



Master's Degree in International Relations

Course of
International Organizations and Human Rights

The War in Darfur: Responses by the United Nations and the Role of International Justice

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Index

<i>Introduction.....</i>	<i>6</i>
<i>Chapter 1</i>	<i>8</i>
<i>The dynamics of Darfur's conflict.....</i>	<i>8</i>
<i>1. The conflict in Darfur.....</i>	<i>8</i>
1.1 Sudan and its historical-political prelude.....	10
1.1.1 The brief history of liberal democracy: coups and a new turn to authoritarianism ..	12
1.1.2 The state's constitutional framework during the period of the conflict	15
1.2 Darfur: navigating a tapestry of cultures and conflict.....	17
1.2.1 Non-Arab populations: Fur, Masalit, Zaghawa and Bideyat	17
1.2.2. The Arabs	19
1.3 Unraveling the causes of conflict	20
1.4 The actors: Government forces, Janjaweed, and rebel groups	20
1.4.1 Government forces.....	21
1.4.2 Government-backed forces: The Janjaweed	22
1.4.3 The rebels: Sudan Liberation Movement and Justice and Equality Movement	23
1.5 The evolutionary path of conflict.....	25
1.6 Humanitarian ramifications: internal displacement and refugee crisis	26
<i>Chapter 2</i>	<i>30</i>
<i>The peacekeeping mission led by the United Nations and the AU: UNAMID.....</i>	<i>30</i>

2.1 Legal basis and functioning of the peacekeeping mission	30
2.1.1 Chapter VII of the UN Charter	31
2.1.2 Process to have a peace-keeping mission and the fundamental role of the SG	32
2.1.3 Structure and tasks	34
2.2 UNAMID	36
2.2.1 2007: Resolution 1769 by the SC authorizing the creation of the peacekeeping mission	36
2.2.2 The mandate and the structure of the mission	39
2.2.3 Achievements of the mission and the end of its mandate	41
2.3 UNAMID as an example of R2P? The opening to international community engagement	44
2.3.1 The origins of Responsibility to Protect	45
2.3.1.1 Kofi Annan's will	46
2.3.1.2 2001 ICIS Report	47
2.3.1.3 The 2005 World Summit Outcome Document	48
2.3.1.4 Responsibility to protect: the 3 constituting pillars	49
2.4 A failure in maintaining peace?	50
Chapter 3	52
<i>The accusation of Genocide, Crimes Against Humanity, and War Crimes: the approach of International Justice</i>	52
3.1 The events	52
3.1.1 The human cost of massive human rights abuses	53
3.1.2 The use of sexual violence as a mean of war	56

3.2 Legal existing framework	58
3.2.1 The United Nations' Genocide Convention	58
3.2.2 The elements of Genocide and the difficult path to its recognition.....	62
3.2.3 The role of the International Criminal Court	64
3.2.3.1 The Rome Statute of the International Criminal Court.....	65
3.2.3.2 Determination of the Court's Jurisdiction.....	67
3.3 International opinion and the opening to international justice.....	69
3.3.1 Secretary of State Colin Powell and President George W. Bush's statements and European Union's opinion.....	69
3.3.2 The role of the Security Council in addressing the issue: Resolution 1547, Resolution 1556, Resolution 1564, and the creation of the International Commission of Inquiry on Darfur.....	70
3.3.3 The role of the International Criminal Court and the possibility of action against Sudan through the Security Council referral.....	72
3.3.4 Investigation in front of the Court: the first international arrest warrant for Al-Bashir	73
3.3.5 A new international arrest warrant and the lack of cooperation	77
Conclusion.....	80
Bibliography.....	85

Si chiamava

Moammed Sceab

Discendente

di emiri di nomadi

suicida

perché non aveva più

Patria

(...)

E forse io solo

so ancora

che visse

G. Ungaretti, In memoria

Introduction

The resumption of the conflict in Sudan on 15 April 2023 marks the beginning of this research. This conflict constitutes the third Sudanese civil war, which has occurred in the wake of several coups in an inherently fragile and unstable region. The Darfur region in Western Sudan has been particularly affected by internal conflicts within the broader context of the conflict that has affected the entire country. These conflicts are attributable not only to the considerable ethnic and religious diversity of the region, which has resulted in numerous clashes, but also to the diminishing availability of resources, which has compelled nomadic populations to settle in previously occupied territories. The Darfur region has been the site of conflict since 2003. Despite an apparent resolution in 2020, the conflict flared up again in 2023, following the resumption of fighting in the capital, Khartoum. To date, the situation in the region has not yet reached a peaceful resolution for the parties involved. As is often the case in conflict situations, it is civilians who bear the brunt of the consequences. Indeed, the analysis will demonstrate that a significant ethnic cleansing was conducted against the non-Arab populations residing within the Darfur region. In 2008, the Prosecutor General of the International Criminal Court levelled accusations against Omar al Bashir for the commission of crimes of genocide, war crimes and crimes against humanity. These crimes were allegedly perpetrated with the intention of devising a plan for the annihilation of the Fur, Masalit and Zaghawa communities. In 2009, a first international arrest warrant was issued against Bashir, although the International Criminal Court did not uphold the charge of genocide; A second arrest warrant followed in 2010, stating that there was a reasonable basis to believe that the crime of genocide was being committed. The humanitarian crisis that has befallen the population is without precedent. According to UNHCR, Sudan is ranked as one of the countries from which the greatest number of people flee, with more than 800,000 refugees seeking asylum and shelter across the border, in addition to nearly 4 million internally displaced persons. The circumstances have been further compounded by the ongoing conflicts in the region and the international community's inability to offer a lasting peace project. Despite the ongoing tragedy, the media do not discuss it sufficiently, and it is one of the least represented conflicts. This research aims to shed light on the events that have occurred and those that are currently unfolding, highlighting the shortcomings and vulnerabilities of the international community in the context of such cases. This study aims to provide an in-depth analysis of the international community's response to the ongoing conflict in Darfur. It will explore the actions of the United Nations, including their peacekeeping

mission UNAMID, as well as the role played by the International Criminal Court. The study will evaluate the effectiveness of these measures in addressing the conflict and determine whether they were commensurate with the severity of the situation.

This research project will be divided into three chapters. The initial chapter will provide a purely historical and cultural context to the conflict. This will commence with an analysis of the recent history of the region, which will include an examination of the different ethnic groups, the apparent causes of the conflict and the actors involved, as well as the humanitarian consequences. The second chapter will address the central issues of international law: firstly, it will examine the origins of peacekeeping and the fundamental principles upon which it is based. It will then analyze the legal framework of peacekeeping operations and illustrate their structure and activation process. The chapter will then focus on UNAMID and its distinctive characteristics, as well as the entire process that led to its withdrawal in 2020. Then, it will demonstrate the connection between the UNAMID mission and the principle of Responsibility to Protect, by recalling its historical origins and the pivotal role played by Secretary General Kofi Annan. Finally, it will analyze the most recent historical developments to demonstrate the limitations of the mission. The third chapter will analyze the response offered by international justice, in particular the International Criminal Court. The analysis will commence with an examination of the violations that took place in Darfur region, which will demonstrate the gravity of the circumstances. Then, the existing legal framework will be examined, focusing on war crimes, crimes against humanity, the crime of genocide and the role played by the ICC. Finally, the chapter will investigate public opinion and global perceptions regarding these violations, which prompted the Security Council to refer the matter to the ICC, resulting in the latter issuing two international arrest warrants for Omar Al-Bashir, including genocide counts. In conclusion, the research will seek to determine whether the responses were adequate in view of the gravity of the events.

Chapter 1

The dynamics of Darfur's conflict

1. The conflict in Darfur

Before delving into the analysis of the conflict, it is useful to understand from the geographical point of view in which region the conflict took and is currently taking place. The region of Darfur is an area of 160.000-square-miles¹, differentiated in deserts and savannah, populated by around 8 million people in 2020². The region is located in Western Sudan, bordering Libya, Chad, Central African Republic and the recently born South Sudan³. The name of the region originates from "dar fur" which in Arabic language means "the land of the fur"; historically, Fur was the dominant ethnic group in the region before 1916 and Darfur was an Islamic Sultanate in West Sudan.⁴ The Sultanate was constituted in 1596 while Islam was declared as the official religion of it before being conquered by British in 1916 and then incorporated in the state of Sudan.⁵ Such a history of conflicts, resistance and independence should be considered in deconstructing the reasons for the conflict and for this reason the current section will focus on it.

Darfur region is home to around 80 different ethnic groups, both nomadic and sedentary, that used to live in a peaceful condition until the resources of the region became scarce leading ethnic groups that used to behave in a friendly way, to collide the one with the other.⁶ Building on this, the conflict was also exacerbated by the fact that the region is extremely far from the capital city of Sudan, Khartoum,

¹ "Darfur", The Editors of Encyclopaedia Britannica, accessed 2024, <https://www.britannica.com/place/Darfur>.

² "Sudan", World Bank Group, accessed 2024, <https://data.worldbank.org/country/sudan>.

³ "Darfur", The Editors of Encyclopaedia Britannica, accessed 2024, <https://www.britannica.com/place/Darfur>.

⁴ "Understanding Darfur Conflict", Government of Sudan, 2005, <https://reliefweb.int/report/sudan/understanding-darfur-conflict>.

⁵ Ibid.

⁶ Ibid.

making that region even more ideologically distant from the idea of the "state union".⁷ The severe tensions stemming from post-colonial ethnic conflicts further escalated in 2003 when rebels revolted against the Sudanese central government, accusing it of neglecting the region, and particularly the African population.⁸ In response, the government supported Arab militias, known as the Janjaweed, to suppress the rebellion in Darfur.⁹ However, the presence of these militias hindered international organizations from providing food and medicine to civilians, who were in urgent need due to the conflict.¹⁰ Notwithstanding a ceasefire agreed upon in 2004 between the Sudanese government and the rebel movements active in the region, and the intervention of the African Union following the outbreak of the conflict, the humanitarian consequences were devastating, with hundreds of thousands of civilians killed and over two million internally displaced people fleeing.¹¹

The United Nations Security Council authorized, through Resolution 1769 of July 31, 2007, a joint peacekeeping mission between the United Nations and the African Union, known as UNAMID (United Nations-African Union Hybrid Operation in Darfur), with the aim of replacing the unilateral African Union mission. However, troop deployment only began in 2008.¹² In 2008, international justice also began to act when, in July, ICC's First Prosecutor accused Al Bashir of being criminally responsible for the crisis in Darfur as sitting Head of State of Sudan.¹³ Al Bashir was accused of setting up a genocide, committing war crimes and crimes against humanity, leading to attempts to obtain an international arrest warrant for him, welcomed by denial by the Sudanese government, which declared his guiltlessness.¹⁴ The international arrest warrant was issued on March 4, 2009, for war crimes and crimes against humanity, but not for genocide, which came a year later in July.¹⁵ This arrest warrant

⁷ Ibid.

⁸ "History of Sudan: The Republic of the Sudan", Robert O. Collins, accessed 2024, <https://www.britannica.com/topic/history-of-Sudan/The-Sudan-under-the-Anglo-Egyptian-Condominium#ref359075>.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

was unique as it was the first time it targeted a sitting president of a country, sparking reluctance from some member and non-member countries towards such action despite the Statute.¹⁶

1.1 Sudan and its historical-political prelude

Following the conquest of Sudan in the closing decade of the 19th century, the British faced the challenge of governing the territory amid ongoing legal and diplomatic conflicts.¹⁷ Great Britain's initial aim in conquering Sudan was to assert their imperial power over the Nile. However, it was Egypt's financial resources and military might that enabled them to achieve this goal. Despite this, Great Britain was determined to retain control of the territory.¹⁸ To address the political challenges in the territories, the Anglo-Egyptian Condominium was established, granting Sudan a divided political status. This arrangement entailed shared sovereignty between the Egyptian Khedive and the British Crown.¹⁹ In this setup, military and social governance were entrusted to a general governor appointed by the Egyptian Khedive but designated by the British government. From the outset, it was clear that the partnership was skewed in favor of the British.²⁰

Feeling marginalized by the British, the Sudanese population decided to fully support the Egyptian nationalist movement, which eventually led to the rise of Sudanese nationalism in the 20th century.²¹ The first actions of this movement began in 1921 with the creation of the United Tribes Society by 'Alī 'Abd al-Laṭīf, who was subsequently arrested for his nationalist activities. Shortly thereafter, in 1924, he founded another organization, the White Flag League, aimed at liberating Sudan from British rule.²² A turning point seemed imminent in 1924 when Sir Lee Stack was assassinated in Cairo, prompting the British to expel the Egyptians from Sudan and to attack a Sudanese battalion that

¹⁶ Ibid.

¹⁷ "History of Sudan: The Sudan under the Anglo-Egyptian Condominium", Robert O. Collins, accessed 2024, <https://www.britannica.com/topic/history-of-Sudan/The-Sudan-under-the-Anglo-Egyptian-Condominium#ref359075>.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

supported Egypt. The Sudanese rebellion was swiftly crushed, and British control persisted until the end of World War II.²³

In 1936, the Anglo-Egyptian Treaty was signed, and it allowed Egyptian officials to come back to the Country. Although it did not show it, the Sudanese elite was unhappy about not being consulted by either country regarding the decision.²⁴ Consequently, the Graduates' General Congress was created, initially as a university association and later inclusive of all Sudanese graduates. In the beginning, its prominent actions were mainly social and educational. Later, with the support of Egypt, the association demanded to be recognized by the British as the voice of Sudanese nationalism.²⁵ When the Government refused, the association split into two groups: a moderate one willing to accept the government and a radical one group, led by Ismā'īl al-Azharī, who sought support from Egypt. In 1943, Azharī and his circle took control of the Congress and formed the Ashiqqā' (Brothers), Sudan's first true political party. In response, moderates created the Ummah (Nation) party under Sayyid 'Abd al-Raḥmān al-Mahdī, who aimed to collaborate with the British towards independence.²⁶ Sayyid 'Abd al-Raḥmān leveraged his inherited influence from his father's followers. His main rival, Sayyid 'Alī al-Mīrghānī, leader of the Khatmiyyah brotherhood, supported Azharī. The rivalry between the Azharī-Khatmiyyah faction, rebranded as the National Unionist Party (NUP) in 1951, and the Ummah-Mahdist group rekindled old animosities, complicating Sudanese politics and undermining parliamentary governance.²⁷

To address the issue of pervasive nationalism among the Sudanese elites, the British increasingly sought to create institutions that would more closely involve the Sudanese in governance. Consequently, an advisory council for North Sudan was established, consisting of the governor-general and 28 Sudanese members.²⁸ However, Sudanese nationalists desired this council to evolve into a legislative body that also included South Sudan. For years, the British had solidified their control over Sudan by segregating the animists and Christians predominant in the south from the Muslim Arabs in the north.²⁹ The creation of the legislative council compelled them to abandon this policy by including southern participation in the governing body; in addition, it resulted in a unilateral abrogation by the

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

Egyptian government in October 1951, which proclaimed its dominion over Sudan.³⁰ This only further distanced the Sudanese from Egypt, until in 1952, the rebellion led by Gamal Abdel Nasser and Muhammad Naguib succeeded in bringing to Cairo men more empathetic to Sudanese ambitions.³¹ In 1953, an agreement was signed between Great Britain and Egypt, affirming Sudanese self-government and self-determination within 3 years. A few months later, in December 1953, the first elections for a representative parliament were held in Sudan: the Egyptians supported Ismā'īl al-Azhārī, leader of the NUP, while the British less explicitly supported the Ummah Party; the NUP of Azhari won a landslide victory, and despite having campaigned for the creation of a union of states between Sudan and Egypt, it failed to keep the promises made and declared Sudan an independent republic with a representative parliament elected in 1956.³²

1.1.1 The brief history of liberal democracy: coups and a new turn to authoritarianism

In Sudan, liberal democracy existed for a brief period following the country's independence in 1956. However, this period was frequently interrupted by military regimes. Consequently, the periods marked by democracy were from 1956 to 1958, from 1965 to 1969, and from 1985 to 1989. The political instability of the country was accompanied by the instability that characterized the process of drafting a new constitution. Indeed, at the beginning of each democratic period, the 1956 constitution was brought back with minor modifications, and the country did not have a permanent constitution approved by a Constituent Assembly or a Parliament for a long time.³³

The process of drafting a constitution commenced immediately following independence in 1956. However, conflicts over its contents led to the first military coup in 1959. General Ibrahim Abboud initiated this coup by overthrowing the government, suspending the constitution, dissolving parliament, and finally banning the existence of any political party. Abboud attempted to establish a national identity through the implementation of Islamization and Arabization initiatives, which subsequently gave rise to the emergence and intensification of civil conflict between the north and south of the country. The south felt inadequately represented by the central government and not

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Markus Böckenförde, *International Law and Constitution-Making: "Sudan"* (Cambridge: Cambridge University Press, 2022), 157-182.

sufficiently endowed with political autonomy.³⁴ Abboud's years of rule were marked by general discontent, which led to a popular rebellion in 1964. This rebellion marked the beginning of a new parliamentary period characterized by the presence of the 1956 Constitution with some amendments, intended to be functional for the adoption of a new document.³⁵

In 1967, a constituent assembly was elected with the intention of creating a permanent constitution. However, its condition rapidly deteriorated when General Jafar Muhammad Nimairi, supported by the Soviet Union, led a coup in 1969, even before the draft of a constitution could be adopted by the assembly. However, Nimairi faced a communist-inspired coup attempt against him in 1971, and, due to the death of Gamal Abdel Nasser in Egypt, he became a loyal ally of the West.³⁶ In 1972, there was a rapprochement with the South of the country, followed in 1973 by the signing of the Addis Ababa Peace Agreement, which played a foundational role in the process of creating the Permanent Constitution of 1973. The constitution granted the South various powers of autonomy and self-governance, including the exclusive regulation of religious and cultural conflicts. Unfortunately, these guarantees of autonomy were not appreciated by the Islamic elite, who increasingly withdrew their support from Nimairi. After being a victim of another coup attempt in 1976, Nimairi decided it was time to reconcile with the Islamist opposition.³⁷

While the inclusion of Islamists in the regime was a factor in its survival and success, it also allowed radicals to weaken it internally and undermine the peace treaty. The situation further deteriorated with the discovery of oil in the South, which resulted in the administration of the South being returned to the North. This action effectively cancelled the autonomy of the South and made Arabic the official language of the territories. The culmination of these developments occurred in 1983, when the September Laws were enacted, effectively establishing Sharia as the law of the land.³⁸

³⁴ "Le costituzioni federali tra common law e civil law dell'Africa (prima parte): Nigeria e Sudan", Senato della Repubblica, accessed 2024, https://www.senato.it/4800?newsletter_item=1710&newsletter_numero=160.

