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LL.M. International and European Public Law

**The United Nations Security Council and the Darfur Conflict -
The first test-case for the concept of “responsibility to protect”.**

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Abbreviations

AMIS	African Union Mission in Sudan
AU	African Union
CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
EU	European Union
GoS	Government of Sudan
High-level Panel	High-level Panel on Threats, Challenges and Change
HCA	Humanitarian Ceasefire Agreement on the Conflict in Darfur
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
IGAD	Intergovernmental Authority of Development
JEM	Justice for Equality Movement
LJM	Liberation and Justice Movement
NATO	North Atlantic Treaty Organization
NCP	National Congress Party
NGO	Non-Governmental Organization
P5	Permanent Members of the United Nations Security Council (China, Russia, US, UK, France)
R2P	Responsibility to Protect
SLM/A	Sudan Liberation Movement/Army
SPLA/M	Sudan People's Liberation Army/Movement
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNMIS	United Nations Mission in Sudan
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WSD	World Summit Document

Introduction & Methodology

Five years after at least 800.000 Tutsi and moderate Hutu had been killed in the Rwandan genocide while the United Nations Security Council (UNSC) failed to fulfill its duty as primary body “for the maintenance of international peace and security”¹, no attempt had been made to formulate a framework on how to deal with such an incidence in the future. Former Secretary-General Kofi Annan pressed the international community² to “find common ground in upholding the principles of the Charter, and acting in defence of our common humanity”.³ In doing so, he pointed to “the lack of an accepted framework for intervention in the face of egregious abuses.”⁴ The Canadian government answered one year later to the call and sponsored the independent International Commission on Intervention and State Sovereignty (hereinafter ICISS or Commission).⁵ The ICISS published its report ‘Responsibility to Protect’ (hereinafter referred to as R2P) in 2001.⁶ Only four years later, the World Summit of the General Assembly and 150 heads of state or government acknowledged the idea of R2P in 2005.⁷ However, over the course of those four years, and also after the adoption of the World Summit Document (hereinafter referred to as WSD), the concept, in regard to legal, moral, political, and practical terms, was controversially discussed. Specifically the question under which circumstances a Humanitarian Intervention⁸ might be justified, let the feelings ran high.

The concept of R2P was developed to challenge the traditionally strong position of state sovereignty in international affairs, by including an obligation for each state to fulfil its primary responsibility as

¹ United Nations, *Charter of the United Nations*, (adopted 26 June 1945, entered into force 24 October 1945) (1945) 892 UNTS 119 (UN Charter) Art. 24).

² While non-state actors such as inter-governmental or non-governmental organizations did contribute to draft the concept developed by the ICISS, the term ‘international community’ will stand in this paper, if not otherwise noted, for the Member States of the United Nations. Particular the term community is, however, mistakable, because it suggests broad agreement within the community of states on a particular issue. It will become clear in this thesis that this is, however, seldom the case, at least in the case of Darfur.

³ Annan, Kofi A. “Secretary-General’s Speech to the 54th Session of the General Assembly”, speech at General Assembly Summit, September 20, 1999. SG7SM/7136 GA/9596, 1999, <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html> (10.03.2010).

⁴ Grono, Nick. “Briefing - Darfur: The International Community’s Failure to Protect”, *African Affairs*, Vol. 105, Iss. 421, 2006, pp. 621-631.

⁵ Lloyd Axworthy, then Canadian Foreign Minister, launched the ICISS in September 2000, “with a mandate to promote a comprehensive debate on the relationship between intervention and sovereignty, with a view to fostering global political consensus on how to move from polemics towards action within the international system.” Mohammed Sahnoun of Algeria and Gareth Evans of Australia were invited to co-chair the Commission with its twelve members, which were selected with the broadest geographic spreading and area of expertise to foster a widely accepted result. See the Homepage of the ICISS for further information, in particular <http://www.iciss.ca/progress-en.asp> (09.04.2010).

⁶ “On December 18, 2001, the report was formally presented to Secretary-General Kofi Annan and the United Nations community.” Ibid.

⁷ Hild, Maja K. “Balancing the Irreconcilable? Debating the ‘Responsibility to Protect’ and its Legal, Political and Ethical Implications”, (L.L.M. thesis, University of Kent at Brussels, 2008).

⁸ The term ‘military intervention for human protection purposes’ will be used throughout this thesis instead of the term ‘Humanitarian Intervention’. Human Relief organizations such as the Red Cross movement “found (...) the association of “humanitarian” with any form of military action [inherently abhorrent]”, a notion which finds support by this author. See: Evans, Gareth. *The Responsibility to Protect – Ending Mass Atrocity Crimes Once and For All* (Washington D.C.: Brookings Institution Press, 2008).

sovereign state, which is to protect their citizens. The ICISS developed a set of tools, which should give the international community the possibility to judge whether a state is fulfilling its primary responsibility as mentioned above. However, those tools, the so-called 'just cause' thresholds and the precautionary principles, have not been included in the WSD, because of lacking agreement among the Member States of the UN. Because of the fact the UNSC failed to take necessary action in the Rwanda and Srebrenica genocides, the ICISS also recommended procedural changes for this body. Those changes, e.g. the voluntary abstention from their veto-power by the Permanent Members of the UNSC (hereinafter referred to as P5), in case the UNSC is dealing with a situation falling under the umbrella of R2P, and national interests are not at stake, were also excluded from the WSD.

Parallel to the theoretical discussions, the first test-case for the concept of R2P emerged in Sudan's western region Darfur. Civil war broke out in Darfur in April 2003, and has cost more than 300,000 lives, and almost three million people have been displaced. Mass atrocities against civilians occurred in this conflict for power and the ability to survive in a hostile environment to human beings. The UNSC has dealt with this conflict for six years now, but proved to be unsuccessful to bring peace to Darfur.⁹ Why the UNSC was unable to fulfil its task as primary body for the maintenance of international peace and security in the case of Darfur will be analysed based on the Resolutions and meeting records concerning those Resolutions of the UNSC. This thesis will focus on the question, whether the UNSC might have been able to stop the mass atrocities in Darfur, if the concept of R2P would have been fully applied, as proposed by the ICISS? Did the test-case Darfur reveal shortcomings of the ICISS's proposal?

The concept of R2P will be analysed in the first chapter. In this chapter, the transformation from a concrete concept by the ICISS to a letter of intent by the World Summit in the WSD will be documented. First of all, some information concerning the ICISS and the historical background of the discussion are provided. Subsequently, the concept will be analysed based on the three levels proposed by the Commission, namely the responsibility to prevent, to react, and to rebuild. Because of the fact the Darfur conflict is placed within the responsibility to react, the two other stages of prevention and rebuilding will be discussed first, followed by an exhaustive view on the stage of reacting to a conflict. Military intervention for human protection purposes is a feature of the responsibility to react. For this reason, the analysis of the responsibility to react will be split up between non-coercive measures and the mentioned military intervention.

The second part will focus on the situation in Darfur and present some background information on the people, as well as giving an overview of the conflict since 2003.

The third chapter of this thesis will discuss and analyse the efforts undertaken by UNSC to end the conflict in Darfur. The Resolutions passed by the UNSC concerning Darfur will be discussed in chronological order. Intense debates between supporters and critics of the Khartoum regime are defining the UNSC sessions dealing with Darfur. The meeting records of the UNSC are useful documents for clarifying the gap between those two sides and are helping to identify the problems the UNSC is facing in connection to the Darfur conflict.

⁹ See *inter alia*: Prendergast, John and David Sullivan. "Irresolution - The U.N. Security Council on Darfur", *Enough Strategy Paper 33*, 2008, http://www.enoughproject.org/files/publications/unscc%20july%202004-2_0.pdf (26.03.2010).

Finally, in the fourth part the question, whether the concept of the ICISS might have been able to guide the UNSC to react more consistent and effective to the situation in Darfur, will be answered. In addition, the ICISS's approach in terms of applying a military intervention for human protection purposes in the case of Darfur will be critically discussed, and some preliminary recommendations, based on the analysis done in this thesis, will be stated.

This thesis concludes that a full appliance of the ICISS's concept of R2P might have helped the UNSC to perform better during the stages to prevent and non-coercive reaction. However, concerning military intervention the test-case Darfur revealed shortcomings of the proposed ICISS concept. Thresholds and principles developed by the ICISS, under which circumstances a military intervention for human protection purposes is justified, proved to be inapplicable in the case of Darfur and further development of the concept in this area is needed. In order to increase the appliance of the precautionary principles, as developed by the ICISS, the latter ones need to be further developed. Some preliminary recommendations are suggested, which need to be further researched on the basis of additional test-cases.

1. The Concept of Responsibility to Protect

1.1. Introduction

The foundation of the ICISS was initiated by former UN Secretary-General, Kofi Annan, in his 5th anniversary speech of the Rwandan genocide. The proposed framework has been picked up and endorsed by the High-level Panel on Threats, Challenges and Change in its report *A more secured world: our shared responsibility*,¹ by former Secretary-General Kofi Annan in his report *In larger freedom: towards development, security and human rights for all*,² and was finally acknowledged by the World Summit of the General Assembly in 2005 in its final document WSD.³

The aim of the ICISS was to find a way of bringing together state sovereignty and the principle of non-interference on the interface of the protection of human rights. On the one hand, it allows the international community to react when a state is unwilling or unable to prevent war crimes and crimes against humanity, ethnic cleansing, and genocide towards its own population. On the other hand, every state has the possibility to prevent any kind of intervention by the international community; the state needs to make sure that it is treating its citizens responsibly, namely by protecting it from mass atrocities.⁴

The principle of non-interference in domestic matters is established in the UN Charter under Article 2 (7).⁵ Nevertheless, the UNSC is permitted to use coercive measures under Chapter VII in case of “the existence of any threat to the peace, breach of the peace, or act of aggression”.⁶ The ICISS tried to find a solution for this particular problem, whether in case of mass atrocities against civilians state sovereignty and the principle of non-interference into domestic affairs prevails or the duty of the UNSC to maintain peace and security.

The solution to this conflict, as suggested by the ICISS, is that a state does have the right to sovereign rule over its territory, but is equally responsible to protect its citizens within the territory and, therefore, rendering unnecessary action by the international community. In other words: “state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself”.⁷

A state has to fulfil its duties towards its citizens to gain the right for independent rule. The whole concept has been written from the perspective of people who need the help of the international

¹ United Nations General Assembly, ‘Report of the High-level Panel on Threats, Challenges and Change’, *A more secure world: Our shared responsibility*, (2 December 2004), 59th session, UN Doc A/59/565.

² United Nations General Assembly, ‘Report of the Secretary-General’, *In larger freedom: towards development, security and human rights for all*, (21 March 2005), 59th session, UN Doc A/59/2005

³ United Nations General Assembly, *World Summit Document 2005*, (15 September 2005), 60th session, UN Doc A/60/L.1.

⁴ For the definition of ‘mass atrocities’ used in this thesis, see: Evans. (2008). p. 11f.; see also: Badescu, Cristina G. and Linnea Bergholm. “The Responsibility To Protect and the Conflict in Darfur: The Big Let-Down”, *Security Dialogue*, Vol. 40, No.3, 2009, pp. 287 – 309.

⁵ Article 2(7) reads as follows: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” See: United Nations, *Charter of the United Nations*, Article 2 (7).

⁶ Ibid. Article 39.

⁷ Udombana, Nsongurua J. “When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan”, *Human Rights Quarterly*, Vol. 27, No. 4, November 2005, pp. 1149-1199.

community.⁸ Therefore, whenever a situation occurs and a state does not fulfil its “primary responsibility for the protection of its people”⁹, “the principle of non-intervention yields to the international responsibility to protect”.¹⁰

The problem the creator of R2P had to overcome by drafting the concept was and still is very difficult to solve. The norm of state sovereignty has a long history in the Western political hemisphere and is today accepted worldwide. Therefore, the protection of victims of mass atrocities by intervention does nothing less than challenging the generality of this international norm.

