persons and to provide redress for wrongs committed; and setting in place arrangements to bring the perpetrators of the criminal violations of human rights to justice."²⁰³

Meanwhile, on 2 April 2004, the UNSC issued a presidential statement expressing its concern about the "massive humanitarian crisis" in Darfur and called on all parties to protect civilians, to allow humanitarian agencies full access to Darfur, and to reach a ceasefire.²⁰⁴ The Council issued a second presidential statement on 25 May, expressing its "deep concern at the continuing reports of large-scale violations of human rights" and calling on the Sudanese government to disarm the Janjaweed.²⁰⁵ On 11 June 2004, the UNSC adopted Resolution 1547 at its 4988th meeting, which, though not dealing specifically with Darfur,²⁰⁶ called "upon the parties to use their influence to bring an immediate halt to the fighting in the Darfur region."²⁰⁷

Then came Resolution 1556 of 30 July 2004,²⁰⁸ which was the first comprehensive resolution of the UNSC on Darfur. Drafted by the US and cosponsored by Britain, France, Germany, Chile, Spain, and Romania, Resolution 1556 was adopted under Chapter VII of the UN Charter by a vote of thirteen in favor, with China and Pakistan abstaining.²⁰⁹ It expressed the UNSC's dismay over the "ongoing humanitarian crisis and widespread humanitarian violations [in Darfur], including continued attacks on civilians that are placing the lives of hundreds of thousands at risk."²¹⁰ It typically condemned

all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and expressing its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees.²¹¹

203. Letter from the Acting United Nations High Commissioner for Human Rights to the Chairperson of the Commission on Human Rights, *in id.*

204. The full text of the statement is available on the UN web site, available at www.un.org.

205. *Statement by the President of the Security Council*, U.N. SCOR, U.N. Doc. S/PRST/2004/18 (2004).

206. See S.C. Res. 1547, U.N. SCOR, 4988th mtg., U.N. Doc. S/RES/1547 (2004) [hereinafter Resolution 1547]. Resolution 1547 dealt with the peace process between the GoS and the Sudan People's Liberation Movement/Army (SPLM/A) to end the two decades-old civil war in Southern Sudan.

207. *Id.* ¶ 6.

208. See S.C. Res. 1556, U.N. SCOR, 5015th mtg., U.N. Doc. S/RES/1556 (2004).

209. China and Pakistan argued that Sudan needed time to live up to its commitments and that Resolution 1556 was too harsh.

210. S.C. Res. 1556, *supra* note 208, pmb1.

211. *Id.*

More significantly, Resolution 1556 classified the situation in Sudan as constituting “a threat to international peace and security and stability in the region.”²¹² It acknowledged “steps taken toward humanitarian access”²¹³ but expressed “concern at reports of violations of the Ceasefire Agreement signed in N’Djamena on 8 April 2004.”²¹⁴ It restated that “the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory” and that “there will be no immunity for violators.”²¹⁵ It called on the GoS, *inter alia*, to facilitate international relief for the humanitarian disaster, by means of a moratorium on all restrictions that might hinder the provision of humanitarian assistance and access to affected populations; to advance independent investigation, in cooperation with the UN, of violations of human rights and IHL; to establish a credible security conditions for the protection of the civilian population and humanitarian actors; and to resume political talks with dissident groups from the Darfur region, specifically the JEM and the SLM/A.²¹⁶

Resolution 1556 expressed the determination of the UNSC “to do everything possible to halt a humanitarian catastrophe, including by taking further action if required”²¹⁷ and requested the Secretary-General to report to the UNSC in thirty days and, thereafter, monthly on the progress or lack thereof by the GoS in disarming the Janjaweed militias.²¹⁸ It endorsed the deployment of international monitors, including the protection force envisioned by the AU, to Darfur²¹⁹ and urged the international community to continue to support these efforts and, in particular, to reinforce the AU monitoring team by providing personnel and other assistance including financing, supplies, transport, vehicles, command support, communica-

212. *Id.* Cf. S.C. Res. 1590, U.N. SCOR, 5151st mtg., pmb., U.N. Doc. S/RES/1590 (2005) (“*Determining* that the situation in Sudan continues to constitute a threat to international peace and security” (italics in the original)); S.C. Res. 1591, U.N. SCOR, 5153d mtg., pmb., U.N. Doc. S/RES/1591 (2005).

213. S.C. Res. 1556, *supra* note 208, pmb.

214. *Id.* (reiterating that all parties to the ceasefire must comply with all of the terms contained therein). The N’Djamena Ceasefire Agreement was facilitated by the US and the European Union (EU) and signed by the two main opposition groups and the GoS on 8 April, taking effect on 11 April. It included a GoS commitment to disarm the Janjaweed militia and a protocol on providing humanitarian assistance in Darfur. Earlier, in September 2003, the US, Italy, Britain, and Norway had mediated a ceasefire agreement between the SLA and the GoS. However, both sides soon accused each other of breaking the agreement, and attacks by the Janjaweed militias intensified in December 2003. A common refrain in all the agreements is the lack of good faith on the part of the parties, in particular the GoS.

215. *Id.*

216. *Id.* ¶ 1.

217. *Id.* pmb.

218. *Id.* ¶ 6.