³⁵ Markus Böckenförde, *International Law and Constitution-Making: "Sudan"* (Cambridge: Cambridge University Press, 2022), 157-182.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

These events precipitated the outbreak of a new civil war, this time also involving the opposition of the Sudanese People Liberation Army/Movement (SPLA/M), which was led by John Garang, who was a doctor at the time. In 1985, Nimeiri was ousted by a popular uprising, which led to the adoption of another slightly amended version of the 1956 Constitution³⁹. Following the uprising, Sadiq al-Mahdi was appointed prime minister in 1986. Despite his government's opposition to the September Laws, they were never effectively repealed by him. Finally, when the decision was made to abrogate them, also to negotiate peace with the south of the country, the democratic interlude was unexpectedly interrupted by another coup. The coup was spearheaded by General Omar Hassan al-Bashir and orchestrated by the Islamist ideologue Hassan al-Turabi.⁴⁰

This moment marked the advent of a new autocratic regime that, on paper, transitioned from a military to a civilian government in 1993. In 1996, elections were held, the results of which were likely manipulated by the Bashir regime and hindered by other political parties, resulting in Bashir's victory. Meanwhile, the first fissures began to emerge within the Sudanese People's Liberation Army/Movement, which were exacerbated by the regime.⁴¹ Consequently, a number of former commanders of the Sudanese People Liberation Army/Movement signed the Khartoum Peace Agreement with the central government in 1997. The foundation for another draft constitution was laid thanks to this peace agreement, which was also submitted to a referendum in 1998 and approved by 96.7% of the voters. The new constitution came into effect on 20 June 1998. Subsequently, in late 1999, Bashir re-suspended the constitution, imposed a state of emergency, and dissolved the parliament, thereby preventing a vote on a bill that would have reduced the powers attributed to the President.⁴²

In the early 2000s, as a result of persistent pressure from the international community, spearheaded by the United States, peace negotiations were initiated between the Sudanese People's Liberation Army/Movement and the central Sudanese government. Nevertheless, these negotiations were not conducted with the support of the United Nations or the African Union, but under the direction of IGAD, which lacked both the mandate and the capacity to mediate. Consequently, IGAD was compelled to seek external assistance through the Authority's Partners Forum. In July 2002, an

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

agreement was reached, the Machakos Protocol, which established the framework for a future peace treaty between the central government and the southern part of the country.⁴³ At the beginning of 2005, the Comprehensive Peace Agreement was signed, which addressed the aforementioned issues in greater detail, including security agreements, southern autonomy, power-sharing in the central government, and a more equitable resource distribution. In 2005, the Interim National Constitution (INC) was adopted in order to implement the agreed-upon accords and ensure the necessary autonomy for the southerners.⁴⁴ This level of autonomy was to be facilitated through various mechanisms, including power-sharing, an asymmetric federal structure, and the possibility of secession. The constitution established a single presidency comprising three individuals, namely the president, the first vice president, and the vice president. This further divided the presidency and the first vice presidency between the north and the south. In the event that the president was from the north, the first vice president had to be from the south. Several actions that were typically reserved for the president required the consent of the first vice president, including declarations of war or a state of emergency, convening and updating the legislature, and appointing certain officials.⁴⁵

With regard to the state structure and federalism, the Interim National Constitution divided the country into 25 states, which were represented in the upper house, the Council of States. Furthermore, the Interim National Constitution established the Government of South Sudan, an intermediate government situated between the national government and the states.⁴⁶ This government had its own government, legislature, judicial system, and constitutional document. Moreover, the Interim National Constitution afforded South Sudan the opportunity to exercise self-determination through the guarantee of a referendum to declare its autonomy. In 2011, after six years, South Sudan held a referendum, which resulted in a decision to secede.⁴⁷

1.1.2 The state's constitutional framework during the period of the conflict

In order to gain a better understanding of how the country works, it is useful to examine its Constitution of 2005, during the years that marked the beginning of the conflict, in order to categorize the type of

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

government and better understand the country's situation.⁴⁸ Paragraph A of Article 4 of the Interim National Constitution lists the foundations on which the constitution is based: firstly, it states that the unity of the country must be based on the freedom of action of the population, the rule of law, democratic governance, accountability, equality, respect and justice for citizens; secondly, the article declares that religion, customs and diverse traditions are a strength for Sudanese citizens; finally, it emphasizes that the social and cultural differences of citizens should be the basis for the social unity of the country and not a reason for division. Paragraph D of the same article states that the power of the government derives from the will of the people, freely and directly exercised through periodic elections by universal suffrage and secret ballot. The constitutional document also guarantees certain fundamental human rights, such as the right to life, human dignity, equality, freedom of religion and others such as freedom of movement.⁴⁹

Regarding the Interim Constitution of Southern Sudan, Article 3 declares that this document is the supreme law of the land, and, for this reason, it possesses coercive powers over the various organs and agencies of the government and over the citizens present throughout the territory. Like the Interim Constitution of the Sudan, the Constitution recognizes a number of fundamental rights. In addition, Article 9 of the Constitution affirms the right of the people of Southern Sudan to self-determination through a referendum to determine their own status.⁵⁰

If we are discussing what kind of division of power is outlined in the Constitution, Article 24 of the Interim Constitution of Sudan states that it is a decentralized state with distinct levels of government. First, there is the national level, which should exercise its authority while maintaining the territorial integrity and national sovereignty of the country and promoting its welfare.⁵¹ Then there is the level of government of Southern Sudan, which should exercise its authority over its own citizens and states. Then there are the state levels of each of the country's states, which should exercise their powers and provide services through the level of government closest to the people. Finally, there are local levels of government throughout the country.⁵²

⁴⁸ Border and Immigration Agency, *Country of Origin Information Report: "Sudan"* (London: Border and Immigration Agency, 2007).

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

With regard to the division of powers, as outlined in the model of the Interim Constitution of Southern Sudan, article 165 states that the territory is divided into 10 states and should be decentralized. In addition, the states would be able to adopt their own constitutions, but always in accordance with the central constitution.⁵³

1.2 Darfur: navigating a tapestry of cultures and conflict

The territory of Darfur has always been home to a multitude of ethnic, cultural, and religious groups, and its rich history has played a significant role in shaping the region's diverse population. To this day, the main distinction in terms of culture is that between non-Arab and Arab populations. These groups have frequently conflicted with each other, not least because of their often-nomadic lifestyles, which have been further complicated by the reality of climate change, which forced many to settle in areas of the region already occupied. Due to the considerable number of ethnic groups present in the region, this section will focus on the most numerous non-Arab groups (the Fur, Masalit, Zaghawat and Bideyat) and the most numerous Arab groups (Rizegat, Mahariya, etc.).

1.2.1 Non-Arab populations: Fur, Masalit, Zaghawa and Bideyat

1.2.1.1 Fur

As previously stated, the name Darfur translates to "the land of the Fur" in Arabic. Indeed, the Fur represent the predominant ethnic group in the region, comprising nearly 2 million of the region's 6 million inhabitants. In the past, Darfur constituted a multi-ethnic state that was ruled by a dynasty of sultans, the Keyra. The sultanate remained intact until 1916, when it was integrated into Sudan by the British. Nevertheless, prior to this incorporation, the sultanate encompassed a vast territory that extended beyond the current dimensions of the Darfur region.⁵⁴

With regard to the population, the Fur are found in the central area of Darfur, in the Jebel Marra region, as well as in the nearby plains. They are present in all three of the administrative provinces that currently comprise Darfur. The division of Darfur into three provinces was, in fact, a political action undertaken by the Al-Bashir regime in 1994 with the intention of breaking up the ethnic population and containing its size.⁵⁵ The ethnic group is currently underrepresented at both the central government

⁵³ Ibid.

⁵⁴ Jérôme Tubiana, *Le Darfour, un conflit identitaire?*, Afrique contemporaine (Paris: Karthala, 2005), 165-206.

⁵⁵ Ibid.

level and the local government level. Furthermore, the remaining leaders have consistently been marginalized by the population, with the government being held responsible for attempting to eradicate their history. This is also due to the fact that the Janjaweed, during some attacks, targeted the tombs of some of the Fur sultans.⁵⁶

1.2.1.2 Masalit

With regard to the Masalit, their historical background is comparable to that of the Fur, as they are descendants of a sultanate that was situated in the vicinity of the city of Geneina in Eastern Darfur. Nevertheless, a second community of Masalit can be found in Southern Darfur, in the vicinity of the city of Gereda.⁵⁷

1.2.1.3 Zaghawa et Bideyat

The populations in question refer to themselves as "Beri" but are referred to by the Arabs as Zaghawa and Bideyat. On the one hand, the Zaghawa reside in the Sahel region, primarily in Sudan. On the other hand, the Bideyat inhabit the Sahara region, predominantly in Chad. With regard to their involvement in the conflict, it is useful to highlight the division between two states, Sudan and Chad. Both populations participated in the Chadian civil war around 1970, supporting Hissène Habré, who began his rise to power from Darfur to usurp power in N'Djamena.⁵⁸ However, the Beri group became more prominent later, in 1989. At that time, Idriss Deby (of Bideyat origin) sought refuge in Darfur to fight against Habré, his former leader. Deby was supported by the Zaghawa and the Al-Bashir regime, which enabled him to gain power in 1990. Since that time, the two populations have retained their positions of power in Chad and have also amassed significant wealth. This introduction is useful to understand the role these populations have played in the Darfur crisis. It is not surprising to suppose that for some of them, there was a possibility of seeing in Sudan what had already happened in Chad in 1990.⁵⁹

With regard to their lifestyle and activities, the Zaghawa who have settled in the northern region of Darfur are nomads and primarily engage in camel herding. However, due to the impact of changing climatic conditions and drought, they are compelled to remain in those same areas. Against the

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

backdrop of the prevailing drought, a considerable proportion of the Zaghawa population has been compelled to settle in the southern part of Darfur.⁶⁰

1.2.2. The Arabs

It appears that Arab populations have been present in the Darfur region since approximately the eighth century. However, their existence in larger groups is thought to have emerged only in the seventeenth century with the establishment of the Sultanate.⁶¹ The period of the Sultanate also coincides with the time when the region underwent Islamisation, which initially concerned only the rulers. The Arab population is still divided into two groups, although this distinction is not as clear-cut as it once was. On one side, the Baggara Arabs are cattle herders, while on the other side, the Gamala Arabs are camel herders.⁶²

With regard to the various groups present in the region, the Rizegat are likely to be the most numerous. They can be further divided into several subgroups, including the Mahariya, Mahamid, Eregat, and Etefat. All members of this ethnic group have land to live on (Dar in Arabic) in the southern part of the region and share a single nazir, or leader.⁶³ Conversely, the four northern subgroups each have their own leader but do not possess a Dar. Nevertheless, they have been granted permission by the government to settle in non-Arab areas. Notwithstanding their primary occupation as camel herders, the war and the presence of rebels in the territories have forced them to cease their migrations.⁶⁴

Other Arab groups include the Mahariya, who previously inhabited southern Darfur and parts of northern Darfur. Subsequently, the government facilitated their relocation to the Disa area in Dar Zaghawa, in part due to the drought that had previously affected their previous locations. Following the outbreak of the rebellion, they were compelled to relocate once more. It would appear that a number of them, the most impoverished, joined the Janjaweed.⁶⁵

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

Among the Arab groups in Darfur, the Mahamid, Eregat, Rizegat, Habbaniya, Ta'aisha, and Beni Halba in southern Darfur, and the Beni Husein in northern Darfur, all have their own Dar. Conversely, numerous groups lack their own territory, which has led to numerous conflicts with other Arab groups and non-Arab groups that do possess land. The internal divisions within the Arab groups present a significant challenge for the central government.⁶⁶

1.3 Unraveling the causes of conflict

One of the underlying causes of conflict in the region is the distribution of territories among the various tribes that inhabit it. Indeed, from 1930 onwards, some of the sedentary groups that had been compelled to settle in a territory due to their involvement in agriculture frequently found themselves in conflict with the nomadic groups that worked instead with livestock and animal husbandry.⁶⁷ Furthermore, the numerous climate changes that impacted the scarcity of resources further exacerbated the conflicts. Moreover, it is essential to examine the role of the Sudanese central government in the context of these conflicts. The government's historical approach to the outermost regions of the country has been characterized by a lack of attention and resources, which has contributed to a sense of neglect among the populations in these areas.⁶⁸

1.4 The actors: Government forces, Janjaweed, and rebel groups

In order to gain a deeper understanding of the conflict's origins and subsequent escalation, it is essential to analyze the various actors involved. This paragraph will therefore focus on this aspect. The actors can be divided into two groups. The first comprises government forces and the Janjaweed, representing those actors linked explicitly or not by the central government of Khartoum. The second group is composed of the Sudan Liberation Movement and the Justice and Equality Movement, known as the group of rebels.

⁶⁶ Ibid.

⁶⁷ Benjamin Ijenu, *When Darfur Weeps: A Historical Overview*, Augustinian Journal of Philosophy: The ViewPoint 2 (Augustinian Publications, 2009), 40-44.

⁶⁸ Ibid.

1.4.1 Government forces

The armed forces of Sudan, as outlined in the 2005 Constitution in Article 122, are tasked with the protection of the country and the maintenance of internal security. They are composed of and assisted in fulfilling their mandate by other structures such as the Popular Defence Force militia and the Border Intelligence.⁶⁹ The commander of the armed forces is the president of the country, who is assisted in his roles by the Minister of Defence. The Minister of Defence appoints a Commander of the Armed Forces and a Chief of Staff, along with five Deputy Chiefs of Staff. These figures collectively constitute the so-called Committee of Chiefs of Staff. Initially, Military Intelligence was also part of the Armed Forces, but subsequently gained independence, thereby acquiring the authority to arrest, detain, and interrogate civilians.⁷⁰

In the event that the Sudanese Armed Forces deems it necessary, they may request assistance from civilians through the Popular Defence Forces (PDF). The legal basis for the PDF is the Popular Defence Forces Act of 1989.⁷¹ This act defines the PDF as paramilitary forces composed of Sudanese citizens with specific characteristics. The PDF is responsible for assisting the state army in maintaining internal security within the country. With regard to the recruitment of citizens into these forces, it appears that local governors were tasked with recruiting potential candidates through tribal leaders.⁷²

Within the Armed Forces, there is also an operational unit called Borders Intelligence, which is responsible for gathering information through members who are recruited on a voluntary basis and who must, however, possess certain required qualifications. With regard to Darfur, the Commission of Inquiry has indicated that approximately 3,000 soldiers belonging to this unit were recruited and deployed in the region.⁷³

Finally, the National Security and Intelligence Service is responsible for monitoring the security of the country, both internally and externally. It is tasked with keeping track of possible relevant events and,

⁶⁹ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

if necessary, recommending certain protective measures to be taken.⁷⁴ This organization is presided over by the President, with the assistance of the Director General, who is responsible for the implementation of its functions and the success of the organization itself. It is important to note that, following an amendment to its articles of incorporation in 2001, the organization possesses extremely broad powers, including the ability to detain citizens without charge for up to nine months. Several acts of torture and inhumane and degrading conditions of detention have been reported as having been committed by this entity.⁷⁵

1.4.2 Government-backed forces: The Janjaweed

The etymology of the term Janjaweed appears to originate from the Arabic language, from "jinnī" (spirit) and "jawad" (horse), meaning "demon on horseback". These latter constitute a militia of Arab origin particularly active in the Darfur region.⁷⁶ As for their origin, it seems that the militia originated from two different Arab nomadic groups involved both during the civil war in Chad and in Sudan itself to avoid attacks coming from Chad.⁷⁷ In the following years, the relationship between the two groups tightened increasingly until they formed a union, although not formally. Despite the numerous raids carried out by them between Sudan and Chad, the central government of Sudan maintained a constant (albeit implicit) supportive attitude towards them, even arming the militias in order to integrate them into the army and never interrupting their brigandage actions.⁷⁸ In terms of the group's numerical makeup, while some sources suggest there are 20,000 militiamen, this figure does not accurately reflect the actual size of the militia. Instead, it appears to consist of a variable number of members who are recruited as needed.⁷⁹ Diverse testimonies given by Sudanese civilians, victims of attacks, supported the assimilation of the Janjaweed into the army, claiming that the two were the same, as the militias possessed central government weapons and were reportedly trained by the army with the benefit of weapons, food, and money.⁸⁰

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ "Janjaweed", Michel Ray, accessed 2024, <https://www.britannica.com/topic/Janjaweed>.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Jérôme Tubiana, *Le Darfour, un conflit identitaire?*, Afrique contemporaine (Paris: Karthala, 2005), 165-206.

⁸⁰ Ibid.

With regard to the organizational structure of the Janjaweed, it appears that they did not belong to a single entity. According to the International Commission of Inquiry on Darfur to the United Nations Secretary-General, it is possible to distinguish between three distinct categories of Janjaweed according to their relationship with the central government. The first category comprises militias that are vaguely affiliated with the government but receive weapons and other supplies from it. These militias operate according to the control and tasks entrusted to them by the central government, yet they appear to maintain a certain degree of autonomy in their actions.⁸¹ The second group of militias analyzed are those employed in paramilitary organizations or parallel to regular organizations. Some of these appear to be controlled by high-level tribal leaders or regular army chiefs, but unlike the first group, they do not have any legal basis allowing their existence. Finally, a third category of militias appears to be those that also contain members of the PDF and Border Intelligence who fight alongside the regular army and possess a legal basis in Sudanese law.⁸²

The Commission of Inquiry also investigated the relationship between the state and the militias of the three dissimilar categories. Several characteristics would have demonstrated their closeness: for instance, the clear link between them and the PDF, a state institution with a legal basis. Furthermore, all three groups listed above received weapons and various ammunition from the central government.⁸³ Many victims of attacks by them then referred to those who had carried out the attacks as the Janjaweed. Nevertheless, it is evident that the central government has consistently denied any association between itself and the militias. For instance, on 28 January 2004, the Minister of Defence asserted at a press conference that it was of paramount importance to distinguish between the Janjaweed and the Popular Defence Forces. If the latter were merely army helpers and volunteers, the former were instead armed bandits with whom the government had no relationship whatsoever.⁸⁴

1.4.3 The rebels: Sudan Liberation Movement and Justice and Equality Movement

The ancestor of the Sudan Liberation Army was the Darfur Liberation Front, created in the late 1980s to form an opposition group to the government-backed militias that would later be named Popular

⁸¹ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

Defence Forces. The Darfur Liberation Front changed its name in 2003 and became the Sudan Liberation Army (SLA), with a political branch called the Sudan Liberation Movement (SLM). The name changes also brought with it several ideological changes: initially, the movement called for the secession of Darfur and the establishment of Darfur as an independent state, while later it simply took the form of a movement calling for the creation of a more democratic and equitable Sudan.⁸⁵ In a political statement, dating back to 2003, one can clearly see the lack of secessionist competence, as it is said that the unity of Sudan is of paramount importance even though it must be based on justice and equality of all Sudanese peoples.⁸⁶

In essence, therefore, the possibility of self-determination seems quite obvious in the event that the central government fails to organize unity according to the principles listed above, to which must be added the political cultural and moral pluralism and material prosperity that must be guaranteed to all.⁸⁷ Among other things, the Sudan Liberation Army movement emphasizes the principle of the division between religion and state, saying that the state belongs to the Sudanese population without distinction of religious or spiritual values because religion and state belong to two different spheres of a citizen's life and should therefore always be considered as separate: the state belongs to everyone, but religion belongs only to the individual.⁸⁸ Therefore, the relationship between the two spheres cannot and must not become a reason for conflict.⁸⁹

The Justice and Equality Movement (JEM) represents the second largest opposition movement to the central government in the Darfur conflict. It has distinct goals and characteristics from the Sudan Liberation Army (SLA).⁹⁰ The political manifesto offers insight into the movement's objectives and values. These include a change of power that guarantees the unity and stability of the country and transparency in its administration. The manifesto also outlines the movement's stance on the division of power and wealth at the national and regional levels. This includes a commitment to creating criteria

⁸⁵ M.A. Mohamed Salih, *Understanding the Conflict in Darfur*, (Centre of African Studies: University of Copenhagen, 2005).

⁸⁶ Sudan Liberation Army, *Political Declaration* (Sudan Liberation Army, 2003).

⁸⁷ M.A. Mohamed Salih, *Understanding the Conflict in Darfur*, (Centre of African Studies: University of Copenhagen, 2005).

⁸⁸ Sudan Liberation Army, *Political Declaration* (Sudan Liberation Army, 2003).

⁸⁹ Ibid.

