

UNIVERSITY OF GALWAY, IRELAND

European Master's Programme in Human Rights and Democratisation  
A.Y. 2022/2023

# ANALYSIS OF THE DARFUR GENOCIDE THROUGH A CRITICAL AND POLITICAL PERSPECTIVE AFTER 20 YEARS OF CONFLICT

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Word Count Declaration: 29,653

## **ABSTRACT.**

This year 2023 is the 20<sup>th</sup> anniversary since the conflict in Darfur started. After more than 300.000 casualties and almost 2.5 million displaced persons, Darfur has an active genocide that mixed with the recent Civil War leaves a discouraging scenario. Based on the ‘never again, but again Darfur’, this thesis studies why ethnic cleansing seems inevitable after 20 years and how the external powers’ interests have influenced such an extension. The complexity of the ethnic situation and the controversy defining the crimes as genocide has been the rhetoric used for more than 20 years to justify non-intervention. This thesis provides a detailed explanation of the political and economic interests of the so-called “triangle of black interest”: the US, China and Russia. Those who happened to be the majority of the members of the UN Security Council are the ones in control of humanitarian responses. Despite the human rights motives that should dictate the UN Resolutions, the state’s actions in Darfur have been driven by the war on terror narrative, the control of petroleum and the commerce of armament. This political use of the UN human rights protection mechanism has been nourishing the ‘African solutions for African problems’ narrative adopted by the AU which has indirectly positioned the organisation on the perpetrators side. Those actions have triggered the so-called ‘African Revolution’ by the African continent in other UN dependent instruments such as the ICC. This intersectional scenario has led to two decades of conflict without a solution, ongoing violence, and no reparations for the victims. Is Darfur the new Rwanda? How many deadly conflicts are needed to show the international community the inconsistencies of the human rights system?

**Keywords:** Darfur, Sudan, genocide, humanitarian emergency, Al-Bashir, US, UN Security Council, China, Russia, African Union, International Criminal Court, political and economic interests.

## **TABLE OF ABBREVIATIONS.**

ADP Atrocities Documentation Project

AMIS African Mission in Sudan

AU African Union

AU PSC African Union Peace and Security Council

CAR Central African Republic

CEN-SAD Community of Sahel-Saharan States

CIA Central Intelligence Agency

CNPC China National Petroleum Company

COI United Nations International Commission of Inquiry on Darfur

COMESA Common Market for Eastern and Southern Africa

DLF Darfur Liberation Front

DPA Darfur Peace Agreement

DRC Democratic Republic of the Congo

HFCA N'Djamena Humanitarian Ceasefire Agreement

ICC International Criminal Court

ICISS International Commission on Intervention and State Sovereignty

IDPs Internally Displaced Persons

IIWW Second World War

JEM Justice and Equality Movement

NIF National Islamic Front

Res Resolution

RSF Rapid Support Forces

SAF Sudan's Armed Forces

SIPRI Stockholm International Peace Research Institute

SLM/A Sudan Liberation Movement/Army

UN United Nations

UNAMID African Union–United Nations Mission in Darfur

UNGA United Nations General Assembly

UNHCR United Nations High Commissioner for Refugees

UNSC United Nations Security Council

US United States

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## 1. INTRODUCTION.

Reeves' quote on the Darfur genocide having 'the perverse distinction of being the longest and most fully chronicled genocide of the last century', illustrates the two decades of ongoing violence.<sup>1</sup> 2023 is the 20th anniversary since the conflict in Darfur started in 2003 in a context where the international community appears to have gotten used to a scenario that seems classic in our times. Ethnic struggles mixed racial origins with disputes over scarce resources. The result is mass killings, displacement, misery, and a variety of atrocities. This is the case in Darfur.

In a world where human security is placed at the centre of the international agenda, a conflict with the characteristics of Darfur is especially relevant in the contemporary global dynamics. The implications of the Darfur crisis in the current era have salient dimensions as they entail a test of the 20th-century legal texts' applicability over modern conflicts.

In light of these considerations, and using the ongoing genocide in Darfur as context research, this thesis will set out to explore the research question: how the political dynamics and economic interests of the external parties can influence the development of humanitarian conflicts where people are still dying? Why haven't the killings stopped? The conflict in Darfur is relevant to situate the analysis, since after 20 years of conflict, noneffective intervention has been carried out even though the conditions and the legal background were there. Thus, the paper will be based on a critical analysis of all the actors involved in the dynamics of the genocide in Darfur to state the importance of reviewing the priorities of the existent human rights system and organisations. Based on the existing tendency to balance economy and political power over human lives, the subsequent questions are posed: should Darfur be used as the starting point for a reform of the system? Should that reform be the disappearance of the existing one?

A case such as Darfur is crucial for the current configuration of international relations and the human rights system constructed by it. Among them is the Convention on the Prevention and Punishment of Genocide in 1948 based on which the signatory countries made a legal commitment to defend and protect civilian populations as well as to adopt

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<sup>1</sup> Eric Reeves, 'Getting Darfur Wrong' (2009) 56(4) Dissent 108.

measures to prevent and punish those crimes. On the same hand, the 10th anniversary of the Rwandan genocide triggered the creation of the Responsibility to Protect figure under which the states have the moral obligation to protect populations from extreme human rights violations. Affirming that sovereignty no longer means that a state is free to act without constraint, the UN through the Security Council, has the responsibility to use the means necessary to protect a population.

Thus, a case like Darfur is extremely valuable to discern how the reborn international values are translated into action. While states have made commitments through legal instruments, it remains to be understood to what extent such commitments are effective in responding to potential genocide. As well as, in an interconnected and globalised world where the press, public opinion and social media occupy such an essential role, it is interesting to study how those actors interact with international conflicts. This is especially important in contemporary genocides such as Darfur, where the over-exposition, the political visibility, and the data collection, can directly influence the states' response towards it.

To explore how the strategic and political agenda of the countries have influenced the extension of the genocide for two decades, this thesis is structured into five main chapters. Chapter One commences by delineating the historical and legal context under which the research question analysis is designed. To situate the crisis in the larger field, the study of the definitions of genocide under international law is carried out to understand its limitations and its possible application to the presented case. Furthermore, the historical overview of the conduction of the genocide is exposed to describe the causes of the crisis and to address the main events from 2003 to the present day. In this way, it seeks to provide an objective picture of Darfur to analyse if the genocidal intent and ideology were present in the crimes. All these characteristics illuminate the rest of the research work which considers the different international reactions to the crisis and its designation as genocide or not.

In Chapter two, the international community response will be analysed with a special focus on the United Nations' action through its main executive power: the Security Council. Through this initial analysis, the paper will move forward with an understanding of the actions taken by the Members of the UNSC based on their political interests in

Darfur rather than the humanitarian catastrophe. For that, this chapter will focus on the so-called triangle of black interests in Sudan: China, Russia, and the US, all permanent members of the UNSC.

Consequently, Chapter three outlines the political and legislative background that conforms to the modern notion of the R2P and the possible application of it in Darfur. Chapter four focuses on the primary role the African Union had in the conflict and how their political response shifted during the years. This is done by firstly analysing if Article 4(h) of the Constitutive Act could have been invoked in Darfur; and secondly, by studying the shortcomings of the hybrid peacekeeping mission deployed. Chapter Five situates the role of the International Criminal Court in the conflict and the framing under which the investigations were conducted. Through the study, the shortcomings, the so-called African Revolution, and the current stage of the process are analysed. Finally, a conclusion is presented in which the overall argument is summarised, that throughout the divergent failure of the international system in Darfur there is an urgent need to think about the shortcomings of the actual human rights system this conflict has shown.

To answer these questions an analysis of the most important primary sources concerning the genocide in Darfur based especially on the Genocide Convention, the Rome Statute, the UNSC Resolution and the AU Constitutive will be undertaken. Furthermore, past cases will be used to address how the legal texts could be applied in Darfur in order to support the interpretation subsequently given. Secondary sources, primarily journal articles, were utilised to assist the interpretations of the history of the genocide and the political interest of the parties in Sudan. Ultimately, newspapers articles, independent investigations and NGOs reports will be used in conjunction with the official documents to reconstruct and analyse what happened and ask for legal responsibilities.



## **2. HISTORICAL BACKGROUND OF THE DARFUR CASE: 20 YEARS OF CONFLICT.**

The determination of the Darfur crisis as a genocide has been object of controversy within the international community since it started in 2003. The political applicability of the definition in Darfur, as in Rwanda, has, once again, been centred on the etymological placement of genocide rather than an effective way to stop the killings.<sup>2</sup> Therefore, it is essential to analyse the internationally validated definitions of genocide and the conditions under which it should be defined in order to subsequently understand, based on the historical events, if they could be applied in the Darfur case.

### **2.1. Definition of Genocide under International Law.**

As in every field, the lack of concrete definitions can lead into a politicised use of the terms in the service of the strategic interests of the States. Unlike other concepts, genocide is a broadly debated one. Despite the multiple attempts over the past 40 years, the main problem is not to define what can compose crimes of genocide, but to what extent the proposed definition can be considered universal.

As is well known, the most important example of genocide in modern times is the Nazi Holocaust during the Second World War (IIWW). The term itself was first formulated by Raphael Lemkin, a Polish jurist that understood genocide as a tool for destroying nations.<sup>3</sup> It was then, when genocide was recognised not only as a morally outrageous act, but also as something that might trigger legal liability.<sup>4</sup> Therefore, there is a direct relation between the legal development of the meaning of “genocide” and the Holocaust at the core. However, the controversy around the term lies in the particularities of this specific event. In the actual international law system, it is broadly accepted the existence of genocide as an international crime. Nevertheless, a universally accepted definition has become one of the major issues.<sup>5</sup>

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<sup>2</sup> Scott Straus, ‘Darfur and the Genocide Debate’ (2005) 84 Foreign Affairs 123.

<sup>3</sup> Bradley Campbell, ‘Genocide as Social Control’ (2009) 27(2) Sociological Theory 151.

<sup>4</sup> William Schabas, *Genocide in International Law: The Crime of Crimes* (2<sup>nd</sup> edition, Cambridge University Press 2009) 17.

<sup>5</sup> William D. Rubinstein, *Genocide: A History* (1st edn, Pearson Education Limited 2004) 1-2.

In 1948, taking Lemkin's definition attempt, the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide in which the first legal definition of genocide was given. Even though the resulting one was narrower than the initial, it gave a structured ground for short-term effective action. Under Article 2, genocide is defined as 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'<sup>6</sup>

However, over the years many questions have been arising around this archaic definition. As it was the first legal attempt based on a specific event, it is not a scientific definition complementary to the advancement of the social reality.<sup>7</sup> The Nazi Holocaust set a precedent in mass murder as it was known so far. This created an unconsciously biased definition with a limited notion of genocide which made extremely difficult the standardization of it to previous and posterior genocides.<sup>8</sup> According to scholars as Frank Chalk and Kurt Jonassohn, 'the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it.'<sup>9</sup>

Since the Convention has a limited scope, many human rights academics have either stretched the definition to include different atrocities or proposed new ones in order to expand the application. This new field of study has developed the analysis of the most important obstacles in a universally legal application of the term.<sup>10</sup>

For instance, it is stipulated the direct implication of the government and the national security forces in the commission, as the twentieth-century genocides pattern was well-organised crimes against a specific group conducted by a totalitarian government. This ignores the genocides conducted by rebel forces, paramilitary groups, or gangs.<sup>11</sup> Similarly occurs in limiting the historical context. Genocides are assumed to take part under conditions of a major war, such as the IIWW. However, as Paul Bartrop stated, 'genocide does not equate with war', even though it has a direct connection with the

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<sup>6</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>7</sup> Campbell (n 3) 152.

<sup>8</sup> Paul Bartrop, 'The relationship between war and genocide in the twentieth century: A consideration' (2002) 4(4) *Journal of Genocide Research* 519, 522.

<sup>9</sup> Frank Chalk and Kurt Jonassohn, 'The Conceptual Framework', in Frank Chalk and Kurt Jonassohn, (eds) *The History and Sociology of Genocide* (Yale University Press, 1990) 11.

<sup>10</sup> Schabas (n 4) 117.

<sup>11</sup> Rubinstein (n 5) 4.

success of it.<sup>12</sup> This may entail its independency from the acts of warfare produced, the casualties, or the levels of violence.

Another concern posed by Steven Katz would be the scope of the application. It has been assumed that since those crimes are conducted by governments, its territorial scope would only apply to the region under the control of the State. However, in asymmetric conflicts where killings are targeted against members of a disaggregated group or by not purely defined groups, the definition of genocide is too limited to be applied.<sup>13</sup>

Besides that, because genocide constitute a criminal offense, there is a direct connection between the definition issues and the criminal law analysis. From a criminal perspective the ‘elements of the offense’ are essential in prosecuting a crime. For that, a basic distinction between the physical element (*actus reus*) and the mental element (*mens rea*) should be made. It is therefore necessary to establish a link between the material facts and the clear intent for the conduction of those acts. This has been one of the major shortcomings in the definition. Although, the UN Convention does include the ‘intent to destroy’ in connection with the *actus reus*, there has been a controversy surrounding the actions that constitute genocide under a genocidal *mens rea*.<sup>14</sup> While most definitions agree on the direct killings or acts that result in deaths, there is no agreement on the levels of violence necessary for that destruction or on the other acts that may not cause immediate death. It is assumed that acts may require a proof which means that the act of genocide needs to have a result: death. However, the scope is extremely limited to cases where the actions intended to destroy a group do not produce an immediate result that can be proven.<sup>15</sup> This is where concepts based on negative violence lies. For instance, the cultural genocide based on homeland expulsion, which nowadays is known as ‘ethnic cleansing.’<sup>16</sup> In cases as Darfur in which massive killings are combined with a direct assault over the suppression of national identities and a subsequent genocide by attrition, the Convention is too limited to understand the reality.

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<sup>12</sup> Bartrop (n 8) 531.

<sup>13</sup> Jacob Neusner, ‘Steven T. Katz. The Holocaust in Historical Context. Vol. 1. The Holocaust and Mass Death Before the Modern Age. New York: Oxford University Press, 1994. 702 Pp.’ (1995) 20 AJS Review 454, 455.

<sup>14</sup> Schabas (n 4) 172.

<sup>15</sup> *ibid* 177.

<sup>16</sup> *ibid* 206.

Ever since Rwanda speaking of genocide entails a direct connection with the African context as it provides a different way of understanding how genocide can be committed in modern terms. When the initial UN definition was created only four African countries were part of the Convention, of those only Liberia, Ethiopia and Egypt signed the document. The UN Genocide Convention came into force in 1951 when the European policies regarding the independency of the African colonies were about to take a dramatic change.<sup>17</sup> In the 1960s the newly independent countries had to face an extremely delicate reality within their borders as the multiethnicity of the imposed division of the European countries tended to ignore the ethnical and geographical composition.<sup>18</sup>

Between the 60s and the 70s, several conflicts started to appear on the international agenda as genocides, however, neither of those qualified or matter enough, to be formally considered as such. This reality exposes a third problem with the UN definition: the restrictive notion of a group under the designated categories of “national, ethnic, racial or religious”. The post-IIWW society drafted a definition based on groups already present in European history, closely connected with recent events and, therefore, easy to recognize. Even though, it explicitly rejected the inclusion of other groups such as economic, political, and linguistic in the definition, a dangerous assumption was done. In the Convention, the groups are presented as static, homogeneous, and permanent within the borders of a State consolidated controlled.<sup>19</sup>

Consequently, the application of the definition in the context of postcolonial Africa creates a deep legal problem. The imposed borders have created asymmetric ethnic groups that are spread across more than three countries, with a complex process for determining their membership. In this regard, it would be logical to think that if the group is not well-defined under the Convention standards, doesn't matter if the intent element is there, or if the genocidal acts are present. Hence, it could be argued that the main shortcoming of the definition in the African context is the assumption that only with the

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<sup>17</sup> Timothy J. Stapleton, *A History of Genocide in Africa* (Praeger Security International 2017) 4.

<sup>18</sup> *ibid* 5.

<sup>19</sup> William F.S. Miles, 'Labeling "Genocide" in Sudan: A Constructionist Analysis of Darfur' (2006) 1(3) *Genocide Studies and Prevention: An International Journal* 252.

demarcation of the group is where rights can be conferred. This places the existence of a vulnerable group as the prerequisite for more rights.<sup>20</sup>

The drafting of the Statute of Rome in 2002 brought some clarity to the field. Even though, genocide was depicted in Article 6 under the same definition of the UN Convention, it addressed the codification of the *mens rea* in international crimes. According to Article 30 the mental element has two components: the intent to engage in a genocidal conduct; and the knowledge that the cause will produce that consequence. Nonetheless, the field has been focusing more on the actual intent, as the word ‘intent’ it is in the actual definition, than the ‘knowledge approach’ in the demarcation of genocides.<sup>21</sup> The adoption of the purpose-based approach results in a focus on their personal motives which ignores the collective dimension of conducting a genocide within a complete policy plan of the State. Therefore, the importance of the concept lies in the interpretation of the genocidal intent and the transposition of such intent into a practical genocidal campaign against that specific group.<sup>22</sup> This problematic has been the main controversy aspect of the genocide in Darfur.

However, from a technical point of view, it is essential to determine what is understood by intent? what are the elements of it? and in whom should this intent be present? The limitation of the meaning of intent relates to the responsibility and willingness as well as the consciousness of committing the crime. Despite the need to define what intent means, the definition can open the possibility of exonerating acts that do not have clear intent defined. Moreover, if the intent is connected with a practical action of massive killings, an organisational aspect should be present. A political or institutional structure is needed as acts of genocide are not ‘randomly, accidentally or indiscriminately.’ The perpetrator targets a group and through the control structures of the state, a massive killing strategy is conducted.<sup>23</sup>

As it has been pointed out, multiple problems arise from each element, all of them used in the Darfur case. The fact that the international debate has been placed in the

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<sup>20</sup> Thomas W. Simon, ‘Defining Genocide’ (1996) 15 Wisconsin International Law Journal 243, 240.

<sup>21</sup> Schabas (n 4) 242.

<sup>22</sup> Claus Kreß, ‘The Crime of Genocide under International Law’ (2006) 6 International Criminal Law Review 461, 463.

<sup>23</sup> Simon (n 20) 250.

applicability of this term is not casual.<sup>24</sup> The wide range of definitions, the ignorance of the African context, the lack of a universally agreed definition, and the multiple shortcomings of the actual one, leave open the possibility of its political use, which in the case of Darfur is deviating the attention over the truly important issues.

## **2.2. The context under the development of the Genocide: from a resource conflict to ethnic cleansing.**

To analyse the applicability of the definition of genocide to the Darfur case, it is essential to study the conflict itself. Even though Sudan has been an unstable state with multiple intersecting conflicts since its independence from the United Kingdom in 1956, the Darfur crisis started in February 2003.<sup>25</sup>

Darfur is a region situated in the Western part of Sudan. With almost six million citizens, twelve different tribes and a land mass of 196,555 km<sup>2</sup>, Darfur is divided into three administrative areas: North, South, and West. The loosely demarcated area, and the migration movements within the region due to the drought conditions, blurred the lines between the geographical ethnic divisions.<sup>26</sup> Commonly, the Western and the South were habited by Arabs descendants tribes while the North was formed by the non-Arab – the Fur, Masalit and Zaghawa majority.<sup>27</sup> Therefore, the region could be ethnically divided into two groups: one that claim to be African descendant and practice sedentary agriculture, and the other that claims to be Arab and nomadic herders. Over the years, this ethnical and cultural separation has transformed into physical colour differences between Arabs and black Africans.<sup>28</sup> Nonetheless, the rich ethnical structure of the Darfurian society is so complex that it would be extremely limited to just based the division on

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<sup>24</sup> Carlota García, 'La Comunidad Internacional y Darfur' (2005) 62 Real Instituto ElCano Estudios Internacionales y Estratégicos 1, 5.

<sup>25</sup> Straus (n 2) 125.

<sup>26</sup> Mohamed Salih, 'Understanding the Conflict in Darfur' (2005) Centre of African Studies, University of Copenhagen 1, 22  
<[https://teol.ku.dk/cas/publications/publications/occ.\\_papers/muhamed\\_salihsamletpaper.pdf](https://teol.ku.dk/cas/publications/publications/occ._papers/muhamed_salihsamletpaper.pdf)> Accessed 27 May 2023.

<sup>27</sup> Robert O. Collins, 'Disaster in Darfur: Historical Overview' in Samuel Totten and Eric Markusen (eds) *Genocide in Darfur: Investigating the Atrocities in Sudan* (1st edition Routledge 2006) 3.

