

# THE AFRICAN UNION, THE RESPONSIBILITY TO PROTECT AND CONFLICT IN SUDAN’S DARFUR REGION

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## INTRODUCTION

The “tugs and pulls” of the post-colonial state-building projects have resulted in conflicts in several African states. In some cases, these conflicts have degenerated into violence. As a result, an environment of anarchy has often provided the propitious conditions for the commission of vitriolic human rights violations by various antagonists, including governments. For example, during the Ugandan civil war (1986-2010), the two Liberian civil wars (1989-1997 and 1999-2003), the Sierra Leonean civil war (1991-2002), and the Congolese civil wars (1997-1999, 1999-2003, 2003-2006), war crimes and crimes against humanity were committed, including heinous acts such as the terrorizing of civilians, mass killings, the violation of personal dignity, including sexual violence against women, cruel treatment

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and looting.<sup>2</sup> Similarly, during the Rwandan civil war (1990-1994), *genocidaires*<sup>3</sup> operating under the banner of the government and various militias, especially the Interhamwe,<sup>4</sup> committed various genocidal acts that resulted in the death of over 800,000 people.<sup>5</sup>

Importantly, the commission of these atrocities and the resultant complex humanitarian crises in these various conflicts generated debates in Africa and throughout the international community regarding the appropriate responses. Accordingly, in some cases, the Organization of African Unity (OAU), sub-regional organizations such as the Economic Community of West African States (ECOWAS) and the United Nations responded with peacemaking and peacekeeping operations as remedial measures.<sup>6</sup> However, in other cases, such as Rwanda, the OAU and the international community sat on the sidelines, amidst the commission of acts of genocide. In short, as Garth Evans and Mohamed Sahnoun observe, “The international community . . . repeatedly made a mess of handling the many demands that were made for ‘humanitarian interventions:’ coercive action against a state to protect people within its borders from suffering grave harm.”<sup>7</sup>

Clearly, state sovereignty has been a major impediment to the African regional and sub-regional organizations, as well as the U.N.’s robust military intervention in conflicts in which war crimes, crimes against humanity, and genocide were committed. Tom Kabau provides an excellent summation of the state sovereignty lacuna thus: “Forceful intervention for humanitarian purposes has been problematic due to the principles of state sovereignty and non-intervention. The traditional conceptualization of

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2. See generally HUMAN RIGHTS WATCH, WORLD REPORT (1989-2012) (providing a comprehensive discussion of various human rights violations that were committed during some of the violent conflicts in Africa).

3. The *genocidaire* is a French word that is used to generally describe those who commit genocide. The term gained currency during the Rwandan genocide in 1994 in which about one million people were killed. For the application of the term in the Rwandan case, see Elizabeth Barad, “Rwanda’s Mother and Son Genocidaires,” Pambazuka News, Issue 547, September 15, 2011.

4. The Interhamwe (meaning “those who strike as one”) was the principal Hutu-based militia that was accused of bearing the greatest responsibility for the 1994 Rwandan genocide. For a discussion of the roots of the genocide and the Interhamwe’s role in it, see *Rwanda: A Brief History of the Country*, UNITED NATIONS (Feb. 5, 2013, 2:15 p.m.), <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>.

5. See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA, (2012) (for a discussion of the Rwandan genocide).

6. See DEALING WITH CONFLICTS IN AFRICA: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS (Jane Boulden ed. 2005) (for an examination of some of the peacemaking and peacekeeping efforts undertaken by African regional and sub-regional organizations and the United Nations).

7. Garth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 99 (2002).

sovereignty was an effective shield for a state in respect of its domestic affairs, despite its misconduct or atrocities towards its citizenry.<sup>8</sup>

Interestingly, in 2002, the African Union (AU), the successor to the moribund OAU, initiated what amounted to a “sea change” in the conceptualization of state sovereignty in Africa by adding a “responsibility dimension.” That is, while retaining the conception of state sovereignty as a right, the AU also added the dimension that sovereignty imposes responsibility on states as well, especially the requirement that they protect their citizens from heinous acts such as war crimes, crimes against humanity and genocide.<sup>9</sup> Moreover, the AU asserted its legal right to circumscribe the sovereignty of a member state, if the latter failed to perform its “responsibility to protect” function.<sup>10</sup>

Against this background, the violent conflict in Sudan’s Darfur region, especially its attendant commission of genocide, war crimes, and crimes against humanity provided a “litmus test” for the AU’s responsibility to protect framework.<sup>11</sup> In this vein, the purpose of this article is two-fold. First, the article will assess the application of the African Union’s (AU) responsibility to protect norm to the conflict in Sudan’s Darfur Region. This entails an examination of the methods the AU has used and their resulting impact on the implementation of the organization’s responsibility to protect norm. Second, based on the assessment of the application of the AU’s responsibility to protect norm, the study will proffer some suggestions for strengthening the capacity of the AU to implement its responsibility to protect norm. In order to address the research problem, the article is divided into five major parts. The first section probes the origins and the major contours of the AU’s responsibility to protect regime. Next, the article examines the travails of the conflict in Sudan’s Darfur region for the ostensible purpose of determining whether the atrocities committed are covered acts that would necessitate the application of the norm of the responsibility to protect. Third, the study deciphers the application of the AU’s responsibility to protect norm to the conflict in Sudan’s Darfur Region. Fourth, the study offers some suggestions for helping to strengthen the AU’s capacity to implement its responsibility to protect regime. Finally, in the concluding section, the article discusses the major findings regarding the failure of the AU to apply its responsibility to protect norm to the civil conflict in Sudan’s Darfur region.