1.2. The Cold War and its Aftermath

During the Cold War, the principle of non-intervention prevailed. The two superpowers struggled for political influence in countries worldwide and the preservation of their alliance bloc, interfering by veto-power at the UNSC in case action was about to be implemented against one of its allies. In addition, newly decolonized states rejected (military) action led by Western powers and declared them neo-colonization efforts, ensuring therewith “the primacy of non-intervention until the 1990s.”¹¹ Only in the aftermath of the Cold War, intervention in case of mass atrocities was implemented - for the first time in Somalia 1992. This first military intervention for human protection purposes was widely criticised by the South and blamed as an opportunity for the Western hemisphere to establish a ‘right to intervene’ in domestic affairs contrary to Article 2 (7) of the UN Charter. The argument is indeed comprehensible, based on the fact that the emphasis for this mission was on the ‘right to intervene’ for states, rather than the well-being of the people.¹²

Therefore, the ICISS needed to calm down “fears about a ‘right to intervene’ being formally acknowledged”.¹³ In order to secure the broadest support, the ICISS put specific attention to the fact that

“any new approach to intervention on human protection grounds needs to meet at least four basic objectives:

- ❑ to establish clearer rules, procedures and criteria for determining whether, when and how to intervene;
- ❑ to establish the legitimacy of military intervention when necessary and after all other approaches have failed;
- ❑ to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result; and

⁸ Williams Paul D. and Alex J. Bellamy. “The Responsibility to Protect and the Crisis in Darfur”, *Security Dialogue*, Vol. 36, No. 1, 2005, pp. 27-47.

⁹ International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty, 2001, <http://www.iciss.ca/pdf/Commission-Report.pdf> (22.02.10).

¹⁰ *Ibid.* p. XI.

¹¹ Grono. (2006). p. 622.

¹² Evans. (2008). p. 33.

¹³ *Ibid.* p. 11.

□ to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.”¹⁴

Not only the ‘right to intervene’ was a concern for the ICISS but also the fact that the concept of R2P touches many different fields of international law and politics. Therefore, it has to be mentioned that an exhaustive analysis of R2P in all its facets here is not possible, but that those features touching the test-case of Darfur will come to the fore.

1.3. From the ICISS’s concept to the WSD

Francis Deng promoted the idea of ‘sovereignty as responsibility’¹⁵, which means that in case states fail to exercise their responsibility to protect their citizens, “international consequences” are legitimate.¹⁶ But this does not necessarily mean that those consequences have to be measures of a coercive, military nature. The Commission in turn proposed further measures and categorized them into three stages. The first stage was named ‘responsibility to prevent’ and includes measures in cases when mass atrocities against civilians might occur in the future, but they are not imminent or likely to occur in short terms. Assistance and support by the international community should help to prevent any situation which might be potentially dangerous to the civilian population even occurring. The ICISS emphasizes the importance of the stage of prevention, because “effective prevention is far less costly in blood and treasure.”¹⁷ In case such preventive measures are fruitless and mass atrocities are occurring or are likely to occur very soon, the second stage of ‘responsibility to react’ allows the international community to use coercive measures such as economic or political sanctions. This stage includes also the coercive use of force, which has dominated, as discussed above, the discussion on how to react in case of mass atrocities so far. Finally, the ICISS promotes a ‘responsibility to rebuild’ for the international community. As soon as mass atrocities against civilians come to an end the international community has to fulfil this responsibility by providing manifold support such as measures in rehabilitation and reconciliation.¹⁸

As has been already mentioned, the High-level Panel on Threats, Challenges and Change as well as Kofi Annan welcomed the concept of R2P in their reports previous to the World Summit in 2005. The High-level Panel emphasized the uncertainty inherent in the UN Charter “when it comes to saving lives within countries in situations of mass atrocity.”¹⁹ However, the High-level Panel stated that in case of genocidal acts and other mass atrocities it is not possible to argue based on the principle of non-intervention as reason for non-interference, because such gross humanitarian and human rights violations “can properly be considered a threat to international security and as such provoke action by the Security Council.”²⁰ The High-level Panel endorsed “the emerging norm that there is a collective international responsibility to protect.”²¹ Kofi Annan, too, supported this point of view,

¹⁴ Ibid. p. 11.

¹⁵ Deng, Francis et al. *Sovereignty as Responsibility – Conflict Management in Africa* (Washington D.C.: Brookings Institution Press, 1996).

¹⁶ Evans. (2008). p. 36.

¹⁷ Evans. (2008). p. 79.

¹⁸ Smith, Michael J. “Humanitarian Intervention: An Overview of the Ethical Issue”, *Ethics & International Affairs*, Vol. 12, Issue 1, 1998, pp. 63 – 79.

¹⁹ UNGA, ‘Report of the High-level Panel on Threats, Challenges and Change’, *A more secure world*, p. 65.

²⁰ Ibid.

²¹ Ibid.

stating “[w]hile I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. *I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it*”.²² The core idea of R2P has been formally acknowledged by the World Summit of the General Assembly in 2005. Paragraph 138 and 139 deal with the “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²³

However, during the four years from publication of the ICISS report in 2001 to the adoption of the WSD in 2005, the framework has been further developed. The ICISS approach was cut down significantly in order to be discussed at the World Summit in 2005 at all.²⁴ Almost all practical recommendations, e.g. the voluntary abstention of the P5 using their veto-power in case the UNSC is dealing with mass atrocity situations and national interests are not directly at stake, have been erased.²⁵ The changes made from the ICISS report to the WSD will be analyzed on the basis of the three stages, starting with the responsibility to prevent, followed by the phase of rebuilding. The responsibility to react will be, however, the major focus and discussed in more detail at the end, because the situation in Darfur is entirely based within this phase.

1.3.1. The Responsibility to Prevent

As already mentioned, the ICISS attached great importance to the responsibility of the international community to prevent mass atrocities to occur in the first place. In this area the international community should primarily provide assistance to endangered countries by providing help to build “state capacity, remedying grievances, and ensuring the rule of law.”²⁶

The primary responsibility to protect its people from mass atrocities lies with the state. According to Evans, the very basic of fulfilling this responsibility is providing full political and civil rights, in particular the right of free speech. By giving the people a voice to be heard, the political regime cannot ignore the suffering of the people. A strong civil society and its organisations, such as unions, churches or non-governmental organizations (NGO), do have the possibility to reach huge numbers of people and have, therefore, the ability to point out shortcomings of the government’s performance. This can play an important role in preventing mass atrocities. In addition, Gareth Evans also suggests that states should join international treaties and conventions, such as the human rights covenants of 1966²⁷, and actively participate in their organizations; the committees attached to those covenants review the performances of states in terms of human rights and their protection. When human rights are stick up to, mass atrocities will not occur.²⁸

²² UNGA, ‘Report of the Secretary-General’, *In larger freedom*, p. 35.

²³ UNGA, *WSD 2005*, p. 30.

²⁴ Badescu & Bergholm. (2009). p. 291.

²⁵ The United States rejected the idea of the ICISS, because it was unwilling to accept a general, voluntary abstention from the veto-power without having the chance to decide on case-by-case basis. See: Bellamy. (2005). p. 146f.

²⁶ *Ibid.* p. 43.

²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR).

²⁸ *Ibid.* p. 88-89.

Indeed, a critical review of the human rights performance of a state is a useful tool to protect civilians from atrocities, e.g. by the tool called 'name and shame'.²⁹ A free press and civil society organizations are using equal procedures to keep pressure on the political regime to acknowledge the rights of the individual. This should indeed be encouraged.

In case that those tools prove to be insufficient and a state is not fulfilling its primary responsibility to protect its citizens, the UNSC has, according to the ICISS, in total four kinds of measures subdivided in a political/diplomatic, economic/social, constitutional/legal, and security sector group. Each of these four categories is subdivided into indirect and direct measures. Indirect measures are e.g. the promotion of good governance, support in building a stable economic environment or assistance in fighting corruption. In case of non-compliance by a state, the international community is also eligible to use direct measures, according to the concept R2P, *inter alia* the threat of political or economic sanctions. A political threat might be to terminate the membership in an international organization or travel and assets restrictions on the political elite.³⁰

In the aftermath of the Cold War, the numbers of such preventive action taken by the UNSC increased sixfold.³¹ Equally to the use of military intervention for human protection purposes, such measures were unpopular during most of the second half of the 20th century, because the permanent five veto powers used their veto-right extensively in this time to protect themselves and allied states. Besides economic and political measures, nowadays legal ones are of growing importance for preventing mass atrocities by the establishment of the International Criminal Court (ICC) in 2002. The threat of international criminal prosecution should not be taken lightly anymore by states' leaders and the political elite, especially since an arrest warrant has been issued against a head of state still in office, namely President Omar al-Bashir of Sudan.³² The structural field of legal and constitutional measures should focus, besides the already mentioned promotion of the rule of law, particularly on the protection of human rights. Human rights promotion is not able to prevent an imminent conflict, but is of significant importance in the long term. Governments neglecting human rights protection to its population are likely to spread "the seeds of violent rebellion".³³ The latest example is Kyrgyzstan, where the authoritarian regime, headed by President Bakijew, has been forced to leave the capital city by a bloody revolt.³⁴ A good human rights performance results in a decreasing likelihood of mass atrocities against civilians.

Finally, the international community has the ability to support or pressure states to fulfil their responsibility to protect populations against mass atrocities with structural or direct measures in respect to the security sector. Measures taken in the structural field are e.g. to help military regimes transform to civilian ones or to establish a small and light weapons control system. In case of

²⁹ The idea of 'name and shame' is basically that an entity increases its performance in the specific sector its working in by pressure from another entity outside of the system. In this case, pressure on a government to optimize its human rights performance by the civil society.

³⁰ ICISS. (2001). p. 22ff.; see also: Evans. (2008). p. 87ff.

³¹ Evans. (2008). p. 89.

³² The arrest warrant against Omar al-Bashir has been issued on 4 March 2009. He is accused of five counts of crimes against humanity and further two counts of war crimes as indirect (co) perpetrator und Article 25 3 (a) of the Rome Statute. See: *The Prosecutor vs. Omar Hassan Ahmad Al Bashir*, (Arrest Warrant), ICC-02/05-01/09 (4th March 2009).

³³ Evans. (2008). p. 96.

³⁴ At this point, the situation is still unclear. President Bakijew is rejecting calls to step down. For more information see e.g.: Spiegel Online. "Gestürzter Präsident klammert sich an die Macht", (08.04.2010), <http://www.spiegel.de/politik/ausland/0,1518,687979,00.html>

breaches of this responsibility, the members of the UNSC might press for direct measures, such as arms embargoes or, at this stage only in compliance with the particular state, the deployment of troops in or outside the state's territory to support law and order and the appliance of the rule of law.³⁵

The World Summit of the General Assembly acknowledged the R2P framework by including two paragraphs in the final document. Paragraph 138 of the WSD deals with the stage of preventing mass atrocities and reads as follows:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”³⁶

The primacy given by the ICISS for, first of all, the prevention of mass atrocities, and secondly, the primary responsibility of each state, has been acknowledged here. Previous to the summit, Kofi Annan endorsed this suggestion by the ICISS in light of the UN Charter when he stated that the

“responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.”³⁷

Furthermore,

“[n]o task is more fundamental to the United Nations than the prevention and Resolution of deadly conflict. Prevention, in particular, must be central to all our efforts, from combating poverty and promoting sustainable development; through strengthening national capacities to manage conflict, promoting democracy and the rule of law, and curbing the flow of small arms and light weapons; to directing preventive operational activities, such as the use of good offices, Security Council missions and preventive deployments.”³⁸

The High-level Panel endorsed all three stages of prevention, reaction and rebuilding in its report equally, stating that “prevention, response to violence, if necessary, and rebuilding shattered societies” are the responsibility of the “wider international community” in case a state is unable or unwilling to fulfill its primary responsibility.³⁹

³⁵ Ibid. p. 101ff.

³⁶ UNGA, *WSD 2005*, p. 30.

³⁷ UNGA, ‘Report of the Secretary-General’, *In larger freedom*, p. 35.

³⁸ Ibid. p. 29f.

³⁹ UNGA, ‘Report of the High-level Panel on Threats, Challenges and Change’, *A more secure world*, p. 66.