<sup>28</sup> Straus (n 2) 126.

physical aspects, as the membership to this group is deeply influenced by the ethnical heritage and economic activity.<sup>29</sup>

In this regard, scholars such as Fouad Ibrahim or Mohamed Salih have openly expressed their rejection to the oversimplification of the conflict as a confrontation between Arabs and Africans. While they claim it is part of the motives, it is not the sole cause of the brutal war in Darfur. Some scholars have stated that the conflict is based on the transformation of a resource conflict into ethnic cleansing as the water became the new oil. Thus, Darfur is part of the so-called multicausal or asymmetric conflict.<sup>30</sup>

Against what has been widely assumed and supported by the international community and the press media, Darfur is not a meagre region, in fact, the natural resources groundwater and the agricultural land potential are huge. The geographical location has made the annual productive to half a million US Dollars per year. This shows that even though most of the people in Darfur are poor, the region is not. Hence, it could be understood that the problem is not the lack of resources, but the administration of those.<sup>31</sup>

The traditional land use patterns and the subsistence activities of the ethnic groups inflamed an overlap between political claims and ethnic mobility. Darfur is known for suffering the incapacity of the successive governments to develop an effective economical campaign to increase productivity. This lack of national funds was also present in the development of infrastructure, for instance, since there were hardly any roads in Darfur most of the population had no access to drinking water or even electricity. Thus, Darfur became a forgotten area of Sudan's national government with an archaic economic system and a political structure based on tribes and ethnic divisions.<sup>32</sup>

The demographic division became political. Since the group's main livelihood mechanism is the agriculture of the land, the administration of the resources and the meteorological conditions have a huge impact on their survival. Even though, historically land disputes between the groups were solved peacefully, the consecutive extreme dry

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<sup>29</sup> Alfredo Langa Herrero, 'Aproximación al conflicto armado en el Gran Darfur' (2015) 8(1) *Revista de Paz y Conflictos* 151, 153.

<sup>30</sup> Veronika Danielová, 'Darfur Crisis of 2003: Analysis of the Darfur Conflict from the Times of First Clashes to the Present Day' (2014) 14(1) *Ethnologia Actualis* 37, 47.

<sup>31</sup> Salih (n 26) 23.

<sup>32</sup> Langa Herrero (n 29) 158.



seasons of the mid-1980 started to exacerbate the situation. The population movements to other parts of Darfur created a mixture of multiple tribes within the same area. These new settlements increased the demographic pressure regarding resource administration, especially water supplies.

The clear positioning of the national government over the distribution of the resources with the Arabs tribes, only inflamed the conflict by arming and supporting the new militias. In this regard, the Darfur region started to be extremely influenced by the neighbouring conflicts of Chad and Libya which indirectly increased the need for political control of the tribes. This marked the birth of new militias. The military pressure in the area forced other tribes to arm themselves as well. In fact, the fur, pressured by the migratory flows, started to obtain AK-47s composing the so-called Federal Army of Darfur, supported by Chad's government.

In the 80s the Arab Alliance was created under a racist ideology against the non-Arabs tribes, especially the fur. Even though both groups started a political campaign in Darfur, the latter claimed to the national government the redistribution of the land and the return of political posts to the Arabs who, according to them, constituted the regional majority.<sup>33</sup> All of this resulted in deadly interethnic clashes between tribes where the Arabs militias killed and burned multiple African villages.<sup>34</sup>

However, in the understanding of this conflict, the seizure of power by Osama Al-Bashir and his National Islamic Front (NIF) allies played a major role. The NIF started to increase the support from the Darfurian elite, especially of the Arab tribes under an Islamic and Arab-centric ideology. Even though some of the non-Arab tribes were also Muslims, as the ethnical division was mainly economical and traditional rather than confessional, the NIF focused its political campaign on the Arab identity. The strategy to control the area was the administration division to reduce the power of the fur in Darfur, as it was strategically make them a minority in each of the regions.<sup>35</sup>

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<sup>33</sup> Langa Herrero (n 29) 159-160.

<sup>34</sup> Straus (n 2) 126.

<sup>35</sup> Alex De Waal, 'Darfur and the failure of the responsibility to protect' (2007) 83(6) International Affairs 1030, 1040.



During this period, the Arab tribes brought together a lot of power, notably through the supply of heavy weapons by the government and the attempted disarmament of non-Arab forces. In July of the same year, the leaders of the three big non-Arab tribes agreed on forming a self-defence group against the Janjaweed, the so-called Darfur Liberation Front (DLF) and that soon became the Sudan Liberation Movement/Army (SLM/A). A few months before that, the Justice and Equality Movement (JEM) was created as a resistance against the government.<sup>36</sup>

The Janjaweed are a nomad segment of the camel-herding Arab tribes that also included migrants from Chad who migrated to Darfur in the nineteen-seventies and eighties. Throughout, their own territorial ambitions in Sudan, they have been one of the main allies of the Sudanese government. They were seen as Arab bandits who frighten the civil population.<sup>37</sup>

In October 2002 the Janjaweed militia started the first major offensive against the non-Arab civilians. It resulted in many villages burning, mass killings, rapes against women, and the kidnapping of multiple children. Consequently, both rebel groups, the SLM/A and the JEM, coordinated a joint attack against the Darfurian political administration. The governmental response was fast, as President Al-Bashir, declared an emergency state in Darfur, intensifying the arrests and repression by a newly created Special Task Force. This force was in charge of coordinating the three military branches of the government: the army, the military intelligence, and the Janjaweed.<sup>38</sup>

The government started to massively recruit members from all the Arab tribes while the Janjaweed grew in power thanks to the governmental military support through training, equipment, communication devices and weaponry. The Janjaweed became a complete paramilitary force organised in small brigades and ultimately wearing the army uniform. Scholars such as Gerard Prunier or Daly have stated that the military development of the Janjaweed does not correspond to the behavioural pattern of the Arab tribes, being in fact, a result of the politicization of the military groups by the government around the fake

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<sup>36</sup> Langa Herrero (n 29) 159.

<sup>37</sup> Samantha Power, 'Dying in Darfur. Can the ethnic cleansing in Sudan be stopped?' (2004) New Yorker 1 < <https://people.brandeis.edu/~teuber/SAMANTHA%20POWER,%20'DYING%20IN%20DARUR'.pdf> > accessed 28 May 2023.

<sup>38</sup> Gérard Prunier, *Darfur: The Ambiguous Genocide* (Hurst and Company Publishers, 2005) 130.

identity conception of the Arab ethnicity, but that in reality does not represent it naturally.<sup>39</sup>

In 2003, the Janjaweed, supported by the government, changed its military campaign to targeting civilian settlements instead of rebel camps. According to Daly, in a year the Janjaweed turned Darfur into death camps. Soon the attacks got more brutal. On horseback or in trucks, the Janjaweed entered the villages murdering men, raping women, burning houses where children were sometimes dumped, contaminating wells with bodies, torture, beheading, mutilating, among other things. The barbarity and cruelty of the methods, with the complicity of the government, ultimately sought to depopulate the targeted areas through murder and forced displacement. Moreover, even though the governmental forces sometimes participated actively in the attacks, most of the times they assumed a secondary role. Over the months, the strategy adopted was based on the government leaving the villages unprotected to be assaulted by the Janjaweed.<sup>40</sup>

All these actions ended up in an ethnical cleansing of multiple parts of Darfur, which forced most of the young population to either join the rebel forces to fight the Janjaweed or to flee the cities and look for protection in neighbouring countries. In 2004, 2.5 million displaced people were scattered in camps across Darfur without safe drinking water and adequate sanitation. With the blocking of humanitarian aid the genocide started to be by attrition. The camps were not safe and the lack of access to food was not a consequence of the war situation, but rather part of a strategic campaign against the civil population. The famine situation provoked the death of 10,000 civilians per month in 2004. The extreme conditions led to a huge refugee crisis with 200,000 displaced persons in the camps of Chad in 2004; 350,000 Darfurian refugees across Uganda, Ethiopia, DRC, Kenya, CAR, Egypt, and Eritrea; and 2 million within different parts of Sudan.<sup>41</sup>

From a human rights perspective, the Darfur genocide had a crucial impact on women's rights, something that has been pointed out by some scholars as the ultimate proof of how

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<sup>39</sup> Langa Herrero (n 29) 161

<sup>40</sup> Martin W. Daly, *Darfur's Sorrow. A history of Destruction and genocide* (Cambridge University Press 2007) 283.

<sup>41</sup> UN News, 'Sudan: UN health agency survey shows high death rates in Darfur crisis' (13 September 2004) <<https://news.un.org/en/story/2004/09/114912>> accessed 7 June 2023.

sexual violence place an essential role in the development of a genocide.<sup>42</sup> Even though, this was not the main issue in the COI report, this research wants to give a special mention to the importance sexual violence has in the success of genocide, not only symbolically but also materially. It has been widely studied the impact violence against women has in crimes against humanity, while in a genocidal context, its presence has been mostly ignored. In a case such as the Darfur genocide, massive rapping, forced maternity, sexual torture and forced prostitution are only a few of the used practices to destroy the group. It is essential to give more visibility to these types of practices during the genocidal process for the future enlightening of the crime to measure not only the severity but also the genocidal intent of the perpetrators.<sup>43</sup>

The central government systematically rejected the atrocities committed in Darfur by the Janjaweed on the grounds of traditional tribal conflicts between Arab and African tribes. However, through the oblivious attitude adopted and the harmful policies against humanitarian aid, the government is still committing genocide in the area, especially in the refugee camps where the fragile humanitarian situation is being exacerbated.<sup>44</sup>

### **2.3. Darfur nowadays: genocide by attrition.**

Unfortunately, the Darfur genocide and its humanitarian crisis did not end in 2004. As it will be mentioned later, international intervention has been important, but not decisive. Since 2003 and 20 years after the genocide began, the people of Darfur are still suffering the consequences of a conflict that seems to be dragging on.

Even though between 2003 and 2004 they were some movements towards a peace agreement, neither ended up in a ceasefire. Some scholars as Daly<sup>45</sup> and Prunier has also stated that since the moment the international organisations took part in the mediation of peace, Al-Bashir knew the ethical cleansing was going to continue.<sup>46</sup>

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<sup>42</sup> María Dávila, 'La crisis de Darfur a la luz de los debates sobre Genocidio' (BAS thesis, Universidad de San Andrés 2018) 100.

<sup>43</sup> Elisa von Joeden-Forger, 'Gender and the Future of Genocide Studies and Prevention' (2012) 7(1) *Genocide Studies and Prevention: An International Journal* 90, 92.

<sup>44</sup> Amnesty International, 'Sudan: Darfur: "Too many people killed for no reason"' (23 February 2004) <<https://www.amnesty.org/en/documents/afr54/008/2004/en/>> accessed 7 June 2023, 8.

<sup>45</sup> Daly (n 40) 302.

<sup>46</sup> Prunier (n 38) 134.

In 2005 the United Nations Mission in Sudan (UNMIS) was established for the first time. Even though, this will be mentioned in depth in the next chapter, it is essential to understand the role of this mission in the posterior agreements as both parties were forced to negotiate. In July 2006, the Darfur Peace Agreement (DPA) was signed between the national government and the SLM/A. However, the lack of representation of the other rebel groups as the JEM and the failed attempts to disarm the Janjaweed increased the context of instability.<sup>47</sup> Nonetheless, it was expected that the DPA would fail as the government was the responsible of disarmament, although it has failed to comply with multiple ceasefires attempts and has publicly expressed its lack of interest in the disarmament of the Janjaweed.

The numerous cases of corruption and media manipulation promoted by the central government to ensure power in the elections, made Al-Bashir president of Sudan for more than 30 years at the cost of political and humanitarian attrition in Darfur. The political campaign wore down the social fabric of the region trying to divide the non-Arab tribes and manipulating the loyal rebel militias to maintain Darfur under Khartoum's power. Moreover, the State took advantage of the tribal conflicts to obtain political benefits in the redistribution of the land in exchange for unfulfilled promises of political positions and money.<sup>48</sup>

Even though the number of casualties has been decreasing since 2005, the human rights violations and the massive killings of non-Arab tribes continued. The extreme conditions after the war, the hunger and insecurity of the region as well as the forced displacement, have made Darfur a prolonged minefield for future conflict and some kind of negotiated genocide, depriving the 2 million displaced persons of adequate water, food, and medical care.<sup>49</sup> The genocide by attrition was based on water and pumps contaminations of the villages, acts of forced transfers and expropriation of the vulnerable group's lands by

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<sup>47</sup> De Waal (n 35) 1041.

<sup>48</sup> International Crisis Group, 'Darfur's Fragile Peace Agreement' (20 June 2006) <<https://www.crisisgroup.org/africa/horn-africa/sudan/darfurs-fragile-peace-agreement>> accessed June 7.

<sup>49</sup> Samuel Totten and Eric Markusen, 'Introduction to the Special Issue on Darfur' (2006) 1(1) Genocide Studies and Prevention: An International Journal 1, 2.

resettling allies tribes in the villages previously inhabited by members of the Fur, Masalit and Zaghawa groups.<sup>50</sup>

In 2007, Al-Bashir formalised the Janjaweed forces into the unity of intelligence of the country. In 2013, the President created the Rapid Support Forces (RSF) a paramilitary group directed by General Mohamed Hamdan Daglo, more commonly known as Hemetti. In 2017, Sudan adopted a law legitimising the group as an independent security force, just before Daglo turned against Al-Bashir supporting the revolution that make him lose the power in April 2019. Thus, the country was ruled by an uneasy alliance between the military and civilians until October 2021, when the power-sharing government was overthrown by a military coup of the armed forces of Al-Bushar, leader of Sudan's Armed Forces (SAF), and Daglo.<sup>51</sup> However, in April 2023, the disputes over power and governmental control ended up in brutal attacks between both generals which led to a deep Civil War.

The situation of political instability based on social unrest and betrayed militias has been central in the development of the actual Civil War the country is going through. The important position the RSF occupy at a national level, but initially in the Darfur region, has made the humanitarian situation in Darfur even worse. During the genocide, Hemetti was one of the many young Darfuri war chiefs loyal and armed by Al-Bashir in the fight against non-Arab rebel movements. This is essential in the understanding of the genocide by attrition, as the main paramilitary group in Sudan with the largest troops in the country is the heir to the ones that committed genocide in 2003. In this regard, the reinforced RSF and its alliances with the tribe militias in Darfur have been repeating the pattern of attacks against non-Arab civilians, especially in camps for internally displaced persons (IDPs).<sup>52</sup>

Despite Al-Bashir's fall, it could be argued that Darfur is a genocide by attrition sustained for 20 years and that now is being intensified in a war context. Over the past 10 years, the violence has been increasingly growing over the control of the government while the

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<sup>50</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (12 July 2010).

<sup>51</sup> Nima Elbagir, Tamara Qiblawi, Amarachi Orie, '¿Qué está pasando en Sudán? Esto es lo que debes saber sobre el violento conflicto entre dos generales' (CNN, 24 April 2023) <<https://cnnespanol.cnn.com/2023/04/24/sudan-conflicto-explainer-trax/>> Accessed 29 of May.

<sup>52</sup> Jérôme Tubiana, 'Darfur after Bashir: Implications for Sudan's Transition and for the Region' (2022) 508 United States Institute of Peace 1, 4-7.

genocidal attacks on the civil non-Arab identified are still committed. The fact that the main paramilitary group is from Darfur has not helped the humanitarian emergency the population is suffering. Resentment runs deep, the settling of scores brutal. The central government has traditionally shown little interest in protecting and listening to the locals and in tackling fundamental problems such as the sharing of land, resources and justice, something that now has more reason to ignore.<sup>53</sup>

The reality is that Sudan is in an extreme situation of humanitarian emergency with 24.7 million people in need of humanitarian assistance. The recent Civil War and the ongoing crisis in Darfur are being deathly for the civil population with now 3.7 million IDPs, 843,000 only between April and May 2023<sup>54</sup>, 400,000 killed, and many more injured.<sup>55</sup>

#### **2.4. The genocidal intent: Islamist and Arab-centric genocide ideology.**

To fully determine the applicability of the definition of genocide it is essential to understand the motives and the genocidal intent. As it has been mentioned above, to label the Darfur crisis as a conflict between Arabs and Africans would be simplistic, not accurate and lack nuance. The basis of this division is not the language, the race, or the religion, rather it is the identity. Unlike most of the genocides committed in modern times, the core of the ethnical cleansing carried out in Darfur it is based on claims to Arab identity and what is conceived by that.<sup>56</sup>

Since the NIF joined the coalition of government, a shift in the ideology over the tribes in Darfur was made. The new regime promoted by Al-Bashir started the so-called Islamiphication campaign. The aim was to build an Islamic Republic and consolidating a new Islamist constituency.<sup>57</sup> This campaign was based on the adoption of political and

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<sup>53</sup> Marc Español, 'La crisis humanitaria de Darfur se agudiza con el estallido de la violencia' (El País, 6 May 2023) <<https://elpais.com/planeta-futuro/2023-05-06/la-crisis-humanitaria-de-darfur-se-agudiza-con-el-estallido-de-la-violencia.html>> Accessed 28 of May.

<sup>54</sup> USAID, 'Sudan – Complex Emergency' (USAID Center for International Disaster Information, 19 May 2023) <[https://www.usaid.gov/sites/default/files/2023-05/2023-05-19\\_USG\\_Sudan\\_Complex\\_Emergency\\_Fact\\_Sheet\\_7.pdf](https://www.usaid.gov/sites/default/files/2023-05/2023-05-19_USG_Sudan_Complex_Emergency_Fact_Sheet_7.pdf)> Accessed 29 May.

<sup>55</sup> Ewelina U. Ochab, 'Darfur: Genocide All Over Again In Darfur?' (Forbes, 26 April 2023) <<https://www.forbes.com/sites/ewelinaochab/2023/04/26/darfur-genocide-all-over-again-in-darfur/?sh=54b830> <https://www.forbes.com/sites/ewelinaochab/ee3531>> Accessed 7 June.

<sup>56</sup> Johan Brosché, 'Conflict over the Commons: government bias and Communal conflicts in Darfur and Eastern Sudan' (2022) 22(2) Ethnopolitics 199, 209.

<sup>57</sup> André Rangel, 'Causas del genocidio de Darfur. Un análisis basado en el modelo de Bárbara Harff' (2016) 61 Revista mexicana de ciencias políticas y sociales 365, 368.

legal texts seeking Islamic indoctrination of non-Muslims, as well as waging jihad against those who would oppose the state. With time, these legislative measures became economical, as the Muslim community began to benefit from them. The Islamisation movement, both legally and socially, represented not only the implementation of an ideological programme but also a legitimising discourse.<sup>58</sup> Therefore, when the genocidal campaign started, they were already political structures assimilated in the state's apparatus oriented to destroy the non-Muslim communities.

The Islamisation policies are the culmination of a process of defensive self-assertion by the ruling elite, generally of Arab ethnicity. This is due to the fact that the majority of this new political structures were openly criticised by the non-Arab majority. The measures commenced to be coercively imposed with the moral and material backing of other regional Arab/Islamic governments as Libya. The assimilation of the Arabic identity with the Islamic measures previously imposed by the elite became wider when it started to be associated with a superior status. This triggered the conformation of the Sudanese Arab identity based on the repression of African or non-Arab defined groups and the revaluation and recharacterization of ethnic and racial identities. The Arab identity was consolidated by the beginning of Al-Bashir government, whose regime is not only Islamist but also Arab-centric. Scholars as O'Fahey affirmed that during Al-Bashir's government 'the ethnicization of conflicts in the Darfur region increased.'<sup>59</sup>

The origin of Arab supremacism in Darfur was established in the cooperative relationship with Muammar Gaddafi during the 1970s. The NIF and Gaddafi found out that they had similar interests in Sudan which triggered armaments deals for more than 250 million dollars. Since Al-Bashir came into power both countries have been involved in a close cooperative relationship.<sup>60</sup>

Since the doctrine of marginalisation of the defined as non-Arab groups in Sudan was promulgated by the ruling elite, the doctrine of ethnic superiority became political discrimination. This ideological orientation of the Sudanese elite served as the basis for the use of the term "Black Africans" against the Fur, Masalit and Zaghawa. By

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<sup>58</sup> Abdel Salam Sidahmed and Alsir Sidahmed, *Sudan* (Routledge Curzon, 2005) 53.

<sup>59</sup> O'Fahey, 'Conflict in Darfur Historical and Contemporary Perspectives' in El-Fashir (eds) *Environmental Degradation as a cause of conflict in Darfur* (University for Peace 2006), 27.