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8. Tom Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union’s Interventions*, 4 GOETTINGEN J. INT’L L. 49, 51-52 (2012).

9. See Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

10. See Stephanie Hanson, *The African Union*, COUNCIL ON FOREIGN RELATIONS, (Feb. 5, 2013), <http://www.cfr.org/africa/african-union/p11616>.

11. See Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. CONFLICT & SEC. L. 123, 142 (2008).

I. THE EMERGING AFRICAN UNION'S RESPONSIBILITY TO PROTECT  
REGIME: AN OVERVIEW

A. Origins

The emerging African Union's responsibility to protect regime has its roots in the dismal failure of both the Organization of African Unity (OAU), its predecessor, and the larger international community to undertake much needed robust military interventions in the continent's worst humanitarian crises (such as the 1994 Rwandan genocide, the Great Lakes region, the Democratic Republic of the Congo (DRC), and the Mano River Basin Region of West Africa).<sup>12</sup> Several major factors accounted for this. On the African side, the OAU was hamstrung by its absolutist conception of the state sovereignty doctrine. And this provided a "firewall" for governments that committed atrocities against their own citizens from being held accountable. The other major conundrums included: the prevalence of authoritarianism and its associated culture of impunity; the solidarity between and among the continent's various ruling classes that led them to defend and protect one another; the lack of political will; and the myriad of institutional and operational weaknesses, including the lack of a security architecture.

In terms of the broader international community, the primacy of national interests shaped and conditioned the attitudes of the dominant powers toward humanitarian crises in Africa. For example, during the Rwandan genocide, then American President Bill Clinton made it clear that the United States could neither support nor undertake either a robust multilateral or unilateral military intervention because it had no economic or strategic interest in Rwanda.<sup>13</sup>

Against this backdrop, the AU determined that it had the primary responsibility (within the ambit of the U.N. Charter) to maintain regional peace and security. Accordingly, it became imperative to design the modalities for a security architecture that would facilitate the performance of this important responsibility. Moreover, the AU recognized that it could not rely on the dominant powers in the international system to deal with threats to peace and stability, since these global suzerains are driven primarily by the imperatives of their national interests, rather than humanitarianism. Said Djinnit, the then AU's Commissioner for Peace and Security articulated the rationale for Africa's new system of "self-help" thus: "No more, never again. Africans cannot . . . watch the tragedies

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12. See Tim Murithi, *The Responsibility to Protect, As Enshrined in Article 4 of the Constitutive Act of the African Union*, 16 AFR. SEC. REV. 14, 16 (2008); Paul Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFFAIRS 253 (2007).

13. Rory Carroll, *U.S. Chose to Ignore Rwandan Genocide*, THE GUARDIAN (Mar. 31, 2004, 10:59 EST), <http://www.guardian.co.uk/world/2004/mar/31/usa.rwanda>.

developing in the continent and say it is the U.N.'s responsibility or somebody else's responsibility. We have moved from the concept of non-interference to non-indifference. We cannot as Africans remain indifferent to the tragedy of our people."<sup>14</sup>

### B. The Contours

During its formation, the AU incorporated the "responsibility to protect" as a legal norm in its Charter, thereby making the organization's Constitutive Act the first international treaty to recognize the right on the part of an international organization to intervene for humanitarian protection purposes.<sup>15</sup> The legal basis for the AU's "responsibility to protect" regime is found in Article 4, Section h of the organization's Charter: "[T]he right of the [African] Union to intervene in a [m]ember [s]tate pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."<sup>16</sup> Implicit in these provisions is the understanding that sovereignty is conditional and defined in terms of a state's capacity and willingness to protect its citizens.<sup>17</sup> The Constitutive Act acknowledges that a state has the principal responsibility for protecting its citizens.<sup>18</sup>

"Operationally, like the emergent U.N.-based global "responsibility to protect framework," the AU's regime is anchored on three major pillars: the member states' responsibility to protect; continental and other international assistance; and timely and decisive response. The case of the responsibility to protect, first and foremost, is a matter of state responsibility, because prevention begins at home, and the protection of populations is a defining attribute of sovereignty and statehood."<sup>19</sup> Specifically, the state's responsibilities include the protection of its population from genocide, war crimes and crimes against humanity. The continental and international assistance, along with the capacity-building element, is based on the premise that member countries would be assisted and encouraged to fulfill their responsibility to protect. This would entail assistance with building the capacity to protect the populations of member states from genocide, war crimes, and crimes against humanity. In addition, assistance would be

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14. KRISTINA POWELL, *THE AFRICAN UNION'S EMERGING PEACE AND SECURITY REGIME: OPPORTUNITIES AND CHALLENGES FOR DELIVERING ON THE RESPONSIBILITY TO PROTECT 4* (2005) (quoting Ambassador Said Djinnit, Statement on the African Union's Responsibility to Protect Framework (June 24, 2004)).

15. *See id.*

16. *See* Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

17. POWELL, *supra* note 14, at 11.

18. *Id.* at 11-12.