The endorsement in all four documents of the primary responsibility of the state and the secondary responsibility of the international community in case of unwillingness or inability of the state and specifically the confirmation by the Member States of the General Assembly suggest that the core idea of R2P is nowadays broadly accepted. Equally, the responsibility to prevent has been highlighted in all four documents and supports, in theory, the intent of the international community to react faster to possible mass atrocities. Whether it is a “revolution in consciousness in international affairs” is however questionable.⁴⁰ Many practical obstacles remain which have to be solved before the R2P framework can make a real difference in practical terms and will be discussed in the chapter on the responsibility to react.

1.3.2. The Responsibility to Rebuild

The discussion about the value of the concept of R2P in both academic and political circles focuses clearly on the level of reaction in general and the use of force in particular.⁴¹ While the stage of preventing conflicts is at least not fully blanked out, the Responsibility to Rebuild is virtually absent in those discussions. This is primarily the case because there are not many cases yet where the third dimension of responsibility might prove its effectiveness. In addition, the ICISS itself devotes only some seven pages to this issue.⁴²

The measures available to the international community in the aftermath of a conflict are of a strictly structural nature. Coercive measures such as the threat or actual use of sanctions or force are not applicable anymore, because mass atrocities against civilians are no threat anymore. However, the particular state may need manifold support in reconciliation or rebuilding, to name only two aspects. According to the ICISS, the international community should provide assistance in the same four fields as mentioned in the chapter on prevention. Peacekeeping forces are probably the most prominent measure of the rebuilding phase, but also disarmaments programs or the rebuilding of governmental institutions and support in economic development are counted among possible measures.⁴³

1.3.3. The Responsibility to React

1.3.3.1. Measures short of military action

In the case that preventive action was unsuccessful and the particular state is not fulfilling its primary responsibility, the UNSC should then, according to the Commission, take over the responsibility to protect the people, in accordance to the UNSC “primary responsibility for the maintenance of

⁴⁰ Bellamy, Alex J. “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit”, *Ethics & International Affairs*, Vol. 20, No. 2, 2006, pp. 143 – 169.. p. 144; citing Lindberg, Todd, “Protect the People”, *Washington Times*, September 27, 2005.

⁴¹ See *inter alia*: Evans. (2008); Bellamy, Alex J. “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq”, *Ethics & International Affairs*, Vol. 19, No. 2, 2005, pp. 31-53; Bellamy. (2006); and Bellamy Alex J. “Conflict Prevention and the Responsibility to Protect”, *Global Governance*, No. 2, April-June 2008, pp. 135-156; Welling, J. J. “Non-governmental Organizations, Prevention, and Intervention in Internal Conflict: Through the Lens of Darfur”, *Indiana Journal of Global Legal Studies*, Volume 14, Issue 1, Winter 2007, pp. 147-179; Hamilton, Rebecca J., “The Responsibility to Protect: From Document to Doctrine - But What of Implementation?”, *Harvard Human Rights Journal*, Vol. 19, 2006, pp. 289-297.

⁴² ICISS. (2001). p. 39-45.

⁴³ Evans. (2008). p. 150ff.

international peace and security.”⁴⁴ Measures recommended by the ICISS, and under which circumstances they may be applicable, will be discussed in this chapter.

The measures are again subdivided in legal, political, economic and security subgroups. Indirect structural measures such as assistance are here, however, not applicable anymore. When a situation exists in which an imminent threat of mass atrocities is at stake, the UNSC should, according to R2P, threaten the use of sanctions or, depending on the situation, also the threat for a military intervention for human protection purposes. In case the threat of using those measures still does not push the particular state to fulfil its primary responsibility, the Security Council is requested to implement sanctions and, *only* as last resort, the use of force.

A definition under which the international community has to react to mass atrocities was given by the ICISS. However, it has been changed significantly from the recommendation of ICISS report to the WSD. The ICISS recommended to act in case the following so-called ‘just cause thresholds’ occur:

“large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”⁴⁵

The High-level Panel, however, the first step to narrow the definition down to “the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law”, turning the specific reference by the ICISS to forced expulsion, acts of terror or rape down.⁴⁶ The WSD finally specified that the international community has ‘only’ the responsibility to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁷

The definition of mass atrocities adopted in the WSD triggered some interesting discussion in academic circles. Gareth Evans states that “the slight change in the description of the particular mass atrocity crimes of concern is not significant at all”⁴⁸, neglecting the impression that the trigger mass atrocities have been quite significantly cut down. Carlo Focarelli argues to re-widen the definition by e.g. the reinstalling of democratically elected governments or rescue of own citizens out of a hostile country as justification for an implementation of R2P.

Both Evans and Focarelli are losing sight, in their comments on the definition in the WSD, of the real intent of R2P, namely to protect civilians from mass atrocities. On the one hand, Focarelli’s notion to add the reinstalling of democratic regimes is an honorable but unfeasible approach. Political will as well as logistical support for such a mission would be hard to get, because a *coup d’état* against any regime does not necessarily have to end in mass atrocities against the civilian population. Without a direct connection to relieve mass human suffering, however, R2P would lose sight. On the other hand, Evans’ opinion that the very core of the ICISS’s definition has been adopted in the WSD is missing the point, too. The situation in Burma/Myanmar after the cyclone Nargis in 2008 is a good example for proving him wrong. The French Foreign Minister Bernhard Kouchner immediately made the connection to the concept of R2P, stating that France would under the prevailing circumstances

⁴⁴ United Nations, *Charter of the United Nations*, Article 24 (1).

⁴⁵ ICISS. (2001). p. 32.

⁴⁶ UNGA, ‘Report of the High-level Panel on Threats, Challenges and Change’, *A more secure world*, p. 65.

⁴⁷ UNGA, *WSD 2005*, p. 30.

⁴⁸ Evans. (2008). p. 47.

supply relief goods with a war vessel, because the overextended Burmese military junta refused to accept international help. The accusation towards the junta was that they were committing crimes against humanity by refusing foreign help for their citizens (which is highly controversial).⁴⁹ In the end, under the definition of the WSD a reaction by the UNSC based on R2P was not legitimate. However, the definition of the ICISS that in case of “large scale loss of life, (...) which is the product either of deliberate state action, or state neglect” the international community would have been entitled to intervene with the tool of a humanitarian relief mission.

Regardless of whether this would have been advisable and the right solution, this example shows that the definition of the WSD, as stated by Evans, is not comparable to that one of the ICISS. Indeed, one cannot help but get the impression that the definition provided in the WSD is too narrow and excludes too many potential R2P situations right away from the beginning.

1.3.3.2. The decision to intervene – ‘Just cause’ thresholds and precautionary principles

The ICISS clearly states that military intervention for human protection purposes should only be considered in extreme cases, acknowledging the principle of state sovereignty⁵⁰ and non-intervention in international affairs. A military intervention for human protection purposes is then, according to the commission, “supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is *unable or unwilling* to end the harm, or *is itself the perpetrator*”⁵¹ (*italics added by author*). That however raises the question when an ‘extreme case’ is at hand? The commission identifies, besides the already mentioned ‘just cause thresholds’, four additional criteria, called precautionary principles. These criteria must be fulfilled before the measure of last resort, a military intervention for human protection purposes, is justifiable.⁵² The precautionary principles ‘right intention’, ‘last resort’, ‘proportional means’, and ‘reasonable prospects’ will be shortly presented here.

The use of force under the concept of R2P is only admissible in case that “[t]he primary purpose of the intervention is (...) to halt or avert human suffering.”⁵³ For instance, the overthrowing of a regime

⁴⁹ FAZ-NET, Interview with Edward C. Luck, Special Adviser at the Assistant Secretary-General level „Sollen wir einen Krieg ins Zyklon-Gebiet tragen?“, (14.05.08), <http://www.faz.net/s/Rub4694CFEF46E04113B2625E709D786A26/Doc~EE7F5C56C686A44162EA9F0AE7FC83FC2~ATpl~Ecommon~Scontent.html> (13.04.2010); see also: der Freitag, „Burma und die Kreuzfahrer von heute - Eine Intervention neuen Typs“, (23.05.08), <http://www.freitag.de/2008/21/08210401.php> (13.04.2010); and: Bummel, Andreas, “Souveränität verpflichtet: Die neue Schutzverantwortung der Staaten”, *Bedrohte Völker_pogrom* 248, 3/2008, see: <http://www.gfbv.de/inhaltsDok.php?id=1414&backlink=pogrom.php?id=49&PHPSESSID=25aa767797146a4bcd5f775c06e8fcf8> (13.04.2010).

⁵⁰ The ICISS endorses, in agreement with the principle of equal sovereignty of all Members of the UN as established in Article 2(1) of the Charter, the concept of state sovereignty, which “is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth.” see: ICISS. (2001). p. 12.

⁵¹ ICISS. (2001). p. 16.

⁵² ICISS. (2001). p. 32. The “inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations” as guaranteed in the UN Charter (Article 51) does not touch this just cause thresholds. The right to self-defense by aggression from outside is legitimate, but of significant difference to a military intervention for human protection purposes. The purpose of such a military intervention is to protect civilians from mass atrocities and not self-defense. see also: Evans. (2008). p. 142.

⁵³ Ibid. p. 35.

as such is not fulfilling the principle of 'right intention', although it might be necessary to do so for saving human beings.⁵⁴

Secondly, the engagement of troops is only admissible in case non-coercive means have been unsuccessful. However, this principle should not be understood as an obligation to the international community to implement all possible measures discussed in the stage of prevention. The principle of 'last resort' is fulfilled in case non-coercive measures are unlikely to be effective in protecting civilians anymore.⁵⁵

Thirdly, the magnitude of the threat must be put into perspective to the possible outcome as well as commensurate with the ends. In other words, the military intervention "should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention."⁵⁶

Finally, protection of human beings by military means has to have a certain sureness of success. A military intervention for human protection purposes is not admissible in case that it might even worsen the situation for the people and actual security cannot be achieved.⁵⁷ Some authors such as Ramon Das and Gilliam Brock arguing that the thresholds implementing a military intervention for human protection purposes should be even increased, the principle 'proportionality of means' as well as the 'reasonability of prospects'.⁵⁸ Because of the 'humanitarian value' of such use of force Ramon Das stated that moral and ethical values should be considered even before legal arguments to decide whether military action should be initiated or not.⁵⁹ He continues to argue that in two cases the use of force could be ill-advised, namely:

1. if the intervention produces more harm than good or
2. if the intervention produces in fact more good than harm but far less good than through an "alternative course of action".⁶⁰

Gilliam Brock added a third criterion for establishing a military intervention for human protection purposes. Not only should a military intervention have a reasonable chance to change the situation for good but it must be guaranteed that the situation cannot become worse.⁶¹

The threshold defined here by Gilliam Brock would presumably make the implementation of a military intervention for human protection purposes very unlikely and is ill-advised for the reason that no one is able or willing to give a guarantee that a military intervention will be successful. Undisputed should be Das' threshold that a military intervention for human protection purposes should not produce more harm than good, because this would stand diametral against the purpose of protecting the civilian population. His second threshold formulated here is lacking an ability of proving whether other measures would have brought more success than the military intervention.

The approach taken by the ICISS has been criticised for indeterminacy in practical terms. It remains unclear when the precautionary principles have been satisfied or the 'just cause' thresholds have been crossed. There is no guarantee that states will actually agree in a case that the international community has to theoretically take over the responsibility to protect from the state in question. This

⁵⁴ Evans. (2008). p. 143; see also: ICISS. (2001). p. 35.

⁵⁵ Ibid. p. 144.

⁵⁶ Ibid. p. 145.

⁵⁷ Ibid.

⁵⁸ Das, Ramon. "Humanitarian Intervention in Darfur", (unpublished manuscript); see also: Brock, Gilliam. "Humanitarian Intervention: Closing the Gap between Theory and Practice", *Journal of Applied Philosophy*, Vol. 23, No. 3, 2006, pp. 277-291.

⁵⁹ Das, (unpublished manuscript).

⁶⁰ Ibid.