<sup>60</sup> Rangel (n 57) 380.



entrenching the identity of various ethnic groups as black, in a derogatory way, the government of Sudan enabled the dehumanisation of an expanded and combined grouping of diverse ethnicities, facilitating the targeting and organisation of their killing, rape, displacement and destruction campaign. The Islamist and Arabist orientation of the ruling elite represented the articulation of a belief system that identified Arab supremacy as a fundamental principle to justify campaigns of marginalisation, persecution and destruction of the enemies of the state.<sup>61</sup>

In Article 4 of the UN Genocide Convention, it is stated that the crimes need to be committed against ‘national, ethnical, racial or religious groups.’<sup>62</sup> However, there is no provision that clearly establish how to define them. In this regard, the jurisprudence of the ICC has been setting precedence on how to delimitate their conception. For instance, in *Vidoje Blagojević and Dragan Jokić*, the Trial Chamber affirmed that they are identified “by using as a criterion the stigmatisation of the group (...) on the basis of its perceived national, ethnical, racial or religious characteristics”.<sup>63</sup> In *Radoslav Brđanin* case, the Chamber agreeing with the previous one, went a step further by stating that ‘the relevant protected group may be identified by means of the subjective criterion of the stigmatisation.’<sup>64</sup> In *Sylvestre Gacumbitsi* case, it was affirmed that ‘the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria.’<sup>65</sup>

Although, most of the judgements agree on the case-by-case basis in the definition, it is agreed that the sole perception of what constitutes a national, ethnical, racial or religious identity by the perpetrators is also decisive. Therefore, beyond the existence of a visible distinction of language or religion, the use of pejorative terms by the perpetrators to distinct a group can also define the existence as such. Under this consideration the agglutination of three tribes under the “black”, “Africans” or “non-Arabs” by the

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<sup>61</sup> Rangel (n 57) 385.

<sup>62</sup> See in Article 4 Convention on Genocide (n 5).

<sup>63</sup> *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgment) ICTY-02-60 (17 January 2005) para. 667.

<sup>64</sup> *Prosecutor v. Radoslav Brđanin* (Trial Judgment) ICTY-99-36 (1 September 2004) para. 683.

<sup>65</sup> *Prosecutor v. Sylvestre Gacumbitsi* (Trial Judgement) ICTR-01-64 (17 June 2004) para. 254.



government could consolidate the conformation of a vulnerable ethnic group in Darfur.<sup>66</sup> Since the violence was conducted against what the government perceived as non-Arab identity, it does not matter if the group shares a language or a religion, because the sole distinction of them on basis of ethnicity to be receptors of violence conforms a group that should be protected under Article 4.

Under this consideration, the thesis argues that the Fur, Masalit and Zaghawa population in Darfur has been targeted by the government on a subjective identification basis to justify a political campaign to destroy in whole or part this perceived group. The controversial *mens rea* element of the genocide has been proven by the genocidal campaign intrinsically included in the state's apparatus since 1993 and by the essential assimilation of the Janjaweed in the national security system. As soon as the Janjaweed began wearing a legalised uniform, the government's non-intervention in direct attacks was no longer relevant. The presence of the genocidal intent has been later on supported by the ICC preliminary investigations. According to the Court the Sudanese government, directly ruled by Al-Bashir, conducted a genocidal campaign based on acts of murder and extermination by 'deliberately inflicting conditions of life calculated to bring about physical and mental destruction' against the Fur, Masalit and Zaghawa, which the Tribunal recognises as ethnic groups.<sup>67</sup>

The presence of genocide or politicide was demonstrated by the Sudanese government and Janjaweed militias' promotion, execution and acquiescence policies intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa ethnic groups, politicised by defining them as their actual or potential enemies. Hence, after 300,000 victims, more than 2.5 displaced persons and two decades of crimes, the genocidal intent has been proven.

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<sup>66</sup> Case Matrix Network, 'Art. 6 Genocide – Common elements' (CMN, 2010) <<https://www.casematrixnetwork.org/cmn-knowledge-hub/proof-digest/art-6/common-elements/1/>> Accessed 1 July.

<sup>67</sup> Omar Hassan Ahmad Al Bashir (n 50) 7.

### 3. THE INTERNATIONAL COMMUNITY ROLE.

The fragile situation Sudan is going through right now on top of the genocidal activities committed in Darfur since 2003, has created a scenario similar to Rwanda in 1994. In 2023, most of the embassies in Sudan had to abandon the country in a situation that the UN described as ‘desperate and heart-breaking.’<sup>68</sup> The difference with Rwanda is that the UN and its members knew about what was going on in Darfur since 2003, the genocidal activities have not stopped while the instability of the country has been growing. In this scenario, the question should be, what could have been done that the UN didn’t do? Why? Is the “never again” a false statement? Until when can the international human rights system sustain a never again but in Africa?

#### 3.1. Security Council and the UN position.

Since 2003, the UN role in Darfur have been dictated by the Security Council (UNSC). As it is stated in the UN Charter of 1948, the UNSC and its 15 members have the power to control, accept and deploy peacekeeping operations in the territories where this is required.<sup>69</sup> However, because it is composed of States, the nature of its decision-making system is intrinsically politized and dependent on their own national interests, particularly obvious in the veto exercise of the 5 permanent powers: Russia, United States, China, France, and United Kingdom.

From 2004 to 2014, the UNSC adopted 10 different resolutions concerning Sudan, but not all of them about Darfur. In June 2004, the first resolution was adopted. However, the humanitarian crisis in Darfur was only mentioned once in the whole document. Even though UNHCR estimates that the number of casualties reached 200,000 by the time of the Resolution's adoption.<sup>70</sup>

In Resolution 1547, the UNSC only called for the establishment of peace throughout Sudan and promised to monitor the situation respecting the ‘sovereignty, independence

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<sup>68</sup> OHCHR, ‘Türk calls on Sudan combatants to agree peace talks, aid and protection of civilians’ (United Nations, 11 May 2023) <<https://www.ohchr.org/es/statements/2023/05/turk-calls-sudan-combatants-agree-peace-talks-aid-and-protection-civilians>> Accessed 29 May 2023.

<sup>69</sup> Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTCS XVI.

<sup>70</sup> UNGA ‘Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101’ (9 March 2007) Fourth session UN DOC A/HRC/4/80, 13.

and unity.’<sup>71</sup> Thus, in the first attempt to address a possible genocide in Darfur, the crimes were not even mentioned, or the Sudanese government explicitly condemned. While the inclusion of the term ‘sovereignty’ shows the scepticism towards a humanitarian intervention. In the drafting, members such as China and Russia, considered that the gravity of the human rights violations committed in Darfur was insufficient to recall Sudan’s legal responsibility towards its citizens.<sup>72</sup> It is at the very least surprising that this position came when the number of casualties were desperately increasing.

One month after, Resolution 1556 formally accepted the mission the AU deployed in Darfur to monitor and control the human rights situation. It is relevant how in just a month the tone of the UNSC completely changed. In paragraph 1, the organism directly addresses the conflict in Darfur, pointing to the humanitarian emergency and calling for cooperation between the parties. By specifically mentioning the Janjaweed, the UNSC called for a disarmament of all the parties. However, the fact that the Sudanese government was assigned as the one in charge of it, evidences the internal alliances of the UNSC members with Khartoum. This is noticeable in the not condemnation of the crimes, in the fact that all parties are included in the disarmament and the differentiation of the Janjaweed actions from the Sudanese apparatus system.

This shift was completely strategic as it served two purposes. It first satisfied the international demands asking for a more proactive action in the conflict. At the same time as the AU mandate was the perfect excuse for the UNSC to avoid assuming responsibilities and directly intervening. Thus, the UNSC adopted a position of distancing the organisation from a future intervention by recognising the authority of the re-born AU and transferring the responsibility to the regional one. In any case, the action taken was minimum if we consider the casualties at that time.

It wasn’t until September of the same year, that the organisation adopted more effective resolutions. Resolution 1564 established the United Nations International Commission of Inquiry on Darfur (COI) to investigate the main human rights violations committed with the ultimate purpose of defining if it was a genocide.<sup>73</sup> This has been essential in the

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<sup>71</sup> UNSC Res 1547 (11 June 2004) UN DOC S/RES/1547.

<sup>72</sup> Alex J. Bellamy and Paul D. Williams, ‘The UN Security Council and the Question of Humanitarian Intervention in Darfur’ (2006) 5 *Journal of Military Ethics* 144, 150.

<sup>73</sup> UNSC Res 1564 (18 September 2004) UN DOC S/RES/1564

political debate about the Darfur crisis, as in the whole 3 months of investigations the Commission asserted that crimes against humanity were committed in Darfur, but that despite serious human rights violations there was no evidence of acts of genocide as ‘the crucial element of genocidal intent appears to be missing.’<sup>74</sup>

These findings are extremely relevant. Firstly, the COI pointed to something completely different than what the United States claimed, which show the political interest behind the consideration of the crimes as genocide and the legal implications this may entail for the geopolitics of the region. Secondly, in any case, the report of the COI points out the effective participation the Sudanese government had in the commission of crimes genocide. Therefore, no legal responsibility is attributed to Al-Bashir in the planification and coordination of a genocidal campaign as the genocidal *mens rea* was missing. Thirdly, the COI findings depict the conflict as a war of contra insurgencies. However, for that determination, it is needed to consider what was the role of the non-Arab rebels’ groups and the victims of the attacks.<sup>75</sup> In this regard, most of the casualties were targeted civilians, but to further examine the intent, it is needed a full understanding of the motives behind that target. Fourthly, in such a politized matter where these many interests are interconnected, it would be necessary to formulate the question of whom these conclusions favour?

Some authors point to the international geopolitical context as the main cause of the lengthening of resolutions. According to Prunier, the media in 2004 didn’t prioritize the conflicts in Africa since the international scene was dominated by the Iraq War and terrorism. On the other hand, international diplomacy was more immersed in the separatist conflict between the North and the South of Sudan than in the ‘tribal clashes in Darfur.’<sup>76</sup> All of this contributed to the fact that the UNSC did not pay enough attention to what was happening, underestimating the scope of the conflict and assuming that events would not be harsh enough to worry about.

In March 2005 the diplomatic strategy driven by the US and that will be mentioned in the next section, successfully derived in the creation of UNMIS in Resolution 1590. The

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<sup>74</sup> Miles (n 19) 252.

<sup>75</sup> International Commission of Inquiry on Darfur, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’ (25 January 2005) 4.

<sup>76</sup> Prunier (n 38) 126.

mission was meant to be a supervision mechanism for the disarmament of the parties and the applicability of the DPA.<sup>77</sup> Back then, 10,000 military personnel from UNMIS had to coexist with the already active mission created by the AU in Darfur, AMIS. In this regard, while UNMIS worked in ensuring the peace process in Sudan and the maintenance of the peace agreement between the North and the South of the territory, AMIS was making its best efforts to address the humanitarian emergency in Darfur despite its limited resources.<sup>78</sup> However, the humanitarian impact that AMIS had on the field was minimum. Since the beginning, the mission was working under an undermanned, under-resourced and inadequate mandate. According to Totten and Markusen, the UNSC was aware of it but preferred to leave the problem to the regional organization.<sup>79</sup>

While the international media have been especially harsh in their criticisms of AMIS, the cases of sexual abuse committed by UNMIS peacekeepers have been mostly ignored. In 2007, the Daily Telegraph published an internal report compiled by UNICEF in July 2005 about more than 20 cases of children raped in UN vehicles. The report showed cases of rape, prostitution, abuses of minors and other in Southern Sudan between 2005 and 2010, when it was still part of Sudan and a few months after the deployment of the mission. Nongovernmental organisations have gathered personal testimony about minors picked up by UN cars at night and abused when they are offered cash.<sup>80</sup> Even though, the peacekeepers were immediately sent home, the harm is inconceivable especially in a region where sexual violence has had such an important impact in the commission of the genocide.

The Resolutions 1591 and 1593 focused specifically on the Darfur crisis. Resolution 1591 condemned all human rights violations committed in the Darfur region ‘in particular the sexual violence against women.’ This is essential because at that time, the UN already had the UNICEF report addressing the sexual abuse problems within the mission. Moreover, Resolution 1591 also extended the arms embargo on pro-government forces in Darfur to the Government of Sudan itself. Furthermore, it threatened for the first time the

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<sup>77</sup> UNSC Res 1590 (24 March 2005) UN DOC S/RES/1590, 3.

<sup>78</sup> Dávila (n 42) 53.

<sup>79</sup> Samuel Totten and Eric Markusen (n 49) 3.

<sup>80</sup> Kate Holt and Sarah Hugues, ‘Rape Allegations Faced by U.N. In South Sudan’ (The New York Sun, 3 January 2007) < <https://www.nysun.com/article/foreign-rape-allegations-faced-by-un-in-south-sudan>> Accessed 6 July 2023.

government with sanctions.<sup>81</sup> In all the resolutions, the language appears timid with middle threats to sanction Sudan and with no direct link between the government's legal responsibility and implications with the crimes committed by its allies, the rebel militia.

Furthermore, Resolution 1593 is crucial, since it would be the first time that a non-signatory state like Sudan would be investigated by the International Criminal Court by request of the UNSC.<sup>82</sup> This will be discussed further below.

In August 2006 a new decision was adopted, Resolution 1706, in which the UNMIS mandate was extended to the region of Darfur to implement the Peace Agreement, also adopted that same year. Moreover, acting under Chapter VII of the UN Charter the UNSC gave enough power to the mission to 'use all necessary means' in the prevention and protection of the civil population in line with the Peace Agreement. For that the number of deployed troops in the field increased to 17,300.<sup>83</sup> In this Resolution, and after 6 previous ones, the UNSC was actively giving authority to the mandate to forcibly protect human rights by preventing attacks. Even though, this is positive, it took almost four years to adopt strong and effective measures to address the humanitarian emergency.

Meanwhile, the UNSC continued adopting resolutions ratifying the previous decisions. In July 2007, in Resolution 1769, the hybrid mission between the AU and the UN was created, being the first peacekeeping pilot model of cooperation between two organisations where the troops came from the AU and the financial resources from the UN.<sup>84</sup> Even though, the strengths and the shortcomings of the mission will be analysed in the next section, it is essential to point out that UNAMID was the largest UN peacekeeping operation in 2011 with more than 25,000 deployed military personnel. This mandate changed the traditional nature of the humanitarian peacekeeping model towards a multidimensional approach in which the military aspect is just another cog in the overall machinery of political, diplomatic, and economic agenda.<sup>85</sup>

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<sup>81</sup> UNSC Res 1591 (29 March 2005) UN DOC S/RES/1591.

<sup>82</sup> UNSC Res 1593 (31 March 2005) UN DOC S/RES/1593.

<sup>83</sup> UNSC Res 1706 (31 August 2006) UN DOC S/RES/1706, 3-6.

<sup>84</sup> UNSC Res 1769 (31 July 2007) UN DOC S/RES/1769.

<sup>85</sup> Waseem Ishaque, 'Evolving Trends in Peacekeeping: United Nations–African Union Hybrid Peacekeeping Operations (UNAMID) in Darfur' (2021) 4 NUST Journal of International Peace & Stability 14, 16.

In light of the above, it is understood that the UNSC took a timid and tepid humanitarian approach. Most of the resolutions focused on the peace procedures and missions in the field, instead of a hard-line approach based on military intervention and stronger economic sanctions. However, this perspective was a result of the political tensions between the members of the UNSC.

The position adopted by the UNSC regarding Darfur was divided into two main groups of countries: China, Russia and Brazil which advocated for a non-intervention response in line with the principle of national sovereignty; and the United Kingdom, France and the US which defended the importance of the humanitarian protection for the Darfur civilians. However, the intervention was not even clear for the most proactive group, as neither of them suggested the role the UNSC should have assumed. In fact, the members felt comfortable transferring this responsibility to the AU and publicly condemning the acts of violence.<sup>86</sup> This reluctance to press for effective action ended up in a large number of resolutions that for some went too far and for others were insufficient.

This mild response gave time to Al-Bashir's government to continue committing acts of genocide while in New York and Geneva, the Sudanese ambassadors were looking for allies against the intervention claiming neo-colonialism behaviour by the Western countries. Despite the motives, Al-Bashir got the support of two of the permanent members of the UNSC, most of the Arab League countries and even one of the soft-line states; the UK, which surprisingly voted against the economic sanctions.<sup>87</sup>

This endorsed consensus of not imposing strong enforcing measures and sanctions against Sudan for the multiple ceasefire breaches, shows a new failure of the human rights protection system promoted by the UN. One in which, once again, the realpolitik has won. Two countries that despite having a position in the most important global humanitarian organisation, continue to put materialistic interests and sovereignty before human rights despite clear evidence that the mass killings being committed in Darfur constituted ethnic cleansing and eventually genocide.

Because of the variety of UN bodies, their independence, and their large number of member countries, it is difficult to limit the UN's position. However, the UNSC's powers

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<sup>86</sup> Bellamy and Williams (n 72) 150.

<sup>87</sup> *ibid* 154.



and control over the direction of the UN, has made it a political tool. Nowadays, the UN still rejects the presence of crimes of genocide in Darfur on the basis of the COI results and despite the ICC investigations. Thus, it seems obvious that the findings of the COI have served as the legal basis for the political discourse of the opposition countries that do not want to face the humanitarian crisis in a context where the international community has gotten lost in the legal terminology. For that, the question would be if the position of the UNSC members would have changed if the COI would have found crimes of genocide in Darfur.

### **3.2. United States.**

The US role regarding Darfur changed on September 9 of 2004 when the former US Secretary of State officially labelled as genocide the crimes committed in Darfur.<sup>88</sup> This is essential as historically the US strategy concerning all major massacres has been to avoid the use of the term “genocide”, especially in ongoing conflicts, to avoid intervention responsibility and justify the inaction.<sup>89</sup>

The fact that the UN and the US reached such diverse conclusions in their investigations, is not casual. The US campaign on the policymaking on Darfur is composed of three broad categories of interests: the US “national interest” in Sudan as part of the national security program promoted after 9/11; the domestic political pressures; and the foreign geopolitical agenda for the African continent.<sup>90</sup>

In the US politics concerning Sudan, public opinion has been essential. The civil and public media engagement in Darfur was particularly strong among the US citizens, which pressured the administration to keep the matter high on the political agenda.<sup>91</sup> In early 2004, a group of activists and movements began to emerge pressuring the US government to take action on the situation in Darfur. This initiative was initiated by Jewish-American, African American, liberal, and religious-conservative constituencies but especially by the black Christian community who felt intrinsically connected with the massive killings of

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<sup>88</sup> David H. Shinn, ‘China and the Conflict in Darfur’ (2009) 16(1) *Brown Journal of World Affairs* 85, 86.

<sup>89</sup> Eyal Mayroz, ‘Ever again? The United States, genocide suppression, and the crisis in Darfur’ (2008) 10 *Journal of Genocide Research* 359.

<sup>90</sup> *ibid* 362.

<sup>91</sup> Maria Gabrielsen Jumbert, ‘How Sudan’s “rogue” state label has shaped the US responses to the Darfur conflict: what’s the problem and who is in charge?’ (2014) 35 *Third World Quarterly* 284, 285.



the African population. In the mobilization, the press media played a major role. Editorialists from major US newspapers, started to publish powerful columns recalling the US government for intervention.<sup>92</sup>

At that time the American civil society came from a failure catastrophe in Rwanda where their government abstained not only from acting but also from recognising the crimes as genocide. Hence, when the catastrophe of Darfur started, many members of the civil society agreed that a critical and upfront response in the explicit qualification of the crimes for what they are, genocide, was necessary. In this regard, Salih Booker and Ann-Louise Colgan, members of the advocacy group Africa Action wrote a column in *The Nation* stating that ‘we should have learned from Rwanda that to stop genocide, Washington must first say the word.’<sup>93</sup> The size of this social mobilisation was so large that authors such as Straus expressed that ‘rarely has there been such sustained, widespread, and politically eclectic domestic, civil-society activism on a foreign policy issue.’<sup>94</sup>

This social pressure soon became political. In the aftermath of the 9/11 attacks George W. Bush, the US President at that time, had to face national elections in November 2004. The fact that the administration had a strong Christian base made Darfur a major factor in the President's agenda. The pressure was enhanced by the fact that the pro Darfur movement was driven by the majority of Bush voters, as well as the black community that represented the 11% of the vote that, Bush and his party sought to attract.<sup>95</sup> This was later on recognised by America's former ambassador to the United Nations, John Danforth, in an interview to the BBC's *Panorama* programme, where he recognised that ‘the White House described Darfur as “genocide” to please the Christian right.’<sup>96</sup>

This explains why in July 2004, five months before the elections, the Darfur crisis was debated for the first time in the National Congress. The consequent resolution was

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<sup>92</sup> Straus (n 2) 128.

<sup>93</sup> *ibid* 128-129.

<sup>94</sup> Scott Straus, ‘Rwanda and Darfur: A Comparative Analysis’ (2006) 1 *Genocide Studies and Prevention: An International Journal* 41, 52.

<sup>95</sup> María Laura Acuña Bouzas and Julián González, ‘Estados Unidos, China y Rusia: triángulo de intereses negros’ (2006) III Congreso de Relaciones Internacionales del Instituto de Relaciones Internacionales 1, 14.