219. *Id.* ¶ 2. See also *id.* ¶ 16 (expressing “full support for the African Union-led ceasefire commission and monitoring mission in Darfur”).

tions, and headquarters support as needed for the monitoring operation.²²⁰ It welcomed the contributions already made by the European Union (EU) and the US to support the AU-led operation.²²¹

The draft Resolution 1556 provided for “sanctions” against Sudan in the event of noncompliance. However, seven of the fifteen council members—including Algeria, China, and Pakistan—were reluctant to endorse an explicit threat of sanctions against Sudan, making the US soften the language of the resolution and to substitute a reference to “further actions, including measures as provided for” in Article 41 of the UN Charter in the event of noncompliance. The UN Charter authorizes the UNSC, for the purposes of maintaining international peace and security, to decide on “measures not involving the use of armed force,” including “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”²²² Should such nonforceful measures prove to be inadequate, then the UNSC should “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security,” including “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the [UN].”²²³

On 29 March 2005, the UNSC adopted Resolution 1591, which, *inter alia*, imposes “smart sanctions” on all persons found to

impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the measures implemented by Member States in accordance with paragraphs 7 and 8 of resolution 1556 (2004) and paragraph 7 of this resolution as implemented by a state, or are responsible for offensive military overflights described in paragraph 6 of this resolution, shall be subject to the measures identified in subparagraphs (d) and (e) below.²²⁴

The sanctions include travel ban on perpetrators of the Darfur mayhem;²²⁵ freezing of all funds, financial assets, and economic resources belonging to such persons;²²⁶ and ensuring that no resources are made available by their nationals or by any persons within their territories to or for the benefit of such persons or entities.²²⁷ Targeted or smart sanctions are increasingly becoming attractive in international relations and policies. The UNSC has

220. *Id.* ¶ 3.

221. *Id.*

222. U.N. CHARTER, *supra* note 3, art. 41.

223. *Id.* art. 42.

224. S.C. Res. 1590, *supra* note 212, ¶ 3(c).

225. *Id.* ¶ 3(d).

226. *Id.* ¶ 3(e).

227. *Id.*

invoked Article 41 of the UN Charter in the past to impose smart sanctions against Iraq, Yugoslavia, Somalia, Haiti, and Sierra Leone.²²⁸ It has also extended smart sanctions against non-state actors, because Article 41 does not specify any limitation on those against whom sanctions may be imposed. This is presently the case in Sudan under Resolution 1591. Some of the reasons for preferring smart sanctions over traditional economic sanctions are that they avoid harming the innocent while punishing the guilty and that they minimize the collateral damage inherent in economic sanctions, just as “smart bombs” minimize the collateral damage of military operations.²²⁹ However, the sanctions system requires constant review for its continued relevance.

Prior to Resolution 1591, the UNSC adopted Resolution 1590 on 24 March 2005 to establish the United Nations Mission in Sudan (UNMIS) for an initial period of six months.²³⁰ The mandate of the proposed 10,000 military contingent—excluding “an appropriate civilian component” and “up to 715 civilian police personnel”²³¹—is to support implementation of the Comprehensive Peace Agreement; facilitate and coordinate, within its capabilities and in its areas of deployment, the voluntary return of refugees and IDPs; provide humanitarian assistance, *inter alia*, by helping to establish necessary security conditions; assist the parties to the Comprehensive Peace Agreement in cooperation with other international partners in the mine action sector by providing humanitarian de-mining assistance, technical advice, and coordination; and contribute toward international efforts to protect and promote human rights in Sudan, as well as to coordinate international efforts toward the protection of civilians with particular attention to vulnerable groups, within UNMIS’ capabilities and in close cooperation with other UN agencies, related organizations, and NGOs.²³²

228. See S.C. Res. 665, U.N. SCOR, 2938th mtg., U.N. Doc. S/RES/665 (1990); S.C. Res. 757, U.N. SCOR, 3082d mtg., U.N. Doc. S/RES/757 (1992); S.C. Res. 787, U.N. SCOR, 3137th mtg., U.N. Doc. S/RES/787 (1992); S.C. Res. 875, U.N. SCOR, 3293d mtg., U.N. Doc. S/RES/875 (1993); S.C. Res. 1132, U.N. SCOR, 3822d mtg., U.N. Doc. S/RES/1132 (1997).

229. See *Annual Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, ¶ 62, U.N. Doc. A/53/1 (1998) (noting, “the concept of ‘smart sanctions’ which seek to pressure regimes rather than peoples and thus reduce humanitarian costs, has been gaining support among Member States”). See generally Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 EUR. J. INT’L L. 43 (2002); Mariano Aznar-Gómez, *A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?*, 13 EUR. J. INT’L L. 223 (2002); Gary Hufbauer & Barbara Oegg, *Targeted Sanction: A Policy Alternative?* 32 L. & POL. 11 (2000).

230. See S.C. Res. 1590, *supra* note 212, ¶ 1.

231. *Id.*

232. *Id.* ¶ 4(a).

Clearly, there is much discussion by the UNSC on Darfur, but these discussions have not translated into actions. The measures adopted so far have fallen short of Article 42 use of force, which explains why they have failed to persuade Khartoum to change its behavior in Darfur. Rather than end abuses and provide security to the targeted villages and displaced persons, the GoS remains entrenched and continues to recruit new militias, displace civilians, and burn villages, under the watchful eyes of the international community. Yet, a finding by the UNSC that the Darfur mayhem constitutes "a threat to international peace and security and stability in the region"²³³ should provide a legal basis for tougher measures in Sudan, which, in this case, means HMI,²³⁴ because nonforceful ones have failed to stop the "ongoing genocide," as the CIA terms the Darfur mayhem.²³⁵ Absent such measures, the present writer submits that the UNSC has woefully failed to stand up to its responsibilities under the UN Charter, as far as the Darfur crisis is concerned.

B. Measures Taken by AU Organs and Agencies

Like the UN and its agencies, African intergovernmental institutions and human rights bodies have reacted with concern on the Darfur crisis. At its 35th session in Banjul, The Gambia, the African Commission adopted a "Resolution on the Situation of Human Rights in Darfur, Sudan."²³⁶ The harmless resolution expressed deep concern over "the continuing humanitarian crisis and the reported human rights violations committed in that region since the beginning of the crisis such as the mass killings, sexual violence as a means of warfare, and the abduction of women and children."²³⁷ It called on "all parties to the armed conflict to immediately cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and to allow such assistance to be delivered unhindered."²³⁸ It concluded with a promise by the Commission "to send a fact-finding mission to Darfur to investigate reports on human

233. S.C. Res. 1556, *supra* note 208, pmb.; S.C. Res. 1590, *supra* note 212, pmb.

234. See Frederic L. Kirgis, Jr., *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 512 (1995); see generally Ravi Mahalingham, *The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOR. AFF. 221 (1996).