⁶¹ Brock. (2006). p. 288.

objection brought forward by Alex Bellamy is indeed both of great importance and difficult to find a solution for. The problem remains that R2P is still dependent on political will of the UNSC Member States; even in case agreement on the overstepping of the thresholds and fulfilling of principles exists, effective action is not guaranteed. The ICISS proposed, with the implicit assumption in mind, that in case a majority but not all Members of the UNSC are able to agree on whether the thresholds and principles have been fulfilled, the P5 do then absent to use their veto-power in case national interest are not at stake. This would increase the Security Council's capacity to act.⁶² This idea is indeed comprehensive as the Kosovo conflict in 1999 has shown. NATO responded to Serbia's genocidal and ethnic cleansing behaviour⁶³, because the UNSC was blocked by Russia's threat to use its veto power against a Resolution deploying UN troops. Russia was protecting an ally, direct national interests were not at stake.⁶⁴ In this case, the abstention by Russia would have indeed cleared the way for the Security Council to fulfil its responsibility under Article 24 of the UN Charter. Another point of criticism is the term 'just cause' and the very nature of the proposed thresholds as well as the four principles. Some authors argue that R2P is no more than a reincarnation of Saint Augustine's 'just war' doctrine.⁶⁵ This, however, does not derogate those principles, which have been formulated and supported by all members of the ICISS. Huge efforts have been made to bring together all different geographical as well as expertise backgrounds to get the broadest global recognition of the concept.⁶⁶ The ICISS was not an effort by the Western hemisphere alone and the agreement made in the Commission implicates that not only a Christian-occidental agenda has been discussed and approved.

The discussion on the 'just cause' thresholds, precautionary principles and the abstention of using veto-power were not only controversial in academic but also in political circles. In the end the recommendations by the ICISS have not been included in the WSD 2005. The development from a strong, although not perfect concept to a notion of intent by the international community was for the first time recognizable in the High-level Panel Report in 2004. While the thresholds as well as the principles have been adopted correspondingly to the ICISS recommendations, the abstention of veto-power by the P5 in case a military intervention for human protection purposes is at stake, is nowhere to be found.⁶⁷ Kofi Annan in his report endorsed the work done by the ICISS and the High-level Panel

⁶² Hamilton. (2006). p. 291.

⁶³ Slobodan Milosevic, then Serbian president, established a nationalist movement and an extreme agenda directed against the Albanian population. Serbia was on its way to become an apartheid-like society and the SC failed, because of Russia's threat of a veto, to put adequate pressure on Milosevic to stop his agenda. NATO then decided to take matters in its own hands and started, without authorization of the UNSC, massive air strikes against Serbian infrastructure and was able to finally end hostilities of Serbian troops against the Kosovans.

⁶⁴ The definition of national interest is, however, unclear. Whether Russia had national interests in case of Kosovo is disputable. This author thinks that the interests of Russia in Kosovo were not significant enough to justify the use of its veto-power.

⁶⁵ Focarelli, Carlo, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine", *Journal of Conflict & Security Law*, Vol. 13, No. 2, 2008, pp. 191-213. see also: Hamilton. (2006). p. 292.

⁶⁶ For an overview of the Members of the ICISS and their expertise go to: <http://www.iciss.ca/members-en.asp> (12.04.2010).

⁶⁷ UNGA, 'Report of the High-level Panel on Threats, Challenges and Change', *A more secure world*, p. 57f.

equally, but also in this document the veto recommendation is not mentioned.⁶⁸ In the document of the World Summit in 2005 finally also the thresholds as well as the principles are missing due to lacking support by the Member States of the UN. The concrete nature of both thresholds and principles would have triggered, in theory, action by the UNSC and its Members in order to save victims of mass atrocities without necessarily own strong interests in the conflict zone. This proved to be an obstacle too high for most states. Paragraph 139, which is concerning the responsibility to react, reads as follows:

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”⁶⁹

Not only have the thresholds and principles been left out, even the commitment to find criteria in the future has been fully removed. China and Russia were arguing that they fear abusing of the concept for ill reasons, turn the purpose of those criteria, namely to guarantee intervention when needed but avoid unilateralist attempts when unreasonable and unjustified, upside down. The United States opposed to commit itself when there are no specific national interests at stake.⁷⁰

Both the missing criteria as well as the abstention by the P5 from using their veto-power in case of a military intervention for human protection purposes and when national interest is not at stake would have increased the practical impact of R2P significantly. That those ideas or even the intent to discuss them in the future have not been included in the WSD might prove to be major setback in the future. The ICISS's approach would have made it more difficult for the UNSC to circumvent responsibility in comparison to the WSD.⁷¹ By recommending these 'just cause' thresholds and precautionary principles the ICISS tried to achieve two goals. First of all, it should get harder for the UNSC, as in the

⁶⁸ UNGA, 'Report of the Secretary-General', *In larger freedom*, p. 35; see also: Matthews, Max W., "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur", *Boston College International & Comparative Law Review*, Vol. 31, No. 1, 2008, pp. 137-152.

⁶⁹ Ibid. p. 31.

⁷⁰ Bellamy. (2006). p. 165f.

⁷¹ Ibid. p. 167.

case of Rwanda, to avoid responsibility to protect civilians from genocide and mass atrocities.⁷² Secondly, in case military intervention for human protection purposes is implemented, such as by NATO in Kosovo 1999, it would encourage “potential interveners to justify their actions by reference the just cause thresholds and precautionary principles.”⁷³ This would ultimately give other international organizations the possibility to justify their actions in case the UNSC is in a deadlock and mass atrocities are occurring.

The WSD 2005 has done little to increase the likelihood of preventing further Rwandas or Srebrenicas.⁷⁴ The concept itself, the discussion it started as well as the WSD has successfully raised awareness of the problem of mass atrocities against civilians and how to stop them in the future. However, in the end concrete measures for implementation are missing. In order to get the broadest acceptance, central tools discussed here were erased in the course of time, leaving a toothless declaration of intent rather than the planned practical framework. The tragedy of this development is that in case a situation like Rwanda or Srebrenica occurs anytime soon again, the UNSC will basically be in the same position as before those genocides. Whether the UN primary body for the maintenance of peace and security will fulfil its primary responsibility this time and act differently to 1994/95, is uncertain at best.

⁷²Exhaustive research on the case of Rwanda is not the focus of this paper, however, in case of Rwanda the thresholds were clearly overstepped (mass killings of more than 800.000 people in around 100 days), and all four principles were fulfilled (right intention, balance of consequences, proportional means, last resort).

⁷³ Bellamy. (2006). p. 148.

⁷⁴ Ibid. p. 145.

2. Approaching the Conflict in Darfur

2.1. What does 'Arab' and 'African' mean? A short definition of both Terms

Newspaper articles on Darfur mostly refer to a clash between Arabs and Africans. However, it is absolutely necessary to be able to understand the differences between the so-called Arab and African population in Darfur and that the conflict, which "began in 1955, declined in 1972, and resumed in 1983", has a long history based on this distinction.⁷⁵ Especially journalists tend to oversimplify the situation in Darfur, which is comparable in size to the state of France. It is much more convenient to picture a clear and simple moral world view in black and white drawings. This, however, does not reflect the situation in Darfur correctly, where many different grey tones exist.

The situation in Darfur is mostly described as a struggle of government-supported Arab "janjaweed"⁷⁶ militias against black Africans. However, both 'Arab' and 'African' do have, in the Sudanese context, different meanings which will be shortly analysed and explained.

The three definitions of 'Arab' refer to a local, a regional and a nationwide dimension in Sudan. The definition on the local level simply focuses on the nomad lifestyle of these people. Most of the settled farmers are of African origin. In other words, the Arabs are not necessarily of Arab origin but are defined as Arabs because of their specific nomad lifestyle. On the regional level, the term refers to people whose primary language is Arab. Finally, the political aristocracy in Sudan, which is defined as 'privileged and exclusive', including president al-Bashir's government, is titled Arab, too.⁷⁷

The term 'African' does have both an inclusive and an exclusive approach, which seems to be contradictory at the first glance. The leader of the Sudan People's Liberation Army/Movement (SPLA/M), John Garang, pioneered the inclusive approach of the term. For him "[t]he inclusive meaning [of the term] was more political than racial or even cultural (linguistic), in the sense that an 'African' was anyone determined to make a future within Africa."⁷⁸ Obviously, this definition is remarkably open and every person living on the African continent is, in this sense, an African. The exclusive meaning on the contrary, has a hard and a soft version, respectively referring to a racial and a linguistic dimension. According to these meanings a person can call himself African if he/she is of Bantu origin or if he/she speaks an indigenous African language.⁷⁹

In this paper the term Arab will refer, if not otherwise mentioned, to groups who are living a nomad lifestyle, including the 'janjaweed' militia. The political aristocracy of the Sudan will simply be called Government of Sudan (GoS), though keeping in mind that it is Arab dominated by this definition. The term African, however, will refer to citizens of the Sudan who speak primarily an indigenous African language and living in settled villages in Darfur.

The differentiated distinction made here is necessary to understand the underlying problems of the Darfur conflict. First of all, African rebel groups rose against the Arab government for its lacking

⁷⁵ Battiste, Leilani F. "The Case for Intervention in the Humanitarian Crisis in the Sudan", *11 Annual Survey of International & Comparative Law*, 2005, pp. 49-78.

⁷⁶ 'Janjaweed' means roughly translated "evil man on horseback". The 'janjaweed' militia is a group of poorer nomadic tribes, which is trained and armed by the Sudanese Government and used for military operations within the Darfur region. See: Straus, Scott. "Darfur and the Genocide Debate", *Foreign Affairs*, Vol. 84, No. 1, 2005, pp. 123-133. <http://www.foreignaffairs.org/20050101faessay84111/scott-straus/darfur-and-the-genocide-debate.html> (15.01.2010).

⁷⁷ Mamdani, Mahmood. "The Politics of Naming: Genocide, Civil War, Insurgency", *London Review of Books*, Vol. 29, No. 5, 2007, pp. 1-9. http://www.norman-paech.de/uploads/media/LRB_Mamdani_The_Politics_of_Naming.pdf (12.02.10).

⁷⁸ Mamdani. (2007). p. 5.

⁷⁹ Ibid. p. 5.

interest and political marginalization of Darfur. African citizens of Sudan felt like citizens of a second class, having been kept out of the upper political circles and criticized the inequality of wealth sharing. Secondly, conflicts between Arab nomad herdsmen and African settled farmers for the ever decreasing fertile land are a second major conflict in Darfur. Decades of drought account for the last conflict in Darfur, which has its roots in the 1950s. Both agricultural Africans and nomad Arabs are fighting for decreasing resources to gain their subsistence. The continuing struggle for resources between those tribes has been, besides the drought in Darfur, responsible for the declining food outcome and led to even more tensions between the different ethnic groups. Several dozens of tribes with around six million people are living in Darfur.⁸⁰ Over eighty of these tribes do have their own militia.⁸¹

2.2. The Darfur conflict since 2003

The current crisis in Darfur started with an attack by the Sudan Liberation Army (SLA) rebels on a military airport of the Sudanese Army on 25 April, 2003.⁸² Surprisingly the SLA conquered the airfield and also captured a high military officer of the Sudanese air force. Soon after the JEM joined the fighting and attacked other Sudanese troops. Astonished by the battle defeats the GoS decided to arm Arab tribes in the Darfur region; the 'janjaweed' were born shortly after.⁸³

In addition to this conflict, another one was battled out between the GoS and Christian Africans, mainly the Sudanese People's Liberation Army/Movement (SPLA/M). The ethnic and religious tensions between these two actors led to the longest civil war in all of Africa and lasted twenty-one years, leaving behind two million dead.⁸⁴ Even though this conflict is more North-South based and was not primarily fought on Darfur soil it had a huge influence on the Darfur crisis today. The GoS and SPLM entered peace negotiations under the mediation of the Intergovernmental Authority on Development (IGAD) and signed the Comprehensive Peace Agreement (CPA) in early 2005. However, the rebel groups in Darfur did not participate in those negotiations, but have been excluded because of concerns this would make a solution even more difficult to find for the North-South conflict.⁸⁵

Soon after the first successful attacks of the rebels, the GoS decided to strike back with the help of the 'janjaweed' militias. The attacks of the 'janjaweed', sometimes militarily supported by the Sudanese Army, have been reported as extremely brutal. Furthermore, in most cases villages have been attacked which lack protection by the rebels.⁸⁶ The agenda behind these attacks is to assault those tribes which are the core recruiting bases of the rebels. In addition to the factor of 'punishment' the GoS tries to destroy presumed bases of the rebels, in order to make further recruitment more difficult.⁸⁷ The GoS and the 'janjaweed' militia are being accused as being the worst war criminals in this conflict. Although on a smaller scale, the SLA is responsible for war crimes

⁸⁰ Ibid.