<sup>96</sup> Anne Penketh, ‘US described Darfur as ‘genocide’ to please Christian right – Danforth’ (*Sudan Tribune*, 2 July 2005) <<https://sudantribune.com/article11125/>> Accessed 31 May 2023.

adopted unanimously in the White House and the Senate, labelling the conflict as genocide. In the document, the Congress called for a referral of the issue to the UNSC as well as it included a US compromise to intervene in case of inaction in line with their obligations under the Genocide Convention. This was the beginning of the forceful US campaign before the UNSC for more action in Darfur.<sup>97</sup> Under this context, Colin Powell gave his famous speech in the Senate of Foreign Relations Committee recognising that ‘a genocide has been committed in Darfur and genocide may still be occurring.’<sup>98</sup>

Shortly after it, President G. W. Bush gave a second speech supporting the commission of the crimes of genocide in Darfur based on the findings of the Atrocities Documentation Project (ADP), a project commissioned by the US government to conduct in-depth research on the Darfur crisis. This is crucial not only because for the first time a sovereign state accused other of committing genocide, but also because it endangered a shift in the US pattern regarding the use of the word genocide, not used neither in Kosovo nor Rwanda.<sup>99</sup>

The impact of the genocide designation only implied more coverage in the media and the still ongoing debate of humanitarian intervention. Except for that, non-meaningful political action has been taken by the US. The public recognition of a genocide does not trigger legal obligations concerning intervention. Internationally, the US position only led to some US-driven resolutions with very few real impacts on the field. However, the resolutions became a threat against the Sudanese government concerning economic sanctions and the consequent establishment of the UNMIS. Nonetheless, this position was extremely beneficial in a political matter as it gave the US positive propaganda before the public opinion, the civil society, and the other UN members. Especially important in a context where the US was facing the bad results of the recently initiated intervention in Iraq and the human rights issues derived from the Guantanamo prison.

This positioning has also been extremely beneficial in the long term run as the US political campaign supporting Darfur, led to the adoption of Resolution 1593 under which the ICC was entitled to start investigations. This helped to support the ‘condemnation without intervention’ strategy by portraying an image of human rights defenders. This

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<sup>97</sup> Mayroz (n 89) 359.

<sup>98</sup> Shinn (n 88) 86.

<sup>99</sup> *ibid* 86.

campaign of justice has influenced, what Jumbert has called, the ‘judicialization’ of the process, in which international criminal law is seen as a way of responding to conflicts and therefore, a new form of intervention in humanitarian conflicts.<sup>100</sup> Through the presence of the ICC in Sudan, the US government could calm the social protest within its territory while taking distance from any responsibility in the resolution.

On the other hand, the determination of genocide in Darfur implied some geopolitical benefits in the national security strategy of the Bush Administration. The Darfur crisis started 3 years after 9/11 and the initiation of the so-called ‘War on Terror’. During this period, the US government was developing a campaign of political alliances in the international fight against terrorism. By the time the attacks on the World Trade Centre took place, the diplomatic relations between the US and Sudan were extremely fragile. The Islamist direction taken by Al-Bashir’s government in 1989, the support to the Saddam Hussein invasion of Kuwait in 1991, and the fact that Sudan became a host country for terrorists, including Osama Bin Laden, provoked the inclusion of Sudan on the US list of States Sponsors of Terrorism. However, after 9/11, Sudan was not mentioned in the Washington *axis of evil*. The motives behind it were the search campaign against Bin Laden. Since he chose to hide in Sudan in the past, the Bush Administration considered necessary to open a new collaborative relationship with the Sudanese government in order to increase the efforts between the intelligence services. It is in this re-born collaboration where it lies the influence of the CIA. The connection between the secret services has been deliberately kept outside of the public eye, however, it is well known the importance of Sudan concerning the so-called “black sites” the CIA has in their territory.<sup>101</sup>

Despite the US definition of the crimes in Darfur as genocide, the collaborative relations between both countries have not significantly changed. Even though Sudan has firmly rejected the commission of any crimes in Darfur, Khartoum has not taken any action against the US policies. Nowadays, Sudan is still included in the list of States Sponsors of Terrorism, something that diplomatically leaves the government in a fragile position regarding Western support and relations with neighbouring countries. On the other hand, the fact that it hasn’t been removed is completely strategic as it allows the US to leverage

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<sup>100</sup> Jumbert (n 91) 293-294.

<sup>101</sup> *ibid* 290.

Sudan when pressuring to end the conflict in Sudan and to have a backup rationale in case of future intervention.<sup>102</sup>

The reasons why Khartoum has abstained from reacting against the US position, are the same that pushed them to collaborate with them on the first place: in the War on Terror is more convenient to be a US ally than an enemy. Even though leaks of sensitive information about the CIA activities in Sudan could trigger an international breakthrough not only on American soil but also in the positive image the US was trying to portray, the Sudanese government has preferred to maintain a cooperative relation. Since most of this information is extremely classified, the public may never know the real motives behind it. However, testimonies such as the one proclaimed by Kainsteiner before the Senate of Foreign Relations Committee Subcommittee on African Affairs in which he stated that ‘the government of Sudan appears to have calculated that it could not be against us’<sup>103</sup>, can help to understand the normalization of these relations. On the other hand, is this cooperation in the War on terror that explains why the US has not taken a more effective action to stop the atrocities in Darfur. However, it is essential to point out the Sudanese past willingness to collaborate with the US, as in 1996 offered to turn over Osama Bin Laden in exchange for easing economic sanctions, an offer that the US government rejected.<sup>104</sup> Those were the sanctions consequent to the inclusion of Sudan in the Sponsor of Terrorism List and that included economic, trade and financial measures.<sup>105</sup>

All of this is interconnected with the US foreign geopolitical agenda in Africa. It is well-known how rich Sudan is concerning resources, especially oil and petroleum. Located west of the Red Sea and south of the Suez Canal, it is an important transit point for Saudi Arabia’s oil and much of the trade between Central Africa, the Middle East and China. Hence, the control power over the petroleum is essential for the US agenda, as it would give the country some independence over the Middle East oil and its volatile political situation. In addition, it would allow some resistance over the Chinese control of the Sudanese resources. Since the US knows it is unlikely that Sudan will change its

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<sup>102</sup> Jumbert (n 91) 289.

<sup>103</sup> Walter H. Kansteiner, ‘The Administration’s Commitment to Sudan’ (US Department of State Archive, 11 July 2002) <<https://2001-2009.state.gov/p/af/rls/rm/11843.htm>> Accessed 1 June 2023.

<sup>104</sup> Joseph Hammond, ‘Sudan: China’s Original Foothold in Africa’ (The diplomat, 14 June 2017) <<https://thedi diplomat.com/2017/06/sudan-chinas-original-foothold-in-africa/>> Accessed 2 June 2023.

<sup>105</sup> US Embassy in Sudan, ‘Sudan sanctions’ (22 April 2023) <<https://sd.usembassy.gov/our-relationship/policy-history/us-sudan-relations/>> Accessed 7 June 2023.

relationship with China, the strategy adopted was to hinder as much as possible this association by defining the crimes in Darfur as genocide and portraying the image of the Chinese collaboration with a genocidal government in the public media by the ‘naming and shaming’ technique.<sup>106</sup>

Furthermore, it was the American agenda in the African continent that hindered a material intervention. Between 2003-2005, the US had two ongoing wars: Iraq and Afghanistan. Both extremely demanding economically and militarily. However, the course of both missions, but especially the one in Afghanistan, made it difficult to politically justify a third deployment of troops in another African country, where according to Straus, ‘they would have a strong moral purpose but lack a clear exit strategy.’<sup>107</sup>

Therefore, despite the US claim that humanitarian reasons are what drives its positioning, the information provided shows how, once again, human rights are being used as an instrument to serve political and material interests. However, over the years the genocide by attrition committed in Darfur has gotten out of the political agenda. The initial strong campaign initiated by the public media has lost its power as the endless conflict in Darfur made Sudan a hopeless country. The lack of political will to solve the conflict moved the attention away from Sudan, shifting the idea of the Sudanese government from a perpetrator to an ally. Hence, in 2017, the US lifted the sanctions against the Sudanese government while in 2020 the UNSC withdrew the peacekeeping mission.<sup>108</sup>

Since the construction of the Russian naval base in 2020 in the Sudanese Red Sea access, the relationship between Sudan and the US has changed. To gain back geopolitical influence in the region, the Biden Administration initiated several actions to get closer to the government, among which is the lifting of the country’s debt to the US, the European partner’s involvement in loans to Sudan and a more active role in the mediation of the Ethiopian civil war. However, the military coup of October 2021, alienated again the Western powers on the non-recognition of the new government.<sup>109</sup>

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<sup>106</sup> Estados Unidos, China y Rusia: triángulo de intereses negros. III Congreso de Relaciones Internacionales / International Relations Conference. p. 15

<sup>107</sup> Straus, ‘Rwanda and Darfur: A Comparative Analysis’ (n 94) 52.

<sup>108</sup> David Lanz, *Responsibility to Protect in Darfur: From Forgotten Conflict to Global Cause and Back* (Routledge, 2019) 6.

<sup>109</sup> Francesco Generoso, ‘Russian interests in the Horn of Africa: A Red Sea foothold?’ (2022) 29 South African Journal of International Affairs 549, 557.

The ongoing civil war in Sudan, intensified in April 2023, has triggered the suspension of the US embassy activities in Sudan and the abandoning of American personnel from the country, a scenario reminiscent of Rwanda 30 years ago.<sup>110</sup> However, despite some conversations regarding ceasefire agreements, not much has changed in the US Administration policies concerning the humanitarian emergency in Darfur.

### **3.3. China: African strategy through Sudan's national conflict.**

If a country has influenced the development of the conflict in Darfur, that is China. Based on the deterioration in the relationship between Sudan and Western countries, China intensified its influence through economic investments in the country. As it has been mentioned above, Sudan is a rich country in resources with a strong oil and petroleum potential. Something that the growing Chinese industry was able to take advantage of. Conveniently, in 1995, when the US started sanctioning Sudan for collaborating with terrorists, China signed its first oil deal with Al-Bashir's government.<sup>111</sup>

Since Sudan started oil exploitation in the 1980s, Chinese oil investors and companies have moved to Khartoum. Oil pipelines, wells, oil tankers and transportation machinery has been built across the country but especially in the Red Sea ports where the crude is directly transported to China. Nonetheless, this relationship entails not only benefits to China but also to the Sudanese government which has been paid billions of dollars. Manyok in his analysis research has estimated that 'since 1990, China National Petroleum Company (CNPC) has invested more than 15 billion dollars in Sudan', which materially corresponds to a total of 500,000 barrels of oil per day.<sup>112</sup> Nowadays China imports 4-7 per cent of its oil from Sudan making the Sudanese project its most successful international oil development initiative.<sup>113</sup>

However, despite the social potential the money has for the development and the welfare of the Sudanese citizens, it has been used to finance Al-Bashir's political campaign of national domination in Darfur, South Sudan and Kordofan. Despite the atrocities

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<sup>110</sup> US Embassy in Sudan (n 105) accessed 1 June 2023.

<sup>111</sup> Hammond (n 104) Accessed 2 June 2023.

<sup>112</sup> Phillip Tor Manyok, 'Oil and Darfur's Blood: China's Thirst for Sudan's Oil' (2016) 4 Journal of Political Sciences & Public Affairs 1, 2.

<sup>113</sup> Human Rights Watch, 'What has happened in Darfur?' (25 April 2008) <<https://www.hrw.org/es/news/2008/04/25/crisis-en-darfur>> Accessed 2 June 2023.

committed by the government, some of them labelled as genocide and crimes against humanity, with the Chinese money, China has not taken any political action against its partners.

Since these business relations are so beneficial for China, the Chinese government has used its power as a permanent member of the UNSC to block any intervention attempt that could potentially threaten its business model in Sudan. This has enormously influenced the political development of the humanitarian conflict in Darfur, where, once again, *realpolitik* was the main factor in the equation.

The economic relationship between Sudan and China started in 1959, however, it wasn't until the 1970s that the ties became stronger. Between the 1970s and 1990s, Chinese companies have been receiving loans in areas of public buildings and infrastructures in particular building bridges, roads, or agricultural sector facilities, among others.<sup>114</sup> Soon on, China started to invest more in the oil production sector across the country which led to the construction of three pipelines along South Sudan. Having discovered oil in Western Darfur, Chinese exploitation has grown to the point where Sudan exports between 62 and 85 percent of its oil production to China every year. Due to these factors, their relationship has taken on a unique significance, since no other country has made such a significant investment in Sudan as China. Likewise, the Sudanese government has no other economic and political ties as strong as those it has with China.<sup>115</sup>

On the other hand, what started as a purely economic relationship has evolved into a political one. Since Al-Bashir took control of the country the collaborations between Beijing-Khartoum have been reinforced. In Khartoum, China's stance protecting Sudan's sovereignty and vetoing sanctions against Al-Bashir's crimes has been seen as a sign of loyalty. At the highest level, Xi Jinping and Al-Bashir became extremely close.<sup>116</sup> Their meetings in international forums and the Sudanese president's visit to China were nothing

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<sup>114</sup> Manyok (112) 2.

<sup>115</sup> Shinn (n 88) 88.

<sup>116</sup> Permanent Mission of the People's Republic of China to the UN, 'Xi meets Sudanese president' (2 September 2008) <[http://un.china-mission.gov.cn/eng/zgyw/201809/t20180903\\_8395762.htm](http://un.china-mission.gov.cn/eng/zgyw/201809/t20180903_8395762.htm)> Accessed 2 June 2023.



new. Thus, they showed publicly their good relations and how they stood in solidarity with the interest of the other.<sup>117</sup>

Thus, soon the economic and political relations became military. Conveniently, between the 1990s and the 2000s, the relationship shifted. For the first time, the situation in Darfur and the Chinese interest in oil control, met. China started to export millions of military hardware materials, including helicopters, light weapons, ammunition, and machine guns, among others.<sup>118</sup> Additionally, according to Daniel Large, China has also provided technical assistance in arms fabrication within Sudan. It was the Darfur outbreak when Chinese assistance became vital.<sup>119</sup> Even when the peace negotiations were taking place, both countries continued to have high-level meetings in Beijing and Khartoum regarding the military industry.

According to United Nations Comtrade Data, China has gone from transferring weapons valued at 1 million dollars in 2002 to 23 million dollars in 2005.<sup>120</sup> As the data show, the imports experienced an increment during the years of the major intensity of the crimes in Darfur. In fact, according to Stockholm International Peace Research Institute (SIPRI), 2004 is when the largest flow of arms into Sudan occurred, coinciding with the height of the conflict in Darfur.<sup>121</sup> Based on this consideration it could be argued that there is a correlation between China's business interest in Sudan, and Darfur. Thus, China has been benefiting from the conflict since it started. However, in 2007, the Chinese Foreign Ministry Spokesman stated that 'in conducting arms sales to Africa, we carefully consider area's situation and developmental model and stick to the spirit of protecting local peace and stability.'<sup>122</sup> With this statement, it could be implied that the Chinese government considers legitimate to sell arms to Sudan because it does not threaten the stability within the country, even though at that time, they were plenty of evidence of the human rights violations Al-Bashir was committing with Chinese weapons. On the contrary to this discourse, it is the Chinese Deputy Foreign Minister, who in 2005 in an interview for the

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<sup>117</sup> Sudan Tribune, 'Al-Bashir lauds China's stances towards Sudan' (19 February 2005) <<https://sudantribune.com/article8816/>> Accessed 2 June 2023.

<sup>118</sup> Manyok (n 112) 2.

<sup>119</sup> Daniel Large, 'Arms, Oil, and Darfur: the Evolution of Relations between China and Sudan' (2007) 7 Sudan Human Security Baseline Assessment 6.

<sup>120</sup> *ibid* 5.

<sup>121</sup> Stockholm International Peace Research Institute, 'Trade Registers' <[https://armstrade.sipri.org/armstrade/page/trade\\_register.php](https://armstrade.sipri.org/armstrade/page/trade_register.php)> Accessed 2 June 2023.

<sup>122</sup> Manyok (n 112) 3.



New York Times, stated that ‘business is business’ and continued saying ‘we try to separate politics from business (...) the internal situation in Sudan is an internal affair.’<sup>123</sup> These declarations sadly matches perfectly with the type of political model China has used in the past years in Sudan.

On the other hand, apart from the economic and commercial interest China has in Sudan, it is important to consider the geopolitical potential of this alliance in its neighboring countries: Libya, and Chad. In the case of Libya, the economic interest to develop an oil connection has triggered a strong diplomatic campaign from China’s side.<sup>124</sup> Lastly, Chad is not only economically relevant in the region but also strategically essential due to the Chad-Cameroon pipeline project.<sup>125</sup>

Therefore, the political, economic, and commercial cooperation relationship between both parties has deeply influenced the Chinese response to the conflict before the UN. Thus, since the UNSC started to adopt resolutions in 2004, China has threatened to use its veto power on multiple occasions, especially over the ones condemning Al-Bashir’s implications in the crimes of Darfur. However, the non-interference have been justified under the principle of sovereignty and territorial integrity. Even though the Chinese rhetoric has always been against any kind of sanctions, in practice, China has mostly abstained. Between 2004 and 2005, China abstained from most of the resolutions adopted, including the ones demanding the disarmament of the Janjaweed, the creation of the COI and the referral of the situation to the ICC. Nonetheless, these abstentions came after big political pressures, most of them based on the use of the Chinese position in the UNSC to remove the critical language in the resolutions or an explicit mention of Al-Bashir’s implication in the crimes.<sup>126</sup> Regarding the arms embargo, China agreed on imposing disarmament on the militias and rebel groups, but never on the Sudanese government. This could be related to the arms commercial deals Beijing and Khartoum have. However, in the UN forum the justification provided was ‘this could not be helpful and could further complicate the situation.’<sup>127</sup> China also refused the deployment of a larger contingent of

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<sup>123</sup> Jonathan Hoslsag, ‘China’s Diplomatic Manoeuvring on the Question of Darfur’ (2008) 17 *Journal of Contemporary China* 71, 72.

<sup>124</sup> Shinn (n 88) 89.

<sup>125</sup> Romain Dittgen and Daniel Large, ‘China’s Growing Involvement in Chad: Escaping Enclosure?’ (2012) *Occasional Paper N 116 South African Institute of International Affairs* 1, 3.

<sup>126</sup> Shinn (n 88) 91.

<sup>127</sup> Hoslsag (n 123) 82.

peacekeeping forces in Darfur based on the principle of sovereignty. Even though at that time, they were sending military personnel to protect the oil extraction plants.<sup>128</sup>

Nevertheless, the situation changed in 2006 due to the international attention the celebration of the Summer Olympics Games in Beijing, was bringing to the country. Thus, two years before the Olympics, China started to gradually change its position towards Darfur. In February 2007, when the Chinese President visited Khartoum, he made public the almost five million dollars China was going to give to Sudan for the humanitarian emergency in Darfur. In April, on a new visit, the Chinese diplomats persuaded the government to be more flexible with the presence of the UNMIS mission and to agree on the replacement of AMIS to UNAMID. During the last months of 2007, the Chinese position changed from abstentions to votes in favour. This shift also came when China held the Presidency of the UNSC. Due to this, they not only passed Resolution 1769 for the establishment of UNAMID in Darfur but also, they became one of the main contributors to the mission.<sup>129</sup>

However, the Chinese actions before the UN forum didn't have the same effect in the public media. The upcoming Olympic Games brought a lot of attention from civil society, especially from Darfur activists in the US. This started a harsh international censor campaign against the political and military agreements that China had with Sudan. This campaign is where the concept of the *Genocide Olympics* was born. Something that was also triggered by the arrest warrant for President Al-Bashir issued by the ICC.<sup>130</sup> Public figures such as Steven Spielberg and Nobel Peace Prize winners started to publicly show their rejection to the Olympic games asking Beijing to suspend its relations with Khartoum. However, since the end of the Olympics, nothing has been heard from the Hollywood world about the continuation of the genocide in Darfur.<sup>131</sup>

Nowadays, China still has a close relationship with Sudan, the oil extraction continues while the export of military material is still running and increasing, especially important

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<sup>128</sup> Samuel Aron Issak, 'Conflicting Perspectives on Humanitarian Intervention: In Light of the Darfur Crisis' (2021) 1 Journal of Humanities and Social Sciences Studies 97, 103-104.

<sup>129</sup> Xuefeng Sun and Feng Jin 'China's major approaches to solving the Darfur Issue' (2018) 3 Journal of Middle Eastern and Islamic Studies (in Asia) 29, 34.

<sup>130</sup> Victor Peskin, 'The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur' (2009) 4 Genocide Studies and Prevention: An International Journal 304, 320.