235. CIA FACT BOOK, *supra* note 15.

236. Resolution on the Situation of Human Rights in Darfur, Sudan, A.U. ACHPR, 35th Sess., adopted Jun. 2004, available at www.fidh.org/IMG/pdf/Resolutions35CADHPa.pdf.

237. *Id.* pmb.

238. *Id.* ¶ 2.

rights violations in Darfur and to report back to it."²³⁹ It is not clear if anything tangible has come out of the Commission's "fact-finding mission to Darfur."

The AU Assembly, on its part, does not seem to have a clearly defined position on the Darfur crisis. In its Decision on Darfur, adopted in July 2004, the Assembly expressed the need to address the crisis "with utmost urgency to avoid further escalation";²⁴⁰ and, though it acknowledges that "the humanitarian situation in Darfur is serious,"²⁴¹ it has been reluctant to use forceful measures to end the crisis. The PSC similarly "reiterates the urgent need for increased humanitarian assistance to the civilians affected by the crisis";²⁴² and it may be presumed that the assistance envisaged here are provisions of foodstuff, clothing, and other basic needs, which are necessary but not sufficient. Short of the use of force to restore peace and security and to allow the Darfur refugees to return home to rebuild their lives, all other forms of humanitarian assistance are mere palliatives.

To its credit, the AU has brokered several Inter-Sudanese Peace Talks, comprising the GoS, the SLA, and the JEM, all aimed at reaching peaceful solutions to the Darfur crisis. These talks have resulted in several agreements, including the two Protocols signed in Abuja, Nigeria, on 9 November 2004. On 1 September 2004, the parties again agreed on "The Protocol on the Improvement of the Humanitarian Situation in Darfur," which the AU believes "constitutes an important step in the efforts aimed at alleviating the suffering of the civilian population in Darfur and paving the way to a comprehensive and lasting political settlement of the conflict in this region."²⁴³

Parties to the September Protocol committed themselves to guaranteeing unimpeded and unrestricted access for humanitarian workers and assistance to reach all the needy in Darfur, including allowing the UN and other humanitarian organizations to travel along routes proposed by the UN, without restrictions or escorts, in order to deliver assistance to areas controlled by any of the parties to the conflict. The parties committed themselves to maintain the civilian character of IDPs and refugee camps and to protect the rights of IDPs and refugees to return to their areas of origin. They further agreed to take all steps required to prevent attacks, threats, intimidation, or any other forms of violence against civilians by any party or group, including the Janjaweed and other militias.²⁴⁴

239. *Id.* ¶ 5.

240. Decision on Darfur, A.U. Ass. 3rd Ord. Sess., Addis Ababa, Ethiopia, 6–8 Jul. 2004, ¶ 2, Assembly/AU/Dec.54 (III) [hereinafter Decision on Darfur], available at www.africa-union.org.

241. *Id.*

242. Communiqué of the 14th Meeting of the PSC, 9 Aug. 2004, ¶ 6, PSC/PR/Comm. (XIV) [hereinafter PSC Communiqué 14].

243. See AU Press Release (1 Sept. 2004), available at www.africa-union.org.

244. *Id.*



To monitor and observe compliance with all the ceasefire agreements, in particular the N'djamena Ceasefire Agreement, the AU/PSC established the African Mission in the Sudan (AMIS).²⁴⁵ Currently made up of 2,000 contingents, episodically deployed, AMIS has the additional mandate of assisting in the process of confidence building; contributing to a secure environment for the delivery of humanitarian relief and, ultimately, the return of IDPs and refugees to their homes; and contributing generally to the improvement of the security situation throughout Darfur.²⁴⁶ Within the framework of its mandate, AMIS is further tasked to: monitor and verify the provision of security for returning IDPs and in the vicinity of existing IDP camps; monitor and verify the cessation of all hostile acts by all parties to the conflict; monitor and verify hostile militia activities against the civilian population; monitor and verify efforts of the GoS to disarm militias; investigate and report allegations of violations of the Ceasefire Agreement; and protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability.²⁴⁷ The PSC Communiqué restated the fundamental principle that the protection of the civilian population in Darfur is the responsibility of the GoS,²⁴⁸ a responsibility the GoS has so far failed to discharge.

Taken together, it is clear that the AU/PSC is taking the easy but uncertain path of mediation rather than the seemingly difficult but certain route of humanitarian military action to end the catastrophe in Darfur. Yet, as the Darfur Commission Report stated, "In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict."²⁴⁹ The AU even appears reluctant to hold the GoS directly responsible for the ethnic cleansing and continuing abuses in Darfur, unlike the UNSC; rather, the AU welcomes

measures taken by the GOS to protect the civilian populations, facilitate the work of the humanitarian agencies and NGOs and provide them with unrestricted access to the affected populations. The Assembly welcomes the

245. Communiqué of the 17th Meeting of the PSC, 20 Oct. 2004, ¶ 4, PSC/PR/Comm. (XVII) [hereinafter PSC Communiqué 17] (enhancing the AMIS).

246. *Id.*

247. *Id.* ¶ 6. The PSC further mandates AMIS to protect both static and mobile humanitarian operations under imminent threat and in the immediate vicinity, within capabilities; provide visible military presence by patrolling and by the establishment of temporary outposts in order to deter uncontrolled armed groups from committing hostile acts against the population; assist in the development of proactive public confidence-building measures; establish and maintain contact with the Sudanese police authorities; establish and maintain contact with community leaders to receive complaints or seek advice on the issues of concerns; observe, monitor, and report the effective service delivery of the local police; and investigate and report all matters of police noncompliance with the Ceasefire Agreement. What a wide mandate for a 2,000-person task force!