19. U.N. Secretary General, *Report on the Implementation of the Responsibility to Protect*, ¶ 14, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementation*].

provided to member states that are under stress before crises and conflicts arise.<sup>20</sup> The timely and decisive response pillar is based on the AU's "responsibility to use appropriate diplomatic, humanitarian, and other peaceful means in accordance with Chapters VI and VIII of the U.N. Charter, to help protect populations from genocide, war crimes, and crimes against humanity."<sup>21</sup> However, as Article 4, Section 1 of the AU Charter stipulates, the organization may use military force "should peaceful means be inadequate, and state authorities are manifestly failing to protect their populations from genocide, war crimes and crimes against humanity (plus ethnic cleansing, which is a part of the U.N.'s responsibility to protect norm)."<sup>22</sup>

## II. THE CONFLICT IN SUDAN'S DARFUR REGION

The civil war in Darfur commenced in February 2003, just as the larger Sudanese civil war that pitted the "north against the south" was winding down.<sup>23</sup> The war was triggered by the armed attacks launched by the Sudan Liberation Movement Army (SLM/A) and the Justice and Equality Movement (JEM) against Sudanese government offices, police, and military bases.<sup>24</sup> In turn, the attacks "provoked an indiscriminately violent response from the Sudanese government, led by President Omar Hassan al-Bashir."<sup>25</sup>

Broadly, the war and its resulting genocide, crimes against humanity, and war crimes were caused by a confluence of factors. In spite of the huge revenues, which the Sudanese government earned from the sale of the country's oil, the Darfur region remains one of the most underdeveloped sections of the country.<sup>26</sup> This is evidenced by the prevalence of abject mass poverty, unemployment and malaise.<sup>27</sup> Another factor is that the Darfur region is marginalized in the Sudanese political system. One of the major manifestations of this marginalization is the absence of effective channels through which Darfur is can participate in Sudanese politics. To make matters worse, the government's authoritarian proclivities militate against such participation.<sup>28</sup> This led to some of the non-Arab ethnic groups

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20. See G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

21. *Id.*

22. See *Implementation*, *supra* note 19, at ¶ 49.

23. See UNMIS Background, UNITED STATES MISSION IN SUDAN, (Feb. 4, 2013), [www.un.org/en/peacekeeping/missions/unmis/background.shtml](http://www.un.org/en/peacekeeping/missions/unmis/background.shtml).

24. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 371 (2d ed. 2011).

25. *Id.*

26. See Jennifer L. DeMaio, *Is War Contagious? The Transnationalization of Conflict in Darfur?* 11(4) AFRICAN STUDIES QUARTERLY 30, 31 (2010), <http://www.africa.ufl.edu/asq/v11/v11i4a2.htm>.

27. *Id.*

28. *Id.*

challenging authoritarian rule in the Sudan.<sup>29</sup> Furthermore, there are ethnic conflicts between the various Arab ethnic groups, on the one hand, and the non-Arab ethnic groups, on the other. These conflicts have found expression in disputes over land and land use. The supremacist ideology of the Arab ethnic groups has exacerbated the existing conflicts by, among other things, injecting the “superior-inferior myth,” and thus seeking to establish the hegemony of the Arab ethnic groups in the Sudanese polity.<sup>30</sup>

Infuriated by the military insurgency initially mounted by the two Darfur-based armed groups, the Sudanese government launched massive counter-offenses that involved the military and the use of the Janjaweed or “devils on horseback,” an Arab militia that was organized and is supported by the Sudanese government.<sup>31</sup> Significantly, the Sudanese government then made the determination that the conflict provided propitious conditions for its troops and the Janjaweed militia to commit genocidal acts, as well as war crimes and crimes against humanity. For example, there were, and continue to be, the genocidal massacres of adult male non-combatants from the various non-Arab ethnic groups, especially the Fur, Massalit, and Zaghawa.<sup>32</sup> In addition, rapes are committed against women from the non-Arab ethnic groups on a large scale. Similarly, the members of the non-Arab ethnic groups were subjected to forced migration and starvation.<sup>33</sup> As the Public International Law and Policy Group laments, “Government and Janjaweed forces destroyed everything that made life possible. Food that could be carried away was; the rest was burned. Animals that could be taken away were; the rest were killed. The simple straw buildings that served as clinics and schools were destroyed . . . .”<sup>34</sup>

In addition, the Sudanese military continues to perpetrate various heinous acts against the non-Arab ethnic groups in Darfur, including “bombings from airplanes; and along with the Janjaweed the use of automatic weapons fire, stabbings, the torching of people, the poisoning of wells, and chasing the victim population out into forbidding deserts without water or food.”<sup>35</sup> By early 2012, about 300,000 people had died; approximately 1.9 million people were internally displaced in camps inside

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29. Salih Booker & Ann-Louise Colgan, *Genocide in Darfur*, THE NATION (July 12, 2004), <http://www.thenation.com/article/genocide-darfur#>.

30. See Joseph C. Ebegbulem, *Nigeria and Conflict Resolution in Africa: The Darfur Experience*, 3(2) TRANSCIENCE, 18, 19 (2012), available at [http://www2.hu-berlin.de/transcience/Vol3\\_Issue2\\_2012\\_17\\_23.pdf](http://www2.hu-berlin.de/transcience/Vol3_Issue2_2012_17_23.pdf).

31. *Genocide in Darfur*, UNITED HUMAN RIGHTS COUNCIL (June 1, 2012), <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>. For a discussion of some of the genocidal acts that have been committed by the Janjaweed, see *Sudan's Shadowy Arab Militia*, BBC NEWS, (April 10, 2004), <http://news.bbc.co.uk/2/hi/africa/3613953.stm>.

32. JONES, *supra* note 24, at 372.

33. *Id.*

34. *Id.*

35. See Samuel Totten, *The Darfur Genocide*, in THE GENOCIDE STUDIES READER 195 (Samuel Totten & Paul Bartrop eds., 2009).