<sup>131</sup> Shinn (n 88) 93.

now that the country is under a Civil War. After Al-Bashir ousting, China tried to reinforce their relationship with the new government through a high-level meeting between Xi Jinping and Al-Bushar. During which the Chinese President noted that ‘China and Sudan are good friends and good brothers who share weal and woe.’<sup>132</sup>

However, the Chinese policy of the administration of the Darfur crisis has been softly managed to avoid tough decisions. China was able to minimize the criticism over its image by adopting some key resolutions and some humanitarian donations while keeping tight relations with Khartoum. At the same time, Chinese diplomacy successfully managed the political pressure on the UNSC through well-publicized actions within the forum and huge donations to the peacekeeping mission while they continued its alignment with the African countries regarding the protection of the principle of sovereignty. However, these achievements do not imply any kind of humanitarian improvement in a crisis that now has been ongoing for 20 years. In fact, until now China is still getting economic benefits from the blood being shed in Darfur. Therefore, in the international human rights agenda it is essential to keep in mind that even though China changed its position within the UN, the motives behind it were never humanitarian. Hence, it could be stated that China has oiled the pacification of Darfur.<sup>133</sup>

### **3.4. Russia.**

To get a complete image of the geopolitical scenario in Sudan and the way the Darfur crisis was managed, it is essential to mention the role Russia played. Historically, Russia adopted the same position as China in the UN forum on the issues concerning Darfur. Thus, Russia has been blocking the UNSC Resolutions for more robust decision-making against Sudan hindering sanctions, avoiding the use of the term genocide, and lacking any political will to intervene.<sup>134</sup> Likewise, Russia has been also justifying this position by relying on the principle of sovereignty and non-interference in internal affairs. However, as every member of the UNSC has done in this crisis, the real motives lie in realpolitik and economic interests.

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<sup>132</sup> Consulate-General of the People’s Republic of China in Dubai, ‘Xi Jinping Meets with Chairman of Sudan’s Sovereignty Council Abdel Fattah Al-Burhan’ (9 December 2022) < [http://dubai.china-consulate.gov.cn/eng/zgyw/202212/t20221211\\_10988818.htm](http://dubai.china-consulate.gov.cn/eng/zgyw/202212/t20221211_10988818.htm)> Accessed 6 July 2023

<sup>133</sup> Hoslsag (n 123) 83.

<sup>134</sup> Bellamy and Williams (n 72) 156.

In the Russian case, the main interests rely on the arms business. Today, military relations are an essential element of Russia's policies for the African continent. According to the SIPRI, Russia is the largest arms exporter to Africa.<sup>135</sup> Unlike diplomatic traditional mechanisms, Russia has been using the armaments industry via private military companies to manipulate the foreign state's national politics. These policies have been deeply influenced by the lack of Western presence in the region and the need for a military infrastructure in African countries such as Sudan. In this regard, the Russian presence in Sudan has been defined by some scholars as Samuel Ramani as 'engaged opportunism' where there is not a defined strategy, but rather 'a series of engagement that exploit the opportunities that emerge in the region.'<sup>136</sup>

Under this consideration, the main business that Sudan can provide to Russia is not only the arms but also the completion of the naval base Moscow has been seeking to build in the Horn since 1869.<sup>137</sup>

Those motives triggered the Russian diplomatic pathways taken before the UN that, for the main superficial reasons, align with the Chinese ones. In this regard, Russia has been abstaining from most of the resolutions and adopting a more critical approach in the ones regarding the arms embargos, as it directly affects their business. Despite the UNSC Resolutions, either China or Russia continued sending arms to Sudan and therefore breaching the disarmament petition the organisation adopted of not collaborating with any of the militias involved in the crimes of Darfur. Indeed, it was during the peak years of the Darfur conflict that Russia concluded the most important arms deals.<sup>138</sup> Hence, it would be logical to think that the Russian arms were used to kill civilians in Darfur.

Nevertheless, it is surprising that despite its involvement in the crimes, Russia voted in favour of the referral of the Darfur situation to the ICC. Andrey Denisov, Russian Ambassador in China, declared that 'Council members had reaffirmed that the struggle against impunity was one of the elements of long-term stability in Darfur. All those

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<sup>135</sup> Stockholm Institute for Media Press, 'Surge in arms imports to Europe, while US dominance of the global arms trade increases' (SIPRI, 13 March 2023) <<https://sipri.org/media/press-release/2023/surge-arms-imports-europe-while-us-dominance-global-arms-trade-increases>> Accessed 7 June 2023.

<sup>136</sup> Generoso (n 109) 553.

<sup>137</sup> Stephen Blank, 'Gunboat diplomacy à la Russe: Russia's naval base in Sudan and its implications' (2022) 32 Defense & Security Analysis 470.

<sup>138</sup> Dávila (n 42) 65.

responsible for grave crimes must be punished.’<sup>139</sup> This is surprising as in posterior resolutions on referral of cases as Libya or Syria to the ICC, the Russian Federation has always used its veto power. Therefore, rather than a commitment to international law, the remarks suggest a lack of interest in adopting more robust and costly actions in the Darfur case. This understanding is coherent if we considering the temporal context. At the time the Resolution was adopted, 2005, Russia had no sizeable economic or political interest in Sudan.

Nonetheless, even though, Russia did not take a role as active as China in the international scenario, their interest in Sudan and their implications in the genocide have been stepping up. In 2017, due to the growth of the US sanctions, Al-Bashir started a series of negotiations with the Kremlin for the construction of a naval base in exchange of protection. The shift led to an increase in political relations between the two countries, which culminated in a high-level meeting between Al-Bashir and Putin. After this, some important movements have been done. For the first time, the Russian-made Sukhoi Su-30 and Su-35 fighters’ aircraft, were delivered to an African country.<sup>140</sup>

Like China, Russia has a huge interest in the Sudanese mineral and natural resources, however, instead of oil, Russia seeks to control the gold business. This interest started in 2015 when a Russian company found large gold reserves in the country. It was this discovery what helped Sudan to face the recession produced after the loss of all the oil extraction points in the independency process of South Sudan in 2011. This triggered Khartoum to open the economy to the Russian mining companies. Some scholars have linked the control of the gold extraction in Sudan with the Ukrainian war, claiming that Putin has been using it to face the international economic sanctions since the invasion began in February 2022.<sup>141</sup>

On the other hand, the negotiations with Russia also derived into the welcoming of the Wagner Group in Sudan. The Wagner Group is a private military force that operates as a Russian mercenary organisation and that since 2014 has been safeguarding the Russian

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<sup>139</sup> Mark S. Ellis, Yves Doutriaux and Timothy W. Ryback (eds), *Justice and Diplomacy. Resolving Contradictions in Diplomatic Practice and International Humanitarian Law* (Cambridge University Press 2018) 71.

<sup>140</sup> Generoso (n 109) 556.

<sup>141</sup> Blank (n 137) 477.

interest in the African continent.<sup>142</sup> Although Al-Bashir's decision to welcome the Wagner Group to Sudan was primarily to facilitate the flow of troops and weapons to the CAR, its mere presence was enough to increase its influence. However, independent investigations have shown the presence of 500 Wagner Group operatives in Darfur supporting Al-Bashir's government.<sup>143</sup> According to the CNN investigation report of July 2022, the Wagner Group has been supplying missiles to the RSF since the start of the Civil War.<sup>144</sup>

The ending of Al-Bashir's presidency in 2019, did not end the relations. As has been the normal pattern in the past years, Russia saw the emerging Civil War as a new business opportunity, aligning itself with the new president of Sudan. However, the end of Al-Bashir's mandate meant the end of the sanctions, which allowed the new national players to look for new alliances with the West, especially with the US. Since then, Sudan has been the chessboard between the US and Russia, as the former started a political campaign in Sudan to avoid the construction of the initial naval base Putin and Al-Bashir agreed to build.<sup>145</sup> However, in February 2020 Russia succeeded as Khartoum ratified the agreement for the construction of a Port on Sudan Red Sea access for 25 years. This has changed the geopolitics of the whole region as now Russia has a logistical centre in the Horn of Africa and Sudan has a continuous flow of military equipment, including nuclear vessels, to face the internal conflicts. This it's essential as it threatens the influence of China and the US in the area.<sup>146</sup>

The non-recognition of the new government established after the military coup of October 2021 by the Western countries, triggered the renovation of the relationships with Russia. In fact, Russia declared that 'external powers had interfered in Sudan.'<sup>147</sup> This show how, once again, Russia has taken advantage of the tensions between Sudan and the Western countries to reinforce its influence in Sudan throughout more presence of the Wagner

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<sup>142</sup> William Rampe, 'What Is Russia's Wagner Group Doing in Africa?' (Council on Foreign Relations, 23 May 2023) <<https://www.cfr.org/in-brief/what-russias-wagner-group-doing-africa>> Accessed 7 June 2023.

<sup>143</sup> Nima Elbagir, Gianluca Mezzofiore, Tamara Qiblawi and Barbara Arvanitidis, 'Exclusive: Evidence emerges of Russia's Wagner arming militia leader battling Sudan's army' (CNN, 21 April 2023) <<https://edition.cnn.com/2023/04/20/africa/wagner-sudan-russia-libya-intl/index.html>> Accessed 7 June 2023.

<sup>144</sup> *ibid.*

<sup>145</sup> Generoso (n 109) 556-557.

<sup>146</sup> Blank (n 137) 470.

<sup>147</sup> Generoso (n 109) 557.

Group, Russian mining companies, Russian weapons, and the physical military presence in the new-born Port.

From this scenario, it could be understood that the crisis in Darfur and the genocide by attrition that the region has been suffering for now 20 years, has been the most successful business deal for Russia in an African country. In a still ongoing conflict, Russia has not shown any regrets or intention to change its policies towards the region, in fact, they are reinforcing them despite the humanitarian emergency Darfur is going through. The suffering of the civilians has never been on the table of the negotiations between Russia and Sudan. This way of managing conflict it's what explains the new failure of the UN human rights system, in which humanitarian needs are never the priority. But what can we expect from an organisation controlled by immoral, unethical, and corrupt countries?



#### **4. RESPONSIBILITY TO PROTECT AND THE HUMANITARIAN INTERVENTION.**

In the 1990s, the use of force and the human rights met for the creation of a new form of interventionism, the so-called humanitarian intervention. Since the IIWW, this new doctrine has undergone several changes due to the interventions in Kosovo, Bosnia or Rwanda as well as the 9/11 security paradigm imposed. Events like these have expanded and reshaped the original definitions into what is now considered to be a combination of hard and soft power.<sup>148</sup> Humanitarian interventions changed forever with the adoption of Resolution 688 in Iraq. As internal conflicts began to be considered a threat to international security, intervention issues came under the UNSC's purview.<sup>149</sup>

Humanitarian intervention is naturally opposed to two of the main principles under international public law: the principle of sovereignty and the principle of non-intervention in the internal affairs. The first one is recognised in Article 2.1 of the UN Charter as an exclusive right the States have over their territory, and because of that, Article 2.7 specifically prohibits the interference of other States or the UN in the sovereignty of their Member States.<sup>150</sup> On the other hand, the principle of non-intervention is legally connected with the former, however, it was confirmed in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty adopted on 21 December 1965 by the UNGA. Under the accelerated decolonization context, the declaration affirms that 'no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State.'<sup>151</sup>

In spite of this, the fear of states abusing intervention and the failures in Kosovo led to the development of the Responsibility to Protect doctrine (R2P). This concept was legally based on Chapter VII of the UN Charter which allows an armed intervention in cases of humanitarian need. However, it wasn't until 2005 that the R2P was completely integrated

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<sup>148</sup> Dele Jemirade, 'Humanitarian intervention (HI) and the responsibility to protect (R2P): The United Nations and international security' (2021) 30 African Security Review 48, 49.

<sup>149</sup> UNSC Res 688 (5 April 1991) UN DOC S/RES/688.

<sup>150</sup> Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTCS XVI

<sup>151</sup> Edward McWhinney, 'General Assembly Resolution 2131 (XX) of 21 December 1965 Declaration on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty' (2010) United Nations Audiovisual Library of International Law 1, 3.



in the UN system. The Report published by the International Commission on Intervention and State Sovereignty (ICISS)<sup>152</sup> in 2001 gave the legal basis for its conduction. Additionally, ICISS created a nominal structure of specific R2P obligations divided in prevention, reaction, and reconstruction.<sup>153</sup>

The creation of this legal concept was based on the necessity to protect human rights in cases where the State is committing extreme human rights violations against its population. Hence, the motives for its application are purely humanitarian. Because of that, to make it compatible with the principle of sovereignty, the States agreed that it could only be applied in a situation of emergency, such as genocide, ethnic cleansing, crimes against humanity or war crimes, and only when other means have been exhausted.<sup>154</sup>

Therefore, R2P entails a more comprehensive idea of intervention beyond the use of force. It is the preventive dimension that is normally used in ongoing armed conflicts to warrant that the intervention will not be necessary. Only when the preventive measures are not enough to contain the crisis or there is a lack of will by the government to face the situation, is when the coercive measures are activated. Thus, the R2P seeks a gradual response that usually translates into first less coercive (economic or political sanctions) to more coercive measures (military under the concept of *ius ad bellum*). The latter is the so-called ‘peace imposition’ which includes coercive measures such as the demobilisation of combatants or actions to force a peace agreement.<sup>155</sup>

However, the efficiency of the R2P in the field has not been as expected. Despite grave threats to populations, members of the group are reluctant to act when economic and geopolitical interests are present.<sup>156</sup> There haven't been any normative developments since ICISS, even though the concept has existed for almost 20 years. The failure in Libya or the case in Syria has shown how the term is more political than judicial. The case in Darfur is not an exception.<sup>157</sup>

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<sup>152</sup> Ivan Šimonović, ‘The Responsibility to Protect’ (2016) 53 UN Chronicle <<https://www.un.org/en/chronicle/article/responsibility-protect>> Accessed 5 June 2023.

<sup>153</sup> Jemirade (n 148) 50.

<sup>154</sup> *ibid* 51.

<sup>155</sup> Borja Lasheras, ‘Darfur y la Responsabilidad de Proteger’ (2008) 22 *Política Exterior* 107, 111.

<sup>156</sup> Šimonović (n 152).

<sup>157</sup> Romualdo Bermejo García and Eugenia López-Jacoiste Díaz, ‘De la intervención por causas humanitarias a la responsabilidad de proteger. Fundamentos, similitudes y diferencias’ in *Cuadernos de Estrategia N 160 La respuesta del derecho internacional a los problemas actuales de la seguridad global* (IEES, 2013) 22.

To what once was defined by the UN as ‘one of the worst conflicts in the world’, the response of the international community in Darfur has been minimal.<sup>158</sup> It is widely known, the sensitivity of the post-colonial countries, especially the African, to the intervention of Western States. Despite the multiple ongoing conflicts in the continent, they have always positioned themselves in respect of the sovereignty principle and the non-intervention approach, no matter what the humanitarian costs were. In Darfur, the pattern was the same. The whole debate in the UN forum was around the designation of the conflict as a genocide and the possible intervention, rather than the humanitarian casualties. The rejection of an external intervention, described by Al-Bashir as ‘neo-colonial interference in African affairs’, has also influenced this decision.<sup>159</sup> A position that was supported not only by African countries but also members of the UNSC, such as China and Russia.

This is an example of the political acceptance of sovereignty over human rights, to cover up a refusal to take the humanitarian responsibility approach in Darfur. Unfortunately, in Darfur, the slogan ‘African solutions for African conflicts’ has been used by Western powers as a convenient position to wash their hands from a military deployment of troops.<sup>160</sup>

In the case of Darfur, the intervention has always been on the discussion table, to the extent that the UNAMID mission was deployed. However, was the R2P applied and effective? From a legal point of view, the R2P has been applied in accordance with the first stages of the responsibility to prevent. During the first resolutions, the UNSC language referred to the need to protect the population and described Darfur as a threat to international security. For instance, in the debates to adopt Resolution 1556 the Philippines ambassador stated that ‘sovereignty also entails the responsibility of a State to protect its people. If it is unable or unwilling to do so, the international community has the responsibility to help that State achieve such capacity and such will and, in extreme necessity, to assume such responsibility itself.’<sup>161</sup>

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<sup>158</sup> UN News, ‘World's worst humanitarian crisis unfolding in Darfur, Sudan - UN official’ (19 March 2004) <<https://news.un.org/en/story/2004/03/97792>> Accessed 5 June 2023.

<sup>159</sup> Humanitarian News and Analysis, ‘Sudan: Bashir Accuses Foreign Aid Groups of Neocolonialism’ (allAfrica, 7 August 2001) <<https://allafrica.com/stories/200108070238.html>> Accessed 6 June 2023.

<sup>160</sup> Paul D. Williams and Alex J. Bellamy, ‘The Responsibility To Protect and the Crisis in Darfur’ (2005) 36 Security Dialogue 27, 35.

<sup>161</sup> *ibid* 1.

From a legal perspective, the ICISS affirms that there are two threshold criteria for applying the R2P: ‘the large loss of life’ and the ‘large-scale ethnic cleansing.’<sup>162</sup> If those are met, the principle of sovereignty can be overridden and therefore, military humanitarian intervention will be allowed. In this regard, the supreme humanitarian emergency was clear, making obvious that both conditions were met in the Darfur case and that an armed humanitarian intervention would have been legitimate. However, the international society failed in the consideration of military intervention.<sup>163</sup>

Although the term military humanitarian intervention may sound contradictory, in a situation as extreme as the Darfur its advantages should be considered over the rest. Indeed, peace cannot be imposed by force, however, protection can be granted through coercive measures. If this kind of mission was deployed in Darfur, the benefits in humanitarian terms would have been huge. It is known that one of the main problems in the field was the distribution and access to external humanitarian aid, with the activation of the R2P military mission, the delivery of humanitarian assistance to the refugee and IDPs could have been ensured. In the same way that, without directly intervening in the political development of a peace agreement, the troops could have protected the camps and the villages vulnerable to these attacks. Even though the result of this kind of approach cannot be predicted accurately, scholars such as De Waal<sup>164</sup> and Williams and Bellamy<sup>165</sup> have claimed that just the deployment of a small number of soldiers could have made a substantial difference in the number of victims.

Following its preventive nature, the UNSC started to gradually apply the R2P through non-military measures such as economic sanctions and arms embargoes. However, in conflicts such as Darfur, where the state is directly responsible for the atrocities, it is essential to differentiate between victims and perpetrators to have an effective application of the R2P.<sup>166</sup> As well, when the government controls the economy, the political alliances may intervene in the humanitarian response, the Chinese with Al-Bashir being one example.

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<sup>162</sup> The Responsibility to Protect: report of the International Commission on Intervention and State Sovereignty, in Gareth Evans and Mohamed Sahnoun (eds) (International Development Research Centre, 2001) 74; Šimonović UN Chronicle (n 152).

<sup>163</sup> Williams and Bellamy (n 160) ‘The Responsibility To Protect and the Crisis in Darfur’ 28.

<sup>164</sup> De Waal (n 36) 1041.

<sup>165</sup> Williams and Bellamy (n 160) ‘The Responsibility To Protect and the Crisis in Darfur’ 35.

<sup>166</sup> Lasheras (n 155) 116.

Even though the debate in the UN forum had different positions in favour and against the intervention, the level of destruction qualified to have a military R2P intervention. This was later supported by the COI, which confirmed that between 2003 and 2005 the level of violence reached extreme markers. As has been pointed out in the previous section, the COI described the Darfur crisis as a crime against humanity. However, the question would be if the official determination of the conflict as a genocide would have changed the international response.<sup>167</sup> The answer is no. As the ICISS claimed, the actions that can trigger the activation of the R2P also include crimes against humanity, which the COI found in Darfur. Therefore, the ambiguity labelling the crimes in Darfur should not be an excuse for the non-complete activation.

Although genocide is not a term that legally triggers an automatic humanitarian intervention, it is considered one of the worst crimes which in some way could entail moral responsibility to protect. In this regard, the report of the High-Level Panel on Threats, Challenges and Change adopted by the UNGA in 2004 affirms that ‘any event that leads to the large-scale death or lessening of life, including genocide, should be avoided and prevented, triggering military responsibility to protect.’<sup>168</sup> Under this consideration, the recognition of the crimes of Darfur as genocide could have triggered a stronger military response than what the crimes against humanity triggered. However, the morality levels over the designation of a conflict as genocide and the international policy responses, is a subjective relationship not legally substantiated. Hence, it is impossible to know if a direct determination of genocide could have reduced the number of casualties.

The idea of a coercive intervention without the state’s consent was replaced by the more comfortable approach of blue helmets through UNMIS and the consequent hybrid mission, UNAMID, both with the consent of the perpetrators. A mandate that represents, once again, the failure of the modern R2P as it aims to impose peace in an inexistent moment and to protect civilians from a militia supported by the same government that the mission had to collaborate with.<sup>169</sup>

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<sup>167</sup> Lasheras (n 155) 117.

<sup>168</sup> UNGA ‘Follow-up to the outcome of the Millennium Summit’ (2 December 2004) Fifty-ninth session UN DOC A/59/56, 12-13.

<sup>169</sup> Lasheras (n 155) 117.