⁸¹ Bronner, Stephen Eric, "The Sudan and the Crisis in Darfur", *Logos: A Journal of Modern Society and Culture*, Issue 5.3, 2006.

⁸² Battiste. (2005). p. 53.

⁸³ Welling. (2007). p. 151.

⁸⁴ Ibid. p. 150.

⁸⁵ Straus. (2005).

⁸⁶ Ibid. s. 55; see also: Scott. (2005).

⁸⁷ Scott. (2005).

and crimes against humanity, too.⁸⁸ The situation in Darfur is seen by Straus Scott as “the worst humanitarian disaster in the planet.”⁸⁹

One year after the initial attacks by rebel groups, besides the SLM/A also the Justice for Equality Movement (JEM) needs to be mentioned here, on Sudanese Army’s facilities and counter-attacks by the army and the ‘janjaweed’, hostilities seemed to slowdown after signing the “Humanitarian Ceasefire Agreement on the Conflict in Darfur” (HCA) and the “Protocol on establishing a Humanitarian Assistance in Darfur” in April 2004.⁹⁰ In this agreement, mediated by Chad with support of the African Union (AU), the signing parties GoS, JEM, and SLM/A were obligated *inter alia* to cease hostilities for 45 days. The ceasefire would be automatically extended as long as no party to the agreement would oppose.⁹¹ However, the three major conflict parties at that time did not comply with the ceasefire agreement and hostilities continued.

Over the course of the conflict old strategic partnerships broke and new ones were formed. The SLA broke up into a number of fractions with the most influential groups SLA-Abdel Wahid and the SLA-Minni faction. The latter was the only contracting rebel party of another agreement, the “Darfur Peace Agreement” (hereinafter DPA) in May 2006. The DPA, mediated this time by the AU directly, however had also, in the same manner as the ceasefire agreement, no lasting effect.⁹² In this case, on the one hand, lasting effect of this peace agreement was impossible due to the lacking approval by other rebel groups. On the other hand, the SLA-Minni faction lost almost all its power and is today of marginal significance in the conflict. Both the HCA and the DPA are of particular importance for reactions taken by the UNSC. The peacekeeping operations African Union Mission in Sudan (AMIS) and African Union/United Nations Hybrid Operation in Darfur (UNAMID) have been deployed to monitor their compliance.

The situation in Darfur has become much more complicated by the fragmentation of rebel groups such as the SLA and others since the original attack of the SLA in 2003. Up until early 2006 the fighting groups in Darfur were “relatively cohesive armed movements” and most of the Arab militias were affiliated with the Sudanese army.⁹³ This situation, however, has changed considerably. The number of militia groups has risen and most of them are connected in two large, but unstable organizations, namely the Tripoli Group and the Addis Ababa Group.⁹⁴ How absolutely unstable and unpredictable the situation in Darfur is has become clear by following the reports which have been submitted in the last six months.

⁸⁸ Because of ‘janjaweed’s’ status as alleged main perpetrator of mass atrocities against civilians, the Security Council emphasized in its first Resolution on Darfur that “the commitment of the Government of Sudan to mobilize the armed forces of Sudan immediately to disarm the Janjaweed militias”. Also academic authors see the ‘janjaweed’ as main perpetrators, *inter alia* Mamdani. (2007), p. 2.

⁸⁹ Scott. (2005).

⁹⁰ Humanitarian Ceasefire Agreement on the Conflict in Darfur, N’Djamena (8th April 2004), available at: <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=14149>

⁹¹ Ibid. Art. 1.

⁹² Badescu & Bergholm. (2009). p. 299.;see also: Darfur Peace Agreement , Abuja (5 May 2006), <http://allafrica.com/peaceafrica/resources/view/00010926.pdf> (16.04.2010)

⁹³ De Waal, Alex. “Darfur and the Failure of the Responsibility to Protect”, *International Affairs*, Vol. 83, No. 6, 2007, pp. 1039-1054.

⁹⁴ BBC News Africa. “Who are Sudan’s Darfur rebels?”, (23.02.10).

2.3. Contrary Signals out of Darfur – the latest Developments

General Martin Agwai, who led the hybrid UN-AU peacekeeping forces UNAMID until he left his post at the end of August 2009, stated shortly before his withdrawal that “the vicious fighting of earlier years had subsided as rebel groups split into factions.”⁹⁵ Instead of “full-blown conflict” today Darfurians are suffering from “[b]anditry, localised issues, people trying to resolve issues over water and land at a local level. But real war as such, I think we are over that.”⁹⁶ However, “the existence of 26 different rebel factions [is] a major obstacle to reaching a peace agreement with the government.”⁹⁷ On the one hand, the cessation of major hostilities is positive for the decreased danger for civilians to become victims, on the other hand it is more difficult to find a political solution and unify those different groups for negotiations. The security situation for civilians did not improve, because the splitting of the rebel movements into dozens of fractions is a major obstacle for the peacekeeping forces of UNAMID deployed in Darfur.

In November 2009, UN Secretary-General Ban Ki-Moon, in opposition to General Agwai’s comment, pointed to the fact that the JEM, which is considered today as the most powerful rebel group – especially since a surprising attack on Khartoum in May 2008⁹⁸ – has been alleged to transfer new troops and equipment from Chad into Darfur.⁹⁹ The concerns expressed by the Secretary-General that tensions seemed to increase again were, however, up until this point unfounded. In January 2010 the GoS and the JEM were about to finalize a ceasefire agreement.¹⁰⁰ Both the GoS and the JEM have been able to secure major concessions, which are included in the framework agreement for further peace negotiations. Even more surprising was the signing of a framework deal by the newly-founded Liberation and Justice Movement (LJM), an umbrella organization of ten different movements, for further negotiations.

The situation at the moment shows that the breaking apart of the rebel movements in small entities complicates the ability to find a political solution all the actors can agree on. The SLA branch of Abdul Wahid refuses to participate in peace negotiations so far. In addition, tensions between the different rebel factions are an additional obstacle in the negotiations.¹⁰¹

The signs of the past few weeks are an indication that the conflict in Darfur may finally come to an end. Hopes are rising that the time of mass atrocity crimes in the Western Region of Sudan is running out. In the course of this conflict an estimated 300,000 people lost their lives, while more than 2.7 million Darfurians have been displaced.¹⁰² However, nobody can predict whether or not the ceasefire agreement will actually be implemented by all sides and is able to end this conflict, particular on the experience of the first peace deals in 2004 and 2006.¹⁰³ The deadline for signing the final agreement

⁹⁵ BBC News Africa. “War in Sudan’s Darfur is over”, (27.08.09), <http://news.bbc.co.uk/2/hi/africa/8224424.stm> (20. 03. 2010).

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ BBC News Africa. “Who are Sudan’s Darfur rebels?”, (23.02.10).

⁹⁹ BBC News Africa. (24.11.09).

¹⁰⁰ BBC News Africa. “Q&A: Sudan’s Darfur Conflict”, (23.02.10).

¹⁰¹ BBC News Africa. “Darfur rebel alliance makes peace with Sudan”, (18.03.10), <http://news.bbc.co.uk/2/hi/africa/8574195.stm> (20.03.2010).

¹⁰² BBC News Africa. “Q&A: Sudan’s Darfur Conflict”, (23.02.10), <http://news.bbc.co.uk/2/hi/africa/3496731.stm> (20.03.10); BBC News Africa. “Darfur rebel alliance makes peace with Sudan”, (18.03.10).

¹⁰³ Grono. (2006). p. 629.

between the GoS and the JEM was 15 March¹⁰⁴, but the due date passed without the signing of the final agreement.¹⁰⁵

Whether or not peace will finally come to Darfur is highly unpredictable at this moment. Former South African president Thabo Mbeki, heading an African panel searching for solutions ending the conflict, is not really convinced that this agreement will bring peace to Darfur. He stayed away from the signing ceremony in Doha. Nevertheless, the latest developments are important to keep in mind when giving some recommendations on the further action the UNSC should take.

¹⁰⁴ Sudan Tribune. "Sudan, JEM to sign Darfur peace deal within three weeks – official", (21.02.10), <http://www.sudantribune.com/spip.php?article34198> (20.03.2010).

¹⁰⁵ Ibid.

3. The United Nations Security Council and its Response to the Crisis in Darfur

3.1. The North-South Conflict and its Influence on Darfur

As has become clear in the previous chapter, the Darfur conflict consists of multiple conflicts overlapping each other with a wide range of non-state actors besides the Sudanese government. Alex de Waal abstracted the Darfur conflict as such: “Darfur is the locus of several complex conflicts involving many different armed groups and, consequently, a range of different types and layers of conflict and threat.”¹⁰⁶ Sudan suffered, besides the conflict in Darfur, from the longest civil war in African history ending only in 2005 in a fragile peace agreement, the CPA. Nevertheless, this second major conflict between the GoS and rebels in the south had and still has huge influence on the conflict in Darfur. The North-South peace talks resulted in the CPA, which was signed in January 2005; however, Darfur had been deliberately excluded due to fears that the explosive situation there might endanger the North-South peace process.¹⁰⁷ This second major conflict in Sudan is mentioned here again because over the next chapter it will come into focus several times.

3.2. The United Nations Security Council and Darfur – The rising of the conflict

Former United Nations High Commissioner for Human Rights (UNHCHR) Sérgio Vieira de Mello brought the rising civil war in Darfur to the attention of the UN for the first time. However, only “a softly worded draft Resolution of concern” was discussed. This Resolution was even supported by the GoS, because it did not name Khartoum as perpetrator in the conflict¹⁰⁸, although it was already well-known that the Sudanese Government supported the ‘janjaweed’, which were alleged to be the main perpetrators carrying out mass atrocities. One month later De Mello presented a report on the situation in Darfur and called the GoS to bring its militias under control. Furthermore, the report requested security for refugees to be guaranteed and perpetrators to be arrested and adjudged.¹⁰⁹ The first Resolution dealing with the conflict in Darfur, Resolution 1556, was passed in the end of July 2004, one month after Kofi Annan tried unsuccessfully to negotiate a peaceful solution during a visit to Sudan’s capital Khartoum and the Chad. This Resolution classified the situation in Darfur as “a threat to international peace and security and stability in the region” and condemned gross violations of human rights in Darfur. Furthermore, a monitoring group by the AU was established to monitor the HCA signed in N’Djamena in April 2004. The UNSC stated its concern of reports of violations against the agreement and, as has been mentioned before, this agreement did not really have an impact in the end. Finally, the Resolution called for sanctions against the GoS in the event of default.¹¹⁰ However, no coherent demands or enforcement mechanisms were included.¹¹¹ The Resolution has not been adopted unanimously. China opposed this Resolution because it included mandatory measures to fulfil by the Sudanese Government, which “cannot be helpful in

¹⁰⁶ De Waal. (2007). p. 1047.

¹⁰⁷ Ibid. p. 1041.

¹⁰⁸ Udombana, (2005), p. 1174; see also: United Nations Economic and Social Council, Commission on Human Rights, *Draft Resolution on the situation of human rights in the Sudan*, (9 April 2004), 60th session, UN Doc E/CN.4/2004/L.36.

¹⁰⁹ Ibid. p. 1180f; see also: United Nations Economic and Social Council, ‘Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights’, *Situation of Human Rights in the Darfur Region of the Sudan*, (3 May 2004) 61st session, UN Doc E/CN.4/2005/3.