Darfur; while more than 250,000 others are refugees in various neighboring countries.<sup>36</sup>

Based on the evidence, the Sudanese government continues to perpetrate genocidal acts, war crimes, and crimes against humanity against the members of various non-Arab ethnic groups. Specifically, the actions of the Sudanese government meet the thresholds for genocide established under the International Convention for the Prevention and Punishment of Genocide. According to Article 2 of the Convention, “genocide means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group as such:<sup>37</sup>

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.<sup>38</sup>

For example, there is evidence of genocidal intent. The case in point is that of Musa Hilal, one of the leaders of the Janjaweed militia, who “wrote in August 2004 to a regional commander, “citing orders from President Bashir himself”: “[y]ou are informed that directives have been issued . . . to change the demography of Darfur and empty its African tribes.”<sup>39</sup> Also, various non-Arab ethnic groups are the targets and victims of the Sudanese government perpetrated mass killings. The purpose of these mass killings is to destroy these non-Arab ethnic groups in whole.<sup>40</sup> As for the commission of war crimes and crimes against humanity, the evidence was reflected in the fact that in 2008 the U.N. Security Council, through Resolution 1593, referred the mass killings and other atrocities being committed in Darfur to the prosecutor of the International Criminal Court (ICC).<sup>41</sup> Subsequently, the prosecutor of the ICC requested that President Omar Hassan al-Bashir

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36. *Darfur Conflict: Peace Elusive in War-Torn Region*, ALERTNET (Feb. 16, 2012), <http://www.trust.org/alertnet/crisis-centre/crisis/Darfur-conflict>; Donald A. Ranard, *Refugees from Darfur: Their Background and Resettlement Needs*, CULTURAL ORIENTATION CENTER (June 2011), [http://www.cal.org/co/pdf/files/backgrounder\\_darfuri.pdf](http://www.cal.org/co/pdf/files/backgrounder_darfuri.pdf).

37. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948.

38. *Id.*

39. JONES, *supra* note 24, at 371-72.

40. *Id.*

41. See S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

be charged with genocide.<sup>42</sup> But, the judges did not oblige.<sup>43</sup> Instead, President Bashir was charged with the commission of war crimes and crimes against humanity.<sup>44</sup>

### III. THE APPLICATION OF THE AFRICAN UNION'S RESPONSIBILITY TO PROTECT NORM TO THE DARFUR CONFLICT

By the time the AU intervened in the Darfur conflict in 2004, there was widespread commission of genocidal acts, as well as war crimes and crimes against humanity by the Sudanese government troops and the Janjaweed.<sup>45</sup> Thus, based on the phase of the conflict, and pursuant to the provisions of the AU's responsibility to protect regime, the AU should have used military force to stop the commission of these heinous crimes. Instead, the AU decided to commence its intervention with peacemaking.<sup>46</sup> This further suggested that the AU was mistakenly treating the conflict in Darfur as a traditional civil war involving the Sudanese government and armed resistance groups.

The first major peace agreement the AU mediated was the Humanitarian Ceasefire Agreement, which was signed in Ndjamena, Chad, in April 2004, between the Sudanese government and the armed resistance groups.<sup>47</sup> Two years later, in Abuja, Nigeria, the AU mediated the Darfur Peace Agreement between the Sudanese government and a faction of the Sudan Liberation Army (SLA) led by Minni Minnawi.<sup>48</sup> Originally, the AU intended to mediate a broader and comprehensive peace agreement involving the Sudanese government and all of the armed resistance groups. But, all of the armed resistance groups, with the exception of Minnawi's faction and the free wings factions of the SLA, refused to participate.<sup>49</sup> The adverse effects of the lack of a broader peace accord became evident when shortly after the signing of the Darfur Peace Agreement, "the various . . . armed resistance groups [began] to fight each other., and the situation deteriorated into a military, political and diplomatic conundrum."<sup>50</sup>

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42. See Marlise Simons & Neil MacFarquher, *Court Issues Arrest Warrant for Sudan's Leader*, N.Y. TIMES, (Mar. 4, 2009), <http://www.nytimes.com/2009/03/05/world/africa/05court.html>.

43. *Id.*

44. *Id.*

45. See Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFFAIRS, (Jan./Feb. 2005), <http://www.foreignaffairs.com/articles/60434/scott-straus/darfur-and-the-genocide-debate>.

46. Tim Murithi, *The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur*, 14 J. PEACE, CONFLICT & DEVELOPMENT 1, 9 (2009).

47. *Id.*

48. *Id.* at 10.

49. *Id.* at 11.

50. *Id.*

In spite of the precarious security situation in Darfur, the AU took its second major misstep by deploying a peacekeeping force, rather than a military interventionist one, to stop the Sudanese government troops and the Janjaweed, from continuing to commit acts of genocide, war crimes, and crimes against humanity. Again, by making the decision to deploy a peacekeeping force, the AU once again re-affirmed its belief that the Darfur conflict was a traditional civil war. Thus, peacekeeping was seen as necessary to help create an enabling environment for continual peacemaking and the eventual end of the war. By employing the use of the classical peacekeeping method, the AU was constrained by several factors: 1) the imperative of getting the consent of the Sudanese government; 2) the requirement that the peacekeepers would be neutral; and 3) that the peacekeepers would only use force in self-defense.<sup>51</sup> Thus, in 2005, the AU deployed the African Union Mission I (AMIS) in Darfur, which consisted of 150 military observers. The mandate limited the peacekeeping force to the following:

- 1) To monitor and verify ceasefire violations;<sup>52</sup>
- 2) To protect civilians under imminent threat;<sup>53</sup>
- 3) Undertake confidence-building measures among the parties to the conflict;<sup>54</sup>
- 4) Facilitate the delivery of humanitarian assistance;<sup>55</sup>
- 5) Assist internally displaced persons.<sup>56</sup>

In essence, the primary mandate of AMIS I was to monitor a crumbling ceasefire that was being violated consistently by the Sudanese government and the various armed resistance groups. As John Prendergast observed, “The initial idea of operations for the AU force was deeply flawed from the outset . . . [B]y authorizing a mandate that only was focused on cease-fire observation rather than the protection of civilians, it minimized the objective of the force and rendered it largely irrelevant.”<sup>57</sup> Thus, in effect, the peacekeeping force’s mandate left the primary responsibility for the

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51. See generally LISA M. HOWARD, UN PEACEKEEPING IN CIVIL WARS (2008) (discussing the contours of classical peacekeeping).