⁹⁰ M.A. Mohamed Salih, *Understanding the Conflict in Darfur*, (Centre of African Studies: University of Copenhagen, 2005).

that consider the country's diversity. Furthermore, the manifesto sets out the movement's vision for a federal type of governmental system. This system would allow the regions to have autonomy while still within a single united country. The objective is to ensure that each region has autonomy within a unified country, while still maintaining a single, unified government. To achieve this, it is essential to guarantee the participation of all regions in the administration of central power. This power must be based on a criterion regarding the population of each region. Furthermore, the reconstitution of the armed forces must be solely for the purpose of defending the country. This reconstitution must be based on a criterion of proportionality according to the population of the regions.⁹¹

Despite their joint actions, the two movements have consistently been regarded as distinct entities, exhibiting distinctive characteristics that can be essentially identified in two key areas. Firstly, as previously stated, while the Sudan Liberation Army/Movement has explicitly articulated the necessity to maintain the separation of religious and political dimensions, the Justice and Equality Movement does not mention religion in any way and does not envisage its role in the new political organization hoped for Sudan; furthermore, the Justice and Equality Movement has a specific vision for the future of Sudan, advocating for a federal-type government. In contrast, the Sudan Liberation Army/Movement does not appear to share this desire for a federal structure.⁹²

1.5 The evolutionary path of conflict

The conflict began in 2002 when some of the sedentary peoples of Darfur began to rebel against the central government, claiming that they were being treated unfairly by the central government because they were mainly of African descent (the government was mainly made up of Arabs). In response, the African groups began to attack government structures, which led to the government using its armed forces to respond with various attacks, including aerial bombardments, in order to quell the revolt.⁹³ In 2003, the most significant event in the escalation of the rebellion occurred when the Sudanese Liberation Army and the Justice and Equality Movement raided the Al-Fashir airbase belonging to the central government. The rebels exploited the unpreparedness of the central government and the element of surprise, conducting a few battles and ultimately defeating the central army. In response,

⁹¹ Justice and Equality Movement, *Peace Proposal for Sudan in General and Darfur* (Justice and Equality Movement, 2005).

⁹² M.A. Mohamed Salih, *Understanding the Conflict in Darfur*, (Centre of African Studies: University of Copenhagen, 2005).

⁹³ Jérôme Tubiana, *Le Darfour, un conflit identitaire?*, Afrique contemporaine (Paris: Karthala, 2005), 165-206.

the latter deployed Arab militias (Janjaweed) to suppress the attacks.⁹⁴ It has been established that the central government armed these militias, and these militias subsequently carried out the ethnic cleansing of the Fur, Masalit and Zaghawa peoples. Despite this, Al-Bashir has continued to deny any relationship between the central government and the actions of these militias. The actions of these militias include not only the killing of men, but also the sexual violence committed against women and the abduction of children. Moreover, they extensively destroyed the infrastructure of the regions they occupied, polluted the waterways, and took possession of all they encountered along the way.⁹⁵

1.6 Humanitarian ramifications: internal displacement and refugee crisis

The conflict in Darfur represented a significant humanitarian catastrophe in a territory within which there were already numerous internally displaced persons and refugees. The crisis was exacerbated by the worsening weather conditions in the territory, which led many sections of the population to move in search of food and better living conditions.⁹⁶ According to statistics from the United Nations High Commissioner for Refugees, by the end of 2022, there were nearly 4 million internally displaced persons (IDPs) in Sudan in addition to the 800,000 Sudanese citizens who had taken refuge in neighboring states such as Chad, South Sudan, Egypt, and Ethiopia. The UNHCR anticipates that the situation will continue to deteriorate in the absence of sustainable solutions, potentially leading to an additional 1.8 million refugees and returnees in Sudan.⁹⁷ According to the most recent data, as of 15 April 2023, over 470,250 individuals have sought refuge in countries bordering Darfur. This brings the total number of people who have fled the territories in search of protection to nearly one million, with 40% of them seeking refuge in neighboring countries.⁹⁸ Of the countries that have received these refugees, Chad has received the largest number of people, with just over 400,000 Sudanese nationals taking refuge there. Subsequently, the countries that received the highest number of refugees were the Central African Republic, South Sudan, and Libya.⁹⁹

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ "Five Things to Know About the Crisis in Sudan", UNHCR, accessed 2024, <https://www.unhcr.org/news/stories/five-things-know-about-crisis-sudan>.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

According to the Convention relating to the Status of Refugees, also known as the Geneva Convention of 28 July 1951, a refugee is someone that must be outside of its own country, must lack protection and their inability or unwillingness to be protected must be based on well-founded persecution; the focus of the definition should be on the concept of persecution that could be based on one or more of the 5 grounds indicated in the Convention (race, religion, nationality, membership of a particular social group or political opinion).¹⁰⁰ These conditions are cumulative, meaning that in order to be recognized as a refugee a person should have every one of them. When the Convention was drafted and adopted it had both a temporal and geographical limitation: in the beginning you could only be recognized as a refugee if the events occurred in Europe before 1951; these limitations were removed in 1967 with the adoption of its Protocol.¹⁰¹ Even if you demonstrate to be a refugee according to Article 1A (2) of the Convention, there are some exclusion clauses in articles 1D, 1E and 1F. According to article 1D you are excluded from the status of refugee if you are already protected by other organs or committees: this is the case of Palestinian refugees that are already protected by UNRWA (United Nations Relief and Works Agency for Palestine Refugees in the Near East); Article 1E states that you are excluded from the refugee status when you have links with other countries that are supposed to act in order to guarantee your protection; finally, according to Article 1F you can be excluded from the status if you have committed particularly serious crimes as crimes against humanity, war crimes, crimes against peace, but also nonpolitical serious crimes or acts against the principles and purposes of the United Nations. In Article 1F, we can find the idea that if you are a persecutor then, there is no protection for you.¹⁰² Finally, the Convention also entails a series of cessation clauses contained in the provisions of Article 1C: the person has gone back to voluntarily avail himself of the protection of its country of nationality; the person has reacquired his nationality after the loss of it; the person has a new nationality and is, therefore, protected by that Country; the person has voluntarily resettled himself in the country he fled from; the person can avail himself again with the protection of his country because of the cease to exist of the circumstances according to which he was recognized as a refugee in the first place; if the person has no nationality but can go back to the country of habitual residence because of the change

¹⁰⁰ “Convention Relating to the Status of Refugees”, UNHCR, accessed 2024, <https://www.refworld.org/legal/agreements/unga/1951/en/39821>.

¹⁰¹ “The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol”, UNHCR, accessed 2024, <https://www.unhcr.org/sites/default/files/legacy-pdf/4ec262df9.pdf>.

¹⁰² Ibid.

in the circumstances that made him a refugee.¹⁰³ As of today, the Geneva Convention of 28 July 1951, seems to be outmoded and not capable anymore to include new cases of migration: notwithstanding, its inclusion mostly rely on its interpretation, that can be broader than how it was conceived.

With regard to internally displaced persons, prior to the resumption of the conflict in 2023, there were already almost 3 million of them and approximately 200,000 refugees in the different regions of Darfur.¹⁰⁴ In more recent times, the number of internally displaced persons (IDPs) has increased by almost two million. The areas that have been most severely affected are those in West Darfur (El Geneina), which were entirely destroyed by the conflict. However, the number of IDPs increased in each of the Darfur provinces. East Darfur, in particular, has sheltered more than 500,000 IDPs.¹⁰⁵ The conflict has also had a profoundly adverse impact on the number of casualties and the establishment of human rights violations, as well as the destruction of entire civilian centers, their looting, and recurrent fires affecting several public buildings.¹⁰⁶ For what concerns Internally Displaced Persons, the definition was given by the Guiding Principles on Internal Displacement of 1998, according to which they are persons that were forced to flee their usual residences or homes in order to protect themselves from armed conflicts, generalized violence, violations of human rights or disasters, both human-made and natural but that have not crossed an internationally recognized border.¹⁰⁷ Often IDPs find themselves being more vulnerable than refugees, suffering higher rates of mortality but also suffering high risk of physical violence, that can also be sexual, and in vulnerable conditions because of the depravation of food and health services. Another risk for the safety come from the fact that they can remain trapped in conflicts and the often end up being targeted by hostile forces.¹⁰⁸ The main differences between IDPs and Refugees are two: firstly, the fact that to be recognized as a refugee it is necessary to cross an internationally recognized border while even IDPs suffer the same persecutions and challenges they cannot be recognized such a status because of the lack of this necessary circumstance; secondly, IDPs are not granted a special status in international law so they do not enjoy

¹⁰³ “Convention Relating to the Status of Refugees”, UNHCR, accessed 2024, <https://www.refworld.org/legal/agreements/unga/1951/en/39821>.

¹⁰⁴ "Protection Brief Darfur Region, October 2023", UNHCR, accessed 2024, <https://reliefweb.int/report/sudan/protection-brief-darfur-region-october-2023>.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ “About Internally Displaced Persons”, OHCHR, accessed 2024, <https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/about-internally-displaced-persons>.

¹⁰⁸ Ibid.

any right specifically linked to their situation.¹⁰⁹ The definition of IDP has also been one of the main points of focus of the Kampala Convention of 2009, the first legal document ever to highlight the obligations that State have towards them.¹¹⁰

¹⁰⁹ Ibid.

¹¹⁰ “African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)”, African Union, accessed 2024, <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

Chapter 2

The peacekeeping mission led by the United Nations and the AU: UNAMID

2.1 Legal basis and functioning of the peacekeeping mission

Peacekeeping missions represent one of the mechanisms offered by the United Nations to countries in need of assistance in transitioning from a state of war to a more peaceful one. Peacekeeping missions are characterized by legitimacy, burden sharing, and the possibility of a deployment of troops from different parts of the world. In general, therefore, the objective of these missions is to provide support in order to build security and to bring more political assistance to help citizens achieve a peaceful restoration of order in the country.¹¹¹

UN peacekeeping missions are guided by certain principles such as consent of the parties, impartiality, and non-use of force except in self-defense and defense of the mission's mandate.¹¹² For what concerns the consent of the parties, peacekeeping mission can only start with the due consent of parties involved in the conflict, needed to grant UN the necessary freedom of action to achieve their tasks.¹¹³ Sometimes the problem is that even if the parties agree with the deployment of the troops the central government has no full control over local institutions that may constitute an obstacle to the freedom of action abovementioned. The same problem may happen in conflicts in which the presence of armed groups is detected.¹¹⁴ The second principle guiding peacekeeping missions is impartiality, that does not amount to neutrality nor inactivity. The mission should be impartial while carrying out its tasks but not neutral in their mandate. In a way peacekeeping mission should work a referee in a football match: it should maintain impartiality while also condemning parties if they interfere with violation to the

¹¹¹ "What Is Peacekeeping", United Nations Peacekeeping, accessed 2024, <https://peacekeeping.un.org/en/what-is-peacekeeping>.

¹¹² Ibid.

¹¹³ "Principles of Peacekeeping", United Nations Peacekeeping, accessed 2024, <https://peacekeeping.un.org/en/principles-of-peacekeeping>.

¹¹⁴ Ibid.

process of transition to peace or to international law and principles that do guide these missions.¹¹⁵ In closing, it is important to consider that the value of impartiality of the mission is the fact that its absence may provoke a future lack of consent by parties. Lastly, the third principle of peacekeeping missions is the non-use of force that can only be infringed if it is a case of self-defense or defense of their own mandate.¹¹⁶ In fact, there have been some cases where the Security Council has given some peacekeeping missions the authorization to use any means necessary to maintain order and protect civilians under imminent threat. This type of authorization that makes missions tougher should not lead to confusing them with the peace enforcement missions described in Chapter 7 of the United Nations Charter.¹¹⁷ As a matter of fact, peacekeeping missions should only use force as an in-extremis tool: it should be used precisely and proportionally, it should be appropriate and follow the principle according to which the minimum force should be used to achieve the effect desired.¹¹⁸

2.1.1 Chapter VII of the UN Charter

The UN charter entered into force the 24th of October 1945.¹¹⁹ In its preamble war is briefly mentioned: "we the peoples of the United Nations determined to save succeeding generations from the scourge of war..."¹²⁰. Within the document the emphasis is put not in war but more in the risk of it especially due to the threat of the use of force. Another distinction worth mentioning is the duality of the rules concerning the use of force: if on the one hand, there is a system concerning singular state actions, on the other hand, the system presented in chapter 7 of the UN Charter concerns collective security and foresees the Security Council as the major actor.¹²¹ The main provisions in Chapter 7 are constituted by the range of articles between 39 and 51. Not everyone of them has been really applied, like for example article 42 which provided the Security Council with the possibility to recur to the use of force. This provision and others are the living proof that not every possibility has been enforced yet

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ "United Nations Charter", United Nations, accessed 2024, <https://www.un.org/en/about-us/un-charter>.

¹²⁰ "United Nations Charter: Preamble", United Nations, accessed 2024, <https://www.un.org/en/about-us/un-charter/preamble>.

¹²¹ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2023).

and for this reason the actions, more than being strictly dependent to the provisions already existing, are based on the development given by practice.¹²²

2.1.2 Process to have a peace-keeping mission and the fundamental role of the SG

The Security Council fundamental role is to maintain peace and order at the international level and for this reason it also has the power to determine whether or not a specific situation should be conceived as a threat for peace.¹²³ The power granted to the SC in Chapter VII do not only concern cases in which there is an international conflict but also cases in which within the same State a civil conflict is constituting a risk or in the case of other internal situations, such as genocide. According to theory and to development of the practice, there are three main different kinds of actions that can be taken and that comprehend troops deployment in the territories of a State: armed intervention by the SC (never happened in practice), peace-keeping operations, and the authorization of the use of force by the SC.¹²⁴ Notwithstanding the impartial application of the provisions in Chapter VII a large number of peace-keeping operations were established and even though a large part of the doctrines believes that their legal basis is constituted by a spectrum between Chapter VI and VII, the SC only ever referred to Chapter VII when establishing one.¹²⁵ It can be argued that the legal basis of the missions is a customary rule to be included within Chapter VII of the Charter. It is evident that peacekeeping operations do not constitute peaceful measures falling under Chapter VI of the Charter, since they include the use of force, even though mostly in a defensive way. It is also evident that they cannot belong to the measures prescribed in the Charter by Chapter VII, since they differ from them in that they require the consent of local authorities.¹²⁶ Therefore, peacekeeping missions, the development of which was largely empirical rather than theoretical, represent a new concept in relation to the Charter, given the failure to fully implement numerous provisions under Chapter VII.

As previously outlined, the primary responsibility for initiating a peacekeeping mission lies with the UN Security Council. The process typically involves several stages, including consultations and

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Benedetto Conforti and Carlo Focarelli, *Le Nazioni Unite* (Milano: Wolters Kluwer, 2023).

¹²⁶ Ibid.

assessments in the field, the Council resolution and appointment of senior officials, the practical organization of the mission, and finally the deployment of the mission.¹²⁷ It is also important to note that a significant role is played by the Secretary-General, to whom the primary tasks are delegated by the Security Council. He is entrusted with the strategic direction of the mission and, following agreement with the Council, it is he who appoints the Special Representative and the Supreme Commander of the mission.¹²⁸ As a conflict develops, whether positively or negatively, the United Nations frequently convenes a series of consultations with the objective of determining the most effective approach to an international response. Such consultations are frequently attended by pertinent actors within the United Nations, member states (including those that may be contributing to the mission), the government that will potentially host the mission, regional organizations and other external partners.¹²⁹ The initial phase of consultations is followed by the technical field assessment phase, which is conducted by a team appointed by the Secretary-General and tasked with visiting the territory and ascertaining the conditions under which the operation will take place.¹³⁰ The assessment is to consider the general security of the circumstances as well as the political, military, humanitarian, and human rights conditions of the location. The Secretary-General is then required to produce a report, which will be presented to the Security Council. This report will contain various options for the establishment of the mission, as well as the financial implications it will have.¹³¹ Following an analysis of the report, the Security Council will decide on the authorization of such a mission. In the event of authorization, the mission will be granted through the adoption of a resolution. The resolution will set forth the specifics of the mission, including its scope and mandate. Subsequently, the resolution must be approved by the General Assembly with regard to the budget and resources.¹³² The subsequent phase will entail the appointment of personnel by the Secretary-General. Typically, he will appoint a Head of Mission, who is frequently a Special Representative, to oversee the mission in the field and convey pertinent information to the Under-Secretary-General for Peace Operations at the UN Headquarters. Additionally, the Force Commander and Police Commissioner, along with the senior

¹²⁷ Carlo Focarelli, *Diritto Internazionale* (Padova: CEDAM, 2023).

¹²⁸ Ibid.

¹²⁹ "Forming a new operation", United Nations Peacekeeping, accessed 2024, <https://peacekeeping.un.org/en/forming-new-operation>.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

civilian staff, will be designated.¹³³ The Department of Peace Operations and the Department of Operational Support will be responsible for staffing the civilian component of the operation. Meanwhile, the two departments and the Head of Mission are engaged in the planning and coordination of different aspects of the mission. This phase also entails the establishment of joint working groups, involving various departments that may be relevant, funds and programmes.¹³⁴ The final phase of the mission's establishment is initiated by the arrival of the mission's personnel, who are typically deployed to their respective posts in a gradual and orderly manner. This process is often facilitated by the establishment of a mission headquarters by one group, which serves as a central point of operations. The arrival of the remaining personnel is then coordinated with the relevant authorities and stakeholders in accordance with the resolution that authorized the mission.¹³⁵ The troops are composed of military personnel from Member States who wear their uniforms and are distinguished by wearing the blue helmet, which symbolizes their belonging to the United Nations. It is also pertinent to note that the Secretary-General will present regular progress reports on the mission to the Security Council, which will extend the mission's mandate until its conclusion.¹³⁶

2.1.3 Structure and tasks

Although peacekeeping missions have been present since the creation of the United Nations, their prevalence has increased exponentially since the end of Cold War. It is possible to classify these missions into four generations, that represent a temporal progression. However, it is important to note that all types of peacekeeping missions currently exist. Furthermore, it is essential to recall that the fundamental feature of peacekeeping is the delegation of the power to find and command forces.¹³⁷ The first generation of missions is best exemplified by UNEF I, which was established with the objective of resolving the Suez Crisis and was authorized in an extraordinary manner in 1956 by the General Assembly. The purpose of missions of this type is to monitor the cessation of hostilities between two parties during a conflict, ensuring that there is no resumption of fighting.¹³⁸ These missions are defined by several key characteristics. Primarily, the consent of the state in question must

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Benedetto Conforti and Carlo Focarelli, *Le Nazioni Unite* (Milano: Wolters Kluwer, 2023).