¹¹⁰ The Sudanese representative to the UN rejected Resolution 1556 as “an unfair and unjust policy of double standards” that was “the result of a domineering, colonial mindset.” See: Williams & Bellamy, (2005), p. 33.

¹¹¹ Badescu & Bergholm. (2009). p. 295.

resolving the situation in Darfur and may even further complicate it.”¹¹² Pakistan argued comparably, stating that the threat or imposition of sanctions as well as adoption under Chapter VII is ill-advised and does not help to solve the conflict.¹¹³

The United States, in person of then ambassador John C. Danforth, did not mince matters concerning the ruthlessness of the al-Bashir regime, stating that:

“[T]he Government of Sudan has left us no choice. It has done the unthinkable. It has fostered an armed attack on its own civilian population. It has created a humanitarian disaster. So, the Resolution just adopted is our necessary response if we are to help save the people of Darfur. Exploiting an ancient rivalry between Arab African herdsmen and groups of largely black Africans who are farmers, the Government armed the ‘janjaweed’ militias and unleashed them against black civilians. Sudan must know that serious measures — international sanctions — are looming if the Government refuses to do so.”¹¹⁴

Resolution 1556 is considered as the starting point of the UNSC efforts to take over responsibility to react relating to the mass atrocities occurring in Darfur. The UNSC expressed its concern on reports about violations of the agreement, deployed, as mentioned above, an AU monitoring mission and included a threat to sanctions. Resolution 1556, however, was a rather weakly drafted Resolution and needs to be assessed as a typical Resolution of the council in the case of Darfur: short-term and of ad hoc nature, without following an overall strategy.¹¹⁵ Especially the demand of the UNSC towards the GoS to “fulfil its commitments to disarm the ‘janjaweed’ militias and apprehend and bring to justice ‘janjaweed’ leaders” within 30 days has been highly criticized for three reasons.¹¹⁶ First of all, neither the group of ‘janjaweed’ nor the actual meaning of ‘disarm’ has been defined, making implementation almost impossible. Secondly, no monitoring system for the disarming procedure was established and therefore there is little to no ability to prove whether the Sudan is fulfilling the task.¹¹⁷ Finally, the forced disarmament of the ‘janjaweed’, as requested by the Resolution, was an impossible task for the GoS to actually implement within 30 days.¹¹⁸ China and Pakistan refused to support the Resolution and abstained from voting.¹¹⁹ The consultations for this first Resolution on Darfur under Chapter VII of the UN Charter however helped to sharpen the ‘frontlines’ in the UNSC between supporters and opponents of international responsibility to act in case of Darfur. China expressed from the very beginning its concern to put (too much) pressure on the GoS, holding a protective hand over the al-Bashir regime because of its economic interest in the country.¹²⁰ The Russian Federation, while supporting this first Resolution, would also choose in later Resolutions to abstain from voting, primarily because its alleged position as main arms supplier of

¹¹² United Nations Security Council, Verbatim Record (30 July 2004), UN Doc S/PV.5015.

¹¹³ Ibid. p. 9-10.

¹¹⁴ Ibid. p. 3-5.

¹¹⁵ De Waal. (2007). p. 1041.

¹¹⁶ United Nations Security Council, *Resolution 1556*, S/RES/1556 (2004).

¹¹⁷ De Waal. (2007). p. 1041.

¹¹⁸ Ibid. p. 1050.

¹¹⁹ Badescu & Bergholm. (2009). p. 295.

¹²⁰ China owns a 40 percent share of Sudan’s main oil producing field. Welling, (2007), p. 160; see also: Global Policy Forum, Sudan, <http://www.globalpolicy.org/security/issues/sudanindex.htm> (14.04.2010); and: Human Rights Watch, *The United Nations and Darfur*, (January 2005), <http://www.hrw.org/legacy/wr2k5/darfur/3.htm> (14.04.2010).

the Sudanese army and own oil interests.¹²¹ On the other side, particular countries from the Western hemisphere were pressing for more coercive measures against Sudan, as has been previously indicated by the harsh statement of the USA.

It has to be mentioned though that the US also had diverse issues concerning Sudan that made it unlikely that to the harsh statements in the UNSC an equal reaction would follow. Before the Darfur crisis started in early 2003, Washington concentrated on finding a solution for the then still ongoing civil war between the GoS and the African rebels in the south of the country. The US government's goal was to prevent the Sudan becoming again a haven for terrorists. The GoS had granted e.g. asylum for Osama bin Laden in the mid 1990's.¹²² The US government established an economic boycott against Khartoum in that decade, which is the reason why the US does only have marginal economic connections and was partially replaced by China.¹²³ Therefore, the US has the ability to criticise Sudanese politics in Darfur more openly.

However, since the terrorist attacks on 9/11 Sudan's President Omar al-Bashir used his position and offered the US government close cooperation in the 'war on terror'.¹²⁴ The connections between the Sudanese and US secret services are too important for the effective battle against Islamists targeting the US and the latter knew that Khartoum would cease co-operation in case the US would press for stronger Resolutions in the UNSC.¹²⁵ Therefore, the US was able to make strong statements in and outside of the Security Council, while Khartoum knew that the US would not press for strong coercive measures against Sudan.

An interesting statement was made by the Sudanese Ambassador Mr. Erwa, who was "overwhelmed by sorrow at the Council's hasty adoption" of this Resolution.¹²⁶ This notion should, however, be simply rejected and turned down, instead criticizing the Security Council for its 13 months of faineance in case of Darfur before taking serious efforts to end the hostilities. Furthermore, the Sudanese representative accused the US government and the US congress, which by then had the hostilities in Darfur declared genocide and ethnic cleansing, to follow a "domineering, colonial mindset."¹²⁷ Sudan is therewith referring to one of the major concerns of former colonized countries against the concept of R2P, namely the wrongful use by Western countries for neo-colonialism purposes. However, this accusation is questionable, keeping in mind that only the threat of sanctions has been stated in this Resolution. Finally, Mr. Erwa accused in particular the US of using every means to expropriate the conflict of Darfur from the AU. The then three African Member States to the UNSC, Algeria, Angola and Benin, however, voted in favor of the Resolution, supporting the efforts taken by the Security Council. If the AU would have feared marginalization it is unlikely that those three countries would have supported this Resolution.

¹²¹ Global Policy Forum; HRW. (2005).

¹²² Williams & Bellamy, (2005), p. 34.

¹²³ Sanders, Edmund. "Sudan prospering despite a Decade of US Sanctions - China Investment, Oil Exports have eased the Pain", *Los Angeles Times*, (Los Angeles 26.07.2007), http://www.boston.com/news/nation/articles/2007/08/26/sudan_prospering_despite_a_decade_of_us_sanctions/ (11.05.2010).

¹²⁴ Grono. (2006). p. 628.

¹²⁵ Welling. (2007). p. 37.

¹²⁶ UNSC, Verbatim Record (30 July 2004), p. 11.

¹²⁷ Ibid. p. 14.

4.3. Non-compliance by Khartoum and the Threat of Sanctions

Under the impossible conditions imposed on Sudan by Resolution 1556 it was rather unsurprising the UNSC was forced to rework this portion of the sentence with the GoS based on the discussed Resolution. Resolution 1564 from mid-September 2004 declared that

“the Council, in the event the Government of Sudan fails to comply fully with Resolution 1556 (2004) or this Resolution, (...) *shall consider* taking additional measures as contemplated in Article 41 of the Charter of the United Nations, such as actions to affect Sudan’s petroleum sector and the Government of Sudan or individual members of the Government of Sudan, in order to take effective action to obtain such full compliance or full cooperation.”¹²⁸

This Resolution threatened the Sudanese government for the first time with sanctions, but for this reason Russia and China as well as the non-permanent members of Algeria and Pakistan abstained from voting.¹²⁹ In addition, the UNSC established an inquiry commission to clarify whether genocide occurred in Darfur. This second important outcome will be discussed later in this chapter.

All those countries abstaining from voting based their reasoning for doing so on two main arguments: first of all, the threat of sanctions would make it more difficult to find a political solution for the conflict, repelling the Sudanese Government from working on a political solution for the conflict. Secondly, all four emphasized the mediation efforts done by the AU and claimed that the African Union should play the primary role instead of the UNSC. As the Algerian ambassador put it: “Our conviction [is] that the African Union is the most appropriate organization to seek a settlement to the crisis in all its dimensions.”¹³⁰ Furthermore, both China and Algeria argued that the Resolution does not do justice towards the GoS, arguing that the latter one is really trying to fulfill the obligations to stop the atrocities from occurring.

However, both the Ambassadors of the US and UK pointed to the fact that the Resolution *welcomes* both efforts undertaken by Sudan for the delivery of humanitarian relief and confirmation of the leadership role of the African Union.¹³¹ In opposition to the countries opposing the threat of sanctions, both Mr. Danforth (US) and Sir Emyr Jones Parry (UK) argued that only the intense international pressure has forced Sudan to finally act to bring relief to the civilian population. Further indulgence by the UNSC towards Sudan would have had the opposite result.

The arguments by the US and the UK are indeed comprehensible. At this point, already estimated 30,000 people had been killed and more than one million displaced by the conflict. The situation in camps for displaced persons was called disastrous by UNICEF.¹³² The Sudan had initiated relief efforts only 18 months after the first hostilities between rebels and the Sudanese Army broke out in April 2003, however, not in a sufficient way to prevent the threat of sanction in case of further non-compliance. The GoS acted after long refusal. It is highly unlikely that such a policy change would

¹²⁸ United Nations Security Council, *Resolution 1564*, S/RES/1564 (2004); Article 41 of the UN Charter allows the Security Council to adopt measures short of the use of force. See: United Nations, *Charter of the United Nations*, Article 41.

¹²⁹ Clough, Michael, “Darfur: Whose Responsibility to Protect?”, *Human Rights Watch*, (undated), pp. 1-11 <http://hrw.org/wr2k5/darfur/darfur.pdf> (23.03.10).

¹³⁰ United Nations Security Council, Verbatim Record (18 September 2004), UN Doc S/PV.5040

¹³¹ UNSC. (2004) Res. 1564. p. 1-2.

¹³² RP-Online. “US-Kongress erklärt Greuelaten in Darfur zum Völkermord“, (23.07.04), http://www.rp-online.de/politik/ausland/US-Kongress-erklaert-Graeueltaten-in-Darfur-zum-Voelkermord_aid_55724.html (15.04.2010).

have been voluntary at this point. Growing international pressure did push the GoS to compliance. The arguments of the countries who decided to abstain from voting was therefore false; decreasing the pressure on Khartoum was not the decision to make.

A second result of Resolution 1564 was the request of the SC towards the Secretary-General to establish an international commission of inquiry to answer the question whether acts of genocide had occurred in Darfur.¹³³ At this stage, the conflict in Darfur had been defined as genocide by the US Congress and Government¹³⁴ as well as non-governmental organizations (NGOs) like Physicians for Human Rights and Justice Africa. Already in May 2004 the US Department of State sent a team to investigate whether acts of genocide occurred in Darfur. Indeed the investigation team did confirm genocidal acts. However, the Bush-Administration made clear that this outcome would have no effect on US foreign policy towards the conflict.¹³⁵ On the other side, there is also a huge group of actors in the international arena which rejects the term genocide in connection to Darfur. Members of this group are, for instance, the European Union (EU) and NGOs like Amnesty International and Human Rights Watch.¹³⁶

The lack of clarity bases on the fact that it was and still is difficult if not impossible to prove the intent of the Sudanese Government to commit genocide.¹³⁷ As mentioned above, the UNSC established with Resolution 1556 an inquiry commission¹³⁸ to finally answer the question whether genocide occurred in Darfur. In the SC session concerning this Resolution the abstaining Algerian Ambassador Mr. Baali regretted the decision to employ the inquiry commission, pointing to the concern that this would possibly “disrupt or jeopardize the delivery of humanitarian assistance and the ongoing African Union efforts aimed at reaching a political settlement.”¹³⁹ Whether this is true is not entirely provable, but another negative impact did indeed come up by the employment of the inquiry commission. A major setback for advocates supporting a strong stand against the GoS was triggered by the result of the inquiry commission. The inquiry commission confirmed “gross violations of human rights perpetrated by Government forces and the militias under their control.”¹⁴⁰ However,

¹³³ UNSC. (2004) Res. 1564. p. 3 (para. 12).