52. Kristina Nwazota, *African Union’s Effort*, PBS NEWSHOUR (Jul. 3, 2008) [http://www.pbs.org/newshour/indepth\\_coverage/africa/darfur/union.html](http://www.pbs.org/newshour/indepth_coverage/africa/darfur/union.html).

53. *Id.*

54. Murithi, *supra* note 46.

55. *Id.*

56. *Id.*

57. Nwazota, *supra* note 52.

“protection of civilians to the government that is accused of terrorizing them.”<sup>58</sup>

Clearly, the peacekeeping operation, besides being an inappropriate response to halting genocide, war crimes, and crimes against humanity, was a dismal failure. Several factors accounted for this. The size of the peacekeeping force was very small, especially against the background of the land mass: Darfur is about the size of France.<sup>59</sup> Therefore, a peacekeeping force with 150 military observers was bound to not succeed from the onset.<sup>60</sup> Another factor was that the mandate of the peacekeeping force did not include the overarching issue of protecting civilians. Further, the peacekeeping force lacked the requisite equipment, logistical, and intelligence gathering capabilities.<sup>61</sup>

With the failures of AMIS I, which were quite glaring, a Technical Assessment Mission comprising of representatives from the United Nations, the European Union, and the United States recommended that the AU undertake another peacekeeping mission with an enhanced mandate. In this vein, the AU continued to use an inappropriate method—peacekeeping—to deal with a conflict-ridden environment in which genocide, war crimes, and crimes against humanity were being committed by the Sudanese government troops and the Janjaweed. As a result, in late 2005, AMIS II was established.<sup>62</sup> Some changes were made to the mandate and the size of the peacekeeping force: the mandate was extended to include the protection of refugee camps, and the size of the force was initially a little over 3,000.<sup>63</sup> Later, the size of the peacekeeping force was increased to 7,000.<sup>64</sup> In spite of the changes, AMIS II faced similar challenges as its predecessor. With regard to the size of the peacekeeping force, even the size of 7,000, at its peak, was still woefully inadequate to cover a region as large as Darfur. The continuing limited size issue adversely affected the peacekeeping force’s capacity to protect the refugee camps. Furthermore, AMIS II, like its predecessor, was constrained by the inadequacy of weapons, equipment, logistical, and intelligence gathering capabilities.<sup>65</sup> To make matters worse, the operational deficiencies of the peacekeeping force emboldened the

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58. *Id.*

59. See Mohamed Suliman, *The War in Darfur: The Resource Dimension*, 8 RESPECT: SUDANESE JOURNAL FOR HUMAN RIGHTS’ CULTURE AND ISSUES OF CULTURAL DIVERSITY 1 (2008), available at [http://w.sudan-forall.org/sections/ihitiram/pages/ihitiram\\_issue8/pdf\\_files/Dr-Mohamed-Suliman.pdf](http://w.sudan-forall.org/sections/ihitiram/pages/ihitiram_issue8/pdf_files/Dr-Mohamed-Suliman.pdf).

60. See *Crisis in Darfur*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, [www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur](http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur).

61. See Robert L. Feldman, *Problems Plaguing the African Union Peacekeeping Forces*, 24(3) DEFENSE AND SECURITY ANALYSIS 269-70 (2008).

62. See Murithi, *supra* note 46, at 10.

63. *Id.*

64. See *Crisis in Darfur*, *supra* note 60.

65. See Feldman, *supra* note 61.

Janjaweed to attack its troops, which led to the death of some peacekeepers.<sup>66</sup>

Although the peacekeeping method was inappropriate for addressing the commission of genocide, war crimes, and crimes against humanity, coupled with the fact that the two operations failed miserably, the AU continued to violate the contours of its responsibility to protect regime.<sup>67</sup> This was reflected in the AU's violation of a key provision that requires the organization to use military intervention to protect the citizens of a member state who are victims of genocide, war crimes, and crimes against humanity as a result of their government's unwillingness to protect them. It could also be used in a case where the government is the perpetrator of any of the above mentioned crimes. Instead of identifying the Sudanese government as the chief culprit in the commission of genocide, war crimes, and crimes against humanity against its own citizens, the AU continued to use the peacekeeping method inappropriately. However, since it was clearly established that the AU did not even have the operational capacity to undertake a peacekeeping mission, the AU and the U.N. agreed to establish a hybrid force as the successor to AMIS II.<sup>68</sup> Interestingly, the U.N.-AU decision was shaped by the Sudanese government's strenuous objection to having a solely U.N. peacekeeping force. In other words, the decision to establish a hybrid force consisting of troops from the AU and U.N. was a clear act of capitulation to the Sudanese government. The Bashir regime had insisted that it would not accept a U.N. peacekeeping force. However, it was willing to accept an expansion of the size of the AU's peacekeeping force. But later, the Bashir regime indicated that it would allow a hybrid U.N.-AU force. In short, based on the Bashir regime's distrust of the U.N., it was thus apprehensive about allowing a peacekeeping force that was exclusively under the control of the organization. However, in the case of the AU, the Bashir regime has confidence in the organization, because it has defended him against the backdrop of his indictment for war crimes and crimes against humanity by the ICC. Even then, the deployment of the hybrid force was delayed by continuing objections from the Sudanese government with the support of China, which has economic (oil) and strategic interests (the sale of weapons) in the Sudan.<sup>69</sup> Finally, in 2008, the hybrid force was

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66. See *Humanitarian Disaster in Sudan*, INFOPLEASE (2005) <http://www.infoplease.com/ipa/A0107996.html?pageno=3>.