¹³⁸ Ibid.

be obtained. Additionally, the deployment of force is only permitted in a defensive manner against the troops. Furthermore, a neutral position must be maintained between all parties involved. Finally, troops for the mission must be procured through agreements with UN member states. The appointment of the mission director, who serves as Commander in Chief, is made by the Secretary General.¹³⁹ The second generation of peacekeeping operations emerged following the conclusion of the Cold War and expanded its scope to encompass a range of new competencies. These included the return of refugees to conflict zones, the provision of humanitarian assistance, the promotion of respect for human rights, the implementation of the rule of law, and support in the event of natural disasters.¹⁴⁰ The third generation of missions is characterized by the objective of peace enforcement, which often entails the imposition of peace through the use of military force. It is evident that these missions lack the defining features of the initial generation, such as neutrality and the consent of the local authority. Finally, a recent discussion has envisaged a fourth generation of missions, which indicated that they should be led by a UN standing army. However, this has not yet been created and its future creation is uncertain.¹⁴¹

The Peacebuilding Commission was established by the Security Council and the General Assembly in resolutions 1645 and 60/180 of 2005. Its purpose was to institutionalize peacekeeping activities. The commission is comprised of representatives from 31 countries, with each member serving a two-year term that may be renewed.¹⁴² Seven members are elected by the General Assembly, seven are selected by the Security Council (including permanent members), seven are elected by the Economic and Social Council, five are chosen from among the countries that contribute the most to the United Nations, and finally, five are selected from among the main contributors in terms of military and police personnel when it comes to UN missions. The commission's objective is to devise potential strategies that facilitate reconstruction, the restoration of order and peace, and the coordination of forces in accordance with the circumstances.¹⁴³ However, this can only be achieved if there has been a peace agreement and a minimum level of security in the country in question. Furthermore, it can be convened for the purpose of formulating opinions by request of the Security Council, the General Assembly, the

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

Secretary-General, and ECOSOC.¹⁴⁴ However, this must occur under two conditions: firstly, there is the need for the authorization of the state concerned and secondly, the Security Council needs to not have started yet to deal with it under Article 12 of the UN Charter. In a final instance, the request for an opinion can originate from a member state that has reason to believe that it may soon become embroiled in conflict, provided that the Security Council has not yet commenced proceedings.¹⁴⁵ Typically, the commission convenes in country-specific meetings, during which representatives from the country in question, as well as geographically neighboring and affected states, the state contributing the most to reconstruction, UN representatives on the ground, and other regional or international institutions potentially involved in the matter, participate. Finally, each year, the commission publishes a report on the preceding year's activities, which is then examined in the General Assembly.¹⁴⁶

2.2 UNAMID

The United Nations-African Union Hybrid Operation in Darfur (UNAMID) was established in 2007 with the adoption of Security Council Resolution 1769. It was formally concluded on 31 December 2020 with the adoption of Security Council Resolution 2559. The distinctive feature of the mission is its hybrid configuration.¹⁴⁷ This was necessitated by the political circumstances in the country and the requirement to adhere to the principle that peacekeeping missions must be agreed with the central government. UNAMID was not only the first hybrid peacekeeping operation ever authorized, but was also the second most expensive mission ever, after MONUSCO.¹⁴⁸

2.2.1 2007: Resolution 1769 by the SC authorizing the creation of the peacekeeping mission

Not long after its establishment in 2002, the African Union decided to send a mission to Darfur as a response to the uninterrupted violence in the region; the mission was supported by the Security Council and was meant to supervise the establishment of a cease-fire agreement between the rebels and the

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ "UNAMID Fact Sheet", United Nations Peacekeeping, accessed 2024, <https://peacekeeping.un.org/en/mission/unamid>.

¹⁴⁸ Ibid.

central government.¹⁴⁹ The mission evolved and became AMIS (African Union Mission in Sudan) but remained inadequate in bringing security and protection against the violations taking place in the region mostly because of smallness compared to the vastness of the territories affected by hostilities.¹⁵⁰ After the creation of the International Commission of Inquiry on Darfur, under the will of Secretary General Kofi Annan in March 2005, it became clearer that the central government was not acting according to law and was instead committing heinous violations on civilians. These findings led to a pressure on the African Union in order to make it accept the intensification of the action by AMIS or the creation of a new force by the United Nations.¹⁵¹ The pressure for a change became even greater in 2006 and the president of the Peace and Security Council, Tanzania, admitted that the organ was thinking of the possibility of replacing AMIS with a UN mission even though this created the opposition of the Sudanese representative, firm believer of preferring the internal solution rather than the international one.¹⁵² Even though, the concern for the situation raised both for the international community and for the African Union, the Sudanese central government was still linked to idea of not wanting a UN guided mission, claiming that one of them would have had imperial and colonial interests in the territories.¹⁵³ The lack of ability in managing the situation was particularly highlighted by the inadequacy in helping the parties in complying to the Abuja Agreement¹⁵⁴, signed the fifth of May 2006 between the central government and a faction of the SLA and rejected by the JEM and another faction of the SLA.¹⁵⁵ Between the goals of the agreement there was the idea to unarm Janjaweed militias (the correct implementation of this point needed to be checked by AU), giving the population the freedom to decide who should have had represented them and whether the region should have had been guided by a central, and only, government or not and, lastly, the commitment by the

¹⁴⁹ "The African Union in Darfur: An African Solution to a Global Problem?", Adam Keith, accessed 2024, <https://jpia.princeton.edu/sites/g/files/toruqf1661/files/2007-7.pdf>.

¹⁵⁰ Ibid.

¹⁵¹ "Sudan: 'We Are Not Moving Fast Enough' to Deal with Appalling Situation in Darfur, says Secretary-General, after meeting with Security Council", UN Secretary General, accessed 2024, <https://reliefweb.int/report/sudan/sudan-we-are-not-moving-fast-enough-deal-appalling-situation-darfur-says-secretary>.

¹⁵² David Mickler, *UNAMID: a hybrid solution to a human security problem in Darfur?*, Conflict Security and Development 13(5), November 2013.

¹⁵³ Ibid.

¹⁵⁴ "The African Union in Darfur: An African Solution to a Global Problem?", Adam Keith, accessed 2024, <https://jpia.princeton.edu/sites/g/files/toruqf1661/files/2007-7.pdf>.

¹⁵⁵ "Sudan, Main Rebel Group Sign Peace Deal", The Washington Post, accessed 2024.

international community to financially support Darfur reconstruction and the granting of humanitarian corridors and buffer zones.¹⁵⁶ The failure of AMIS was also due to the incorrect hope according to which, the same government who was persecuting civilians could have embodied the guardian of their rights by complying to a cease-fire agreement.¹⁵⁷ Everything that occurred led to the authorization through Resolution 1706 by SC of an enlargement of the UNMIS (already operating in Sudan) up to Darfur region, with 20.000 troops. The authorization was based on Chapter VII of the UN Charter and the tasks to perform were guaranteeing the compliance to the Peace Agreement, guaranteeing freedom of movement and finally protect civilians from what was happening.¹⁵⁸ Even though the agreement by the African Union was not easy coming at some point they realized the clear need for a more strong mission in order to protect civilians; still, the agreement by the central government of Khartoum was not there and a series of negotiations meeting started in order to make a change.¹⁵⁹ Bashir explained what in his view a possible UN mission would have looked like: only a financial, logistical and technical support and the preserving of the Sudanese authority; for this reason the Security Council Resolution 1706 was never activated as planned.¹⁶⁰ A High Level Consultation on the Situation in Darfur was held in Addis Ababa in November 2006, chaired both by the United Nations and the African Union; the decision was taken that a joint project between the two entities should have guided the future of Darfur. The proposed initiative was structured in three distinct phases, namely, light-support, then heavy-support, and finally, a "hybrid" AU-UN peace operation in Darfur.¹⁶¹ The appointment of the military and political leadership of the mission was subject to consultations with the central government, while the United Nations assumed the role of guarantor with regard to the mission's logistical and financial sustainability.¹⁶² Furthermore, the Peace and Security Council, the organ of the African Union intitled to enforce decisions, resolved that the Special Representative would

¹⁵⁶ "Darfur Peace Agreement", United Nations, accessed 2024, <https://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf>.

¹⁵⁷ David Mickler, *UNAMID: a hybrid solution to a human security problem in Darfur?*, Conflict Security and Development 13(5), November 2013.

¹⁵⁸ "Resolution 1706 (Sudan) S/RES/1706", United Nations Security Council, accessed 2024, <https://www.globalr2p.org/resources/resolution-1706-sudan-s-res-1706/>.

¹⁵⁹ David Mickler, *UNAMID: a hybrid solution to a human security problem in Darfur?*, Conflict Security and Development 13(5), November 2013.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

be selected by the UN and AU collectively, and that the Force Commander should be an African national, appointed by the African Union with the advisement of the Secretary General.¹⁶³ Despite the willingness to implement the mission gradually, the gravity of the situation necessitated its commencement in June 2007. Rodolphe Adada from the Republic of Congo was appointed Joint Special Representative for Darfur, while Gen. Martin Luther Agwai of Nigeria assumed the role of Force Commander. With regard to the necessity for both the Peace and Security Council and the United Nations Security Council to approve the mission (highlighting the hybrid nature of the project), the former authorized the operation on 22 June, additionally requesting that the states of the Union provide troops and personnel for the operation;¹⁶⁴ the second, adopted Resolution 1769, on 31 July of the same year, authorizing the mission for an initial 12-month period commencing on 31 December 2007.¹⁶⁵

2.2.2 The mandate and the structure of the mission

Resolution 1769, adopted unanimously by the members of the Security Council, reaffirms the events that have occurred in Sudan, with particular reference to Darfur, and sets out the conditions necessary for the transition to the co-led UNAMID mission. The process spanned several months of negotiations in response to objections raised by Sudan and China on numerous occasions. These objections included the removal of any threat of sanctions and the open condemnation of the central government for its failure to guarantee the entry of humanitarian workers to areas of high distress.¹⁶⁶

With regard to the specific mandate of the troops that would be deployed to the territories, this is not explicitly stated in the resolution. Instead, it is referenced in paragraphs 54 and 55 of the report of the Secretary-General and Chairperson of the African Union Commission from 5 June 2007.¹⁶⁷ The report begins by outlining the central objective of the operation, which is to protect civilians, facilitate the entry of humanitarian aid, and enable internally displaced persons and refugees to return to their homes. To achieve these goals, the report recommends contributing to the enforcement of the Darfur

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ "Resolution 1769", United Nations Security Council, accessed 2024, <http://unscr.com/en/resolutions/1769>.

¹⁶⁶ "Sudan: UN Resolution for Darfur - an Important but Insufficient First Step Towards Protecting Civilians - Sudan", Refugees International, accessed 2024, <https://reliefweb.int/report/sudan/sudan-un-resolution-darfur-important-insufficient-first-step-towards-protecting>.

¹⁶⁷ "Resolution 1769", United Nations Security Council, accessed 2024, <http://unscr.com/en/resolutions/1769>.

Peace Agreement and addressing the reconstruction of security in the region following the conflict.¹⁶⁸ Furthermore, the report delineates the various elements that contributed to the entirety of the mandate. These elements were extracted from the Darfur Peace Agreement, the AMIS mandate, the Secretary-General's report dated July 28, 2006 on Darfur, and finally, the communiqués of the Peace and Security Council and the UN Security Council.¹⁶⁹ Paragraph 55 gives a comprehensive description of the mission's objectives which, however, are well effectively summarized in paragraph 54: to contribute to the return to a secure situation so that humanitarian assistance sees its access to the territories facilitated; to contribute to the protection of civilians who are at risk of violence without prejudice to the responsibility of the central government; to monitor ceasefire agreements as well as the Darfur Peace Agreement; to assist the political process as well as the participation of the United Nations and the African Union; to help build the positive environment for economic reconstruction and development as well as the return of refugees and internally displaced persons; to contribute to the respect and protection of human and fundamental rights; to assist in the promotion of rule of law through consultation with Sudanese authorities; and to monitor and report on the security conditions of the territories bordering Chad and the Central African Republic.¹⁷⁰

If we consider another strong feature of Resolution 1769, there is a reference to Chapter VII of the UN Charter and thus to the use of force in circumstances that risk compromising global security: in fact, in paragraph 15, it says that "15. Acting under Chapter VII of the Charter of the United Nations: (a) decides that UNAMID is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to: (i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers, (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan".¹⁷¹ It should be emphasized that the somewhat vague nature of the resolution has led to a lack of success in its implementation, but it should not be forgotten

¹⁶⁸ "Sudan: UN Resolution for Darfur - an Important but Insufficient First Step Towards Protecting Civilians - Sudan", Refugees International, August 2, 2007, <https://reliefweb.int/report/sudan/sudan-un-resolution-darfur-important-insufficient-first-step-towards-protecting>.

¹⁶⁹ Ibid.

¹⁷⁰ "Letter Dated 5 June 2007 from the Secretary-General Addressed to the President of the Security Council", UN Digital Library System, accessed 2024, <https://digitallibrary.un.org/record/601024?ln=ar&v=pdf>.

¹⁷¹ "Resolution 1769", United Nations Security Council, accessed 2024, <http://unscr.com/en/resolutions/1769>.

that the decision-making process of the Security Council is typically characterized by political compromise in situations of multilateralism.¹⁷²

With regard to the structure of the mission, it was decided, in accordance with paragraph 2 of the same Security Council resolution, that the mission should include the forces of AMIS mission and the UN heavy and light support packages for the same mission. Thus, the mission should consist of 19,555 military personnel, including 360 military observers and liaison officers, and a civilian component of up to 3,772 police personnel and 19 formed police units of 140 personnel each.¹⁷³ The numbers have remained more or less at this level, with a few variations from one year to the next, but always stable. This was the case until around 2017, when the numbers began to fall in the face of the actual withdrawal of troops.¹⁷⁴ The mission, which was originally intended to only last 12 months, has since been extended and renewed several times, in line with the United Nations' practice of determining the duration of operations, until its complete closure in 2020.¹⁷⁵

2.2.3 Achievements of the mission and the end of its mandate

Despite the commitment of the Peace-keeping forces in order to keep the situation stable and carry out their mandate, their work has not always been linear. First of all, as noted, from the beginning the mission met the dissent of the central government in Khartoum, which not only delayed giving its consent to the deployment of troops, but also repeatedly hindered or prohibited their access to cities where violations against civilians were occurring.¹⁷⁶ In addition, the operation suffered a very high number of deaths among its military, becoming one of the most targeted operations ever.¹⁷⁷ Furthermore, the operation was not able to constitute a real help in terms of improvement to achieve objectives such as the implementation of the rule of law, the achievement of a successful peace process

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ "Resolution 2363 (2017)", United Nations Security Council, accessed 2024, <https://digitallibrary.un.org/record/1290876?ln=en&v=pdf>.

¹⁷⁵ "About UNAMID", UNAMID, accessed 2024, <https://unamid.unmissions.org/about-unamid-0>.

¹⁷⁶ "Exit of the African Union-United Nations Hybrid Operation in Darfur (UNAMID)", Manohar Parrikar: Institute for Defence Studies and Analyses, accessed 2024, https://www.idsa.in/africatrends/Exit-of-the-African-Union-United-Nations-Hybrid-Operation-10-1-2#footnote7_q7yx41.

¹⁷⁷ Ibid.

and a marked improvement in the well-being conditions of the civilian population.¹⁷⁸ Finally, the operation showed the fragility of the hybrid partnership: very often the two entities found themselves discussing again the hierarchy between them, as well as their respective competences and the legitimacy of their actions.¹⁷⁹ Despite what has just been shown, the operation has also achieved several successes. In fact, there has been a decrease in the number of armed clashes and access to areas hitherto denied has been made possible; the operation has been an important mediator between the Government of Sudan and armed groups; finally, support actions for Internally Displaced Persons have been strengthened and protection has been offered in particularly isolated and at-risk areas.¹⁸⁰

Some of the weaknesses mentioned were also at the basis of the end of the mission: in fact, this was largely due to the Central Government's desire to get rid of them. But the actual process of conclusion came following Trump administration's decision to cut the funds that the United States of America dedicated to peacekeeping at the United Nations.¹⁸¹ This contributed to the conclusion of the mission's mandate, also due to the historical evolutions of the country.

In fact, as we have already indicated above in 2008, the International Criminal Court requested an international arrest warrant for Al-Bashir for the violations he committed against some populations in Darfur.¹⁸² Despite this, his fame has not undergone major changes and in 2010 he was elected president of the country again, during the first multi-party elections held in 24 years, with a very high percentage of votes in favor received and, despite the accusation coming from the international community that the elections were held fraudulently. In addition, in January 2011 the citizens of the southern area of Sudan, as indicated in the Comprehensive Peace Agreement of 2005, voted for the secession of the territory, which officially took place in July 9, 2011. Despite this, it is important to mention that the secession was achieved with the risk of the opening of a new civil war, following the occupation of a territory in the South by the troops of the central army and the declaration of it belonging to the North.¹⁸³ In 2011, the Doha Document for Peace in Darfur was signed, also thanks to the support

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ "UNAMID Infographic", UNAMID, accessed 2024, https://unamid.unmissions.org/sites/default/files/unamid_infographic.pdf.

¹⁸¹ "US funding cuts to UN agencies would be costly for peace and security", The Guardian, accessed 2024, <https://www.theguardian.com/global-development/2017/jan/31/un-funding-cuts-us-trump-administration>.

¹⁸² "History of Sudan", Robert O. Collins, accessed 2024, <https://www.britannica.com/topic/history-of-sudan>.

¹⁸³ Ibid.

offered by UNAMID and AU; the document, signed between the central government and the Liberation and Justice Movement, was supposed to constitute the basis for a lasting peace process in the region. Despite this document, peace in the Darfur region has not been reached, and Al-Bashir, despite arrest warrants and attempts at rebellion by the population against his rule, ran again in the 2015 presidential elections (despite promising that this would not happen) and was, once again, elected president. After the 2015 elections, there were accusations of lack of regularity in the circumstances in which they took place from members of the opposition and from the international community.¹⁸⁴ Al-Bashir's excessive power began to falter in 2018 when, due to the country's economic difficulties, when citizens began to rebel, to the point to set fire to the headquarters of the National Congress Party. Following these rebellions, Al-Bashir declared a state of emergency in February 2019, following which he dissolved the central government and appointed a new prime minister; but the rebellions did not stop and on April 11, 2019, Bashir was ousted by a military coup and arrested.¹⁸⁵ The ruling military dissolved the government, suspended the constitution and expressed its intention to create a military council to lead a transitional government for the next two years, following which elections would be held. Eventually, in August 2019, the Constitutional Declaration was born and was the Sovereign Council, a civil and military body at the same time, that was entitled to lead the transition.¹⁸⁶

2019 was also the year in which the negotiations of the Juba Peace Agreement began; the document was then signed on October 3, 2020. The Agreement was aimed at resolving all conflicts in Sudan and not only the one in Darfur and was also signed by the Sudan Liberation Movement, Justice and Equality Movement and armed groups.¹⁸⁷ The agreement consisted of eight protocols that dealt with regulating power sharing and the renewal of institutional governance in the broader framework of a federal-type government. In addition, it provided that fighters from certain armed groups would be included in the country's army and that representatives of the groups would also have representation in the Transitional Legislative Council. As ambitious as the project was, however, it did not include the participation and consensus of all the armed groups that had been involved in the conflict.¹⁸⁸ This semblance of transition

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ "Key actors in the Juba peace agreement: Roles, impacts, and lessons", Rift Valley Institute, accessed 2024, <https://reliefweb.int/report/sudan/key-actors-juba-peace-agreement-roles-impacts-and-lessons>.

¹⁸⁸ "Sudan: appuntamento storico con la pace", ISPI, accessed 2024, <https://www.ispionline.it/it/pubblicazione/sudan-appuntamento-storico-con-la-pace-27265>.

to a peaceful situation led the Security Council to the adoption, on 22 December 2020, resolution 2559, declaring the end of UNAMID's mandate on 31 December of the same year. The mission was given a period of 6 months to completely withdraw from the territories and hand over the administration of the territories to the central government in Khartoum, while the United Nations would continue to support its actions.¹⁸⁹

2.3 UNAMID as an example of R2P? The opening to international community engagement

As will be demonstrated below, the documents that theorized the Responsibility to Protect assert that it is an existing duty incumbent on States. This entails the obligation to prevent crimes such as genocide, war crimes, ethnic cleansing, and crimes against humanity from being committed against the state's population. In the event that the state is unable or unwilling to fulfil this responsibility, the international community may intervene with the aim of protecting civilians, who should never be subjected to such occurrences, notably within their own territory.¹⁹⁰

It is easy to define the UNAMID mission as an instrument of R2P: the central government was indeed unable and unwilling to protect its citizens from harm; on the contrary, it was the central government in Khartoum that, by supporting militias, was harming them, and committing serious human rights violations. International intervention was therefore necessary. Peacekeeping operations can be recognized as one of the tools of R2P also because the principle should be understood as an agenda and not as a single action towards the violations.¹⁹¹ This makes the case of Darfur even more suitable for the idea of R2P: in fact, according to the theory, it is meant to be a process and it is meant to include, ideally, the referral of the case by the Security Council to the International Criminal Court, in order for it to rule on it, if necessary.¹⁹² It is additionally worthy of note that the Constitutive Act of the African Union enshrined a principle similar to the one of R2P. In the event of circumstances such as war crimes, genocide and crimes against humanity, the Union was accorded the right to intervene in order to implement the Assembly's decisions.¹⁹³ It is notable that the mission was originally

¹⁸⁹ "UNAMID Ends its Mandate on 31 December 2020", United Nations Peacekeeping, accessed 2024, <https://peacekeeping.un.org/en/unamid-ends-its-mandate-31-december-2020>.