¹³⁴ The United States signed (11 Dec 1948) and ratified (25 Nov 1988) the Convention on the Prevention and Punishment of the Crime of Genocide. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (09.04.2010).

¹³⁵ De Waal. (2007). p. 1041f.

¹³⁶ Scott. (2005). p. 128.

¹³⁷ The “intent” to commit genocide is, however, according to the Genocide Convention, of particular importance. It is very difficult to find evidence that the GoS did directly support to commit genocide, was part of a conspiracy, incited in public, or was part of a complicity to commit genocide in any form.

¹³⁸ “In October 2004, the Secretary General appointed Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the Commission and requested that they report back on their findings within three months. The Commission was supported in its work by a Secretariat headed by an Executive Director, (...) a legal research team and an investigative team composed of investigators, forensic experts, military analysts, and investigators specializing in gender violence.

In order to discharge its mandate, the Commission endeavoured to fulfil four key tasks: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable.” The full report was submitted on 25 January 2005. See: International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, (25 January 2005)

¹³⁹ UNSC, Verbatim Record (18 September 2004), p. 2-3.

¹⁴⁰ International Commission of Inquiry on Darfur. (2005). p. 131.

the genocidal intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds were missing and, therefore, the inquiry commission “concluded that the Government of the Sudan has not pursued a policy of genocide.”¹⁴¹

The findings of the inquiry commission had two particular effects on the Darfur conflict. First of all, the fact that genocide had not occurred in Darfur, according to the inquiry commission, was celebrated by the GoS as a moral victory, forcing defenders of humanitarian and human rights onto the defensive. The fact is: around 300,000 people have been killed in this conflict so far. Neither today nor in September 2004 was the question significant, *in regard to the protection of the Darfurians*, whether the killings have to be labelled genocide or ‘just’ crimes against humanity, ethnic cleansing and/or war crimes. In both cases, according to R2P, the international community would have been obligated to take over the responsibility to protect the civilians. For reasons of personal liability and prosecution of important leaders to the conflict, however, it is important to clarify whether genocide has been committed. Nevertheless, the point of time to discuss this question was badly chosen in September 2004. In retrospect, the UNSC would have been well advised to stop the mass atrocities before dealing with the question whether the hostilities in Darfur should be labelled genocide. At that time, in September 2004 and with ‘only’ 30,000 dead people, the focus should have been more on preventing further harm. The genocide question only distracted the debate as well as the UNSC itself from the imminent problem of how to stop mass atrocities. The question whether the crime of genocide or crimes against humanity, war crimes, and ethnic cleansing occurred, was not important at this stage. It was only important to stop the mass atrocities, regardless of how to label them at this point.

Concerning the R2P framework, the findings of the inquiry commission would have made no difference in regard to the responsibility of the UNSC. The international community obligated itself in the WSD to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing equally; the latter three crimes occurred, according to the inquiry commission, in Darfur. Also the proposed ‘just cause’ thresholds in the ICISS report are equally clear on this point. The international community should protect civilians in case of “large scale loss of life, actual or apprehended, *with genocidal intent or not*” (italics added by the author). The undisputed fact of occurring mass atrocities and that those claimed 300,000 lives did certainly fulfill the thresholds. Both the ICISS’s ‘just cause’ thresholds and the crimes included in the WSD would have triggered international responsibility to react.

The second, important outcome of the inquiry commission’s report was its strong recommendation “to the Security Council [to] immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute.”¹⁴² The UNSC followed the recommendation and referred the situation to the ICC within a month. The decision was, however, not undisputed, because fears rose that Khartoum would end any efforts to save the pain of the Darfurian people as a protest to that decision. The referral to the ICC by Resolution 1593 will be discussed in the next chapter.

¹⁴¹ Nevertheless, the inquiry commission stated in January 2005 “that the Darfur atrocities should not be called genocide, though it claimed the acts were ‘no less serious and heinous than genocide’.” See also: Welling, (2007), p. 160.

¹⁴² International Commission of Inquiry on Darfur. (2005). p. 5.

3.4. Resolution 1593 and the Referral to the International Criminal Court (ICC)

By adopting Resolution 1593 the Security Council referred the situation in Darfur to the Prosecutor of the ICC.¹⁴³ As was the case of the first two important Resolutions 1556 and 1564 on Darfur, this Resolution also was not adopted unanimously. In the case of Resolution 1593, four Member States decided to abstain from voting, namely the two permanent Members China and the United States as well as Algeria and Brazil.

The United States as well as Algeria abstained from voting because they would have favoured criminal prosecution of perpetrators to be undertaken by the AU. While Algeria repeated its argument that AU's mediation efforts are compromised by a UNSC Resolution, the US expressed its dismay; one of the reasons the US did not ratify the Rome Statute is that "the ICC [is] able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty."¹⁴⁴ Brazil expressed its support for referring the situation in Darfur to the ICC, "[n]evertheless, Brazil was not able to join those members that voted in favor of the Resolution."¹⁴⁵ By doing so, the South American country acknowledged the fact that the ICC is not universally supported and therefore the referral might compromise the integrity of the court.¹⁴⁶ China argued also in this session that the interference by the UNSC might have negative impacts on political negotiations and would have preferred the Sudanese judicial system to deal with gross human rights perpetrators. Whether the judiciary in Sudan is, however, independent enough to release an arrest warrant against President al-Bashir, as has been done by the ICC in March 2009¹⁴⁷, is questionable and should be handled, to say the least, with care.

3.5. Contrarian Signs: Peace in the North-South Conflict and harsher Course of Action in Darfur

The partly encouraging, partly threatening tone of the UNSC Resolutions of the first two years of the conflict missed their intentions to settle down the conflict without using coercive measures. Therefore, within a week prior to the adoption of Resolution 1593 and the referral to the ICC, the UNSC discussed and adopted two other Resolutions concerning Sudan. Resolution 1591 stepped over the line from threatening to actually implementing sanctions within the level of the responsibility to react. So-called 'smart sanctions' were adopted which cleared the way for travel bans and freezing funds of individuals. Resolution 1590 passed unanimously a week prior to Resolution 1593 and deployed the United Nations Mission in Sudan (UNMIS).¹⁴⁸

¹⁴³ United Nations Security Council, *Resolution 1593* (31 March 2005) S/RES/1593; See also: De Waal. (2007). p. 1042; see also: Badescu & Bergholm. (2009). p. 295.

¹⁴⁴ United Nations Security Council, Verbatim Record (31 March 2005), UN Doc S/PV.5158.

¹⁴⁵ UNSC, Verbatim Record (31st March 2005), p. 11.

¹⁴⁶ In regard to Brazil's notion of the disputed status of the ICC, there is also unsurprisingly no connection made in the document of the World Summit in 2005 between R2P and the ICC. Although the Rome Statute only entered into force one year after the ICISS report, the Commission mentioned the Court several times and welcomed "the establishment of the International Criminal Court – when 60 states have ratified the 1998 Statute – [because it] will mean there is new jurisdiction over a wide range of established crimes against humanity and war crimes, some of which are described in greater detail in the Statute than in existing instruments, such as the categories of sexual violence constituting crimes against humanity, and some of which are new, such as the prohibition on the enlistment of child soldiers. The establishment of the International Criminal Court is also to be welcomed as a measure to avoid the accusations of double standards, or "victor's justice," which are periodically aimed at the specialist tribunals just referred to." ICISS. (2001). p. 24.

¹⁴⁷ See Footnote 32.

¹⁴⁸ United Nations Security Council, *Resolution 1590* (24 March 2005), S/RES/1590.

UNMIS's mandate is "[t]o support implementation of the Comprehensive Peace Agreement." The CPA was signed by the GoS and the Sudan People's Liberation Movement/Army (SPLM/A) in Nairobi, Kenya on 9 January 2005 to end the twenty-one years old North-South civil war.¹⁴⁹ The CPA, however, deliberately excluded Darfur and while UNMIS's mandate included the whole Sudan, in Darfur UNMIS was requested "to closely and continuously liaise and coordinate at all levels with the African Union Mission in Sudan (AMIS) with a view towards expeditiously reinforcing the effort to foster peace in Darfur, especially with regard to the Abuja peace process and the African Union Mission in Sudan."¹⁵⁰ It would take another 18(!) months before a Resolution was introduced which would have extended the UNMIS mandate to include Darfur too. The exclusion of Darfur from the peace agreement, as well as UNMIS's mandate, was primarily defended due to the complicated structure of both conflicts. Including Darfur would have endangered a possible peace in the oldest civil war. Eric Reeves however dismissed this argument, stating that Darfur's interests have been traded by Western governments in order to fix the North-South deal.¹⁵¹

The argument of the complicated situation for leaving Darfur out of the North-South process was to some extent acceptable, however, as has been argued in the previous chapter, also interests of the US and China in particular played a role in this modus operandi. Nevertheless, the exclusion of Darfur out of UNMIS's mandate was primarily based on pressure by the GoS. The Sudanese Government insisted from the very beginning on the African Union's primacy over the UN in dealing with the Darfur crisis. A position which needs to be discussed, whether the Sudan tried to escape harsher treatment by the UN by their insistence on the primary responsibility of the AU.

3.6. Diplomatic Efforts by the AU and the African Union Mission in Sudan (AMIS) 2004-2006

Sudan's insistence on AU's primacy in connection to Darfur went as far as stating: "[t]he African Union, as affirmed by one of the major delegations in the Council, is the only body that can deal with Darfur."¹⁵² The 'major delegation' mentioned here is China, which, as has been discussed earlier, tried because of own economic interest to protect Sudan from harsher Resolutions by the UNSC. China also emphasized regularly in the Security Council's sessions concerning Sudan the primary role of the AU, getting support by African nations and partly Russia. While the emphasizing of the AU by African countries is self-explanatory, the vital question arises why Sudan put so much emphasis on the special role of the AU in finding a solution for the conflict. The answer to this question will be given after a short examination of the legal background concerning regional organization and their role in preserving international peace and security.

The UNSC primary responsibility to maintain peace and security is prescribed in Article 24 of the Charter. The ICISS support the UNSC as primary bearer of responsibility to protect, stating that "[t]he task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has."¹⁵³ Kofi Annan in his *In larger freedom* report¹⁵⁴ as well as the WSD 2005 also acknowledged the UNSC primary responsibility.¹⁵⁵

¹⁴⁹ Ibid. p. 1.

¹⁵⁰ Ibid. para. 2.

¹⁵¹ Reeves, Eric. "Failure to Protect: International Response to Darfur Genocide", *Harvard International Review*, Vol. 29, Iss. 4, Winter 2008. p.83-84.

¹⁵² United Nations Security Council, Verbatim Record (29 March 2005), UN Doc S/PV.5153.

¹⁵³ ICISS. (2001). p. XII.

Chapter VIII of the UN Charter, however, opens the door for 'regional arrangement or agencies' which may deal with matters "relating to the maintenance of international peace and security" as long as "their activities are consistent with the Purposes and Principles of the United Nations."¹⁵⁶ The ICISS endorsed in its report that regional organizations may take action up to a military intervention for human protection purposes in case the UNSC is not fulfilling its primary task, such as in the cases of Rwanda, Srebrenica or Kosovo.¹⁵⁷ The World Summit too welcomes the support of regional organizations as appropriate in the specific case.¹⁵⁸

In the case of Darfur the African Union was actively engaged from the very beginning. Already Resolution 1556 in 2004 "[e]ndorsed the deployment of international monitors, (...) and protection forces envisioned by the African Union"¹⁵⁹ and further efforts undertaken by the AU were welcomed, in UNSC Resolutions as well as statements during the UN sessions. The first monitoring groups of the AU were already sent in mid-2004, with no more than 60 monitors and 300 troops. Indeed the Union of African States is the leading international organisation acting in Darfur, and it has mobilized great efforts under its limited resources. The DPA was *inter alia* mediated by the African Union in 2006, and the AU supported negotiations of the HCA signed in 2004.¹⁶⁰ However, when it comes to military action carried out by the AU, the limitations became clear very quickly.