248. *Id.*

249. *Darfur Commission Report*, *supra* note 17, ¶ 70.

commitment by the GOS to disarm and neutralize the janjaweed militia and other armed groups and urges the GOS to follow through these commitments.²⁵⁰

The truth is that the el-Bashir regime is engaged in a dangerous brinkmanship, which explains why all the AU-brokered peace talks have collapsed like a house of cards. One wonders if the AU is not unwittingly playing a game sketched in Khartoum or, for that matter, wittingly showing solidarity with a much maligned "African brother." How else does one explain the decision of the AU Assembly, at its January 2005 summit in Abuja, to hold its January 2006 summit in Khartoum?²⁵¹ The decision is particularly absurd given the absence of "a conducive political atmosphere" in Sudan, which is a necessary condition for the hosting the AU Assembly under its 2002 Rules of Procedure.²⁵² Besides unremitting conflicts that have sucked the strength out of Sudan, the political process in that country is in shambles. Several members of the opposition are either in detention without charge or trial or are in exile.²⁵³ Sudan is still in a state of emergency and emergency laws allow authorities to detain people indefinitely, without charge or trial, to break up peaceful demonstrations, and to violate human rights under the pretext of counter-insurgency.²⁵⁴ The legal and judicial systems are regularly and significantly altered to fit el-Bashir's version of political Islam.²⁵⁵

History might reenact itself, with President Field Marshall el-Bashir being ordained as the next AU Chairperson at the forthcoming January 2006 AU summit. In 1975, the OAU defied all logic and common sense and ordained Field Marshall Idi Amin as its Chairman at the Kampala Summit, despite his woeful human rights record and opposition by few African countries. In its protest, the government of Tanzania noted that "Africa is in danger of becoming unique in its refusal to protest crimes committed against Africans, provided that such actions are done by African leaders and African governments."²⁵⁶

250. Decision on Darfur, *supra* note 240, ¶ 3.

251. The calendar of the AU Assembly is available at www.africa-union.org.

252. Rules of Procedure of the Assembly of the Union, Assembly of the AU, 1st Ord. Summit, Durban, South Africa, Rule 5(3), A.U. Doc. ASS/AU/2(l)-a (2002) [hereinafter AU Assembly Rules]. The Rules also stipulate that a member state offering to host the Assembly shall not be under sanctions and must provide "adequate logistical facilities."

253. *Darfur Commission Report*, *supra* note 17, ¶ 49.

254. SUDAN: CONTINUING HUMAN RIGHTS VIOLATIONS, *supra* note 27.

255. *Darfur Commission Report*, *supra* note 17, ¶ 47.

256. Claude E. Welch Jr., *The OAU and Human Rights: Towards a New Definition*, 19 J. MOD. AFR. STUD. 401, 405 (1981) (citing a statement issued on 25 Jul. 1975 by the Tanzanian Ministry of Information and Broadcasting).

C. The Imperative of HMI in Sudan

It is obvious that diplomacy by the international community, in particular the UN and AU, has failed, is failing, and will fail to prize Khartoum into ending its policy of ethnic cleansing—a euphemism for genocide—in Darfur and, in particular, to hem in the Janjaweed militias. In his congressional testimony in May 2004, Roger Winter had stressed that “the GOS has chosen instead to pursue a policy of escalating violence and ethnic cleansing against the civilian population [in Darfur], believing a military solution to be its best option.”²⁵⁷ In a recent Communiqué on Sudan,²⁵⁸ the PSC expressed its deep concern over the grave situation that still prevails in Darfur, “in particular the continued attacks by the Janjaweed militia against the civilian population, as well as other human rights abuses and the humanitarian crisis.”²⁵⁹ Amnesty International, in a recent Media Briefing, reports that “civilians are still targeted by militias supported or condoned by the government. Notwithstanding all the pressure, the government of Sudan has still not stopped carrying out serious and sometimes flagrant human rights violations in many parts of the country.”²⁶⁰

This author believes that appealing to the GoS to honor past commitments has clearly not worked and will not work. It is, therefore, unconscionable for both the UNSC and the PSC to repeat the same stale rhetorical demands, with little hope of enforcement. It is overwhelmingly improbable that peace can be imposed on Darfur without a much larger and more robust foreign military intervention.²⁶¹ HMI is the most viable option open to the international community to bring an end to the killings, rapes, and pillages in Darfur. Such an intervention will send a clear, enforceable message to Khartoum to respect international rule of and, in particular, to fulfill its primary obligation to protect all persons under its territory without discrimination of any kind. An interventionist force will also provide effective security for humanitarian agencies to render assistance to survivors of the pogrom. It will force parties to the conflict to respect the N’djamena Ceasefire Agreement and facilitate the return of refugees and IDPs to Darfur. It will, finally, facilitate the work of investigators working towards prosecutions

257. USAID, *Ethnic Cleansing in Darfur, Written Testimony of Roger Winter, Assistant Administrator, DCHA* (May 2004), available at ciaonet.org/frame/bookfrm.html.

258. See, e.g., Communiqué of the 13th Meeting of the PSC, 27 Jul. 2004, PSC/PR/Comm. (XIII).

259. *Id.* ¶ 1. The communiqué calls on parties to the conflict to scrupulously comply with the Humanitarian Ceasefire Agreement of 8 April 2004 and to extend full cooperation to the Ceasefire Commission (CFC) and the military observers deployed in Darfur. *Id.* ¶ 4.