¹⁹⁰ "Responsibility to protect", United Nations Office on Genocide Prevention and the Responsibility to Protect, accessed 2024, <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>.

¹⁹¹ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019), 460-62.

¹⁹² Ibid.

¹⁹³ "Constitutive Act of the African Union", African Union, accessed 2024, https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

conceived as an exclusively African undertaking, yet was subsequently led jointly by the United Nations, while maintaining its African elements. This phenomenon is surely linked to the existing legal framework of the region, which incorporates the principle.

2.3.1 The origins of Responsibility to Protect

The principle of Responsibility to Protect is universally recognized today as a soft law principle. According to this principle, states have a form of responsibility towards their own citizens and must therefore protect them in the event of genocide and other such crimes and atrocities.¹⁹⁴ In cases where states are unable or unwilling to do so, the international community can step in on their behalf, through actions of various kinds: diplomatic, humanitarian, and if necessary, collective actions to safeguard them.¹⁹⁵ The development of such principle followed the creation of the United Nations and, especially, of peacekeeping operations. Following the two World Wars, the international community was more sensible than ever to the issue of maintaining international security and avoiding new conflicts; for this specific reason, the United Nations were born.¹⁹⁶ The United Nations Charter was signed in San Francisco June the 16 in 1945 and entered into force in the month of October of the same year following the ratification of Security Council's permanent members and many other States among those who signed it.¹⁹⁷ As is known, both the conception of the Organization and its Charter were based on the principle of state sovereignty, however they foresaw the creation of peacekeeping forces, meant to maintain peace at the international level through the enforcement of several measures such as cease-fire agreements and supervision over the constitutionality of elections.¹⁹⁸ In July 1960, the largest peace-keeping operation started in the newborn Democratic Republic of Congo to free its territories from Belgian troops not willing to acknowledge the Country's independence; the operation was deployed among the criticism coming from some Countries and especially from the Soviet Union that feared that such actions may constitute a new model by the international community to intrude in

¹⁹⁴ "International human rights: prescription and enforcement: Human Rights in the United Nations", Burns H. Weston, accessed 2024, <https://www.britannica.com/topic/human-rights/International-human-rights-prescription-and-enforcement>.

¹⁹⁵ Ibid.

¹⁹⁶ "The Rise and Fall of the Responsibility to Protect", Council on Foreign Relations, accessed 2024, <https://education.cfr.org/learn/timeline/rise-and-fall-responsibility-protect>.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

a State's internal affairs.¹⁹⁹ Indeed, the true affirmation of the principle of Responsibility to Protect emerged in the aftermath of 1991, the year of the dissolution of the Soviet Union. Within the subsequent decade, the United States found themselves in a unique position, being the only remaining superpower and having the opportunity to develop new principles.²⁰⁰

2.3.1.1 Kofi Annan's will

The concept of the Responsibility to Protect was greatly influenced by the seventh Secretary-General of the UN, Kofi Annan. In the aftermath of the genocide in Rwanda in 1994, during which he served as Head of UN peacekeeping, Kofi Annan was increasingly vocal about the need for the UN to adapt its approach to prevent such atrocities from occurring in the future. This was particularly evident in the context of the Srebrenica massacre in 1995.²⁰¹ In his approach to the matter, Annan espoused the notion that the UN Charter safeguarded the sovereignty of peoples. This entailed not only the capacity for force but equally the accountability of states to their citizens. He also delineated how even in circumstances of an internal conflict, the parties were obliged to adhere to the fundamental principles of human conduct.²⁰² During his tenure as Secretary-General, he repeatedly inquired as to which entity was vested with the authority to authorize or disallow the use of force. He asserted that this responsibility rested exclusively with the Security Council and further underscored that, in certain instances, the deployment of force could be justified by the pursuit of peace.²⁰³ The discourse on sovereignty became increasingly significant and was placed at the core of the debate following the events in East Timor. In fact, after years of Indonesian annexation of the territory, in 1999 the population was permitted to vote in a referendum on the question of whether the territories should be granted special autonomy or independence.²⁰⁴ Following the announcement of the referendum results, which indicated a clear preference for independence, militias supported by the Indonesian army destroyed numerous homes and killed hundreds of civilians while many more were forced to flee the

¹⁹⁹ Ibid.

²⁰⁰ Murray, Robert W. and Aidan Hehir, *Intervention in the Emerging Multipolar System: Why R2P Will Miss the Unipolar Moment*, *Journal of Intervention and Statebuilding* 6 (4), 2012, 387–406.

²⁰¹ Abiodun Williams, *The Responsibility to Protect: "The most precious achievement"*, (Oxford: Oxford University Press, 2024), 97-117.

²⁰² Ibid.

²⁰³ Kofi Annan, *We the Peoples: A UN for the 21st Century* (London: Routledge, 2014).

²⁰⁴ Abiodun Williams, *The Responsibility to Protect: "The most precious achievement"*, (Oxford: Oxford University Press, 2024), 97-117.

territories.²⁰⁵ As the situation in the territories deteriorated, Annan assumed a prominent role in the public and personal diplomacy and negotiation efforts aimed at persuading the Indonesian government to accept the deployment of international troops in the territories. He made a concerted effort to convince them of this course of action, emphasizing the potential implications of inaction. Otherwise, the government would also bear responsibility for what appeared to be crimes against humanity.²⁰⁶ On 12 September 1999, Habibie requested that Annan authorize the UN force to act with minimal delay. This request was subsequently endorsed by the Security Council on 15 September of the same year, resulting in the approval of a multinational mission spearheaded by Australia and operationalized under Chapter VII of the Charter.²⁰⁷ In his opening remarks at the General Assembly that year, Annan underscored the limitations of state sovereignty and identified the primary challenge facing the UN system as the prevention of widespread and systematic human rights violations. These assertions were swiftly met with various criticisms and disagreements, especially from developing countries.²⁰⁸ Such reactions were perceived as a threat and as a potential risk that humanitarian interventions would be used as an instrument of imperialist-style interventionism. The Secretary-General responded to criticism by underscoring the legitimacy of such concerns, yet at the same time requesting that states identify the optimal course of action in the event of similar situations. He posited that if humanitarian intervention was untenable, it would be incumbent upon the Security Council to intervene with a moral imperative.²⁰⁹

2.3.1.2 2001 ICIS Report

Following the debate launched on the international scene by Annan, the International Commission on Intervention and State Sovereignty was set up under the announcement of the Canadian Prime Minister to investigate the spectrum of issues concerning humanitarian intervention. This commission consisted of several members representing the heterogeneity of the international community: a major step forward was the recognition by the African Union countries of the limits of state sovereignty.²¹⁰ This

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Kofi Annan, *We the Peoples: A UN for the 21st Century* (London: Routledge, 2014).

²¹⁰ Abiodun Williams, *The Responsibility to Protect: "The most precious achievement"* (Oxford: Oxford University Press, 2024), 97-117.

is evidenced by the fact that the founding document of the African Union, adopted in 2000, explicitly recognized the Union's power to intervene in situations where serious violations of international law, including war crimes, genocide and crimes against humanity, are taking place in a state.²¹¹ The report produced by ICISS and released in December 2001 was entitled precisely 'The Responsibility to Protect' and was publicly endorsed by Annan. The document's significance was immediately apparent in its title, which posited that sovereignty encompasses not only powers but also responsibilities. These include the obligation to protect citizens from war and violence. Moreover, it asserted that there is a responsibility to humanitarian intervention, rather than merely a right.²¹² The report also demonstrates that sovereignty is not the primary obstacle to humanitarian intervention; rather, it is a matter of states' political will. Furthermore, the investigation examines the potential for mobilizing states. The report enumerates a number of obligations incumbent upon states. These include the responsibility to avoid and prevent conflicts and man-made crises, as well as the responsibility to react to imminent situations from the perspective of humanitarian protection and the responsibility to rebuild societies following interventions.²¹³ It is evident that the report was unequivocal in its endorsement of the proposition put forth by Annan, namely that the United Nations should transition from a culture of reaction to one of prevention. However, it is also clear that this idea was not universally embraced by the international community, largely due to the prevailing view that the involvement of an external actor in a conflict can only exacerbate the situation.²¹⁴ Ultimately, the report advised the Secretary-General to initiate a dialogue with the President of the Security Council and the President of the General Assembly, with the objective of determining the optimal means of implementing the recommendations outlined in the text. The process yielded few tangible outcomes, partly due to the obstruction of a procedural motion to the General Assembly by Cuba and a number of other states.²¹⁵

2.3.1.3 The 2005 World Summit Outcome Document

In response to the US invasion of Iraq in 2003, Annan established the High-level Panel on Threats, Challenges and Change, which once again placed R2P at the center of the debate. Annan requested

²¹¹ "Constitutive Act of the African Union", African Union, accessed 2024, https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

²¹² Ibid.

²¹³ Abiodun Williams, *The Responsibility to Protect: "The most precious achievement"* (Oxford: Oxford University Press, 2024), 97-117.

²¹⁴ Ibid.

²¹⁵ Ibid.

that Gareth Evans, co-chair of the ICISS, be included on the panel to advocate for the principle, particularly to persuade those states that were initially reluctant.²¹⁶ In December 2004, the Panel released the report "A More Secure World: Our Shared Responsibility" which advocates the principle of R2P as an emerging international norm. This norm would permit the Security Council to authorize military intervention as a last resort in response to genocide, mass atrocities, ethnic cleansing, or gross violations of international humanitarian law if a state's government proves unable or unwilling to stop these occurrences.²¹⁷ The situation did not undergo a significant transformation until the 2005 World Summit, which was held in New York from 14 to 16 September. At this summit, a considerable number of heads of state and government acknowledged the existence of the R2P principle, which was incorporated into the outcome document in paragraphs 138 and 139.²¹⁸ This was primarily due to the efforts of Kofi Annan, who persistently advocated for the principle, particularly among African countries, and in light of the existence of a comparable principle in the founding charter of the African Union.²¹⁹ Even in the present day, the principle remains the subject of considerable debate, depending on the specific context and circumstances under discussion. However, it must be acknowledged that it offers a valuable framework for understanding how to respond to large-scale atrocities, particularly in light of historical events like those witnessed in Rwanda and Srebrenica.²²⁰

2.3.1.4 Responsibility to protect: the 3 constituting pillars

In 2009, the UN Secretary-General, at the time South Korean Ban Ki-moon, released a report entitled "Implementing the Responsibility to Protect". In this document, the Secretary-General theorized the Responsibility to Protect in more detail, based on paragraphs 138 and 139 of the 2005 World Summit

²¹⁶ Ibid.

²¹⁷ "A more secured world: Our shared responsibility - Report of the Secretary-General's High-level Panel on Threats, Challenges and Change", United Nations, accessed 2024, https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf.

²¹⁸ "2005 World Summit Outcome A/60/L.1", United Nations General Assembly, accessed 2024, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

²¹⁹ Abiodun Williams, *The Responsibility to Protect: "The most precious achievement"* (Oxford: Oxford University Press, 2024), 97-117.

²²⁰ Ibid.

Outcome. In particular, he developed the concept that the principle consists of three pillars.²²¹ The document emphasizes the importance of preventing certain circumstances and, in the event that this is not possible, responding to them quickly and appropriately. With regard to the three pillars, it is said that there is no hierarchy of importance between them nor an order of application. However, it is important to remember that the principle is based on all three pillars, which makes them all equally necessary. Additionally, the report presents policy recommendations for each pillar, which could be employed to optimally actualize the principle.²²²

The first pillar is that it is the state that has a responsibility to protect the population as a whole, regardless of whether the population in question consists exclusively of people with citizenship. The state must protect the population from genocide, war crimes, ethnic cleansing, crimes against humanity, and finally their instigation (highlighting the necessity of prevention). The principle of the responsibility of states towards their population is the foundational pillar of the responsibility to protect. This responsibility is derived from both the nature of state sovereignty and the pre-existing legal obligations of the state.²²³ The second pillar is the one according to which, the international community is eager to assist the State in meeting its obligations of protection. It highlights the fundamental importance of collaboration both through regional and subregional arrangements as well as collaboration between the private and the public sector to effectively and successfully improve the responsibility to protect.²²⁴ The third pillar concerns the responsibility of States to act and respond in a collective way and in manner that could be crucial when the State is not able to guarantee the protection. According to the report, the timely response of whom the third pillar refers to could be represented by the actions taken under Chapter VI, Chapter VII and Chapter VIII of the UN Charter.²²⁵

2.4 A failure in maintaining peace?

In October 2021, Abdel Fatah al Burhan was the architect of a coup d'état that overthrew the transitional government towards democracy. This coup was militarily supported by the paramilitary group Rapid Support Forces: the group, led by Hemedti, is largely composed of military personnel

²²¹ "Implementing the responsibility to protect - Report of the Secretary General", United Nations, accessed 2024, <https://documents.un.org/doc/undoc/gen/n09/206/10/pdf/n0920610.pdf>.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

operating in the past among the Janjaweed.²²⁶ The coup d'état led to numerous particularly violent and bloody rebellions, which caused a huge number of deaths. In 2022, a hypothetical new transition plan was discussed, however, it never came into being due to disagreements between Abdel Fatah al Burhan and Hemedti; the conflict between the two led, on April 15, 2023, to the start of an armed conflict for power between the army and the Rapid Support Forces.²²⁷ Although most of the clashes take place in the capital Khartoum, several regional conflicts remain open, including the one in Darfur (where violence continues to have an ethnic origin), in the Blue Nile region and in the Al-Fashaga region.²²⁸ The reopening of the conflict makes Sudan a region where the suffering of the population is permanent. The humanitarian consequences derived from the developments of recent years only exacerbate the already very serious living conditions of the population: water and electricity are interrupted, infrastructures have been damaged and, for this reason, an immense number of citizens are forced to flee to neighboring countries in order to seek refuge.²²⁹ The international community, on the other hand, does not seem to be able to constitute a real mediator, due to the deep internal divisions and the scarce economic resources in possession.²³⁰

²²⁶ "Sudan", *Atlante delle Guerre e dei Conflitti del Mondo*, accessed 2024, <https://www.atlanteguerre.it/conflict/sudan/>.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

Chapter 3

The accusation of Genocide, Crimes Against Humanity, and War Crimes: the approach of International Justice

In 2008, when the conflict was still ongoing and civilians were still being subjected to severe violence, the first Prosecutor of the International Criminal Court, at the time Luis Moreno Ocampo, drew the Court's attention to the atrocities being perpetrated in Darfur. He requested the Court to issue an international arrest warrant for Omar Al-Bashir. The Prosecutor accused Al-Bashir of "...masterminding and implementing a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity."²³¹ The path that led to this request and the path leading to the proper arrest warrant was not smooth and one of the main features in that was the pivotal role played by the Security Council that, acted in its capacity, as the guarantor of international peace and security. The following paragraph will illustrate the actions and investigations that led the International Criminal Court to issue two international arrest warrants for Al-Bashir for war crimes, crimes against humanity and genocide. The analysis will touch on several points and peculiarities of the case: the definition of the crime of genocide; the creation of the International Criminal Court through the Rome Statute, in order to have a permanent court where crimes such as genocide would be dealt with; the seriousness of the violence that took place in Sudan; and, finally, the particularity of the referral by the Security Council to the first Prosecutor.

3.1 The events

To make the analysis precise and to investigate the circumstances that led to the international arrest warrant, it is crucial to examine the violations and crimes committed by the Sudanese central government and its backed forces. As it was mentioned before, the international community attention to the violations was brought by many Non-Governmental Organizations, extremely aware of the seriousness of the abuses. The International Criminal Court argued, both in the first warrant of arrest

²³¹ "ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/icc-prosecutor-presents-case-against-sudanese-president-hassan-ahmad-al-bashir-genocide-crimes>

for Omar Hassan Ahmad al Bashir ²³², in March 2009, both in the second one, in July 2010 ²³³, that there were unlawful attacks against civilians from Darfur area, specifically towards those of Fur, Zaghawa and Masalit ethnicity that were believed to be close to SLM/A, JEM and other rebel groups opposing to the Government of Sudan.²³⁴ According to the 2004 report by Human Rights Watch, entitled "Darfur Destroyed: Ethnic Cleansing by the Government and Militia Forces in Western Sudan" the central government of Khartoum and the Janjaweed militias (of Arab ethnicity), were responsible of violence against the African ethnic groups abovementioned through different means: they were guilty of massacres, executions on civilians without distinction of gender nor age, and the destruction of infrastructures such as villages and mosques.²³⁵ A couple of years before the arrest warrants, the Security Council, in order to assess the severity of the humanitarian situation there, through resolution 1564 asked the Secretary General to establish a commission of inquiry to examine the violations. The Commission of inquiry, chaired by Antonio Cassese, had to establish whether or not violations of human rights and humanitarian law were committed and to establish if there were serious reasons to suspect the commitment of a genocide by the government and the Janjaweed militias.²³⁶ As the research will soon show, according to the Commission guided by Cassese, a genocide was not committed but many serious violations were. Notwithstanding that, the Report played a pivotal role in the process that led to the activation of a case within the International Criminal Court.²³⁷

3.1.1 The human cost of massive human rights abuses

The Report drafted by the International Commission of Inquiry argued that the atrocities of whom the Central Government forces and Janjaweed militias were accused, unquestionably took place in the region of Darfur.²³⁸ The findings made clear and explicit the use of specific patterns in attacking

²³² "Warrant of Arrest for Omar Hassan Ahmad al Bashir", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/court-record/icc-02/05-01/09-1>.

²³³ "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/court-record/icc-02/05-01/09-95>.

²³⁴ Ibid.

²³⁵ "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces In Western Sudan", Human Rights Watch, accessed 2024, <https://www.hrw.org/sites/default/files/reports/sudan0504full.pdf>.

²³⁶ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

²³⁷ Ibid.

²³⁸ Ibid.

villages and encampments: sometimes attacks were completely carried out by Janjaweed militias on ground and sometimes they were carried out by both the militias and the military together; at times, attacks started as aerial and comprehended bombings, strafing and the utilization of automated weapons.²³⁹ The attacks, per se already constituting a violation, were further exacerbated by the killings of many civilians, assassinations and executions, sexual violence (including rape), torture, kidnappings and robbery. This specific pattern and the linked abuses contributed to the massive displacement of the population, both internal both in the bordering Countries, like Chad; however, the attacks were so cruel that even civilians living in the villages near those who were attacked were forced to flee and although a resettlement was highly desired in the years later, civilians never returned due to the fear that something similar might happen again.²⁴⁰ It is fundamental to highlight that these attacks were mostly not militarily justified in response to specific actions of the rebels, and this led to the development of the belief that the army and the militias were deliberately targeting civilians. It is not easy to assess the precise number of villages that were destroyed and burned, partially or completely, but the evidence of a massive damage exists: water pumps were broken, trees were also cut down and burnt, the instrument to process food were destroyed, wadis (dry water courses that only after heavy rainfalls possess water) that are the main source of water in these areas were ruined. In addition, many infrastructures, such as hospitals, schools and police stations were also destroyed.²⁴¹ Furthermore, the forces also attacked and destroyed mosques, killed imams, and defecated on Qurans.²⁴² These actions clearly show the will of the central government forces and the Janjaweed to completely devastate the territories in the region and target the civilians who found stability there. According to what has been said by the witnesses, the attacks were never preceded by a warning, and they mainly started in the early morning when civilians were either sleeping or praying, often lasting for a long time, being also repeated for days and months. After the attacks and the destroying, looting of civilian property was also very common.²⁴³ The Government stated about the attacks that in order to make the village a target it was sufficient to have the presence of one rebel and that this made the

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan", Human Rights Watch, accessed 2024, <https://www.hrw.org/sites/default/files/reports/sudan0504full.pdf>.