67. For an excellent discussion of the failure of the AU's peacekeeping operations in Darfur, see Feldman, *supra* note 61, at 269-73.

68. Murithi, *supra* note 46, at 10.

69. See Andrew Higgins, *Oil Interests Push China into Sudanese Mire*, WASHINGTON POST, Sept. 24, 2011, available at [http://articles.washingtonpost.com/2011-12-24/world/35417909\\_1\\_south-sudan-stephen-dhieu-dau-cnpc](http://articles.washingtonpost.com/2011-12-24/world/35417909_1_south-sudan-stephen-dhieu-dau-cnpc).

deployed in Darfur.<sup>70</sup> Nonetheless, the expanded peacekeeping force, like its predecessors, has proven incapable of halting the commission of genocidal acts, war crimes, and crimes against humanity by the Sudanese government troops and their allies, the Janjaweed.

Why has the AU continuously failed to use robust military intervention when the Sudanese government has been identified as the perpetrator of genocide, war crimes, and crimes against humanity against its own people? Several factors account for this. Despite the so-called “third wave of democratization” that began sweeping across Africa in the early 1990s, the authoritarian African state and its political culture have remained intact.<sup>71</sup> That is, although the “third wave” has led to the liberalization of the political space in several African states, the democratic reconstitution of the African state has not occurred.<sup>72</sup> In other words, democracy has not been institutionalized in most African states.<sup>73</sup> Accordingly, the “culture of impunity,” has been a major bedrock of the post-colonial African state, and its political culture remains a pervasive feature of the political economy of the overwhelming majority of the African states.<sup>74</sup> Hence, there is a poverty of moral leadership among the continent’s ruling elites. This being the case, it is difficult for the AU to lecture the Sudanese government about respect for political rights and civil liberties, when many of the African states are also engaged in the violation of the human rights of their own citizens; although, such actions, in contradistinction to the Sudanese situation, have not degenerated into the commission of atrocities that rise to the level of genocide, war crimes, and crimes against humanity.

Another factor is the primacy of solidarity between and among the various regimes on the continent. As Dan Kwali aptly notes, “The AU member states appear to operate according to the norm that the mutual protection of ruling elites is of greater priority than the protection of civilians.”<sup>75</sup> For example, all of the regimes on the continent, with the exception of the new government of Malawi under the leadership of President Joyce Banda, have supported the Bashir regime by, among other things, collectively imploring the ICC to drop the charges against President

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70. See Cedric de Coning, *The Emerging UN/AU Peacekeeping Partnership*, 1 *Conflict Trends* 5, available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=116018>.

71. For an excellent discussion of the travails of the “third wave of democratization” in Africa, see Richard Joseph, *Democracy and Reconfigured Power in Africa*, 110 *CURRENT HISTORY* 324, 324-33 (2011), available at <http://www.currenthistory.com/Article.php?ID=924>.

72. *Id.* at 325-30.

73. *Id.*

74. See Mamphela Ramphela, Address at the “Difficult Dialogues Panel Discussion,” University of Cape Town, South Africa (July 1, 2008).

75. Dan Kwali, *The African Union and Challenges of Implementing the “Responsibility to Protect”*, 4 *NORDISKA AFRIKAINSTITUTET* 1, 2 (Mar., 2009), <http://responsibilitytoprotect.org/African%20Union%20and%20RtoP.pdf>.

Bashir, as well as revoke the writ of arrest issued against him.<sup>76</sup> However, the Banda regime in Malawi, which came to power in 2012, has refused to support the Bashir regime.<sup>77</sup> It refused to host the 2012 Summit Meeting of the Assembly of the AU, if President Bashir attended.<sup>78</sup> As such, the AU moved the meeting to its headquarters in Addis Ababa, Ethiopia.<sup>79</sup> The prevailing practice among the majority of the regimes on the continent is to defend heinous acts that are committed by their colleagues. This is because if a regime commits similar acts against its citizens, it would expect to be shielded by the other regimes—a sort of *quid pro quo*. Therefore, supporting the Bashir regime in Sudan is analogous to the securing of an “insurance policy” by the other regimes should they be in similar circumstances in the future. This has led Emmanuel Kwesi-Aning and Samuel Atuobi to observe: “[T]he AU’s response to current security challenges in Darfur in Sudan, . . . and especially the ICC’s application for the issuance of arrest warrant for President Al Bashir of Sudan, does not reflect a clear commitment to the responsibility to protect.”<sup>80</sup>

Also, the continuing centrality of state sovereignty served as an obstacle for the AU, in spite of the AU’s professed commitment to making “sovereignty a responsibility.”<sup>81</sup> For example, the AU sought the Bashir regime’s approval for the various peacemaking and peacekeeping activities it has undertaken in the Darfur conflict. And in the cases where the Bashir regime objected to certain actions contemplated by the AU, the latter capitulated to the former.<sup>82</sup> As Christine Gray argues, “The AU was not willing to intervene in the absence of consent by the government of the Sudan.”<sup>83</sup> In essence, the AU has, and continues to treat the conflict in Darfur as a domestic matter over which the Sudanese government has

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76. See *Sudan’s Wanted President Visits Egypt*, CNN, (Sept. 17, 2012), [http://articles.cnn.com/2012-09-16/africa/world\\_africa\\_egypt-sudan\\_1\\_al-bashir-sudanese-leader-president-morsy](http://articles.cnn.com/2012-09-16/africa/world_africa_egypt-sudan_1_al-bashir-sudanese-leader-president-morsy).