The problem with the R2P in Darfur is not that it didn't have the characteristics or the necessary levels of violence to be activated, is the result of the logic in the international order, where power and strategic priorities took a more important role. Thus, Darfur only proves, once again, how the R2P is a politized concept within the human rights system, that tries to achieve the subjective idea of protecting populations through an extremely limited pacification structure. Hence, after more than 300,000 deaths and 2,5 million displaced people<sup>170</sup>, the R2P has been a failure in the core of the concept: prevent and avoid the extermination of human beings.

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<sup>170</sup> Aljazeera, 'Sudan: Death toll in days of Darfur violence rises to 87' (7 April 2021) <<https://www.aljazeera.com/news/2021/4/7/death-toll-in-darfur-tribal-violence-rises-to-87#:~:text=The%20vast%20Darfur%20region%20was,displaced%2C%20according%20to%20the%20UN>> Accessed 6 June 2023.

## 5. AFRICAN UNION.

Sudan is bound by the AU instruments since it became a member of the organisation on May 1963, when the Organisation of African Unity (OAU) was born.<sup>171</sup>

### 5.1. Article 4 of the Constitutive Act of the African Union.

The former OAU was created in the context of the African's decolonization and the apartheid in South Africa. During this period protection of sovereignty and territorial integrity of the borders were essential for the new African countries. Thus, the continental institution emerged focusing on securing sovereignty instead of citizens. Consequently, the organisation started to be known abroad as the 'club of dictators.'<sup>172</sup>

It soon became evident that the OAU was unable to effectively protect human rights. In July 2002, the African States decided to replace the OAU, leaving behind the outright principle of non-interference for a strong commitment to protecting human rights.<sup>173</sup> The re-born AU was based on a Constitutive Act devoted under Article 3 to the promotion of the principles of peace, security, democracy, popular participation, and good governance.<sup>174</sup> Although the principle of sovereignty was reaffirmed, the Charter also gave the authority to the AU to intervene in a Member State 'in respect of grave circumstances, namely war crimes, genocide and crimes against humanity' under Article 4(h).<sup>175</sup> This advancement was depicted by the AUPSC Commissioner as a replacement of 'the principle of non-interference with the principle of non-indifference.'<sup>176</sup> Nonetheless, organisations as Amnesty International, expressed scepticism around these new commitment and their translation into concrete practices.<sup>177</sup> Thus, the Darfur crisis

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<sup>171</sup> African Union, 'Member States' (10 July 2023) <[https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2)> Accessed 12 June 2023.

<sup>172</sup> Keith Gottschalk and Siegmund Schmidt, 'The African Union and the New Partnership for Africa's Development: Strong Institutions for Weak States?' (2004) 11 *Internationale Politik und Gesellschaft*, 138, 140.

<sup>173</sup> Adam Keith, 'The African Union in Darfur: An African solution to a global problem?' (2007) 18 *Journal of Public and International Affairs* 149, 153.

<sup>174</sup> Gottschalk and Schmidt (n 172) 141.

<sup>175</sup> Constitutive Act of the African Union (adopted 11 July 2000, entry into force 26 May 2001) OAU Doc. CAB/LEG/23.15 Article 4, 5.

<sup>176</sup> Marina Sharpe, 'From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect' (2017) Report International Refugee Rights Initiative 4.

<sup>177</sup> Amnesty International, 'African Union: A new opportunity for the promotion and protection of human rights in Africa' (2002) Report on the Constitutive Act of the African Union 1, 5.

put these expectations under test to prove that the 2002 reform was more than just a mere change of name.

Beyond the peacekeeping efforts in Darfur, which will be analysed in the next section, the AU has abstained from taking any diplomatic action against Al-Bashir. even when the levels of violence were on rise, any recognition of the conflict as a genocide was taken by the AU. For instance, in 2006 the AU allowed Sudan to host the group's annual summit even though a 'conducive political atmosphere' was required. In 2007, when Al-Bashir was to take over the rotating institution presidency, the AU, afraid of losing credibility if it was led by a government accused of genocide, repeated Ghana's mandate. Instead of using this as an opportunity to condemn Al-Bashir's crimes in Darfur, it was justified as a way of commemorating Ghana.<sup>178</sup> These political dynamics have also influenced the shortcomings of the peace operation in Sudan and the non-applicability of Article 4(h).

In this regard, Article 4(h) is meant to be an 'intervention against mass atrocities' which triggers a military force when a state fails to discharge its duty to protect populations from mass atrocities. For its activation, it is needed the consent of the two-thirds majority of the Members of the AUPSC. However, despite the humanitarian conflicts that the continent has been going through, some of them defined as genocide, Article 4(h) has never been activated.<sup>179</sup>

As the R2P, Article 4(h) challenges at a regional level the principle of sovereignty safeguarded under Article 2(1), (4), and (7) of the UN Charter.<sup>180</sup> Although, the language use in Article 4(h) is straightforward, some inconsistencies have led into substantial problems concerning its applicability. On the one hand, in the Charter, Article 4(h) is not considered a duty, but rather a right. This specificity in the wording confers the AU decision power over whether to intervene or not in the situation but not an obligation to do so. In legal terms, this intervention could be seen as a 'right to act' which depends on the political will of the States to do it. Hence, intervention is viewed as an opportunity to avoid indifference but not a duty.<sup>181</sup> On the other hand, the conditions that trigger its

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<sup>178</sup> Keith (n 173) 154-155.

<sup>179</sup> Linnea Bergholm, 'The African Union, the United Nations and civilian protection challenges in Darfur' (2010) 63 Refugee Studies Centre. Oxford Department of International Development 3, 6.

<sup>180</sup> Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTCS XVI

<sup>181</sup> Dan Kuwali, 'From stopping to preventing atrocities. Actualisation of Article 4(h)' (2015) 24 African Security Review 248, 249.



application are ‘grave circumstances’ which are difficult to define and not easy to determine, for instance, genocide. As has been pointed out in the first part of this research, there are already several issues regarding the use of the term genocide and its real applicability.<sup>182</sup>

Since the lack of accuracy around the Article leaves room for interpretations, in 2012 a group of experts published the Pretoria Principles on Ending Mass Atrocities according to Article 4(h) of the Constitutive Act of the African Union. Even though, they are not abiding instrument of the AU, they provide guidelines on how to apply Article 4(h), and therefore in which circumstances the intervention should be invoked.<sup>183</sup>

According to the Pretoria Principles, there are a few conditions under Article 4(h) intervention that could have been applied in the Darfur case. Firstly, the existence of grave circumstances that constitute serious violations of human rights in the form of genocide, crimes of war and crimes against humanity trigger its activation.<sup>184</sup> The lack of a universal definition, the UN’s consideration of it as crimes against humanity instead of genocide, and the political interest involved in the conflict have served as an excuse for the non-consideration of the crimes in Darfur as grave circumstances under the figure of genocide. It is crucial to consider that the decision bodies that can activate the applicability of Article 4(h) are politized. Hence, the political discretion in deciding the implementation and the difficulty to prove it has been the perfect excuse for its non-activation.

On the other hand, the existence of grave circumstances is not sufficient for the activation. The failure of the State to prevent and halt the atrocities should be also present. Otherwise, the targeted State can ask for the activation of the so-called *intervention by invitation* under Article 4(j). This figure is based on the consent of the State and the non-military intervention. According to Principle 9 of the Pretoria Principles, in deciding whether to intervene or not, the AU Assembly should consider the unwillingness of the national government to protect the population. It is specified that this could be proved by the implication and culpability of the government in causing, tolerating, or committing such

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<sup>182</sup> Kuwali (n 181) 248.

<sup>183</sup> Centre for Human Rights, ‘Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union’ (7 December 2012) University of Pretoria.

<sup>184</sup> *ibid* 1.



atrocities. Hence, where the State fails to protect its citizens by tolerating the commission of these crimes, the AU Assembly should authorise Article 4(h).<sup>185</sup>

Therefore, in the decision process of Article 4(h) activation, a two-phase inquiry needs to be applied. The first phase is to establish that one of the three crimes considered grave circumstances is being or has been committed. A study of the case through the relevant legal instruments and the ICC jurisprudence should be applied in conjunction with a fact-finding process of credible information.<sup>186</sup> This is essential to avoid politically driven decisions. In the second phase, the role of the government should be studied to determine whether to intervene. Nonetheless, phase two is not explicitly included in the wording of Article 4(h) itself, rather it is stated in the Pretoria Principles.

In the case of Darfur, phase one of the inquiry was already controversial as the AU did not recognise the crimes as genocide based on the COI report. However, taking the same source and even including the US position, it has been generally agreed on the existence of crimes against humanity which are also considered grave circumstances under the Article. Therefore, the first phase for the activation of Article 4(h) supports the intervention. Regarding phase two, the intersection of political interest in diplomatic relations with Sudan and the resistance of Al-Bashir's government hindered the application process. It has been widely proven the Sudanese involvement and participation in the commission of the genocide. However, for the AU and the political interests of Al-Bashir, it was more convenient to apply the intervention by invitation with the consent of Sudan, rather than Article 4(h).

The political pressure by the African leaders to find African solutions for African problems led to the deployment of AMIS under the N'Djamena Humanitarian Ceasefire Agreement (HFCA) on 8 April 2004.<sup>187</sup> This mandate was completely convenient for all the parties to justify the non-activation of Article 4(h). For the African leaders, it was viewed as an opportunity to position the AU as the political-dominant institution in Africa; and for the Sudanese government, it was seen not only as the best alternative to

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<sup>185</sup> Pretoria Principles (n 183) 1.

<sup>186</sup> Constitutive Act of the African Union (n 175) Article 4.

<sup>187</sup> Seth Appiah-Mensah, 'The African Mission in Sudan: Darfur dilemmas' (2010) 15 African Security Review 1, 3.

avoid an international intervention but also to have some control over the powers of the mandate.<sup>188</sup>

Thus, according to the Pretoria principles, Article 4(h) should have been applied. If there is an ongoing mass atrocity, and there is a political instrument that can be used as the legal basis for the intervention, the question would be: why it has not been invoked? The answer can be found not in the legal sphere but rather in the political one. Likewise, the non-activation of the R2P and the non-determination of the conflict as a genocide, the lack of political will and the economic interests of the countries involved, have hindered the application of Article 4(h) intervention.

Moreover, it is widely known the financial problems the organisation has to face and that, most of the time has driven its position in political matters. The AU budget is mostly financed by external parties, especially the European Union. Thus, the organisation and its members have a political dependence and a legal responsibility in the administration of those funds. On an African level, South Africa, Nigeria, Libya, Algeria, and Egypt are the main contributors to the budget. From a geopolitical point of view, this gives them a lot of power in the development of regional politics and therefore, in the application of Article 4(h) in Darfur. When the crisis started the members of the AUPSC were the main financial contributors and Africa's wealthier nations. Each of them had their national security problems and a lack of political interest in solving the crisis in Darfur. This translated into an inexistent financial commitment.<sup>189</sup>

It is noteworthy that all members included the anti-imperialism paradigm in their own foreign political affairs. It was this lens of viewing the regional order that defined the conceptualisation of human rights issues and that blindly placed them on Al-Bahir's side.<sup>190</sup> Nevertheless, this mantra lacks meaning considering that its sole dependence on external funds already entails a form of intervention in the African affairs. Moreover, arguing that African problems require African solutions, ignores the international

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<sup>188</sup> Michael Clough, 'Darfur: Whose Responsibility to Protect?' in Human Rights Watch *World Report 2005* (HRW, 2005).

<sup>189</sup> Bewuketu Dires Gardachew, 'The rhetoric and reality of the AU peace operations in Darfur (Sudan): Is the 'African Solution' enough?' (2021) 30 *African Security Review* 247.

<sup>190</sup> Laurie Nathan, 'Interests, ideas and ideology: South Africa's Policy on Darfur' (2011) 110 *African Affairs* 55.

responsibility over a conflict like Darfur where countries such as Russia and China are extremely involved.

However, the scale of devastation in Darfur became so overwhelming that the re-born AU could not ignore it. Thus, pushed by the international pressure for an African Action, the AU established this small monitoring mission with a huge gap between the intentions and the capabilities. A mission that since the beginning was doomed to disaster as it was collaborating with the same government that was persecuting and committing the genocide. Hence, instead of invoking the available Article 4(h), the AU preferred negotiation rather than coercion.<sup>191</sup> But how legitimate is it to negotiate and directly cooperate with criminals?

It could be argued that based on the evidence and the guidance provided by the Pretoria Principles, Article 4(h) could have been activated in Darfur. However, once again, political interest and geopolitical dynamics interfere in the development of a humanitarian conflict. Even though Article 4(h) has a very powerful potential at the African level, it is crucial to reflect on the momentum and if the AU is legally and politically prepared to activate it someday. The respect for sovereignty and the economic interest in a continent dominated by ethnic and racial problems, make the scenario discouraging. In this regard, Article 4(h) has proven to be ineffective rather than useful. There is no doubt that the re-born AU peace and security commitment looks appealing on paper but not on effective on the field. Thus, is 'the African solution for African problems' paradigm enough?

Since the problem in Darfur was not the absence of legal instruments, it is essential for the prevention of mass atrocities to create a political-normative framework that promotes a culture of compliance with international human rights standards. For that, Article 4(h) intervention should not be seen as a solution for the African problems, but rather as a useful tool to develop preventive strategies to protect the rights of the African population and bring security in the short term.<sup>192</sup>

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<sup>191</sup> David Mickler, 'UNAMID: a hybrid solution to a human security problem in Darfur?' (2013) 13 *Conflict, Security & Development* 478, 495.

<sup>192</sup> Kuwali (n 181) 263.

## 5.2. From AMIS to UNAMID: The Hybrid Peacekeeping Operations in Darfur.

As Baba Gana Kingibe, African Union's Special Representative to Darfur, said 'we stand or fall with Darfur. If we fail here, nobody is going to look to the AU for a solution to other conflicts on the continent.'<sup>193</sup> Thus, the AU primary role in conducting peace operations in Darfur was triggered by the need to prove the new commitment, and the security challenges that this conflict posed for the Horn of Africa region.

As a result, in mid-2004 the AU's deployed the AMIS peace operation mission in Sudan. It was their first large-scale military intervention mission in an internal conflict of one of its member states.<sup>194</sup> The aim was to monitor the implementation of the ceasefire agreement signed in HFCA by patrolling the region and protecting civilians from imminent danger.<sup>195</sup> The mandate was extremely limited as it was more an observer mission than a proactive one. AMIS was never intended to be a 'direct civilian protection force', but rather a ceasefire agent responsible for creating a political space for conflict resolution.<sup>196</sup> The AU personnel could only protect civilians if they were being attacked in its presence and if they had the resources to effectively conduct the intervention.<sup>197</sup> Both were unlikely to happen as the government took the necessary measures not to do so, as it was a collaborative party of the mission.

Since the ceasefire did not solve the rooted political causes of the conflict, the mandate had to gradually expand to 7,000. However, the constant level of violence and the multiple breaches of the peace agreements rapidly showed the logistics challenges of the mission in the field. To the extent that in 2007 it became evident that AMIS was not strong enough to deter the attacks against civilians. Given the limited resources and the lack of an effective mandate to act due to political constraints, the AU was unable to bring stability to the region affecting the outcome of their performance.<sup>198</sup>

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<sup>193</sup> El Fasher, 'Sudan: On patrol with AU troops in Darfur' (Reliefweb, 8 June 2005) <<https://reliefweb.int/report/sudan/sudan-patrol-au-troops-darfur>> Accessed 19 June 2023.

<sup>194</sup> Cristina G. Badescu and Linnea Bergholm, 'The Responsibility To Protect and the Conflict in Darfur: The Big Let-Down' (2009) 40 Security Dialogue 287, 295.

<sup>195</sup> Adeyinka Samson Adeniji, Agaba Halidu and Jacob James, 'The United Nations/African Union intervention in the Darfur conflict (2007-2010): Achievements, Challenges and Lessons for the future' (2015) 3 Global Journal of Arts, Humanities and Social Sciences 64, 67.

<sup>196</sup> Mickler (191) 495.

<sup>197</sup> Nick Grono, 'The International Community's Failure to Protect' (2006) 105 African Affairs 621, 626.

<sup>198</sup> Gardachew (n 189) 255.

The mission had to operate without vehicles, radio and telecommunication equipment and other logistical requirements. AMIS depended completely on the donation of their partners especially the EU which made available 70 million euro. However, the mandate had not a predictable funding plan and the AU did not have the logistical capacity to handle the bulk of million dollars purchases for large peace operations.<sup>199</sup>

Furthermore, the limited mandate was not strong enough not only to protect civilians but also to protect their own personnel. It was reported several attacks against AMIS troops and convoys by the local militias. The levels of violence and the instability of the region provoked the AU's loss of credibility as the only international force present to protect civilians.<sup>200</sup>

Despite the challenges and shortcomings, the AU provided a rapid response to the crisis adopting the main role of protecting human rights in Africa. The cooperation by the African leaders to intervene in deploying the mission showed the willingness to implement the idea of the R2P. This role was essential and gave good promotion to the AU in the international community. However, the AU was institutionally ill-equipped and un-resource mismatching the ambitious objectives of the mission with the reality on the ground.

On the other hand, it could be argued that the main limitation of the mission was the consent of Sudan. At the beginning of the conflict, the organization, like the other parties, tried not to adopt a strong position and to avoid denominations. The AU knew they had to intervene because of the international and regional pressures around the conflict, but not about the internal reality and how to face it. Like the rest of the world, the AU was more focused on Sudan than on Darfur itself. This resulted in a vehement ignorance of the roots of the violence. Consequently, the AU has never declared the violence in Darfur as an ethnic cleansing or a genocide. According to Prunier, the AU was afraid of getting directly involved in the distinction between Arabs and Africans because of its potential to divide the members of the organization.<sup>201</sup> For that, it was essential to minimize the racial angle of the conflict. Thus, the organization opted for a neutral position as a mediator, refusing to directly condemn Khartoum by putting the responsibilities exclusively over

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<sup>199</sup> Appiah-Mensah (n 187) 5.

<sup>200</sup> *ibid* 11.

<sup>201</sup> Prunier (n 38) 145.

the Janjaweed. For the AU, Darfur was a case of mass murder without a criminal and political organization of perpetrators. As a result, all the actions taken by the AU were based on the cooperation and consent of Al-Bashir's government obviously unknowing that it was impossible to reach peace if the ones that should collaborate to protect civilians were also the ones persecuting them.

Even though there was strong support for the 'African solutions' paradigm in the UNSC, as it was convenient to justify their inaction, over time, it became clear it was not enough. The meagre resources, the ill-equipped personnel, and the continuous violation of the ceasefire by the government and the rebel groups, started to make clear the unwillingness of the UN to intervene.<sup>202</sup> On the other hand, the AU was not completely open to external intervention. It was essential for the organization to have greater agency in dealing with African security problems. Moreover, the historical failure in facing African mass atrocities and the lack of continental representation in the permanent seats of the UNSC, strengthen the notion of African solutions. This encouraged the AU to indirectly position themselves with Al-Bashir's argument against non-intervention.<sup>203</sup> There was a clear aspiration for the AU to lead the peacekeeping mission on their own, despite the results. For instance, Thabo Mbeki, former president of South Africa, in 2005 affirmed that 'Africa has not asked for anybody outside of the African continent to deploy troops in Darfur. It's an African responsibility, and we can do it.'<sup>204</sup>

By March 2005, the COI report was published. Even though, for the international community, the focus was on the non-recognition of the crimes as genocide, public opinion was a game changer. The report directly pointed out the commission of crimes against humanity by the Sudanese government. This situated the AU in a less convenient position regarding the effectiveness of a peacekeeping mission supported by a criminal government. At that time, the security in Darfur was still at what Kofi Annan described as an 'unacceptable level.' There were more than 175 reports of ceasefire violations, more than 700 people killed between June 2004 and April 2005, and approximately 6 million internally displaced persons in 2005. Yet pressure from the international community to

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<sup>202</sup> Gardachew (n 189) 258.

<sup>203</sup> Mickler (191) 493.

<sup>204</sup> Office of the US Press Secretary, 'President and South African President Mbeki Discuss Bilateral Relations' (The White House Archive, 1 June 2005) <<https://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050601.html>> Accessed 20 June 2023.

the UN to intervene and to the AU to play a more effective role mounted into the initiation of talks for a joint mission in Darfur.<sup>205</sup>

In January 2006, after 18 months of unsatisfactory results, the AU and the UN started a series of consultations to allow the transition of AMIS into a UN peace operation. The key to this cooperation initiative was to get the consent from the Sudanese government and to leave the control of the mission to the AU. As a result, the UNSC adopted a proposal through the Resolution 1706 in August 2006. However, Sudan's refusal to this first attempt triggered a second one based on a hybrid mission between the AU and the UN. Sudan finally consented in 2007 thanks to the negotiations talks carried out by China. Consequently, in July 2007 the UNSC authorized the deployment of the so-called UNAMID mission.<sup>206</sup>

The whole implementation strategy was intended to be an integrated approach to the introduction of the UN staff within the AU's existing one. This embedding strategy within the operational structures of the regional organization was an innovative form of partnership. Due to its novelty and the inexperience of both parties in this kind of relationship, the challenges concerning effective cooperation have been more rooted. Despite its hybrid appearance, it was actually asymmetrical. To the extent that some scholars have depicted it as a hybrid paternalism.<sup>207</sup> Naturally, the UN is an older organization with more experience and resources than the AU. This means, that in the development of the mission, it is more likely that the flow of human, material and financial resources will be unidirectional, from the UN to the AU. As a regional organization, the AU has an essential role in the engagement with the local communities and the respect for the regional government sensibilities. However, the lack of resources, the inexperience, and the neutral position in the conflict, leaves an unclear space in the dominance of its regional role.