²⁴³ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

village "...no longer a civilian locality, it becomes a military target"²⁴⁴. In this context, it is crucial to keep in mind that the possession of a weapons was very common in Darfur tribes, that were often legally detained in order to defend land and cattle: for this reason, the custody of weapons would never be enough to justify the killings.²⁴⁵ Concerning the specific violence on civilians, no distinction was made on the basis of gender nor age. Children were also targeted and killed by Janjaweed and the army and sometimes means as burning or mutilation were also involved. Both torture and inhuman treatments were reported by many NGOs, and the abuses were often both physical and mental.²⁴⁶ The inhumane acts that took place included: burnings to death (houses were often burned down with people inside), mental torture (for example, mothers were forced to witness the burning of their children), crucifixion of the victims, beatings as a form of torture and the use of offensive language with the goal of humiliating civilians. Many civilians also witnessed the use of abusive language against the detainees, which not only were subjected to lack of water and food and to poor hygienic conditions but where also often called "slaves".²⁴⁷ In general, it has to be said that the Government forces did not take place in such actions, but the Janjaweed conducted them in their presence and under their safeguard.²⁴⁸

It was also reported that the targeted populations were Darfurians, who have an African ethnicity as opposed other tribes of the area, mostly of Arab ethnicity, likewise the majority of Janjaweed. The ethnic rationale of the attacks seems to be also due to the African composition of the rebel forces.²⁴⁹ Victims were also asked why they believed that the attacks specifically took place against them: many of them stated that it was because of the forces' need to rob their lands and their cattle, or because they wanted to make them flee from the area; others reported what was said to them during the attacks, such as "the Fur are slaves, we will kill them"²⁵⁰ or "We are here to eradicate blacks"²⁵¹; finally, they also

²⁴⁴ Idem, 66.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Idem, 65.

²⁵¹ Idem, 65.

argued that rebel forces were not present in their villages and most of the civilians were not in possession of weapons.²⁵²

Besides the violations already reported, several NGOs also reported obstruction of humanitarian agencies in Darfur, leaving civilians in several areas without any assistance.²⁵³ Notwithstanding all the information just mentioned, it is difficult to assess the precise number of deaths in the area. According to some data, between 2003 and 2008, the number of deaths was of around 300.000, caused not only by the attacks but also by diseases as well as lack of food.²⁵⁴

3.1.2 The use of sexual violence as a mean of war

Sadly, as horrendous as this crime is, it has become very common over the years for rape to be used as a war mechanism in conflict circumstances. For instance, this type of action not only creates fear and humiliation in the populations that are subject to it, but often results in a desire by the same populations to flee, which may prove to be a sadly effective weapon if the final goal is to occupy their territories or to conduct an ethnic cleansing.²⁵⁵ At the humanitarian law level, prohibition of rape was already recognized in the Lieber Code in 1863, a document drafted with the aim of codifying the norms of customary law to whom the armies complied during war time.²⁵⁶ The Geneva Conventions, on the other hand, even if rape and sexual violence is not explicitly prohibited, share article 3 that seemed to represent an opening to such a prohibition requiring to treat people that are not taking part in the conflict humanely, without distinction based on race, color, religion or belief and gender; article 3 prohibits every violence to life and person, taking people hostage, personal dignity abuses and finally, issuing a ruling and executing people without a regular trial.²⁵⁷ The mentioned article was expanded,

²⁵² Ibid.

²⁵³ "Darfur: Humanitarian Aid Under Siege", Human Rights Watch, accessed 2024, <https://www.hrw.org/legacy/backgrounder/africa/sudan0506/5.htm>.

²⁵⁴ "Darfur", Holocaust Encyclopedia, accessed 2024, <https://encyclopedia.ushmm.org/content/en/article/darfur>.

²⁵⁵ Tara Gingerich, J.D., M.A., Jennifer Leaning, M.D., S.M.H., *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan*, Program on Humanitarian Crises and Human Rights, François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health (Boston, Massachusetts USA: October 2004).

²⁵⁶ "Rape and Other forms of Sexual Violence", International Humanitarian Law Database, accessed 2024, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule93#Fn_3C5B94FA_00001.

²⁵⁷ "Geneva Convention relative to the Treatment of Prisoners of War", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war>.

in the sense of prohibiting rape, by the adoption of Protocol I and II additional to the Convention.²⁵⁸ According to Article 7 of Rome Statute, "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity"²⁵⁹ constitute crimes against humanity if committed systematically against civilians with awareness of the attack.²⁶⁰ As of today, many States and Organizations, both at the regional and international level, as well as human rights law recognize the prohibition of sexual violence.²⁶¹

The Report of the Commission of Inquiry stated that in many areas of the region rape and sexual violence were common tools used against women and young girls. Abuses against women were often committed by several men at the time and were paired with other physical, but not sexual, abuses as beatings and lashes; they recurrently took place in public. In addition, during the abuses women were called "slaves" and "Tora Bora"²⁶²(name used to refer to rebels from Darfur because, as Islamist mujahedeen used to hid in caves in the Afghan region called Tora Bora, they hid in caves in Jabel Marra)²⁶³. The Commission reported three different patterns of violence: first, sexual assaults that took place during the attacks on villages; second, sexual assaults that took place after the kidnapping and detainment of women for many days; finally, in some cases sexual violence was also perpetrated during the fleeing and the displacement of women, or when they left the villages to collect water and food.²⁶⁴ In the report, it is also argued that women were often the ones entitled with the task to search and bring home food and water, because men were usually more at risk of being killed in attacks. For this reason, it was very common for them to be at risk of abduction and abuses. Many members of families

²⁵⁸ "Rape and Other forms of Sexual Violence", International Humanitarian Law Database, accessed 2024, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule93#Fn_3C5B94FA_00001.

²⁵⁹ "Rome Statute of the International Criminal Court", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.

²⁶⁰ Ibid.

²⁶¹ "Rape and Other forms of Sexual Violence", International Humanitarian Law Database, accessed 2024, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule93#Fn_3C5B94FA_00001.

²⁶² "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

²⁶³ "If We Return, We Will Be Killed; Consolidation of Ethnic Cleansing in Darfur, Sudan", Human Rights Watch, accessed 2024, <https://www.hrw.org/legacy/backgrounder/africa/darfur1104/6.htm>.

²⁶⁴ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

were forced to witness the violations to whom women were subjected, without being given the possibility to react and protect them.²⁶⁵

In the majority of the cases, rapes were committed by Janjaweed and with the complicity of Government forces, they were rarely committed by rebels. The Commission ascertained that various sexual crimes were committed, both right after the attacks on villages (leading to further displacement), both during the displacement.²⁶⁶ For this reason, a pattern according to which rape and sexual violence were used as a strategy with the goal of spreading fear and humiliate the civilians, while contributing to their displacement, was identified.²⁶⁷

3.2 Legal existing framework

3.2.1 The United Nations' Genocide Convention

As it happened in the statutes of the two ad hoc criminal tribunals, the one for Former Yugoslavia and the one for Rwanda, in the International Criminal Court's statute the definition and prosecution of the crime of genocide was kept distinguished from the other crimes; in the Rome Statute, article 6 re-states its definition that can be originally found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.²⁶⁸ The term "genocide" first appeared in 1944 in a book by Raphaël Lemkin, a polish lawyer, "Axis Rule in Occupied Europe". The word comes from the combination of the Greek prefix "genos", that means race, and the Latin suffix "cide" that means killing. The term was developed not only on the basis of the Nazi policies against Jewish people during Holocaust but also in response to other actions in the past that were meant to target and destroy precise groups of people. Lemkin wanted it to become a codified international crime and advocated for it to happen.²⁶⁹ Shortly before the codification of the crime in the 1948 Convention, genocide was firstly recognized as a crime under international law by the resolution 96 (I) of 1946 by the United Nations General Assembly.²⁷⁰ In the

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

²⁶⁹ "Genocide", United Nations Office on Genocide Prevention, and the Responsibility to Protect, accessed 2024, <https://www.un.org/en/genocideprevention/genocide.shtml>.

²⁷⁰ Ibid.

Resolution, genocide was defined as "a denial of the right of existence of entire human groups"²⁷¹ and the Assembly started advocating for the adoption, by states, of a Convention by also seeking the assistance and support of the Economic and Social Council.²⁷² The ECOSOC deferred the task to the Secretary General in 1947 and the document accomplished through the joint effort of the SG and three experts was used as the basis for the development of the Convention itself. At this point the task was once again deferred to a committee within ECOSOC on the 3rd of March 1948, consisting of 7 Countries (China, France, Lebanon, Poland, United States of America, Venezuela, and Union of Soviet Socialist Republics).²⁷³ Shortly afterwards the committee adopted a project of Convention composed of a preamble and 19 articles: the document was discussed again both within the Committee and within the General Assembly and was eventually adopted by unanimity December, the 9th of 1948 in a composition that differs from the original.²⁷⁴

The Convention, differed from the project of the resolution in three aspects: firstly, the list of the protected groups included in the resolution was broader than the one included in the Convention, that struggled to include, for example, political groups; secondly, the resolution included the definition of a cultural genocide as well, however the presence of such concept was not contained in the Convention; finally, it is important to highlight how every reference to Nuremberg Tribunal were omitted, according to an amendment suggested by Venezuela.²⁷⁵ For what concerns its preamble, it is possible to find in it the rationale behind the creation of the document itself; the opening of the document recognizes that genocide has to be recognized as a crime under international law and has to be acknowledged as expressing values that are against the ones of the United Nations; then, it highlights the loss in terms of humanity that such crimes lead to; finally, the preamble declares the goal of the convention, to free humanity from the existence of this kind of act and to do so, it proceeds in declaring the pivotal role that should be played by international cooperation.²⁷⁶

²⁷¹ "UNGA Session 1 (1946-47)", ICC Legal Tools Database, accessed 2024, <https://www.legal-tools.org/doc/f438af/>.

²⁷² Giorgio Chiarelli, *La convenzione sul genocidio*, Rivista di Studi Politici Internazionali 16, no. 1, January-March 1949, 51-58.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ "Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948", International Humanitarian Law Databases, accessed 2024, <https://ihl-databases.icrc.org/en/ihl-treaties/genocide-conv-1948>.

Regarding the entering into force of the Convention, the process to follow was outlined in the document itself. According to Article XI, the Convention was meant to be open for signature until the end of 1949 and its signature was open to both States member to the United Nations and non-members that received an invitation to opt in by the General Assembly.²⁷⁷ Article XI also prescribed that the Convention should be ratified, and the instruments of ratification should have been submitted to the United Nations' Secretary General; finally, the article defined that after the 1 of January 1950, the Convention would have been open to the access of every state member of the United Nations or non-member if "invited" as aforementioned.²⁷⁸ In outline with Article XIII, the Convention was meant to enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification or accession to the Convention. For what concerns, the ratification or access to the Convention that happened after, it should have become effective after ninety days after the deposit of the instrument of ratification or access.²⁷⁹ Finally, articles XIV and XV prescribed that the Convention will continue to remain in force for 10 years after the entrance into force and then for a subsequent period of 5 years for the Parties that have not decided to opt out by denouncing it at least six months before the expiration of that period.²⁸⁰ In order to withdrawal from the Convention, the States should have had presented a written notification to the Secretary General of the United Nations. If following some denunciations, the number of parties participating in the Convention was reduced to less than sixteen States then, the Convention will cease to being into force.²⁸¹ Based on what expressed in the mentioned articles, the Convention entered into force January the 12, 1951 and has now 153 State party.²⁸²

Another aspect worth analyzing is the one concerning reservations: while it was never a doubt that it was possible to reserve the Convention, for quite some time there were some doubts about the legal

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² "Ratification of Genocide Convention", United Nations Office on Genocide Prevention and the Responsibility to Protect, accessed 2024, <https://www.un.org/en/genocideprevention/genocide-convention.shtml>.

effects of such reservations.²⁸³ In order to solve the uncertainty about their value, the International Court of Justice was asked by the first Secretary General of the United Nations to render an advisory opinion. Firstly, the General Assembly asked whether it was still possible to recognize a State that ratified or entered the Convention with a reservation as party to the Convention if the aforementioned reservation was objected by some parties to the Convention.²⁸⁴ Then, if the answer to the previous question was affirmative, it asked what would the effects of such reservation be between the State that reserved the Convention and between the States that rejected it and those who accepted it.²⁸⁵ Finally, it asked what would be the legal value of a reservation made by a State that signed the Convention but did not yet ratify it and a reservation made by a State who has not yet acceded or signed the Convention even if it had the right to do so.²⁸⁶ The International Court of Justice's response essentially consisted in three points and it contributed to the evolution of the norm, at the international level, prohibiting genocide. To begin with, the Court argued that prohibition of the crime of genocide had binding effects in every State, not only those party to the Convention, because of its belonging to customary international law. Then, the Court affirmed that the nature of the Convention was universal and meant to respond to the need of States to punish and prevent the crime and, in arguing so, foreshadowed an opening to the development of the theory according to which some norms within the international law framework have an erga omnes nature and for this reason may be enforced by every State.²⁸⁷ The ICJ, dealt further with the doctrine in Barcelona Traction case, in which not only embraced the existence of erga omnes obligations but also used as an example the punishment of the crime of genocide.²⁸⁸ Lastly, as regards the possibility of any limitation relating the reservation of the

²⁸³ Yuval Shany, *"The Road to the Genocide Convention and Beyond"* in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 15 October 2009).

²⁸⁴ "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", International Court of Justice, accessed 2024, <https://www.icj-cij.org/case/12>.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Yuval Shany, *"The Road to the Genocide Convention and Beyond"* in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 15 October 2009).

²⁸⁸ Ibid.

Convention, the Court argued that since the goal of the document was "humanitarian and civilizing"²⁸⁹, then every state was entitled to reserve it without other states objecting.²⁹⁰

3.2.2 The elements of Genocide and the difficult path to its recognition

According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, the crime of genocide is defined as:

"In the present 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:

- (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 in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."²⁹¹

To begin with, it is essential to remember that the definition of genocide is at the heart of the convention. The definition we find in Article Two is made up of two elements: the first element, the systematic one, is contained in the opening of the article and consists of the need for a "specific intent" to destroy wholly or partially an ethnic, national or religious group; the second element, on the other hand, is that of the individual act and is found in paragraphs from (a) to (e), where it is possible to find a list of behaviors that cause harm to the physical and psychological integrity of the members of the group and that attack the existence of the group itself.²⁹² It is worth specifying that even if only

²⁸⁹ "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", International Court of Justice, accessed 2024, <https://www.icj-cij.org/case/12>.

²⁹⁰ Yuval Shany, *"The Road to the Genocide Convention and Beyond"* in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 15 October 2009).

²⁹¹ "Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948", International Humanitarian Law Databases, accessed 2024, <https://ihl-databases.icrc.org/en/ihl-treaties/genocide-conv-1948>.

²⁹² Florian Jelsberger, *The Definition and the Elements of the Crime of Genocide* in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2009).

subparagraphs (c) and (d) mention it, a mental element is required for every action of those listed; this has also been confirmed by the jurisprudence of the ICJ and by the International Law Commission. The mental element also constitutes the substantial difference between the crime of genocide and crimes against humanity, which do not require the specific intent to destroy the group.²⁹³

As for the actual acts of genocide, those enumerated in the paragraphs of the article constitute a complete and exhaustive list; therefore, any other act, even if carried out with the specific intent to destroy the particular group, does not constitute genocide. The article says nothing about the characteristics of those who must commit this type of act; therefore, it is possible that anyone can commit such an act, even members of the same group.²⁹⁴ Furthermore, it is important to emphasize that not only is it not necessary for the group to actually be destroyed, but it is not even necessary for the act to be committed against the group as a whole, it is sufficient to commit an attack on a single member.²⁹⁵ Proceeding to the analysis of each para, with regard to para A ("Killing members of the group"): the commission of the act must be intentional and, for this reason, the para does not include involuntary killings; moreover, the idea that a single murder is sufficient to constitute genocide is established by case law.²⁹⁶ As regards Paragraph B ("Causing Serious Bodily or Mental Harm to Members of the Group"), the element of intent is also required here; according to case law, conduct causing serious harm to health, organs, and senses, as well as mutilation, are included in this list; as regards harm to mental health, these do not necessarily have to be permanent or irreversible and include sexual violence, death threats and torture.²⁹⁷ Paragraph C concerns "Deliberately Inflicting Conditions of Life Calculated to Bring About the Physical Destruction of the Group": this refers to all measures that, even if not immediately, are aimed at the physical destruction of the group; these include, for example, forced labour, deprivation of resources necessary for survival such as food and lack of hygiene.²⁹⁸ Paragraph D, then, concerns "Imposing Measures Intended to Prevent Births Within the Group", and includes all actions aimed at undermining the group's ability to reproduce, for instance forced sterilizations, gender segregation and, in some circumstances, even rape; as specified by the International Law Commission, any state programme of voluntary birth control implemented as a

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

social policy (such as the one-child policy in China) is not to be included in this list.²⁹⁹ Finally, subsection E is the one concerning "Forcibly Transferring Children from the Group to Another Group": in substance, the assumption behind this provision is that if children are transferred from one group to another, they will become estranged from their culture and will not be able to grow up as part of their group of origin. In this way, the traditions, languages, and culture of their group will become alien to them.³⁰⁰

3.2.3 The role of the International Criminal Court

International crimes used to be managed for a long time by internal courts and tribunals even though their repression was universally recognized. As a matter of fact, the creation of international criminal tribunals is a newly introduced mechanism useful in order to prosecute international criminal crimes.³⁰¹ Nuremberg and Tokyo tribunals, managed by the winning powers of World War II in order to legally punish the crimes that were committed during war, can be considered the ancestors of the international criminal tribunals that have been established for the first time to punish the crimes committed in the territories of former Yugoslavia and in Rwanda by the United Nations Security Council.³⁰² The abovementioned experiences of the two Criminal tribunals, with a limited mandate, were pivotal in order to inspire the creation of the International Criminal Court, that was meant to be a permanent structure with universal jurisdiction.³⁰³ Even if the idea of the creation of such an institution is long-established in history, with the first intentions shown after the end of World War I³⁰⁴, however it was after World War II that the idea of a necessity of a permanent international court with competence over criminal matters arose.³⁰⁵ Such a Court was finally established with the Rome Statute, adopted the 17 of July 1998 and entered into force the first of July 2002. According to Article 5 of the Statute the

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Antonio Cassese, *The Path to Rome and Beyond, 1 From Nuremberg to Rome: International Military Tribunals to the International Criminal Court* in *The Rome Statute of the International Criminal Court*, ed. Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Oxford: Oxford University Press, 25 July 2002).

³⁰⁵ "The ICC at a Glance", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf>.