260. SUDAN: CONTINUING HUMAN RIGHTS VIOLATIONS, *supra* note 27.

261. *Mild Rebuke for Darfur’s Killers*, *supra* note 32, at 38.

of the grave crimes committed in Darfur,²⁶² in view of the recent UNSC referral of the Darfur situation to the International Criminal Court (ICC).²⁶³

AMIS, as presently constituted, "is over stretched to address the security concerns" in Darfur and "lacks basic elements of a balanced military force."²⁶⁴ The Military Staff Committee of the PSC has recommended the enhancement of the military component of AMIS to a total strength of 6,171.²⁶⁵ The Enhanced AMIS Plan makes provision for eight battalions with Nigeria contributing three, Rwanda three, Senegal one, and South Africa one, all to be deployed from 1 July to 30 September 2005. The major problem remains with its mandate. Even an enlarged contingent, though desirable, cannot end the ethnic cleansing or genocide in Darfur unless it is given a robust mandate either under Chapter VII of the UN Charter or Articles 4 of the AU Act and PSC Protocol. It is cheering news, at least, that the yet-to-be-constituted UNMIS will "protect civilians under imminent threat of physical violence."²⁶⁶ It is hoped that deployment will take place soon.

Darfur might be a complex crisis politically, but it is morally and legally simple for several reasons. First, the Golden Rule forbids treating people who differ from us—in ways that are irrelevant to their status as human beings—as having less of a right to life than people who happen to be of the same tribe or religion. Second, the international community has always regarded the persecution of ethnic, national, and religious minorities as morally reprehensible and has labored for years to elaborate bilateral and multilateral treaties for their protection. The problem of national, racial, ethnic, religious, and linguistic minorities still constitutes one of the most burning issues on the international human rights agenda, with international law using the vehicle of self-determination to focus attention on protecting the rights of minorities within state political systems.²⁶⁷

262. See Africa Action, *Africa Action Talking Points on How to Stop Genocide in Darfur, Sudan*, available at www.africaaction.org.

263. See S.C. Res. 1593, U.N. SCOR, 5158th mtg., U.N. Doc. S/RES/1593 (2005) (mandating that the ICC Prosecutor investigate the Darfur situation for possible prosecutions for grave crimes committed in the western region of Sudan). See generally Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, TULSA J. COMP. & INT'L L. (2005) (on file with author).

264. Conclusions of the Third Meeting of the Military Staff Committee Held on 25 Apr. 2005, at Addis Ababa, Ethiopia, ¶¶ 5(2),(3), available at www.africa-union.org.

265. *Id.* ¶ 5(4).

266. S.C. Res. 1590, *supra* note 212, ¶ 16(1) (further authorizing UNMIS "to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, to protect United Nations personnel, facilities, installations, and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers, joint assessment mechanism and assessment and evaluation commission personnel.").

267. See Nsongurua Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209, 1249 n.211 (2003); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 863 (1994).

Complacency by the international community on Darfur is itself a threat to international peace and security, given the atmosphere of absolute impunity in Sudan. The Rwandan genocide painfully illustrates the dangers of such complacency; its story, says the present writer elsewhere, "might have been different had the international community adopted preventive deployment. But there was no political willingness to use force in response to genocide, maybe for fear of the financial costs of intervention."²⁶⁸ There is no excuse for the AU's failure to thwart the crimes being committed in Darfur, even if the UNSC had demonstrated lack of interest, as always. Besides the obligations to prevent genocide under the Genocide Convention,²⁶⁹ the AU Act and PSC Protocol now represent authoritative rules of international law on HMI in Africa. States also undertake, in the AU Non-Aggression and Common Defence Pact, to "prohibit and prevent genocide, other forms of mass murder as well as crimes against humanity."²⁷⁰

A failure to use strong military force to stop the atrocities in Sudan raises questions on the utility of the emergent norms on peace and security in Africa, as enshrined in the AU Act, PSC Protocol, and several soft laws. If the current normative frameworks in Africa were elaborated as a result of frustrations with the UN Charter system, why is the AU unable to use these norms as a springboard for a strong military action in Sudan? Why should Africans take the rhetoric of a renaissance in Africa seriously if their leaders fail to avail themselves of opportunities for action that violent conflicts regularly throw at their sovereign doorsteps, as is currently the case in Darfur? Are Africans not justified in concluding that the AU is merely creating an illusion of progress while producing confusion and inefficiency?

It is instructive that Rwanda—a country that had experienced the horrors of genocide—was the first African state to contribute troops towards the AMIS. Similarly, as of 26 July 2005, "three (3) days before the deadline established by the AU plan of deployment" of enhanced AMIS, Rwanda had completed the deployment of its first battalion of 680 troops in Darfur and has "made itself ready to start the deployment of its second Battalion."²⁷¹ If the fifty-three African states had demonstrated the kind of zeal that Rwanda has shown, Darfur would not have become an open sore for the continent.

268. Udombana, *supra* note 11, at 102.

269. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989), art. 1, at 174 [hereinafter Genocide Convention] ("The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish.").

270. AU Non-Aggression and Common Defence Pact, *supra* note 84, art. 3(d).

271. See Darfur Integrated Task Force (DITF), *Information Update No. 2* (26 July 2005), available at www.african-union.org (reporting on the current status of the military deployment for the enhanced AMIS).

The present writer flatly rejects the contention that fifty-three African states are incapable of mobilizing a strong military force, with or without the UN, to confront the mad dogs on a rampage in Darfur. The time has come for the AU to transform itself from a club in which the members entertain intensive social relations among themselves and tend to show a sort of group solidarity towards the outside world. History will judge African leaders harshly for the unending disappointment of shying away from their responsibilities in the face of grave atrocities.

V. RESPONDING TO THE CONTINUING CHALLENGE OF PEACE AND SECURITY IN AFRICA

The Darfur crisis shows that conflict is still a huge problem in Africa and that there is still much to be done to establish genuine peace and security on the continent. This part examines the continuing challenges of peace and security and points the way forward.²⁷²

A. A Continent that is Still Defined by Conflict

Although Africa has broken the colonial yoke, it inherited a legacy of conflicts and “at present, holds the record of interstate wars and conflicts.”²⁷³ Conflicts have become time bombs, exploding in several states such as Angola, Liberia, Sierra Leone, Ethiopia, Eritrea, DR Congo, Uganda, Sudan, Somalia, Burundi, and Cote d’Ivoire. In some countries, such as Sudan and, until recently, Angola, warfare is written into the whole fabric of social relations, and the majority of the population have lived their lives in a context of war and conflicts. While Africa tries to smother old fires of conflicts, as in Angola, Sierra Leone, DR Congo, and Somalia, new ones rapidly brew up, as in Togo, where the death of Gnassingbe Eyadema and the “election” of his son as successor has created avoidable tensions among a population that has endured four decades of unbridled despotism.