However, since the consent given by the government was based on the pressures of China rather than a genuine agreement about the need to establish the mission, the transition

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<sup>205</sup> Mickler (191) 497.

<sup>206</sup> *ibid* 502.

<sup>207</sup> Tim Murithi, 'The African Union's evolving role in peace operations: the African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia' (2010) 17 *African Security Review* 69, 79.



was not easy. There was a huge mistrust from the government side to the presence of international forces in their territory, especially considering the tense diplomatic relations with some members of the UNSC. Even though the transition from AMIS to UNAMID was challenging, it became fully operational in 2008. Nonetheless, in the transformation process, the new operation inherited the problems of the previous one as the mission did not meet the expectation envisioned. The presence of UNAMID in Darfur did not foster peace or long-lasting stability. Although this was not their task, the mission also failed in protecting the civilians in the field. UNAMID did not perform well in Darfur for the same reason as AMIS: inadequate force levels, ill-equipped personnel, limited deployed forces, and scarce logistic and financial resources.

Thus, the mandate was very limited. UNAMID was authorized to support the implementation of the DPA and 'to protect civilians, without prejudice to the responsibility of the Government of Sudan.'<sup>208</sup> With the inclusion of this last element, Sudanese sovereignty was protected as a priority over humanitarian needs. The troops remained caught between a rock and a hard place. The UN did not support the mission with crucial tactical or ground transportation facilities. Despite, on paper the main objective was the protection of civilians, the mission lacked a strategic goal and a structure to comprehensibly assess the population. At the same time, the UNAMID personnel found themselves waiting for the Sudanese government's permission on decisions over troops' land use. This dependence on the perpetrator government has influenced the fact that the mission was unable to rescue and protect not only the civil population but also their personnel from attacks as the one on July 2008 when seven UNAMID peacekeepers died.<sup>209</sup>

Additionally, the harsh climate and the limited access to food and water supplies made humanitarian operations extremely challenging. The living conditions became difficult due to the extreme temperatures, the sandstorms, and the lack of permanent accommodation facilities of the military and police personnel in tents.<sup>210</sup> However,

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<sup>208</sup> UNSC Res 1769 (n 84) 5.

<sup>209</sup> Badescu and Bergholm (n 194) 301-302.

<sup>210</sup> Adeniji, Halidu and James (n 195) 75.



organizations such as the Darfur Consortium, have openly claimed that ‘UNAMID could be doing more, even within the limits of their powers.’<sup>211</sup>

After a while, in 2012, the UN decided to decrease the number of troops serving the mission due to the financial challenges that soon became delays in troops’ contributions. The renewed violence and the lack of personnel influenced the response to the attacks. UNAMID failed on multiple occasions to protect civilians in an emergency, especially on the IDP camps. On the other hand, the mission had to face the unwillingness of the Sudanese government to cooperate with the peacekeepers.<sup>212</sup> The government interference became clear in the access to humanitarian aid. Khartoum imposed visa requirements and border control strategies that hindered the ability to secure humanitarian relief and the freedom of movement from the personnel within the vulnerable territory.<sup>213</sup>

Since the mandate was limited to the respect of Sudan’s sovereignty and the ‘African solutions for African problems’ paradigm, the peace operation did not address any political solution concerning the fundamental root causes of the conflict. The peace operation was intended to protect civilians in the short term but not stopping violence in a systematic and generalized way. It was a system of protection without a trajectory level or a political process in place. In this regard, it was obvious that the peacekeeping mission was going to fail as it was no peace to keep or any provision on how to do it.

On 31 December 2020, UNAMID completed its mandate according to Resolution 2559, after the adoption of the Juba Peace Agreement on 3 October 2020. The process resulted in the withdrawal of all the uniform and civilian personnel, the repatriation of their equipment and the closure of the mission’s sites by 30 June 2021.<sup>214</sup> According to the Resolution, the cease meant the fully transfer of the mandate’s activities to the Sudanese government which since then has the responsibility to protect civilians, provide access to humanitarian aid, and mediate in the conflicts.<sup>215</sup> With this decision, the UNSC fully trust

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<sup>211</sup> Sudan Tribune, ‘Darfur peacekeepers must do better – groups’ (27 July 2008) <<https://sudantribune.com/article28017/>> Accessed 21 June 2023.

<sup>212</sup> Zsolt Szabó, ‘The history of the Darfur conflict and its recent developments’ (2022) 1 Journal of Central and Eastern European African Studies 82, 89.

<sup>213</sup> Adeniji, Halidu and James (n 207) 75.

<sup>214</sup> UNAMID.UNMissions, ‘ABOUT UNAMID’ (United Nations Peacekeeping, 31 December 2020) <<https://unamid.unmissions.org/about-unamid-0#:~:text=In%20mid%2D2011%2C%20UNAMID%20stood,authorized%20strength%20of%2023%2C743%20personnel>> Accessed 30 May 2023.

<sup>215</sup> UNSC Res 2559 (22 December 2020) UN DOC S/RES/2559.

that the Sudanese government will not only protect the vulnerable population in Darfur but also comply with the ceasefire agreement. These assumptions are astonishing, to say the least. In the more than 15 years that the mission has been operating in Sudan, the government has openly breached the peace agreements and negatively interfered in the access to humanitarian aid. Likewise, the Janjaweed forces, who became the government paramilitary force, kept attacking not only the UNAMID's personnel but also the refugee camps and the civilians, especially the women. This scenario has shown the little willingness the government has had in bringing peace to Darfur. Even though Al-Bashir was not part of the government at that time, it seems that the cease of the mission was due to other reasons and not the real trust in the Sudanese compliance with the human rights standards.

It is important to take into account that on the 854th meeting of the Peace and Security Council in June 2019, Sudan was ceased from the organization after the Coup d'Etat of 11 April 2019.<sup>216</sup> This suspension in practice will mean the loss of every voting right in the AU organs. Although the country will still be part of the organization meaning that it is still bound to fulfil its obligations with the AU.<sup>217</sup> After the new Coup d'Etat in 2021, the AU renewed Sudan's suspension.<sup>218</sup> From a political perspective, even though a suspension sends a strong message it's needed a mediation plan to become politically effective for the civilian population. Long suspensions harm civilians as they are the ones that suffer the most from the sanctions.<sup>219</sup>

The diplomatic tensions with the AU and the withdrawal of the UN mission in Darfur have left the country on its own. The international community once again has indirectly adopted a secondary role based on false hopes that the conflict would be solved on its own.

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<sup>216</sup> AU PSC Communiqué 854th Meeting (6 June 2019) AU DOC PSC/PR/COMM.(DCCCXLIV) 3.

<sup>217</sup> Assodesire, 'African Union Suspended Sudan: What are the Consequences?' (7 June 2019) <<https://assodesire.com/2019/06/07/african-union-suspended-sudan-what-are-the-consequences/#:~:text=In%20practice%20the%20suspension%20of,the%20lifting%20of%20the%20suspension>> Accessed 21 June 2023.

<sup>218</sup> Sudan Tribune, 'Sudan seeks lift of African Union's membership suspension' (5 February 2023) <<https://sudantribune.com/article270455/>> Accessed 21 June 2023.

<sup>219</sup> Elin Hellquist, 'Regional sanctions as peer review: The African Union against Egypt (2013) and Sudan (2019)' (2021) 42 International Political Science Review 451, 462.

## 6. INTERNATIONAL CRIMINAL COURT: THE AFRICAN REVOLUTION.

Since the ICC entered into force in 2002, 34 African countries have ratified the Statute, being the continental bloc with the most member states among ICC.<sup>220</sup> Even though Sudan is not part of the Statute of Rome, the ICC has played a major role in the discussion over the Darfur crisis. This case has been essential for the ICC as it was the first time that the investigations were conducted in a non-signatory party for crimes committed by the Head of State himself. From a legal point of view, Darfur is extremely interesting as it deals with three main challenges: non-signatory country, immunity problems, cooperation and enforcement issues.

### 6.1. Start of the investigations: From Rome to Darfur.

In light of the crimes that were being committed in Darfur, the UNSC in the Resolution 1593 of 31 March 2005 decided to refer the situation in the region since July 2002 to the Prosecutor of the ICC.<sup>221</sup> This was the first time that the UNSC referred a case of a non-signatory State to the ICC. However, in such a politicized conflict, even the Resolution seeks to safeguard the interests of the drafters, the permanent members.

Although in the Resolution it is not mentioned, Article 13 conforms the legal basis under which this referral is legitimate.<sup>222</sup> Indeed, it is obvious that the conduction of independent and impartial investigations in Darfur would have a positive impact on the reconciliation of the communities and the reconstruction of national peace and security. However, the absence of a direct mention of Article 13 is not a coincidence. As it has been mentioned above, 3 out of 5 of the permanent members of the UNSC are not part of the ICC. As a result, they are not under their jurisdiction, and they cannot be judged by the crimes committed in their national territories. Therefore, the fact that Article 13 is not mentioned can be explained by the need to avoid a direct connection between the legal text and the political reality. A reality in which the UNSC is referring the case of a non-

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<sup>220</sup> International Criminal Court, 'The States Parties to the Rome Statute' (26 November 2019) <<https://asp.icc-cpi.int/states-parties>> Accessed 21 June 2023.

<sup>221</sup> UNSC Res 1593 (n 82), 1.

<sup>222</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 11 July 2002) 2187 UNTS 3, Article 5, 9.

party state to a tribunal of which they are not even part of and for crimes that some of them are even financing.

In the Resolution it is crucial to mention paragraph 2, in which the UNSC specifically points out the responsibility of the Member States of the Statute and, in this case, of Sudan to cooperate. It also urges the non-member states to cooperate with the Court, knowing that as non-signatories they don't have any obligation to do so.<sup>223</sup> With this, the permanent members explicitly took out part of their responsibility to directly involve themselves in the conflict as the cooperation is 'urged' but not mandatory.

It is Article 86 of the Rome Statute that regulates the responsibility of the member states to cooperate with the Court. As a treaty-based provision, this obligation is not binding among non-signatories' states, unless they have agreed to cooperate by an agreement with the Court. However, Article 87 allows non-member states to be called to cooperate on another 'appropriate basis' such as a UNSC Resolution.<sup>224</sup> Therefore, the UNSC could have adopted a resolution forcing all states, members and non-members, to cooperate with the Court.<sup>225</sup> However, they didn't. The reason behind it, is again political. With the distinction between member and non-member, the UNSC emphasizes that non-signatories' states, such as Russia, the US or China, don't have the obligation to cooperate in the investigations.

As a result, the adoption of this Resolution seems more politically convenient for the interest of the members of the UNSC than for the actual intent of the UN to protect human rights. This lack of political will can also be observed in paragraph 7 in which the funding of the investigations is mentioned. According to the Resolution, none of the expenses of the investigations should be borne by the UN. However, in Article 115(b) of the Rome Statute, it is stated that the expenses of the Court should also be provided by the UN and 'in particular the expenses incurred due to referrals by the Security Council'.<sup>226</sup> Therefore, the fact that the UNSC expressly rules out the organisation's funding of the investigations

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<sup>223</sup> UNSC Res 1593 (n 82) 1.

<sup>224</sup> See in Article 87 Rome Statute (n 222).

<sup>225</sup> Konstantinos Magliveras and Gino Naldi, 'The ICC Addresses Non-Cooperation by States Parties: The Malawi Decision' (2013) 6 African Journal of Legal Studies 137, 148.

<sup>226</sup> See in Article 115 Rome Statute (n 222).

in Darfur is not only against what is stated in the Rome Statute but also of the principle of good faith.

All these inconsistencies in the Resolution questions the real motives that drove the referral in the first place. Hence, the Resolution and the language used in it should be understood considering the geopolitical context under which it was adopted. On January 2005, three months before the UNSC referred the case to the ICC, the COI's report was published. Even though, in the report, the COI affirms that genocide crimes have not been found, it urged further investigations by the ICC.<sup>227</sup> The demand for justice done by the first independent investigations concerning the crimes of Darfur is the main reason that triggered this resolution.<sup>228</sup>

From an African perspective, neither Sudan nor the AU agreed to the intervention of the ICC. This is directly connected with the 'African solutions for African problems' paradigm. Even though the AU has always been supportive of the ICC's authority and creation, this case triggered a shift in its historical position.<sup>229</sup>

The AU wanted to build a political and institutional network for supporting African interests abroad. When the ICC began operating, international perceptions of human rights protection on the African continent began to shift. The ICC became the so-called 'African tribunal' as soon it had seven ongoing cases in the continent. This translated into opposition by the AU to the interference of what was seen as a Western criminal tribunal, strengthening the idea of non-intervention in Africa under the anti-imperialism and neo-colonialism discourse. It was this idea that Al-Bahir used to express their disagreement regarding the intervention, and what the AU used to justify their indirect positioning with the persecuted country. Publicly, the AU response was silence. The organisation did not mention the referral once in the subsequent meetings of the AU PSC nor the AU Assembly declarations on the peace talks.<sup>230</sup>

Despite the inconveniencies of the regional and international organisations, Luis Moreno-Ocampo, Prosecutor of the ICC at that time, opened the investigations on 6 June 2005 on

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<sup>227</sup> International Commission of Inquiry on Darfur (n 75) 4.

<sup>228</sup> *ibid* 167.

<sup>229</sup> Peskin (n 130) 321.

<sup>230</sup> Kurt Mills, "Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 Human Rights Quarterly 404, 413-416.

crimes of genocide, crimes against humanity and war crimes.<sup>231</sup> During the first stages of the investigations, the relations between Khartoum and the ICC were cordial. Even though Al-Bashir did not allow the ICC to open an office in Khartoum, they did not interfere in the conduction of the investigations. They permitted the ICC to interview government officials and judicial personnel on more than four occasions. Nonetheless, soon became clear that Al-Bashir's intentions behind this was to prove that the Sudanese domestic judicial system was willing and prepared to prosecute the crimes. As the ICC is based on the principle of complementarity for the admissibility of the cases, the best approach for the Sudanese government was to prove to Ocampo that Sudan was prepared to conduct the investigations and that therefore, the ICC was not needed.<sup>232</sup>

However, in May 2007 the ICC unveiled the first arrest warrants against two individuals who face fifty-one counts in total for war crimes and crimes against humanity between 2003-2004. One for Ahmad Harun, the former Minister of State for the Interior, who was accused of war crimes and crimes against humanity. The second arrest warrant was against Ali Muhammad Al Abd-Al-Rahman, senior leader of the Janjaweed, and accused of war crimes and crimes against humanity. These two first arrest warrants were not well received by Al-Bashir who refused to cooperate. Since 2007, the relationship between the ICC and the Sudanese government has been hostile. This situation became worst once Ocampo issued the arrest warrant against Al-Bashir on 14 July 2008.<sup>233</sup>

In it, the Prosecutor alleged that Al-Bashir bears criminal responsibility for committing more than 10 counts of war crimes, crimes against humanity and genocide. Likewise, he stated that Al-Bashir is responsible for masterminding and implementing a plan to destroy in substantial part the Fur, Masalit and Zaghawa tribes, on grounds of ethnicity. The Prosecutor has further affirmed that Al-Bashir has openly sustained and directed the Janjaweed actions pursuing the destruction of the mentioned tribes.<sup>234</sup>

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<sup>231</sup> Press Release Office of the Prosecutor, 'ICC - The Prosecutor of the ICC opens investigation in Darfur' (ICC News, 6 June 2005) <<https://www.icc-cpi.int/news/icc-prosecutor-icc-opens-investigation-darfur-0>> Accessed 26 June 2023.

<sup>232</sup> Peskin (n 130) 306.

<sup>233</sup> Mills (n 230) 418-420.

<sup>234</sup> Omer Yousif Elagab, 'Indicting the Sudanese President by the ICC: Resolution 1593 revisited' (2009) 13 The International Journal of Human Rights 654, 655.

## 6.2. The African Revolution: Arrest warrant against Al-Bashir.

Since the ICC issued the arrest warrant against Al-Bashir in 2008, the relationship between the Court and the African continent has completely shifted. Not only the communications between the Sudanese government and the ICC were broken, but also the cooperative attitude between the African member states. Likewise, the AU also became extremely critical with the ICC's decisions. One week after the arrest warrant, the AUPSC in a communication asked the UNSC to deter the ICC process under Article 16 of the Rome Statute. In the view of the AU, the arrest warrant could have a negative impact on the pacification process in Darfur as 'a prosecution may not be in the interest of the victims and justice.'<sup>235</sup> It also reiterated that the ICC was abusing the principle of universal jurisdiction and insinuated that it was an unfair process guided by the double standards of the Western countries. With this communication, the AU made clear it desires to keep the international community out of the African affairs. On September 2008, the AU reiterated a second time their opposition to the process by asking again the UNSC to deter the arrest warrant.<sup>236</sup> However, neither the UNSC nor the ICC took into consideration those claims as the Pre-Trial Chamber I issued two more arrest warrants, one in March 2009 for crimes against humanity and war crimes; and another one in July 2010 for the crimes of genocide.<sup>237</sup>

On the other hand, the Sudanese government also started a rhetorical campaign against the reputation of the ICC. Al-Bashir started to portray the Court as a neo-colonial mechanism used by Western countries to punish not only Sudan but also Africa as a whole. For Sudan, the ICC was a political instrument of the UNSC, especially the US, to violate the African sovereignty.<sup>238</sup>

These ideological problems not only with Sudan but also with the regional human rights organisation, started to open debates concerning some of the ICC's foundational principles: immunity and cooperation. Due to their interconnectedness, the African countries justified their lack of cooperation with the principle of immunity.

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<sup>235</sup> AU PSC Communiqué 142<sup>nd</sup> Meeting (21 July 2008) AU DOC PSC/MIN/Comm (CXLII) Rev.1, 2.

<sup>236</sup> AU PSC Communiqué 151<sup>st</sup> Meeting (22 September 2008) AU DOC PSC/MIN/Comm.1(CLI), 2.

<sup>237</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II) ICC-02/05-01/09 (26 March 2013) 3.

<sup>238</sup> Peskin (n 130) 307.



Even in Resolution 1593, the UNSC protected this principle. This is reflected in paragraph 6 in which it is stated that ‘nationals (...) from a contributing State outside Sudan which is not a party to the Rome Statute of the ICC shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts (...) related to operations in Sudan.’<sup>239</sup> The inclusion of this provision entails indirect protection of not only the US nationals but also the Chinese and Russian. Therefore, even in the Resolution, before the investigations or the arrest warrant, the own UNSC was trying to safeguard the interest of their members based on the principle of immunity. This partly confirms the AU argument of the Western double standards concerning the conflict in Darfur.<sup>240</sup>

However, the controversy around immunities has also expanded to the Sudanese nationals. In this regard, Article 27 of the Rome Statute, establishes that it shall be applied ‘equally to all persons without any distinction based on official capacity.’<sup>241</sup> From this provision it could be understood that the ICC does not recognise the principle of sovereign immunities in the prosecution of crimes. However, this seems incompatible with Article 98 which the Court recognises the immunity of individuals in the performance of obligations in third countries.<sup>242</sup>

This legal loophole has been politically supported. Since the arrest warrant was issued, Sudan has been mobilising all the foreign policy machinery to thwart the tribunal. This anti-ICC campaign has been heavily backed by Libya, which held the AU Chair in 2009 and that triggered an AU statement in mid-2009 calling the African members of the ICC not to cooperate in the arrest of Al-Bashir.<sup>243</sup> This decision has been described by Amnesty International as ‘a disdain for those in Darfur who suffered gross human rights violations.’<sup>244</sup>

As the ICC lacks enforcement mechanisms, it is completely dependent on the member states cooperation to arrest war crimes suspects and hand them over to trial. Therefore,

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<sup>239</sup> UNSC Res 1593 (n 82) 3.

<sup>240</sup> Elagab (n 234) 660-661.

<sup>241</sup> See in Article 27 Rome Statute (n 222).

<sup>242</sup> See in Article 98 Rome Statute (n 222).

<sup>243</sup> AU Assembly, ‘Decision and declarations adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People’s Libyan Arab Jamahiriya’ (3 July 2009) AU DOC Assembly/AU/Dec. 243-267 (XIII) Rev.1, 3.