Court has jurisdiction over crimes against humanity, genocide, war crimes, crimes of aggression. As the Report of the International Commission of Inquiry on Darfur perfectly stated, the crimes who took place in the territories belong to the categories abovementioned and for this reason the International Criminal Court was the adequate place for them to be judged.³⁰⁶

3.2.3.1 The Rome Statute of the International Criminal Court

The signing of the Rome Statute of the International Criminal Court took place on July 18, 1998, but the document did not enter into force until July 1, 2002, following its 60th ratification. First of all, it is worth emphasizing that the document was not adopted by consensus but by a large majority, which, however, could not count on the participation of many countries, including, for example, China, the United States and the Russian Federation, which are also permanent members of the Security Council.³⁰⁷ As for the United States, although they had signed the Statute of the Court in 2000, they declared on 6 May 2002 that they would not ratify it and, in so doing, allowed the signature to lose its value. Furthermore, fearful of the possibility that their own military and civilian personnel might still be brought before the Court, they advocated for the Security Council to adopt a resolution stating that nationals engaged in a peacekeeping mission of a state not party to the Statute may be exempted from the jurisdiction of the Court; they subsequently entered into several "exemption" agreements whereby states party to the Statute committed themselves not to surrender US citizens to the Court.³⁰⁸ As for the Russian Federation on the other hand, although it had signed the treaty in 2000 it declared in 2016 that it would never ratify it.³⁰⁹

With regard to the composition of the Court, according to Article 34 of the Statute, the organs are the Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, a Prosecutor's Office, and, finally, the Registry. Judicial functions within the Sections will be carried out by the Chambers.³¹⁰

³⁰⁶ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³⁰⁷ "La conferenza diplomatica di plenipotenziari delle Nazioni Unite", Ministero della Difesa, accessed 2024, <https://www.difesa.it/giustizia-militare/rassegna/cortepenaleinternazionale/conferenzadiplomaticanazioniunite/29006.html>.

³⁰⁸ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³⁰⁹ Ibid.

³¹⁰ "Lo Statuto di Roma della Corte Penale Internazionale", Ministero della Difesa, accessed 2024, <https://www.difesa.it/giustizia-militare/rassegna/cortepenaleinternazionale/statutoromacortepenaleint/29036.html>.

According to Article 35 of the Statute, the Court is composed by 18 judges, having the nationality of a state party, elected full-time by secret ballot by the Assembly of Member States on the basis of their professional and linguistic competence. According to Article 36, their term of office will last nine years and will not be renewable.³¹¹ According to Article 43, the Prosecutor has a central role in the functioning of the Court: he can gather information about the commission of an offence, decide whether to open an investigation, carry out the investigation with the aim of seeking evidence and, finally, formulate charges.³¹² The prosecutor, too, will be elected by the Assembly of States, by secret ballot and must obtain an absolute majority.³¹³

Regarding the general principles of criminal law followed by the Court, those are listed in Articles 22 to 33. First, the principle *nullum crimen sine lege*, according to which no act may be punished if, when committed, it did not constitute a criminal offence; then, the principle *nulla poena sine lege*, according to which a person convicted by the Court may only be punished in a manner consistent with the Statute; then, non-retroactivity *ratione personae*, according to which, a person may not be held criminally liable for an act committed before the Statute entered into force.³¹⁴ Chapter 3, however, also contains in Article 25 one of the cornerstones of the Statute, which is of extreme importance in the present case. It refers to individual criminal liability: according to this Article, a person may be held criminally liable for an offence if that person commits the offence individually or with another person, if that person orders or persuades the commission of the offence, if the person is an accomplice in the commission of the offence and, finally, if the person contributes in any way to the commission or attempt of the offence.³¹⁵ Hence, this principle admits that one can be found guilty even when one has not "physically" committed the violation but has given the order to a third party to commit certain actions. In this sense, let us also recall Article 33, which states that even if the crime was committed in order to implement an instruction from the government or a superior, who may be military or civilian, the

³¹¹ "Statuto di Roma della Corte Penale Internazionale", Centro Studi per la Pace, accessed 2024, https://files.studiperlapace.it/spp_zfiles/docs/romastat.pdf.

³¹² *Ibid.*

³¹³ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³¹⁴ "Statuto di Roma della Corte Penale Internazionale", Centro Studi per la Pace, accessed 2024, https://files.studiperlapace.it/spp_zfiles/docs/romastat.pdf.

³¹⁵ *Ibid.*

person who committed the crime will not be released from his or her responsibility unless one of the circumstances set out in the article exists.³¹⁶

3.2.3.2 Determination of the Court's Jurisdiction

According to Article 5 of the Statute, the Court has jurisdiction over the most serious crimes: genocide, crimes against humanity, war crimes and the crime of aggression. With regard to the crime of aggression, Article 5 bis and ter state that an individual can only be tried for this crime if it has been committed at least one year after the ratification by at least thirty states of the Kampala Amendments and with the condition that an authorization of the Court's exercise of jurisdiction is adopted after 1 January 2017 by the same majority of states parties as was required for the adoption of the amendments. Officially, the conditions have been met and as of 17 July 2018 the Court also exercises jurisdiction over the crime of aggression.³¹⁷ The Statute then proceed to define the crimes under discussion: with regard to the crime of Genocide, it is set out in Article 6 and use is made of the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was analyzed a little further up in this same chapter.³¹⁸ When it comes to the definition of crimes against humanity, this is found in Article 7 of the Convention. Any act of the following that is committed in a widespread or systematic attack on the civilian population with knowledge is considered to be such: murder; extermination; enslavement; deportation or forcible transfer; imprisonment or other severe forms of deprivation of liberty that violate fundamental norms of international law; torture; rape, sexual slavery and other forms of sexual violence of similar severity; persecution of a specific identifiable group or community for political, racial, national, ethnic, religious, cultural or gender-based reasons, as well as for other reasons universally recognized as impermissible under international law; enforced disappearance of persons; apartheid; and other such inhumane acts that may cause suffering or serious harm not only to the integrity but also to the physical and mental health of civilians.³¹⁹ Article 8 of the Statute, on the other hand, defines War Crimes for which the Court has jurisdiction especially when they are committed as part of a large-scale plan,

³¹⁶ Ibid.

³¹⁷ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³¹⁸ "Statuto di Roma della Corte Penale Internazionale", Centro Studi per la Pace, accessed 2024, https://files.studiperlapace.it/spp_zfiles/docs/romastat.pdf.

³¹⁹ Ibid.

policy or commission.³²⁰ Generally speaking, it can be said that war crimes consist of very serious violations of the laws and customs of war and may concern not only land warfare but also sea and air warfare. For an extensive list of these, reference can be made to the Four Geneva Conventions of 1949 and the First Additional Protocol of 1977.³²¹ In the past, only those crimes that took place in international armed conflicts were considered international crimes, whereas recently, the idea that they can also take place in non-international armed conflicts has been consolidated.³²² War crimes include, for example: murder, torture and inhuman treatment, hostage-taking, destruction and unlawful appropriation of property, attacks against humanitarian or peace missions, attacks against defenseless towns and villages, use of poisons and poisonous weapons, sexual violence, attacks against places of worship.³²³ Finally, Article 8 bis concerns the crime of aggression: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."³²⁴ From this, it can be deduced that the crime of aggression must consist of more than a minor violation of the prohibition of the use of force and, that, it is a so-called "leadership crime", since it must be committed by those in political or military control of the state.³²⁵

The International Criminal Court does not enjoy primary jurisdiction over national courts, but on the basis of Article 17 of the Statute can only rule in those cases in which the national court is "unable or unwilling genuinely to carry out investigation or prosecution".³²⁶ The article is meant to pursue the principle *aut iudicare aut dedere*, according to which who commits an international crime needs to be punished for it.³²⁷ For what concerns unwillingness or inability, they are defined in article 17 but the

³²⁰ Ibid.

³²¹ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³²² Ibid.

³²³ "Statuto di Roma della Corte Penale Internazionale", Centro Studi per la Pace, accessed 2024, https://files.studiperlapace.it/spp_zfiles/docs/romastat.pdf.

³²⁴ "Rome Statute of the International Criminal Court", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

³²⁵ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

³²⁶ "Rome Statute of the International Criminal Court", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

³²⁷ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

definition is not very clear and sometimes may cause ICC and national courts to conflict about jurisdiction.³²⁸ According to Rome Statute, the ICC does not have universal jurisdiction unless in the case which is the Security Council to defer the situation to it, under Chapter VII of the UN Charter: in this case, the Court has jurisdiction no matter the place in which the crime took place nor the nationality of who committed it. According to Article 12, the Court can rule: if a crime is committed by a national of a State party to the Convention or national of a country that has accepted the Court jurisdiction under an ad hoc declaration; if the crime took place in a State that is party to the Convention or in a State that has accepted the Court's jurisdiction through a declaration.³²⁹

3.3 International opinion and the opening to international justice

3.3.1 Secretary of State Colin Powell and President George W. Bush's statements and European Union's opinion

As we have previously mentioned, what happened in Darfur in the early 2000s attracted the attention of many NGOs because of the repeated violations that took place due to the Government of Khartoum and the Janjaweed militia. However, the events, as highlighted, have not only led humanitarian organizations to act but also, as shown above, the United Nations and the international community in general, which agreed to the deployment of a peace-keeping mission in the territories.

Regarding the international community's reaction and advocacy on the activation of an international justice process, we can identify different attitudes. On 9 September 2004, then-Secretary of State Colin L. Powell, appearing before the Senate Foreign Relations Committee, stated for the first time that what was happening in Darfur was genocide, and that it was the Central Government of Sudan and the Janjaweed that were guilty of actions such as rape, mass killings and abuse.³³⁰ Powell's statement was intended to put pressure on the government in Khartoum to stop the violence, and was based on a State Department report which showed that the violence took place specifically against non-Arab villages.³³¹ On the same day, the President of the United States of America, George W. Bush, also claimed that what was happening constituted genocide, and for this reason, he called on the entire international

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ "U.S. Calls Killings in Sudan Genocide: Khartoum and Arab Militias Are Responsible, Powell Says", Washington Post, accessed 2024, <https://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html>.

³³¹ Ibid.

community to ensure that these actions were stopped as soon as possible.³³² These statements were initially welcomed with concern by the international community, which was still hesitant to classify the events as genocide³³³. The European Union, instead, declared in 2004 that it had not accumulated sufficient evidence to declare that a genocide was taking place, despite the widespread killings: for this reason, the Union's position was notably in disagreement with that of the United States. Despite this, however, the European Union agreed that there had been violations and for this reason agreed to the establishment of an Independent Commission of Inquiry.³³⁴

3.3.2 The role of the Security Council in addressing the issue: Resolution 1547, Resolution 1556, Resolution 1564, and the creation of the International Commission of Inquiry on Darfur

As a consequence, to the great concern by the international community for the entire situation, the UN Security Council finally adopted a series of resolutions, first and foremost Resolution 1547 of 11 June 2004. In this resolution, the UNSC primarily condemned all the violations of humanitarian law and human rights that were taking place in Sudan, as well as the pressure of the conflict on civilians, especially women and children; then, it welcomed the idea of the Secretary General to set up a special UN team to facilitate the process of preparation for peace agreements and emphasized the need for this process to be understood effectively through the use of sufficient public information;³³⁵ In addition, it expressly requested that the parties involved commit themselves so as to ensure that a ceasefire could be reached and that the fighting would cease as soon as possible; finally, the most interesting point of the resolution was represented by the fact that the Security Council declared itself open to the creation of a UN-led operation to support peacekeeping, and in this regard, asked the Secretary General to make

³³² "President's Statement on Violence in Darfur, Sudan: Statement by the President", The White House President George W. Bush, accessed 2024, <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040909-10.html>.

³³³ "U.S. Calls Killings in Sudan Genocide: Khartoum and Arab Militias Are Responsible, Powell Says", Washington Post, accessed 2024, <https://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html>.

³³⁴ "Declaration by the Presidency on behalf of the EU on the situation in Darfur, western Sudan", Relief Web, accessed 2024, <https://reliefweb.int/report/sudan/declaration-presidency-behalf-eu-situation-darfur-western-sudan>.

³³⁵ "Resolution 1547, Report of the Secretary-General on the Sudan (S/2004/453)", UNSCR, accessed 2024, <http://unscr.com/en/resolutions/1547>.

recommendations regarding the structure and mandate of such an operation.³³⁶ Therefore, this resolution represents the document that paved the way to a peace-keeping mission. Shortly afterwards, on 30 July 2004, the Security Council adopted Resolution 1556, again concerning the situation in Sudan, the Darfur area in particular. The Security Council demanded Sudan to take care of disarming its militias and, in addition, to provide the Secretary General with ongoing information on the country's progress in this regard; then, the Security Council demanded all States to pursue a policy of prohibiting the sale and supply of arms or similar material to entities operating in Sudan, unless these were supplies useful in assisting and monitoring peace support and human rights, or unless they were clothing useful in protecting humanitarian or UN personnel.³³⁷ Furthermore, the resolution authorized and showed its support for a mission deployed in Darfur under the leadership of the African Union and, to this end, pledged to provide personnel and assistance of any kind.³³⁸ Due to the non-implementation of Resolution 1556 and the international community's strong concern over the continuing severity of the crisis, the Security Council adopted Resolution 1564 on 18 September 2004, despite abstentions by China and the Russian Federation. The resolution argued that despite Sudan's apparent commitment to peace negotiations, it had not yet demilitarized the Janjaweed militias, protected the safety of civilians, and finally apprehended those responsible for violations of human rights and humanitarian law. For these reasons, the Security Council once again called on the Central Government to commit itself to the success of the peace process, under the leadership of the African Union.³³⁹ In addition, the resolution called on the Secretary-General to establish an International Commission of Inquiry on Darfur to determine whether or not genocide had occurred and to establish the extent of the violations. Remarkably, the intention to establish such a Commission of Inquiry marked the first time that reference was made to Article 8 of the Convention on the Prevention and Punishment of Genocide, which states that the Contracting Parties may request the United Nations and its competent organs to take any appropriate measures to prevent and suppress such crime.³⁴⁰

³³⁶ Ibid.

³³⁷ "Resolution 1556 (2004) / adopted by the Security Council at its 5015th meeting, on 30 July 2004", United Nations Digital Library, accessed 2024, <https://digitallibrary.un.org/record/527076?v=pdf>.

³³⁸ Ibid.

³³⁹ "La crisi nel Darfur: la Risoluzione 1564 del Consiglio di Sicurezza delle Nazioni Unite", Università degli Studi di Padova: Centro di Ateneo per i Diritti Umani Antonio Rapisca, accessed 2024, <https://unipd-centrodirittiumani.it/it/news/La-crisi-nel-Darfur-la-Risoluzione-1564-del-Consiglio-di-Sicurezza-delle-Nazioni-Unite/195>.

³⁴⁰ Ibid.

3.3.3 The role of the International Criminal Court and the possibility of action against Sudan through the Security Council referral

As aforementioned, the Commission was officially constituted in order to pursue the Security Council Resolution 1564, and officially began working on October 2004 with the goal of reporting the conditions of violations to the Secretary General within 3 months. The focus of the commission were the acts that took place between February 2003 and January 2005.³⁴¹ In the report, the Commission argued that, after having carefully investigated and witnessed the serious situation, it could be said that Janjaweed and the Government of Sudan were responsible of serious violations of human rights law and humanitarian law. The acts took place on a systemic base and comprehended torture, killings, burning villages and forced displacement; in addition, the majority of the attacks were carried out against civilians of African ethnicity (Fur, Masalit and Zaghawa). The Commission expressed its concern for the situation and argued that it was necessary to act as soon as possible in order to prevent further violations.³⁴² For what concerns the question of whether or not the crime of genocide was committed, the Commission stated that it was not: if on the one hand, the *actus reus* and the existence of a so-called protected group being attacked were definitely present, on the other hand the acts lacked genocidal intent and seemed to be more linked to counter-insurgency warfare. However, the Commission's considerations did not imply that the situation in Darfur was simple.³⁴³ Indeed, the Commission itself proposed in the report that the Security Council exercise its referral power with regard to the International Criminal Court, with the objective of ensuring that actions would be judged in a more appropriate space.³⁴⁴ Soon after the publishment of the Report by the Commission of Inquiry, the Security Council decided to refer the situation of Darfur to the International Criminal Court by Resolution 1593 of 2005, acting under Chapter VII of the UN Charter. Acting this way, the Security Council made up for the lack of universal jurisdiction of the Court: since Sudan was not, and still is not, party to the Statute of Rome, it was the only way possible to punish the crimes.³⁴⁵

³⁴¹ "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General", ICC Legal Tools, accessed 2024, <https://www.legal-tools.org/doc/1480de/pdf/>.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Natalino Ronzitti, *Diritto Internazionale* (Torino: Giappichelli, 2019).

3.3.4 Investigation in front of the Court: the first international arrest warrant for Al-Bashir

Shortly after the referral of the matter by the Security Council to the Prosecutor of the International Criminal Court, who at that time was Luis Moreno-Ocampo, agreed to begin the investigation primarily with the purpose of determining whether the situation met the legal requirements necessary for the Court to address it.³⁴⁶ In such cases, in fact, it is at first necessary to ascertain that: there are grounds for believing that crimes, on which the Court has jurisdiction, have been committed; the criteria of admissibility are met, and thus, a certain gravity of the situation and whether the internal proceedings have actually been exhausted; and finally, the presence of an interest of justice, which relates not only to the seriousness of the actions but also to their effect on the victims.³⁴⁷ The procedure to issue an arrest warrant officially began on 14 July 2008 when the ICC Prosecutor asked for it to be issued; 8 months later, on 4 March 2009, the First Pre-Trial Chamber held that there were grounds to hold President Al Bashir legally responsible for the commission of war crimes and crimes against humanity as an indirect perpetrator or indirect co-perpetrator.³⁴⁸ As for the counts, he was charged with two counts of war crimes (pillaging and intentionally directing attacks against civilians) and five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape).³⁴⁹

As has already been mentioned, the case of Al Bashir is a rather peculiar one as it constitutes the first time that a head of state has been subjected to an international arrest warrant, namely in a case where the plausibility of the commission of the crime of genocide is raised.³⁵⁰ In this regard, it is worth considering the issue of the immunity attached to the position of Head of State held by Al Bashir and the potential protection this might provide for his defense. Article 27(1) of the Rome Statute holds that what is contained in the Statute applies to everyone without distinction on the basis of the capacity they hold; however, as we know, Sudan is not a party to the Statute and for this reason this article

³⁴⁶ "ICC - The Prosecutor of the ICC opens investigation in Darfur", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/icc-prosecutor-icc-opens-investigation-darfur-0>.

³⁴⁷ Ibid.

³⁴⁸ Ssenyonjo, Manisuli, *II. The International Criminal Court Arrest Warrant Decision for President Al Bashir Of Sudan*, International and Comparative Law Quarterly 59, no. 1 (2010): 205–25.

³⁴⁹ "ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan>.