Violent conflicts have killed and displaced more people in Africa than in any other continent in recent decades.²⁷⁴ They have forced millions of people, including women and children, into drifting lives, deprived of their

272. See also Udombana, *supra* note 11, at 55 *et seq.*

273. Yaounde Declaration (Africa: Preparing for the 21st Century), *adopted* 8–10 Jul. 1996, ¶ 6, O.A.U. Doc. AHG/Decl.3 (XXXII) [hereinafter Yaounde Declaration].

274. COMMISSION FOR AFRICA, OUR COMMON INTEREST: REPORT OF THE COMMISSION FOR AFRICA 250 (2005) [hereinafter OUR COMMON INTEREST].

means of livelihood, human dignity, and hope.²⁷⁵ They have led to economic devastation and a drain on Africa's meager resources,²⁷⁶ driving poverty and exclusion and undermining growth and development. According to the Cairo Declaration, conflicts "have brought about death and human suffering, engendered hate and divided nations and families . . . , gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people."²⁷⁷ "[N]o single internal factor," the PSC Protocol echos, "has contributed more to socio-economic decline on the Continent and the suffering of the civilian population than the scourge of conflicts within and between our States."²⁷⁸ The impact of these conflicts stretch beyond the countries immediately affected; war in surrounding countries has adversely affected countries such as Tanzania and Cote d'Ivoire, though the latter is now exporting refugees to neighboring West African countries.

The tragedy in all this is that while the rest of the world increasingly concerns itself with bread-and-butter issues, such as jobs, health care, and education, Africa still grapples with war-and-peace issues in the twenty-first century—boundary disputes, conflicts, resource control, dictatorships, corruption and bad governance, and minority problems. These issues continue to derail Africa's march towards sustainable development, with the result that thirty-four of the forty-nine countries currently classified as Least Developed Countries (LDCs) by the UN are from Africa, including Sudan.²⁷⁹ Africa is deeply in need of a new way beyond the darkness that repeatedly envelops it.

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275. PSC Protocol, *supra* note 10, pmbi. Cf. 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, ¶ 9, adopted 28–30 Jun. 1993, O.A.U. Doc. AHG/Decl.3 (XXIX) (1993), reprinted in Letter Dated 10 Aug. 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General, U.N. GAOR, 48th Sess., Annex II, Prov. Agenda Item 43, U.N. Doc. A/48/322 (1993) [hereinafter Cairo Declaration] ("Conflicts have forced millions of our people into a drifting life as refugees and displaced persons, deprived of their means of livelihood, human dignity and hope."); OUR COMMON INTEREST, *supra* note 274, at 157 (noting that conflict in Africa "has driven poverty and exclusion, undermined growth and development, and deprived many of their right to life, liberty, and security as enshrined in Article 3 of the Universal Declaration of Human Rights"). Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, art. 3, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949).
276. See Yaounde Declaration, *supra* note 273, ¶ 6. Cf. AU Act, *supra* note 7, pmbi. (concerned that the scourge of conflicts in Africa "constitutes a major impediment to the socio-economic development of the continent").
277. Cairo Declaration, *supra* note 275, ¶ 9.
278. PSC Protocol, *supra* note 10, pmbi.
279. See UN Conference on Trade and Development, Statistical Profiles of the Least Developed Countries, at 5, U.N. Doc. UNCTAD/LDC/Misc.72 (2001) [hereinafter UNCTAD/LDC], available at www.unctad.org/en/docs/poldcm72.en.pdf.

B. Emergent Norms on Peace and Security in Africa

In recent years, African leaders have, in numerous instruments, expressed their determination to confront conflicts, conscious of the symmetry between peace and security, on the one hand, and development, on the other. Peace and development are indivisible, and neither is possible without the other.²⁸⁰ The first instrument to consider is the CSSDCA Solemn Declaration that was adopted in 2000,²⁸¹ pursuant to the report of the ministerial meeting of the Conference on Security, Stability, Development and Cooperation in Africa. The CSSDCA Declaration recognizes that “the problems of security and stability in many African countries have impaired their capacity to achieve the necessary level of intra and inter-African cooperation that is required to attain the integration of the continent and is critical to the continent’s socioeconomic development and transformation.”²⁸²

The CSSDCA process creates a synergy between the various activities earlier undertaken by the collective Africa and seeks to consolidate Africa’s efforts in the areas of peace, security, stability, development, and cooperation. It affirms general and specific principles in four main areas called “Calabashes”; these are security, stability, development, and cooperation.²⁸³ Among the general principles include the interdependence of African states in matters of security, stability, and development, which “makes it imperative to develop a common African agenda . . . [that] must be based on a unity of purpose and a collective political consensus derived from a firm conviction that Africa cannot make any significant progress without finding lasting solutions to the problem of peace and security.”²⁸⁴

When African states adopted the AU Act on 11 July 2000, they made the promotion of peace, security, and stability in Africa one of their goals.²⁸⁵ Underpinning these goals are certain principles, including “[p]eaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly” and “[p]eaceful co-existence of Member States and their right to live in peace

280. See Yaounde Declaration, *supra* note 273, ¶ 24. Cf. AU Act, *supra* note 7, pmb1. (stressing that the promotion of peace, security and stability is “a prerequisite for the implementation of our development and integration agenda”). Cf. Declaration on Code of Conduct, *supra* note 81, pmb1. (noting that “every cooperation effort is doomed to failure in an environment devoid of stability, trust and security”).