77. See Ananyo Ezugwu, *Ripples in AU Over Al-Bashir*, NEWSWATCH (June 20, 2012), [http://www.newswatchngr.com/index.php?option=com\\_content&task=view&id=4279&Itemid=41](http://www.newswatchngr.com/index.php?option=com_content&task=view&id=4279&Itemid=41).

78. See *Ethiopia to Host African Union Summit After Omar Bashir Malawi Row*, BBC NEWS AFRICA (Jun. 12, 2012, 4:41ET), <http://www.bbc.co.uk/news/world-africa-18407396>.

79. *Id.*

80. Kwesi Aning & Samuel Atuobi, *Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security architecture*, 1 GLOBAL RESPONSIBILITY TO PROTECT 90, 90 (2009).

81. See Constitutive Act of the African Union art. 4(h) (July 11, 2002), OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org>.

82. See John Bith Aliap, *Has the African Union (AU) Become a Chess Pawn in the Hands of the Khartoum Regime?*, SOUTH SUDAN NEWS AGENCY (June 20, 2012), <http://www.southsudannewsagency.com/opinion/articles/has-african-union-au-become-a-chess-pawn-in-the-hands-of-khartoums-regime>.

83. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 55 (3d ed., 2008).

primary responsibility. Thus, the AU sees its primary role, and those of other external actors as mediatory. That is, the Bashir regime should be encouraged rather than coerced to end the conflict in Darfur. Unfortunately, the AU's view is contradicted by the fact that the conflict in Darfur is genocidal rather than simply traditional (a classical civil war involving a government and insurgent domestic faction or factions). Accordingly, since the Bashir regime is the principal source for perpetrating the genocide, military force should be used against it as is required by the AU's responsibility to protect norm.

Similarly, the AU continues to demonstrate the lack of political will to invoke the use of the military force, given the circumstances in Darfur. In spite of the hoopla and fanfare about the dawning of a "new era" on the African Continent in which governments would be held accountable for committing atrocities against their citizens, the AU has failed to match its rhetoric with praxis in the Darfur case. As Kithure Kindiki argues,

[D]arfur presents a splendid example of a government that is "unable or willing" to protect its citizens, but also tragically, an international community that is equally unable or unwilling to take on the default sovereign responsibility that the Responsibility to Protect envisages. More importantly, the Responsibility to Protect essentially endorses the legality and legitimacy of humanitarian intervention, a doctrine whose normative status has remained fraught with uncertainties over the years.<sup>84</sup>

Christine Gray puts the case this way:

[The] failure to prevent a major humanitarian crisis demonstrates that the universal acceptance in principle of a "responsibility to protect" in the World Summit Outcome Document cannot guarantee action. . . . It may be that the World Summit's acceptance of the 'responsibility to protect' has created expectations which will not be fulfilled in practice.<sup>85</sup>

In short, the AU's failure to match its rhetoric with practice in Darfur is symptomatic of the continuation of the legacy of African states that revolves around the habit of formulating documents with lofty objectives, but failing to implement them.

In addition, the AU has several institutional and operational weaknesses that would have adversely affected its use of robust military intervention in the Darfur conflict, even if it chooses to pursue this option. Institutionally, there are two major interrelated problems. The AU has not established the units that would design the modalities for the application of its

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84. Kithure Kindiki, *Intervention to Protect Civilians in Darfur Legal Dilemmas and Policy Imperatives*, 131 ISS MONOGRAPH SERIES 1, 6 (May 2007).

85. GRAY, *supra* note 83.

responsibility to protect norm. In other words, the absence of the requisite institutions has resulted in the AU's lack of operational doctrines, including strategies for enforcing the norm of the responsibility to protect. Another major limitation is that there is the lack of the requisite coordination between and among the existing institutions of the AU regarding matters concerning the processes and procedures for implementing the "responsibility to protect" norm. For example, there are no modalities for ensuring collaboration between and among the various institutions under the AU's security architecture. For instance, there are no procedures and processes in place for the African Commission on Human and People's Rights, which has the responsibility for monitoring human rights violations on the continent (including the violations that are covered under the organization's "responsibility to protect" regime), and the Peace and Security Council, which is the AU's security policy implementation organ.<sup>86</sup> The AU also lacks adequate preventative mechanisms that could be used to tackle crises and conflicts before they degenerate into the commission of genocide, war crimes, and crimes against humanity. In addition, there are very weak links between the organization's "early warning system" and its preventive actions.<sup>87</sup> That is, the required steps have not been taken to develop the appropriate mechanisms that would link early warning with preventive actions that would need to be taken by the AU to prevent the escalation of a conflict.