³⁵⁰ Ssenyonjo, Manisuli, *II. The International Criminal Court Arrest Warrant Decision for President Al Bashir Of Sudan*, International and Comparative Law Quarterly 59, no. 1 (2010): 205–25.

would not apply to the specific case under consideration.³⁵¹ Because of this, Pre-Trial Chamber I deduced the possibility of prosecuting Sudan through the adoption of Security Council Resolution 1593 which not only exercised the function of referral of the case to the Court, but also compelled Sudan to cooperate.³⁵² While certain forms of immunities, such as functional and personal immunity, can be claimed in foreign courts, domestic immunities grant exemption from domestic jurisdiction. Regardless of this, however, both international law and domestic rules should not hinder the ICC from exercising its functions and jurisdiction.³⁵³ It follows from this reasoning that, in this case, the ICC can issue an arrest warrant for a Head of State whether the State in question is a party to the Rome Statute or whether the Security Council has requested deferral of the matter to the ICC under the powers conferred by UN Charter Chapter 7.³⁵⁴ The Pre-Trial Chamber thus interpreted Resolution 1593 as the Security Council's adoption of Article 27 of the Rome Statute, enabling it to take action against a Head of State of a State which is not a member; such a practice is commonly found in the experience of international criminal tribunals.³⁵⁵

A further peculiarity of the case is the acknowledgement of Al-Bashir as a potential indirect perpetrator or co-perpetrator, not as a direct author of the violations, but rather as an ideator; this was the first time that the ICC requested the arrest of someone for indirect responsibility, and this approach is remarkably in line with the development of the manner certain crimes are committed at the international level, notably when Heads of State or major leaders are the perpetrators.³⁵⁶ Specifically, according to the judges, these crimes had taken place in the implementation of a campaign to neutralize the insurgency of the SLM/A and JEM movements, which began in April 2003: throughout the period, civilians in the Darfur area, particularly members of the Fur, Masalit and Zaghawa groups, accused of proximity to the insurgency forces, were illegally attacked by the forces of the Government of Sudan, the allied Janjaweed militias, the Sudanese police and other branches of the state apparatus.³⁵⁷

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ O Triffterer, *Article 27: Irrelevance of Official Capacity* in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, (2nd edn, Nomos, Baden-Baden, 2008): 779–793.

³⁵⁴ Ssenyonjo, Manisuli, *II. The International Criminal Court Arrest Warrant Decision for President Al Bashir Of Sudan*, *International and Comparative Law Quarterly* 59, no. 1 (2010): 205–25.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

As is well-known, at first the Pre-trial Chamber did not find Al Bashir responsible for the crime of genocide, in disagreement with Prosecutor Luis Moreno Ocampo who argued instead that there were grounds to believe that such a crime may have been committed.³⁵⁸ In accordance with the Rome Statute, the definition of genocide is the same as the one found in the Convention for the Prevention and Punishment of the Crime of Genocide; therefore, the document acknowledges the crucial significance of *dolus specialis*, the specific intent to destroy a group, partially or totally on the basis of nationality, ethnicity, race or religion.³⁵⁹ The majority opinion argued that the submitted evidence showed a lack of genocidal intent against the Fur, Masalit and Zaghawa populations; in fact, the violations and the perpetration of war crimes and crimes against humanity would have been based on a different intention. In addition, the majority opinion held that in the event of new evidence being obtained demonstrating the aforementioned genocidal intent, then nothing would preclude a new judgment; in this regard, however, it also stated that it will be difficult to find new grounds because several civilians in Sudan share features such as nationality, race or religion.³⁶⁰ According to the majority opinion, in order to have a new judgement the intent should concern the threat to the existence of a specific ethnic group.³⁶¹

An interesting analysis, however, is the dissenting opinion of Judge Anita Usācka, who claimed that there was a reasonable ground to issue an arrest warrant also for the crime of genocide for two main reasons. First, for what concern the notion of targeted group, the Judge believed that the Fur, Masalit and Zaghawa groups were targeted on the basis of their membership to the "African Tribes" ethnic group, which consists of several small population groups such as those just mentioned.³⁶² Secondly,

³⁵⁸ "ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan>.

³⁵⁹ "Rome Statute of the International Criminal Court", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.

³⁶⁰ Ssenyonjo, Manisuli, *II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan*, *International and Comparative Law Quarterly* 59, no. 1 (2010): 205–25.

³⁶¹ *Ibid.*

³⁶² "Dissenting Opinion of Judge Anita Usacka" in Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, accessed 2024, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF.

as is well known, the Rome Statute requires for each of the three stages of a trial leading to the actual conviction of a person suspected of having committed a crime a threshold that becomes progressively higher; indeed, according to Article 58, the first stage in which the Pre-Trial Chamber may issue an arrest warrant can be accomplished if the Chamber in question finds that there is a "reasonable ground to believe";³⁶³ the second stage, regulated by Article 61 and involving that same Chamber, provides that in order for the charges and the committal of the person for trial to be confirmed, the presence of "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged" must be assessed;³⁶⁴ finally, the third stage, set out in Article 66, which concerns the actual trial and which involves the Trial Chamber, makes it necessary to establish the commission of the offence "beyond a reasonable doubt" in order to convict the suspect.³⁶⁵ In light of these considerations, the Judge clarified that the threshold imposed on the first step of the proceedings was too high and did not comply with the threshold required by the Statute to issue an arrest warrant; for this reason, according to the dissenting opinion, the evidence submitted to the Chamber was sufficient to claim that there was a reasonable basis to believe that Al-Bashir committed the crime.³⁶⁶

Following the arrest warrant, a request was also made to all States Parties to the Rome Statute, the Security Council, and any state if necessary to offer their cooperation in the arrest.³⁶⁷

³⁶³ Article 58 in "Rome Statute of the International Criminal Court", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.

³⁶⁴ Article 61 in "Rome Statute of the International Criminal Court", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.

³⁶⁵ Article 66 in "Rome Statute of the International Criminal Court", United Nations Human Rights Office of the High Commissioner, accessed 2024, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.

³⁶⁶ "Dissenting Opinion of Judge Anita Usacka" in Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, accessed 2024, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF.

³⁶⁷ "ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan>.

3.3.5 A new international arrest warrant and the lack of cooperation

Following the first Prosecutor's request to reconsider the possibility of an indictment concerning genocide (and thus a second arrest warrant)³⁶⁸ and the eligibility determined by the Appeals Chamber for this to be possible³⁶⁹, a second international arrest warrant was issued for Al Bashir, this time including charges of genocide.³⁷⁰ The arrest warrant was issued on July 12, 2010, and as mentioned, in that, the Pre-Trial Chamber I argued that there was a reasonable basis to believe that Al Bashir had also committed three counts of genocide against the civilian populations inhabited in Darfur, particularly Fur, Masalit and Zaghawa.³⁷¹ Most notably, the Chamber found that genocide may have been committed through "killing members of the group, causing serious bodily or mental harm to members of the group"³⁷², and finally, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".³⁷³ The issuance of this new arrest warrant did not constitute the elimination of the previous one and, the request for cooperation from the states was issued once again.³⁷⁴ Notwithstanding the considerable number of requests for cooperation made by the International Criminal Court to States Parties to the Rome Statute and the broader international community, the arrest of Al Bashir has yet to be carried out. In the meantime, the then Head of State was free to travel and was always able to enjoy a sort of protection provided by the states he visited, which never intended to hand him over to the International Criminal Court.³⁷⁵ From 2009 to 2016, for instance, the Head of State has travelled to as many as 22 different countries without interference:

³⁶⁸ "Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/court-record/icc-02/05-01/09-25>.

³⁶⁹ "Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/court-record/icc-02/05-01/09-73>.

³⁷⁰ "Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide", International Criminal Court, accessed 2024, <https://www.icc-cpi.int/news/pre-trial-chamber-i-issues-second-warrant-arrest-against-omar-al-bashir-counts-genocide>.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ "75 Trips To 22 Countries In 7 Years: An Indicted War Criminal's Travels", Nuba Reports, accessed 2024, <https://nubareports.org/bashir-travels/>.

among them were also countries that are part of the Rome Statute ³⁷⁶, such as Chad, whose Minister of the Interior, Ahmat Mahamat Bachi, declared "Which state has ever arrested a sitting head of state? Bashir won't be arrested in Chad" ³⁷⁷.

The underlying reasons for the failure of the International Criminal Court to enforce the arrest warrant are various and can be resumed in three key concerns. To start with, the International Arrest Warrant could have been sealed: such warrants have proven to be more effective than public warrants as they make the timing of arrest significantly shorter and prevent the suspects, who often hold leadership roles, from using their power to circumvent arrest.³⁷⁸ Additionally, it remains important to address the role played by the African Union especially in the aftermath of the arrest warrant. The African Union has always shown a certain skepticism towards the ICC's actions: on the one hand, because the arrest warrant came at a time of great instability for Sudan and there was a concern that the event could bring further difficulties to a potential peace process; on the other hand, because, as already mentioned, the warrant involved the Head of State himself and for this very reason it risked undermining the sovereignty of the country as a whole.³⁷⁹ This opposition culminated on 21 July 2008 when the AU called on the Security Council for a deferral of prosecution for 12 months, in accordance with the procedure outlined in Article 16 of the Rome Statute; when confronted with the refusal of the UNSC, the African Union urged all its members not to cooperate with the International Criminal Court.³⁸⁰ On a final note, the attitude of Sudan is worth mentioning. As previously said, in 2019 Al Bashir was deposed following a coup d'état and arrested, after being accused of money laundering and corruption.³⁸¹ The Country went so far as to declare, with some initial reluctance, that it would extradite

³⁷⁶ Ibid.

³⁷⁷ " 'No question' of Chad arresting Sudan President Bashir", BBC, accessed 2024, <https://www.bbc.com/news/world-africa-10721704>.

³⁷⁸ "Public Arrest Warrant lead to fewer arrests than sealed ones", Vrije Universiteit Amsterdam, accessed 2024, <https://vu.nl/en/news/2023/public-arrest-warrants-lead-to-fewer-arrests-than-sealed-ones>.

³⁷⁹ Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, Fordham International Law Journal 34, no. 6 June 2011: 1584-1619.

³⁸⁰ Ibid.

³⁸¹ "Ex-Sudan leader Omar al-Bashir sentenced to two years for corruption", The Guardian, accessed 2024, <https://www.theguardian.com/world/2019/dec/14/sudanese-court-sentences-omar-al-bashir-to-2-years-in-prison>.

the former president so that the International Criminal Court could judge him.³⁸² As could be deduced, the extradition never happened and in 2023 Al Bashir fled the prison where he was being held, making himself a de facto fugitive.³⁸³

The reported events provide us with an opportunity to reflect on the role of the International Criminal Court and the enforcement mechanisms it possesses, which in most cases prove to be insufficient and not vigorous enough. Indeed, the success of arrest warrants solely relies on the cooperation of States Parties to the Statute, thereby making collaboration the only possible path to bringing to justice the perpetrators of the most heinous crimes. The Security Council could potentially address the Court's lack of enforcement mechanisms by imposing robust sanctions on the states involved.³⁸⁴ However, it is well-known that the SC is a highly politicized body, and thus unlikely to act in this manner.³⁸⁵ Indeed, the Council has only previously exercised its sanctioning powers in the context of terrorism cases, such as the Lockerbie case.³⁸⁶

³⁸² "Sudan signals it may send former dictator Omar al-Bashir to ICC", The Guardian, accessed 2024, <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc>.

³⁸³ "Sudan: la lunga fuga di Al Bashir da giustizia penale internazionale", Giornale Diplomatico, accessed 2024, <https://www.giornalediplomatico.it/sudan-la-lunga-fuga-di-al-bashir-da-giustizia-penale-internazionale.htm>.

³⁸⁴ Saher Valiani, *Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir*, Berkeley Journal of International Law 35, no. 1 (2017): 150-168.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

Conclusion

This research was guided by the interest in the humanitarian impact of a conflict that has been ongoing almost uninterrupted for more than twenty years. As we know, the civil population is always the sole victim to bear the cost of long and non-stop wars. The conflict in Sudan, in the Darfur area in particular, seems to be overlooked by the leading powers and by the media: it does not receive the media coverage it deserves and, perhaps, is not receiving at the moment sufficient interest from the international community for a lasting peace project to become a reality. In this respect, this study hopes to have compensated in a small way for the lack of attention paid to the conflict. The question this project has attempted to answer concerns the effectiveness of the mechanisms that have been used to respond to the crisis, in an attempt to ascertain whether the United Nations (but more generally the international community) and international justice have been taking adequate measures.

In order to answer this question, the study was structured in three chapters. The first chapter analyzed the situation in Sudan from a more historical point of view. Indeed, it focused on the path that led the country to independence, with particular interest in the democratic process; although apparently distant in time, these events are necessary in order to fully understand the conflict. After that, an analysis of the different ethnic groups inhabiting the Darfur region, particularly the Arab and non-Arab groups, was undertaken. As is well-known, the non-Arab groups have represented a perceived threat to the central government, as they have been accused of proximity to rebel groups, and for this reason have been victims of international crimes. For completeness, the different actors in the conflict, both state and non-state, were also presented: on the one hand, mention is made of the central government, government forces and the Janjaweed militia; on the other hand, mention is made of the rebels, the Sudan Liberation Movement and the Justice and Equality Movement. While the entire chapter has tried to provide a general overview of the causes of the conflict and the conflict itself, the last part presents the dramatic humanitarian consequences; as shown, Sudan is one of the countries from which most people flee to seek refuge in neighboring countries and has an extremely high number of internally displaced persons (IDPs) who, unfortunately, do not receive sufficient protection.

The focus of the research in the second chapter is on the analysis of the responses provided by the international community. The chapter engages in an analysis of the hybrid peace-keeping mission led

by the United Nations and the African Union and called UNAMID. To start with, the chapter provides an overview of Chapter 7 of the UN Charter and of the Security Council's role as guardian of international order and peace; it then goes on to examine the ways in which a peace-keeping mission is deployed both legally and in terms of organization. The chapter then proceeds with taking a close look at UNAMID's experience in terms of its strengths and weaknesses, culminating in the abandonment of the Darfur territories in 2020, which contributed to the worsening of an already terribly unstable political situation and a humanitarian situation that was deeply at risk. To conclude the chapter focuses on the relationship between peacekeeping mission and the principle of Responsibility to Protect, arguing that the missions are an implementation of the principle.

Finally, the third chapter of this research focuses on the response to the conflict by international justice. In particular, the focus is on the International Criminal Court and the two arrest warrants for Omar Al Bashir, amounting to a total of seven counts between war crimes, crimes against humanity and the crime of genocide. To begin with, through the analysis of the Report of the Commission of Inquiry on Darfur, the chapter sought to provide as much evidence as possible of the violations that took place in the territory. Later, the chapter offers an overview of the existing legal framework concerning these crimes: the Genocide Convention and its constituent elements are analyzed; then, the Rome Statute and the definition of the other crimes are discussed, as well as the creation of the International Criminal Court with the aim of having a permanent tribunal that can judge on crimes of this scale, and eventually, the determination of the Court's jurisdiction. Lastly, the chapter analyses the process that led to the two international arrest warrants for the then Head of State Al Bashir, emphasizing the fundamental role played in this respect by the UN Security Council which, by means of its power to refer matters to the Prosecutor of the International Criminal Court, made up for the lack of universal jurisdiction of the Court which would otherwise have been prevented from acting since Sudan is not a party to the Rome Statute. In conclusion, there is an analysis of the reasons why, to date, there has been no enforcement of the two arrest warrants: on the one hand the lack of cooperation by the states party to the Rome Statute, and on the other hand the great reluctance on the part of the African Union.

The aim of this research was to determine whether the responses offered to the conflict were sufficient to provide a peace solution: it would be too easy to say that the number of efforts made was not enough. To be thorough it is necessary to recognize that, partly, the International Community tried its best to intervene and solve the crisis but was confronted with lack of action from several subjects (Sudan, African Union, many African Countries etc.). The analysis of the case showed specifically that even if, in theory, a wide range of norms and actions that can contribute to the project of a long-lasting peace

exist, they necessarily confront themselves with the reality of how international relations work. Although it may be poetic to think that everyone has altruistic goals, every entity is guided by its own interests, which do not forcibly align with the need to assist civilians or to enforce international justice. Countries such as Turkey, Egypt, the Russian Federation and China all share political and economic interests in the region, partly due to the access it provides to the Horn of Africa, a coveted peninsula that could grant the access to the Red Sea, known for its prosperous trade routes.

For what concerns peacekeeping operations and its chance in having success they do present several drawbacks that, on the long term, may affect the foreseen achievements. Several problems, as a matter of fact, are related to the absence of codification of the practice of peacekeeping in a single document; this feature only intensified the reluctance of many countries towards such operations, that are still perceived as a sort of intrusion into the national sovereignty of individual countries. A possible solution to these issues, which appears to be gaining popularity at the international level, are the missions that are characterized by a regional leadership, in the specific case of the African continent, led by the African Union itself. However, this kind of actions would not be problem-free: first, they would raise the problem of the funds to be dedicated to such operations, which could underline the region's lack of self-sufficiency in this sense; then, they could conflict with the need to maintain a certain neutrality towards the parties, which although imperative, it is not always easy to keep with leaders and Heads of State with such proximity. Regardless of whether the missions are UN-led or led by regional entities, there is no doubt about the mistakes made by UNAMID, a peacekeeping mission reeking of the hypocrisy unfortunately found in many operations: once awareness of the violations and of the chaos in the area where the conflict is located is acknowledged, an attempt is made to solve it and mitigate its effects, only to end up years later without having truly solved it, and often even exacerbating the geopolitical situation. Notwithstanding their usefulness and great support to affected civilians in humanitarian emergencies, peacekeeping missions must necessarily be pursued or conducted in combination with a comprehensive peace agreement process, otherwise they would only temporarily alleviate the difficulties of the conflict and provide some relief but would not be successful in ending it. This is why, to a certain extent, UNAMID was a failed project.

For what concerns the response that was given by international justice, it stems from the analysis that the actions, taken both by the International Criminal Court and the Security Council to activate the proceedings against Al Bashir, were in fact capable of offering a relatively fast response to the events. In this sense, the case represents a unique event and the abstention of the People's Republic of China and the United States from the adoption of the Security Council Resolution n.1593, just keeps

confirming it. The challenges related to the International Justice response are primarily related to the lack of effective enforcement mechanisms and to the fact the ICC's work relies entirely on the cooperation of States Parties and non-Parties to the Rome Statute. Unfortunately, as has been studied, there has been a general absence of support for the Court's actions, particularly from the states of the African continent: first of all, from Sudan, which has avoided any cooperation even when it came to the arrest warrants for Ahmed Haroun (Minister of the Interior of President Al Bashir) and Ali Kushayb (Head of the Janjaweed); and then, from the states of the African Union, including those party to the Rome Statute, which have consistently refused to detain the Head of State, permitting him to travel unchallenged for many years. A future reform of the Statute of the International Criminal Court would therefore be necessary in order to add more solid enforcement mechanisms. For instance, robust sanctions may be imposed on countries that refuse to cooperate, or the enforcement of arrest warrants could be improved in order to make the Court's work more independent. A reform of the Security Council is similarly required. In addition to the anticipated reform concerning the veto power granted to its permanent members (endorsed by the Permanent Representative of Italy to the United Nations in New York, Maurizio Massari), the Council should seek to become the effective guarantor of peace and international security as set forth in the UN Charter. It may be sufficient for the Council to lose its strong political feature, or at least do so in cases where its intervention is necessary to re-establish a balance, especially in the context of major humanitarian crises.

At the moment, however, the reality under analysis is very different. Al Bashir is still escaping and the moment in which he will be brought to trial in The Hague appears to be very distant; meanwhile, in the last few years, a new conflict has erupted in Sudan on the ashes of the previous one, throwing the region of Darfur once again into chaos. More suffering is being inflicted on civilians of non-Arab origin, and in particular, numerous NGOs have been warning of the danger of a new ethnic cleansing and a possible new genocide being carried out against the very same populations that have been targeted by the actions reported in this research, though this time carried out by the Rapid Support Forces. However, as it is known, the path of fleeing is not an easy one either. In fact, the partnerships of many Western countries with countries of the African continent, among them Al Bashir's Sudan, had and still have the expressed aim of making the migration routes safer, but often disguised great abuses against those who tried to leave the Continent. In this respect, unfortunately Sudan constitutes more of a rule rather than an exception among African countries and shares the same destiny as Burkina Faso, Mali, Senegal, Nigeria, and many others. As long as structural reforms of the system will not take place, and as long as there will be no cooperation from all sides in order to work towards a lasting

peace process, such conflicts will only continue to flourish and to bring suffering and pain to civilians who instead deserve the opportunity to enjoy peace.

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