281. See CSSDCA Solemn Declaration, OAU Assembly 36th Ord. Sess., O.A.U. Doc. AHG/Decl. 4 (XXXVI) (2000) [hereinafter CSSDCA Declaration].

282. *Id.* ¶ 6.

283. *Id.* ¶ 9.

284. *Id.* ¶ 9(c). See also *id.* ¶ 9(b) (“The security, stability and development of every African country is inseparably linked to that of other African countries. Instability in one country affects the stability of neighbouring countries and has serious implications for continental unity, peace and development.”).

285. AU Act, *supra* note 7, art. 3(f).

and security.”²⁸⁶ Within the AU legal framework, the PSC now serves as the “appropriate means” for the resolution of conflicts in Africa, replacing the OAU Mechanism for Conflict Prevention, Management and Resolution (MCPMR).²⁸⁷ Like its predecessor,²⁸⁸ the mandate of the PSC extends to the promotion of peace, security, and stability in Africa; the anticipation and prevention of conflicts; and the promotion and implementation of peace initiatives.²⁸⁹ It will also coordinate and harmonize continental efforts in the prevention and combating of international terrorism; develop a common defense policy for the AU; and encourage democratic practices, good governance, and the rule of law in the continent.²⁹⁰

Even earlier instruments, such as the African Charter²⁹¹ and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights,²⁹² were important for ensuring the promotion, protection, and observance of human rights as an integral part of Africa’s wider objective of promoting collective security for durable peace and sustainable development. In 2001, Africa further elaborated the New Partnership for Africa’s Development (NEPAD)²⁹³ as a Strategic Policy Framework and socioeconomic development program in Africa. Though not a legally binding instrument, NEPAD serves as an additional source of inspiration for the AU.

In the specific context of conflicts, NEPAD pledges joint responsibility for strengthening mechanisms for conflict prevention, management, and resolution at the regional and continental levels and for ensuring that these mechanisms are used to restore and maintain peace.²⁹⁴ It hopes to build the capacity of the states in Africa to set and enforce the legal framework and to maintain law and order.²⁹⁵ It, more significantly, develops an African Peer Review Mechanism (APRM), expected to make a difference in the quality of governance in Africa. As a self-monitoring mechanism, the APRM seeks to

286. *Id.* art. 4(i).

287. The MCPMR was intended “to bring to the processes of dealing with conflicts in . . . [Africa] a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur.” Cairo Declaration, *supra* note 275, ¶ 12.

288. PSC Protocol, *supra* note 10, art. 22(1) (“The present Protocol shall replace the Cairo Declaration.”). *See also* art. 22(2) (providing that the PSC Protocol provisions “shall supercede resolutions and decisions of the OAU relating to the [MCPMR] in Africa, which are in conflict with the present Protocol”).

289. *Id.* art. 3.

290. *Id.* *See also* Udombana, *supra* note 11, at 80–87.

291. *See* African Charter, *supra* note 12.

292. *See* Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, O.A.U. Doc. OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter Human Rights Protocol].

293. *See* OAU, The New Partnership for Africa’s Development 2001 [hereinafter NEPAD], available at www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf.

294. *Id.* ¶ 49.

295. *Id.*

“foster the adoption of policies, standards, and practices” leading to “political stability, high economic growth, sustainable development, and accelerated regional [and continental] economic integration.”²⁹⁶ The APRM works through the sharing of experience and reinforcement of successful best practices, including identifying deficiencies and assessing the needs for capacity building of participating countries.

C. Translating Motions into Movements

The avalanche of normative and institutional frameworks on peace and security in Africa shows, at least in principle, that the AU and its member states are poised to charting a new course in checkmating the scourge of conflicts that has devastated Africa. The problem, as is common with most international instruments adopted in Africa, is that the reality does not match the rhetoric. NEPAD’s APRM, for example, has not yet succeeded in checking new trends towards authoritarianism in Africa, essentially because, like previous mechanisms before it, the APRM represents a mutual admiration club. The AU, for example, has so far failed to call Robert Mugabe, Zimbabwe’s patriarch, to order, notwithstanding that the country is sliding towards anarchy.

Vicious and corrupt governments still dot Africa’s landscape; and, in the restless happiness of power in search of admiration, many of Africa’s leaders have become intolerant of opposition. Uganda has operated a unique political system since Yoweri Museveni came to power nineteen years ago, with opposition parties severely restricted. Political parties are allowed to exist but candidates for office must run as individuals, not as representatives of their parties.²⁹⁷ Rather than address the security needs of their populations, most leaders in Africa still use division and violence for their own political goals, exploiting differences to exacerbate tensions and reaping a wild wind of rebellion to the bargain.

Because responsibility for peace and security in Africa lies primarily with African governments,²⁹⁸ as does responsibility for development,²⁹⁹ the

296. Declaration on the Implementation of the New Partnership for Africa’s Development (NEPAD), *adopted* 8 Jul. 2002, O.A.U. Doc. ASS/AU/Decl.1 (I) (2002) [hereinafter NEPAD].

297. See *Uganda Reveals Democracy Question*, BBC NEWS ONLINE, 9 June 2005, available at news.bbc.co.uk/2/hi/africa/4078168.stm.

298. See, e.g., CSSDCA Declaration, *supra* note 281, ¶ 9(f). Cf. OUR COMMON INTEREST, *supra* note 255, at 250 (“Responsibility for peace and security lies primarily with African governments.”).