At the operational level, there are several major problems as well. At the vortex is the absence of a strategic doctrine for implementing the "responsibility to protect" norm. This is coupled with the lack of adequate equipment for carrying out military operations, the lack of troop mobility as a result of the former, and the lack of an effective intelligence gathering mechanism replete with the required elements. Additionally, there is the perennial problem of inadequate funding. In fact, it is a common practice for the AU to rely on the United States and European states to provide substantial portions of the funds for various regional military operations.<sup>88</sup> This means that the AU member states have failed to demonstrate a real commitment to the security of the continent, as evidenced by their lack of financial support for the AU's security architecture. Clearly, the AU cannot effectively meet its charter obligations concerning the implementation of the

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86. See Jeremy Levitt, *The Peace and Security of the African Union: The Known Unknowns*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 109, 124 (Spring 2003) (for a discussion of the lack of coordination between and among the various institutions of the African Union that have responsibilities related to the implementation of the "responsibility to protect" norm).

87. See Kwali, *supra* note 75.

88. See Eric Berman and Katie E. Sams, *Keeping Peace in Africa*, *DISARMAMENT FORUM* (2000), available at [http://www.unidir.ch/bdd/fiche-periodique.php?ref\\_periodique=1020-7287-2000-3-en#contents](http://www.unidir.ch/bdd/fiche-periodique.php?ref_periodique=1020-7287-2000-3-en#contents).

“responsibility to protect” norm, if it is dependent upon external actors for funding, equipment, and logistics.

#### IV. TOWARD STRENGTHENING THE AU’S RESPONSIBILITY TO PROTECT REGIME

So what are some of the major steps that need to be taken to help strengthen the AU’s “responsibility to protect” regime, especially the organization’s capacity to implement the robust military intervention option, when the situation warrants pursuant to the criteria outlined in Article 4 of the AU’s Charter? First, the democratic reconstitution of the African state is imperative, especially the replacement of the “culture of impunity” with one based on accountability.<sup>89</sup> Regimes would think twice before engaging in the commission of genocidal acts, war crimes and crimes against humanity. This is because the regimes would know that they would be held responsible. Undoubtedly, the democratic state reconstitution project on the continent can only succeed, if the larger society and civil society organizations work together to shepherd the process. This is because with very few exceptions the regimes on the continent prefer the maintenance of the “culture of impunity,” so they can have *carte blanche* to abuse the human rights of their own citizens.<sup>90</sup> Also, the support and cooperation of the international community would be important. Some of the major actors in the international system such as the United States have the record of supporting some of the most authoritarian regimes on the continent, while it claims to support democracy. Without external support, authoritarian regimes on the continent such as Bashir’s in the Sudan would have two major options: democratize or face the people’s power.

Second, the rhetoric of making “sovereignty responsibility” needs to be translated into action by the African Union. One of the major requirements for doing so is the emergence of leaders on the continent, who have the moral leadership to stand up to fellow leaders, who are autocrats. The decision taken by President Banda of Malawi to have arrested President Bashir of Sudan and hand him over to the ICC, if he had attended the 2012 Summit Meeting of the Heads of State and Government of the AU in Malawi, is a major step forward.<sup>91</sup>

Third, both the AU and its member states consistently need to demonstrate political will, especially when it comes to the enforcement of the “responsibility to protect” norm. This would require, for example, African leaders, who have the moral authority, to refuse to play the insidious game of elite solidarity. As has been discussed, President Banda of Malawi has become a trail blazer in this vein.

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89. See Ramphele, *supra* note 74.

90. *Id.*

91. See Ezugwu, *supra* note 77.

The AU also needs to address its various institutional and operational weaknesses. At the institutional level, the AU need to establish new units within its Peace and Security Department that would focus on the development of the modalities for the operation of the “responsibility to protect” regime. Essentially, these new units would develop the blueprint for the operation of the “responsibility to protect regime.” Also, the various entities that have responsibilities bearing on the operation of the “responsibility to protect” regime need to coordinate their activities. This would entail the development of a framework that would serve as the roadmap for the promotion of inter-agency coordination. In terms of the operational weaknesses, the issues of linking “early warning” to preventive action, the provision of funding for various military operations, the development of a strategic doctrine that would serve as a guide for military actions, troop mobility, equipment and intelligence gathering need to be addressed. In addition, the AU needs to establish a cooperative relationship with the U.N. in the implementation of the “responsibility to protect” norm. This is because the U.N. has greater amount of resources—spanning from money to expertise— than the AU.

#### CONCLUSION

The AU has failed to meet its Charter obligations regarding the implementation of its “responsibility to protect” norm in the case of the conflict in Sudan’s Darfur region. Given the gravity of genocide, crimes against humanity and war crimes, peacekeeping is not an appropriate method for implementing the “responsibility to protect” norm. This is because the use of military force to enforce the norm under the stipulated prevailing conditions would have required the identification of the Sudanese government as the culprit, thereby requiring steps to be taken to end the commission of atrocities. Certainly, the AU’s failure to use military force has, and continues to contribute to the Sudanese government’s continuous engagement in committing genocide, crimes against humanity and war crimes.

Finally, the AU’s performance in the case of Darfur does not portend well for the implementation of the “responsibility to protect norm” at the regional level. This is because the AU’s capitulation to the Bashir regime will embolden other autocrats on the continent to engage in a similar pattern of behavior like the Bashir regime under similar circumstances. The establishment of such a bad precedent would return the continent to the era when “sovereignty was only a right for states without a concomitant “responsibility.” In order to forestall the reversion to the past, several steps would need to be taken, including the imperative of democratically reconstituting the state in Africa, particularly ending the culture of impunity, the urgency of moral leadership on the continent, the need to

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develop political will, and addressing the battery of institutional and operational pathologies.