<sup>244</sup> Amnesty International, ‘African Union refuses to cooperate with Bashir arrest warrant’ (6 July 2009) <<https://www.amnesty.org/en/latest/news/2009/07/african-union-refuses-cooperate-bashir-arrest-warrant-20090706/>> Accessed 25 June 2023.



all the States parties have the legal obligation to cooperate with the Court in any investigations under Articles 89(1) and 91 of the Statute.<sup>245</sup> However, this is especially complex as not all the countries are members of the Court. This has been used by Al-Bashir, who travelled to Libya, Qatar, Ethiopia, Saudi Arabia, Eritrea, and Egypt, all non-members of the ICC, to show their regional support.<sup>246</sup> The political tour Al-Bashir did create a challenging situation for the ICC that changed once he started to travel around state party starting the so-called ‘African Revolution’.

Chad, which was part of the ICC since 2007<sup>247</sup>, was the first country in acting against the Rome Statute. In 2010, Al-Bashir confirmed his attendance at the meeting of leaders and heads of state of the Community of Sahel-Saharan States (CEN-SAD) which was going to take part in Chad on 22 July.<sup>248</sup> Since it was a planned visit, the ICC issued a second arrest warrant ten days before.<sup>249</sup> In addition to failing to arrest Al-Bashir, Chad also made a political statement by having its president meet him at the airport. It was unlikely Al-Bashir would be arrested considering the conflict in Darfur also impacts Chad’s border security. It is logical to think that an arrest on Chadian soil could have triggered a conflict between the countries. Therefore, these visits were seen as a geopolitical and symbolic move to strengthen the bilateral relations. Al-Bashir affirmed that ‘Chad and Sudan had a problem in the past. Now this problem is solved. We are brothers.’<sup>250</sup>

In 2010, Al-Bashir visited Kenya, member of the ICC since 2005, failing to arrest to him. Kenya’s Foreign Minister expressed that ‘the message we’re giving to the world by having heads of state from the region is that Kenya is at peace with its neighbours’.<sup>251</sup> In 2011, Malawi, also part of the Rome Statute, fell in not arresting Al-Bashir while he was attending a meeting in Malawi’s capital.<sup>252</sup> They justified this by saying ‘he’s coming for

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<sup>245</sup> See Article 89 and 91 of the Rome Statute (n 222).

<sup>246</sup> Claudio Guler, ‘Slow Dacing with Sudan’ (Center for Security Studies: ETH Zurich, 8 May 2009) <<https://css.ethz.ch/en/services/digital-library/articles/article.html/100004>> Accessed 25 June 2023.

<sup>247</sup> International Criminal Court, ‘The States Parties to the Rome Statute: Malawi’ (11 March 2003) <<https://asp.icc-cpi.int/states-parties/african-states/malawi>> Accessed 25 June 2023.

<sup>248</sup> Amnesty International, ‘Chad must arrest Sudanese President Omar al-Bashir during visit’ (21 July 2010) <<https://www.amnesty.org/en/latest/news/2010/07/chad-detener-presidente-sudanes-durante-visita/>> Accessed 26 June 2023.

<sup>249</sup> *Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II) (n 237).

<sup>250</sup> Xan Rice, ‘Chad refuses to arrest Omar al-Bashir on genocide charges’ (The Guardian, 22 July 2010) <<https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>> Accessed 26 June 2023.

<sup>251</sup> BCC, ‘Court worry at Omar al-Bashir's Kenya trip’ (28 August 2010) <<https://www.bbc.com/news/world-africa-11117662>> Accessed 26 June 2023.

<sup>252</sup> *Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II) (n 237).

business, and we don't have any business to do with the arrest of President Omar.'<sup>253</sup> Moreover, the same year, Djibouti, another member of the ICC, also refused to arrest Al-Bashir during his visit to the country to attend the inauguration of the Djiboutian President's third term in the government.<sup>254</sup> In 2014, he continued his tour among African ICC member states by visiting the DRC. Since this visit was, again, a planned meeting of the COMESA, the ICC in a notification remained DRC their legal obligation to arrest Al-Bashir.<sup>255</sup>

In 2016, Al-Bashir continued defying the ICC by travelling to Uganda, a member of the ICC since 2002, for a 2-day invitation from President Yoweri Museveni. Uganda has expressed multiple times their opposition to the ICC as a Western justice tool against Africa. Between 2016 and 2018, Al-Bashir travelled to it on multiple occasions, and neither trip led to his arrest.<sup>256</sup> In fact, in 2019, Uganda's foreign Minister affirmed that 'they will consider offering asylum to ousted Sudanese leader Omar al-Bashir despite his indictment by the ICC'.<sup>257</sup>

All these cases of non-compliance were supported by the AU, which in decision 397 repeated their claims to the UNSC and further justified the behaviour of the African states by reaffirming that the non-compliance was an implementation of the AU Decisions. By supporting the African countries behaviour, the AU was challenging the UNSC authority internationally.<sup>258</sup> In fact, in 2015, Al-Bashir attended an AU meeting in Johannesburg. This event not only meant a confirmation of the AU support to Al-Bashir but also the South African evasion to arrest him as a member of the ICC.<sup>259</sup>

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<sup>253</sup> BCC, 'Sudan's Omar al-Bashir in Malawi: ICC wants answers' (20 October 2011) <<https://www.bbc.com/news/world-africa-15384163>> Accessed 25 June 2023.

<sup>254</sup> Amnesty International, 'Djibouti refuses to arrest Sudanese President Omar Al-Bashi' (9 May 2011) <<https://www.amnesty.org/en/wp-content/uploads/2021/06/afr230032011en.pdf>> Accessed 26 June 2023.

<sup>255</sup> *Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II) (n 237).

<sup>256</sup> Lino Owor Ogora, 'Ugandan Court Finds Government in Breach of its Obligation Arrest al-Bashir' (International Justice Monitor, 3 January 2020) <<https://www.ijmonitor.org/2020/01/ugandan-court-finds-government-in-breach-of-its-obligation-arrest-al-bashir/>> Accessed 26 June 2023.

<sup>257</sup> Elias Biryabarema, 'Uganda says it is willing to consider asylum for Sudan's ousted leader Bashir' (Reuters, 17 April 2019) <<https://www.reuters.com/article/us-uganda-sudan-bashir-idUSKCN1RT0WA>> Accessed 26 June 2023.

<sup>258</sup> AU Assembly 'Decision on the progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)' (30 January 2012) AU DOC Assembly/AU/Dec.397 (XVIII).

<sup>259</sup> Marlise Simons, 'South Africa should have arrested Sudan's President, ICC Rules' (The New York Times, 6 July 2017) <<https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html>> Accessed 26 June 2023.

Even though, not all the decisions by the AU were unanimous and not all African ICC member states were unwilling to cooperate, this has opened a new era in the Court situation in Africa. This African Revolution has led to Al-Bashir travelling with impunity across more than 15 countries of which 7 had the obligation to arrest him. Nowadays, Chad, Kenya, Malawi, South Africa, DRC, Djibouti, and Uganda are facing proceedings before the ICC for not doing it.

If we consider the justifications given by the political authorities regarding the disobedience, it could be argued that this has been a political rebellion move. A rebellion led by the AU and accompanied by the sceptical African states. However, despite the imperialist and colonialist claims, it has been widely proven the Sudanese government implications in the crimes of Darfur. As well as it was the number of victims and the disproportionate levels of violence that triggered the AMIS and the subsequent UNAMID mandate in Darfur. It is therefore surprising how an organisation such as the AU, which has humanitarian motives in its foundational texts, has openly supported the impunity and protection of a criminal. Someone whose actions are the ones that triggered a humanitarian catastrophe in Darfur with more than 2 million displaced persons and the ongoing deaths of 300,000 human beings. From a moral perspective, it is so far shocking how the AU is still financing and leading a humanitarian mandate to protect Darfur from the ones that they are collaborating with.

Furthermore, the UNSC has also adopted a passive role in the process. Despite the multiple referrals and communications by the ICC regarding non-compliance, the organism has not only not taken any political or economic action against the rebel countries, but also supported this situation. During the time, Al-Bashir was conducting his African tour he also was invited to Russia. Even though Russia is not a member party of the ICC, it still is a member of the UNSC. As a result, Al-Bashir's visit to Moscow only proves that even the body meant to enforce compliance with human rights obligations in Darfur is uninterested.

### **6.3. The Trials.**

Despite it took a decade, Al-Bashir was finally arrested in December 2019 due to the Coup d'état in Sudan a few months before. A national Court in Sudan convicted him for charges of corruption and financial irregularity in a two-year sentence. Despite the

ousting of Al-Bashir, Sudan's relations with the ICC were still broken. At the beginning, the transitional government was not willing to hand over Al-Bashir.<sup>260</sup> However, on August 2021, in a historical move, the former president of Sudan, Hemeti, and the ICC signed an agreement to hand him over to the Court. It was necessary for the Sudanese Sovereign Council to transition to democracy, for which reparations in Darfur were essential. Karim Khan, ICC's Prosecutor, confirmed the new relations by visiting Sudan. In a joint speech in Khartoum, he affirmed the agreement in handing over all the detained officials prosecuted by the Court to the Hague. In the same way, it secured Hemeti's position in power as the leader of the democratic transition. In this regard, the Sudanese Prime Minister stated, 'Sudan's commitment to seek justice is not only to abide by its international commitments, but it comes out of a response to the people's demands'.<sup>261</sup>

The agreement was not only a pivotal move for the Sudanese government but also for the international community as it opened the negotiations for a future Sudanese membership to the Rome Statute.<sup>262</sup>

It was clarified that the ICC was not looking for Hemeti or their supporters. Thus, the new Sudanese position was extremely convenient for their political interest, as they could use the new collaboration with the Court to protect themselves while carrying political revenge. Likewise, by handing over Al-Bashir and the other high-level officials, they ensured their presence would no longer intervene in the national agenda.<sup>263</sup>

Nevertheless, the transference of Al-Bashir has not been conducted yet. Until he is present at the Court in The Hague, the case will remain in the Pre-trial stage. At the time of writing, July 2023, Al-Bashir faces ten different charges: five counts of crimes against humanity including murder, extermination, forcible transfer, rape and torture; two counts of war crimes: conducting attacks against the civilian population that were not taking part

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<sup>260</sup> Emma Charlene Lubaale, 'Now Available but Still Not Accessible to the ICC: Bashir and Africa's Politics' in Emma Charlene Lubaale and Ntombizozo Dyani-Mhango (eds) *National Accountability for International Crimes in Africa* (Palgrave Macmillan, 2022).

<sup>261</sup> Aljazeera, 'Sudan says will 'hand over' al-Bashir to ICC for war crimes trial' (Aljazeera, 12 August 2021) < <https://www.aljazeera.com/news/2021/8/12/sudan-omar-al-bashir-icc-war-crimes-darfur>> Accessed 26 June 2023.

<sup>262</sup> Maram Mahdi and Ottilia Anna Maunganidze, 'Why has Sudan decided to hand over al-Bashir to the ICC?' (Institute for Security Studies, 21 September 2021) < <https://issafrica.org/iss-today/why-has-sudan-decided-to-hand-over-al-bashir-to-the-icc%20>> Accessed 26 June 2023.

<sup>263</sup> Lynsey Chutel, 'Will Sudan Send Bashir to The Hague?' (Foreign Policy, 18 August 2021) < <https://foreignpolicy.com/2021/08/18/sudan-bashir-icc-hague-justice-darfur-hemeti/>> Accessed 26 June 2023.

in the hostilities and pillaging; and three counts on crimes of genocide: ‘by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan’.<sup>264</sup>

Since the Court and Sudan have an agreement, it is a matter of time that Al-Bashir will have to face these crimes in The Hague courtroom. From a rhetorical point of view, it will be helpful to finally give closure to such a long procedure. But from a moral perspective, it should be considered to what extent is this going to bring comfort to the victims given the length of the time and how compensation should be understood in this case. Ultimately, it will be positive to make Al-Bashir accountable for the crimes committed in Darfur and the African Revolution he started. In the same way that having an internationally recognized criminal authority investigating and trying him for crimes of genocide will bring clearance to the ongoing situation. After all, a conviction for crimes of genocide by the ICC will close the overused debate of whether the conflict in Darfur should or not be considered a genocide.

However, given the fragile political situation that the country is going through right now, the process may be prolonged over time. The effective transfer, the conduction of the trials, the appealing process, and the final sentence, gives a logical timeframe of five-to-ten years. Therefore, even if the drive to hold Al-Bashir accountable was lovable, the Court should question if the original motives that drove the conduction of the investigations have changed and whether new methods should be employed. Since the situation it's so volatile the Tribunal should analyze the scenario and what will be the appropriate way of conducting the process concerning the long-term consequences despite the short-term gains.

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<sup>264</sup> International Criminal Court, ‘Al Bashir Case stage’ (6 May 2019) <<https://www.icc-cpi.int/darfur/albashir>> Accessed 27 June 2023.

## 7. CONCLUSION.

Darfur has represented a failed test for every party involved, pointing out the flaws of the human rights protection system and the neo-colonialist biases of its application. However, Darfur brought back to the table the need for a universally accepted definition with a broader understanding of the new realities in Africa beyond the UN Genocide Convention. The gap in genocide studies is highlighted by the fact that it is not possible to apply the term while genocides are ongoing with varying degrees of violence on a long-term basis.

In Darfur, however, there has always been a problem in applying the definition of genocide due to convenient interest interpretations. The humanitarian catastrophe in Darfur has been a dangerous mixture between national politics, oil control and arms deals that has nourished the reluctance to intervene. Therefore, more specific wording would allow less openness in the way provisions are being interpreted. Nevertheless, it is not enough. The inconsistencies of the definition have questioned the effectiveness of the UNSC as the authority to prevent, sanction and intervene in cases of genocide. It is crucial to have an independent authority able to set precedence in the application of the term and the valid interpretations of it.

In a conflict such as Darfur, where the interests are such, countries politicized views dictate how the intervention is seen. This has created what scholars such as Lippman define as ‘genocide denial syndrome’, from which its recognition sometimes appears more political than analytical.<sup>265</sup> But in this sphere, it is interesting how even different independent studies have disagreed on the presence of genocide in Darfur. While the COI did not find genocidal intent in the crimes, the ICC affirmed the genocidal *means rea* in the crimes on Darfur that eventually triggered the arrest warrant against Al-Bashir. However, these findings have been used in different ways depending on the parties’ interests.

The international community in an unreasonable response has gotten used to relying on rhetorical excuses to avoid invoking the term. Events of ethnic cleansing were viewed as regional humanitarian conflicts rather than criminal atrocities. In Darfur, the statistics of deaths and reports of violence opposed to an interventionist approach while the others

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<sup>265</sup> Matthew Lippman, ‘Darfur: the politics of genocide denial syndrome’ (2007) 9 Journal of Genocide Research 193, 210.

hyperbolised them by using the word genocide over and over to justify an inexistent intervention. These political acrobatics portray the crimes as an armed conflict in which both parties are equally guilty and where the violence is inevitable. Such an approach justifies the limited view over the responses to the crisis by triggering a too little too late type of intervention.

Considering the statistics of death, it is surprising the pragmatism under which the international community have faced the crisis. From a human rights perspective it is needed new models of humanitarian management, especially for asymmetric conflicts such as the ongoing crisis in Darfur. There is a need for new models in Africa to move away from the neo-colonialist system proposed after the IIWW. It is unrealistic to pretend to apply fully politicised Western models of humanitarian resolution in states whose political, ethnic, and cultural conditions are different.

The UNSC's disproportionate power over the international affairs has grown to the extend in which the non-permanent members presence is not enough to balance it. The five permanent members, not very respectful of human rights, have sufficient authority to decide on the future of the states and the people living there. Who has given these five states the authority to dictate who is worthy of humanitarian aid? On the other hand, is the authority granted by the IIWW sufficient to keep them in such a position of power? Isn't the five member UNSC an unequal power sharing body that ignores the reality of an entire continent in which not even one African country is represented?

There is a need for a new humanitarian protection system: anti-imperialist, feminist, inclusive, representative, and anti-racist. In which, all the continents have an effective political representation in the permanent members. It is necessary a more active role of regional matters in the international agenda and a more decentralization of the humanitarian responses. It is needed to limit the powers of states and increase the independent competencies of the organisation so that humanitarian protection is always a priority. For that, the reform should look more like the actual High Commission on Human Rights but with real action powers.

However, it would be unreasonable to claim that regionalizing the human rights system is the only solution. As it has been proven, the AU regional humanitarian protection is not working as it should. Darfur was a test for the re-born organisation. A test failed since the



Sudanese government was seen as a collaborator instead of the perpetrator. Complemented by the lack of resources and personnel, this has been the perfect recipe for ineffective action. The paradigm ‘African solutions, for African problems’ has been wrongfully applied. The desire of being the authority in charge of Africa blurred the AU action in Darfur. Instead of a cooperation relation, the AU adopted an anti-interventionist approach towards the UN and the Western world which indirectly positioned themselves with the criminal behaviour of the Sudanese government. Even though this power-sharing fight was visible during the transition mission from AMIS to UNAMID, it became clear with the no-cooperation strategy concerning the ICC investigations. In this regard, the organisation’s power struggle became a war of pride rather than a struggle against impunity for regional crimes.

Rather than the African solutions approach, the problem is the reasoning behind it as, is viewed as a form of sovereignty protection. If the African countries can solve their problems on their own, the sovereignty of the states and the integrity of the continent will be safeguarded. Sovereign is associated to control of the government. Hence, it is the sovereign motivation over the African solutions what explains the protection of the Heads of State, even though they are criminals. Thus, the arrest warrant against Al-Bashir was seen as an attack on their African solutions approach, for what the AU had to defend by protecting the image of sovereignty in Africa.

It has been pointed out that the AU is politicised by the interests of maintaining state sovereignty, but how can it not be if its recent history has been marked by few states that have taken away control over their land? On the other hand, how to trust that it will not be taken away again? And, finally, how to remedy this distrust?

Since neo-colonialism is not a solution and modern regionalism have proven not to work in Africa, the natural question would be what’s the solution in such a negative stage? A balance needs to be found. However, to achieve a harmonic and respectful equilibrium for all the parties involved, it is needed that both sides of the scale are new. A redefinition of the objectives towards a more humanitarian approach and the recognition of the particularities in Africa should be the base of the new balance system. Even though, nowadays protection cannot be granted, it can be achieved. An African solution approach could be possible under the main purpose of humanitarian protection. Africa should be

able to protect their civilians by themselves and by their understanding of the particularities of the region. However, it should be carried out on the premise that the security of African citizens should dictate these solutions not the sovereignty.

In a separate matter, Darfur is a case that brings unique elements to the study, including the ICC prospect in Africa. The lack of enforcement mechanisms and the dependence on cooperation efforts have proven. Despite Africa having the most members, the reasons for membership are not right. If they were convinced of the effectiveness of the Court as a tool to fight off international criminals, then it cannot be explained why Al-Bashir was not arrested. Although, the UNSC control over the Court and the fact that half of its members have not ratified its statute, nurture the discourse of the court as an instrument of Western control.

Perhaps it would be more beneficial to strengthen the system by creating more specialized and less politicized tribunals based on the *ad hoc* ICTY and ICTR experience. On the one hand, removing its dependence from the UNSC and giving more power in terms of its independence from the UN would not only eliminate political dependence but also unfounded accusations of being an instrument of Western powers. On the other hand, states would be more willing to cooperate, as in *ad hoc* tribunals all UN member states are obliged to do it. Under this consideration, the ICC's actions will be purely seen as a way to fight against the impunity of international criminals.

Sudan has been the main concern, while Darfur has only been a collateral damage. Neither of the parties has considered the long-term impact of the methods used in Sudan on Darfur. The genocide committed in the area is due to their specificities, therefore, the national programs introduced in Sudan have little positive impact on local politics in Darfur. Hence, it is needed long-term solutions with a special view over a new model of national management and ethnic representation. The conflict would only be solved once the Sudanese elite realises that Sudan cannot be governed without taking into account the tribal realities. A centralised system cannot be applied in such as heterogeneous society. It is crucial to remember that the ideology that justified the genocidal campaigns had been cultivated over more than 30 years in the state's structure. For this reason, reconstructing the society would require eliminating the State's inherent genocidal campaign.

The Sudanese government must claim back control over their land. It is a customary way of thinking in Africa that intervention can only be conducted politically or militarily. However, the reality is that economic interventionism takes a major role in the continent in a more dangerous way than the perceived military one. With the control of the resources, it comes the control of the economy, which subsequently entails political and diplomatic command. This is the case in Sudan. Even though, Russia and China have positioned themselves on the Sudanese side, the economic control over the monopoly of oil, gold and weapons has influenced the way Sudan has managed the crisis in Darfur. Under false support, these countries have been hiding interventionism for more than 20 years.

For all these reasons, the case of Darfur is relevant for further study in the human rights field, making its analysis essential for the development of the existing system. However, it is urged compensation to the victims. After 20 years it is time for justice, reconstruction, and reparation.

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