299. See, e.g., Declaration on the Economic Situation in Africa, *adopted* 18–20 Jul. 1985, ¶ 6, OAU Doc. AHG/Decl.1 (XXI) (1985) [hereinafter Declaration on Africa’s Economic

AU and its member states must work harder to prevent conflict and to create a continent conducive for foreign direct investment (FDI) and sustainable development. The establishment of peace and security will lead to a measurable reduction in defense spending, enable states to redirect their resources towards raising production and services, create more job opportunities, achieve economic growth and development, and generally raise the living standards of citizens. The AU should stop bemoaning Africa's conflicts and work towards securing a permanent solution to them, because chronic remorse is a most undesirable sentiment. Africa's conflicts may be delicate, sophisticated, and complicated, but they are not unsolvable; what is needed is a genuine political will.

There is near unanimity that the root cause of Africa's conflicts is the endemic competition for resources, be it land or minerals.³⁰⁰ Other internal and external factors complicate this root problem, such as increasing poverty resulting from a cruel and unjust social system and the adverse exploitation of cultural diversities and religious specificities.³⁰¹ Western vested interests further complicate these problems, including their unfair trade, punitive economic and development policies, as well as their participation in small arms deals and "conflict resources." As Chris Cramer puts it: "International arms markets, the use of external debt or foreign exchange, especially mineral based, to purchase arms, the integration of cross-border weapons and criminal networks, foreign military 'aid,' are all characteristics of many modern 'civil' wars."³⁰² These activities have rendered resolutions of African conflicts extremely difficult, if not almost impossible.³⁰³

An integrated approach is needed to tackle Africa's conflicts, given the complexity of the problem. The start line is for African states to give real meaning to the now established truth that "[d]emocracy, good governance,

Situation] ("We re-affirm that the development of our continent is the primary responsibility of our Governments and people."); Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, *adopted* 9–11 Jul. 1990, ¶ 8, O.A.U. Doc. AHG/Decl.1 (XXVI) (1990) [hereinafter Declaration on the Socio-Economic Situation in Africa] ("We reaffirm that Africa's development is the responsibility of our governments and peoples."); NEPAD, *supra* note 296, ¶ 205 ("In proposing the partnership, Africa recognises that it holds the key to its own development.").

300. See generally ANTHONY CLAYTON, *FRONTIERSMEN: WARFARE IN AFRICA SINCE 1950* (1999); *CIVIL WARS IN AFRICA: ROOTS AND RESOLUTION* (Taisier Ali & Robert Matthews eds., 1999).

301. See OAU, Ouagadougou Declaration, *adopted* 8–10 Jun. 1998, pmb1, O.A.U. Doc. AHG/Decl. 1 (XXXIV) (1998) [hereinafter Ouagadougou Declaration].

302. Chris Cramer, *The Economics and Political Economy of Conflict in Sub-Saharan Africa*, CDPR Discussion Paper 1099 (Center for Dev. Pol. & Research, School of Oriental and African Studies, University of London) (1999), at 5, available at www.soas.ac.uk/centres/cdpr.

303. See OUR COMMON INTEREST, *supra* note 274, at 150.

respect for human and peoples' rights and the rule of law are prerequisites for the security, stability and development of the continent."³⁰⁴ States must respect the ideals of constitutionalism, including an independent judiciary, realizing that years of raw assertions of personal power have led to increasing rebellion and conflicts, understandably because rebellion is the language of the unheard.

The international community, for its part, should work with the AU to build the capacity of African states to prevent and manage conflicts and should particularly assist the PSC as it struggles to create an ASF. In the end,

[r]eactive military or humanitarian measures are necessary to prevent the further loss of life in emergencies, but even at their most successful can only control a situation not resolve it. Investment in other tools, such as development, African national and regional capacity to manage conflict, mediation, and peacebuilding, is needed to ensure existing conflicts are resolved as well as future ones prevented. Without such investment, the demand for reactive measures, such as military intervention, can only increase.³⁰⁵

VI. CONCLUSION: WHEN NEUTRALITY IS A SIN

The inaction of the international community during the 1994 Rwanda genocide has shown nonintervention in the so-called internal affairs of states to be a questionable principle, particularly in times of grave crisis. The Darfur crisis further shows that this principle can no longer be taken as an article of blind faith, and the international community must come to terms with these global realities. As Ocran rightly concluded, "no state should, under the cover of the principle of nonintervention in domestic affairs, commit acts contrary to the peremptory rules of international law."³⁰⁶ Even advocates of sovereignty seem to agree that the interpretations of the UN Charter "do not reflect a conclusion that the 'sovereignty' of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity."³⁰⁷

The Darfur crisis presents the UNSC with a unique opportunity to demonstrate its commitment to humanity and to rebuild confidence in the legitimacy of global governance that broke down after the disillusionment of Rwanda. It also opens an uncomfortable opportunity for the AU to

304. CSSDCA Declaration, *supra* note 281, ¶ 9(h).

305. *Id.* at 150–51.

306. Ocran, *supra* note 46, at 19 (arguing that, "if such acts occurred, it should be within the right of other states under certain arrangements to intervene to rectify the situation").

307. Henkin, *supra* note 188, at 825.

showcase its seriousness regarding moving Africa in the direction of peace, security, and stability and the rejection of impunity. The international community has undoubtedly expressed great moral revulsion against the GoS for its Darfur atrocities, but moral revolt is not enough. A strong, military action is now needed to protect black Africans in western Sudan, given the failure of diplomacy to convince Khartoum to halt the mayhem. Those who have power to prevent acts of savage aggression from being committed on others but prefer to be neutral, allowing such acts to run their full course, are as morally culpable as the perpetrators of the acts are legally responsible; and in international law and relations, legality and morality are different sides of the same coin.

The international community's reaction to the tsunami disaster in Asia has shown that it has the capacity to respond with great compassion and urgency to sufferings in any part of the world. Unlike the Asian tsunami, which was an act of God, the Sudan "tsunami" is manmade; it could have been prevented; it can be stopped. The victims of this modern holocaust are waiting for tougher actions to save the dying; and further delay is perilous, as it means further, certain deaths. The animated debate on the legitimacy or even legality of HMI is of no meaning to the dying population of Darfur, because a desperate man does not argue with primitive medical claims.

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