The "big gap between intentions and capabilities" came to fore, first of all, by the insufficient mandate the observers and troops were sent off with in 2004.¹⁶¹ In particular, the mission suffered by the fact that it was fully intended as an observer mission, which broadly negated the active protection of civilians. Only in cases when the troops were present during an attack and they felt strong enough to defend civilians and themselves were they allowed to actively use force, which almost never happened. The HCA was, as already mentioned, the basis for the deployment, but the document was rather unclear and the AMIS commanders did not really know where they are allowed to operate and where not.¹⁶² Furthermore, the mission and its employees were constantly underpaid, waiting sometimes months to be paid and international funding dried out over the course of time.¹⁶³

In conclusion, AMIS was overstretched, ill-equipped and under-mandated.¹⁶⁴ The mission has to be judged as more a symbolic than actual civilian protection effort and was "a convenient excuse for Western powers to avoid direct involvement in Darfur."¹⁶⁵

Concerning the practical implementation of the concept of R2P, diplomatic and political efforts by regional organizations should be indeed welcomed and supported. However, the deployment of forces should remain in hands of the UN as primary body for the maintenance of international peace

¹⁵⁴ "[T]he Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required." See: UNGA, 'Report of the Secretary-General', *In larger freedom*, p. 35.

¹⁵⁵ UNGA, *WSD 2005*, p. 30 (para. 138).

¹⁵⁶ United Nations, *Charter of the United Nations*, Article 52 (1).

¹⁵⁷ ICISS. (2001). p. 53f.

¹⁵⁸ UNGA, *WSD 2005*, p. 30 (para. 139).

¹⁵⁹ UNSC. (2004) Res. 1556. para. 2.

¹⁶⁰ International Crisis Group, "Darfur's Fragile Peace Agreement", *Africa Briefing No. 39*, (20.06.06), see: <http://www.crisisgroup.org/home/index.cfm?id=417991>(17.04.2010).

¹⁶¹ Grono. (2006). p. 625.

¹⁶² De Waal. (2007). p. 1041.

¹⁶³ Grono. (2006). p. 626.

¹⁶⁴ De Waal. (2007). p. 1045.

¹⁶⁵ Badescu & Bergholm. (2009). p. 298f.

and security. Support and contribution for UN mission is easier to get by the Member States of the UN than for a mission by the African Union; although that is also a difficult undertaking as will be discussed below (see chapter 4.8.).

The matter why Sudan is insisting on deploying African troops may not be clearly answered, however, as Ademola Abass is suggesting, that mantra [‘African solutions to African problems’] is sometimes used as a weapon to shield international scrutiny of the activities of certain African regimes or to facilitate a kid-glove treatment of otherwise serious issues.”¹⁶⁶ Due to the fact that still today many political regimes in African states might not be called ‘flawless democracies’, this notion is indeed worthwhile to recognize.

3.7. Raising the Pressure? – Resolution 1591 and ‘Smart Sanctions’

In addition to the deployment of troops (Res. 1590) and the referral to the ICC (Res. 1593), at the end of March 2005 the UNSC implemented also sanctions against all parties to the Darfur conflict. In doing so the SC disapproved *strongly* both the unwillingness of the GoS and the rebels to halt hostilities as well as the breaking the N’djamena Ceasefire Agreement of 8 April 2004 (which actually has never been kept by any side).¹⁶⁷ In addition, an arms embargo established against non-governmental entities, the ‘janjaweed’ and rebel groups, by Resolution 1556,¹⁶⁸ was widened to all parties of the ceasefire agreement, which therefore applied for the first time sanctions on the Sudanese government.¹⁶⁹ Because of this fact Resolution 1591 was, as *inter alia* Resolution 1564 and 1593, not unanimously adopted. In this case China, Russia and Algeria abstained from voting. For the first time the core problem of applying R2P was discussed by the Security Council dealing with this Resolution. Namely, the conflict of state sovereignty *versus* the responsibility to protect civilians from mass atrocities. The issue of Sudan’s sovereignty, unity and territorial integrity was of integral importance in this Resolution and one of the arguments brought forward by Algeria refusing to support it.¹⁷⁰ Russia *inter alia* focused its objection on the notion that not all political and diplomatic measures have been exhausted¹⁷¹, while China repeated its argument that those measures would only result in greater difficulties for the peace process (which was apparently nonexistent in the case of Darfur).¹⁷² What is of particular interest here is that both Russia and the non-permanent Member Tanzania brought forward the argument that sanctions against important individuals to the conflict might compromise the work of the newly united government of al-Bashir’s National Congress Party (NCP) and the SPLM, the two parties who signed the CPA which included a power-sharing deal. Tanzania argued that as soon as the united government is in place, the sanctions should be abandoned for three months, to give the new government a clear and fair chance.¹⁷³ The

¹⁶⁶ Abass, Ademola. “The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia“, *Netherlands International Law Review*, Vol. 54, No. 3, 2007, pp. 415-440.

¹⁶⁷ United Nations Security Council, *Resolution 1591* (29 March 2005) S/RES/1591.

¹⁶⁸ UNSC. (2004) Res. 1556. para. 7.

¹⁶⁹ UNSC. (2005). Res. 1591. para. 7.

¹⁷⁰ UNSC, Verbatim Record (29 March 2005), p.2-4. In case of the deployment of AMIS the Sudan gave his definite agreement to the deployment, for which reason the question of Sudan’s sovereignty was of marginal importance.

¹⁷¹ UNSC, Verbatim Record (29 March 2005), p.4.

¹⁷² *Ibid.* p. 4-5.

¹⁷³ *Ibid.* p. 5-6.

power-sharing government was, however, only formed some six months later, in September 2005.¹⁷⁴ Therefore, Tanzania voted in favor of this Resolution, while Russia used the very same argument, giving the new government a clear start, but abstained from voting instead of supporting it.

Both Tanzania and Russia's argument seems at first to be supportable. However, this is not the case for several reasons. First of all, the power-sharing government was established between the parties of the North-South conflict and, as has been noted before, Darfur was deliberately excluded from this deal. Therefore, it seems unlikely that the work of the power-sharing government would be compromised by sanctions against individuals or an arms embargo to the Darfur conflict. In the end, only four persons have been affected by those sanctions starting in April 2006 - no one was a member of the GoS - but "a low-level air force commander, a 'janjaweed' commander, and two rebels."¹⁷⁵

The second interesting outcome of Resolution 1591 was the arms embargo, which had already been established in Resolution 1556 but now included the GoS. Russia is alleged to be one of the main arms suppliers of the Sudanese government. The Resolution states that the supplying of arms for usage in Darfur is not permitted without Security Council's permission, however, "Khartoum is still allowed to purchase all the arms it wants if the arms are designated for use outside of Darfur. Though deployment of new military equipment to Darfur must be approved by a UN committee on Sudan sanctions, Khartoum's disregard for this provision has left a giant hole in the arms embargo."¹⁷⁶

Based on this information, Russia's argument for abstaining from voting on Resolution 1591 in order to give the new government a clear head start is therefore, at the very least, questionable. The supplying of the GoS with at least 33 military aircrafts and other military goods points out the fact that the real reason for Russia's abstention is the desire to continue massive arms trades.¹⁷⁷ In benefit to Russia, the Sudan takes advantage of the weaknesses within the Resolution for using Russian military goods in Darfur without permission of the UNSC. Therefore, Russia is not forced to use its veto threat which would possibly have isolated the country in the UNSC.

It has to be mentioned here though that the P5 supporting the arms embargo (UK, US, France) were able to do so because their arms supply to Sudan were insignificant.¹⁷⁸ All three of them could easily support the embargo against Sudan, because they did not have any vital interests concerning arms transfer.

¹⁷⁴ BBC News Africa. "Timeline Sudan", (15.03.10), http://news.bbc.co.uk/2/hi/middle_east/country_profiles/827425.stm (17.04.2010).

¹⁷⁵ Grono. (2006). p. 626; see also United Nations Security Council, *Resolution 1672* (25 April 2006) S/RES/1672.

¹⁷⁶ McGregor, Andrew, "Russia's Arms Sales to Sudan a First Step in Return to Africa: Part Two", *Eurasia Daily Monitor*, Vol. 6, Iss. 29, (12.02.09.), [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=34494](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=34494) (17.04.2010).

¹⁷⁷ "Russia reported transferring thirty-three military aircraft to Sudan since 2004. In the Comtrade database, Russia self-reported only \$5,567 in arms sales to Sudan. However, that figure does not include sales of aircraft - Russia reported higher figures in various aircraft categories, but since the categories do not distinguish between military and civilian aircraft, these figures have not been included in this study. Independent media reports confirm Russia has transferred combat aircraft to Sudan. Russian pilots reportedly operate MiG-29 fighters in Darfur and the Sudan Air Force has used Russian Mi-24 helicopter gunships in attacks on civilian areas." Human Rights First, "Arms Sales to Sudan 2004-2006", <http://www.stoparmstosudan.org/pages.asp?id=36#russia> (17.04.2010).

¹⁷⁸ Arms were exported by those three countries in the years 2004-2006 in the amount of: UK (\$ 8,784), US (\$ 24,067), and France (\$ 10,824). Ibid.

3.8. AMIS and UNAMID - Peacekeeping Forces solving the Conflict?

The powerlessness of AMIS in Darfur became obvious for all involved parties within the first year. From early summer 2005 onward the United States therefore focused its efforts to change the African-led forces into an UN peacekeeping mission. While AU and UN members were reluctant to implement a UN mission, Khartoum was once again openly opposing this idea.¹⁷⁹ As has been shown above, Khartoum's intentions to hold UN troops out of Darfur is most presumably based on fears of higher pressure by the UN than the AU. The AU mission, however, was acceptable as a lesser evil to a UN deployed mission. A refusal towards an AU mission would have made the deployment of a UN mission to an earlier stage more likely. It took another 18 months of negotiations until late August 2006 before Resolution 1706 was passed, which constituted that "UNMIS shall take over from AMIS responsibility for supporting the implementation of the Darfur Peace Agreement upon the expiration of AMIS' mandate but in any event no later than 31 December 2006."¹⁸⁰ As will be shown below, Resolution 1706 was of significant importance not only for the Darfur conflict, but also for practical implementation of R2P and unfolded the full scale of UNSC's unwillingness to deal with this conflict in a sufficient matter.

Resolution 1706 was adopted after a short period of hope for a peaceful solution. The Darfur Peace Agreement had been signed in early May 2006. However, because of the fact that only the Sudanese Government and the Minni-fraction of the SLA signed the Agreement it was not able to make a real difference, challenging therefore the international community to take further action.

UNMIS was mandated to secure the North-South peace deal, the CPA of 2005, and was allowed to use coercive measures under Chapter VII to guarantee compliance. Resolution 1706 now reacted to AMIS's lacking success to protect civilians from mass atrocities in Darfur and included Darfur into UNMIS mandate.¹⁸¹ As so often in drafting Resolutions which are discussed in the UNSC, the specific wording is of major importance. The essential phrase, which was of highly weakening effect, of this Resolution was that the Security Council "invites the consent of the Government of National Unity for this deployment."¹⁸² On the one hand, approval by the specific government for the deployment of UN troops is of course always welcomed, making the mission a lot less dangerous for UN soldiers by eliminating otherwise possible clashes with the state's troops. On the other hand, in case of Darfur Khartoum's acceptance was from the beginning almost certainly out of reach, which left the international community two possibilities: to go through with it, deploying UN troops in Darfur without consent of the Sudan and risk further worsening of the relationship to the GoS; or stepping back from its demand and leave the momentum, not for the first time, to the GoS. The international community decided in favor of the latter one.¹⁸³ The statements made by the different UN Ambassadors were of such weak consistency in the UNSC session dealing with Resolution 1706, that Khartoum's rejection of it was expectable.

The first hint towards UNSC's unwillingness to insist on deploying troops under UNMIS mandate to Darfur was that the international community was once again only a virtual community, and failed to speak with a unified voice. Again China, the Russian Federation and also Qatar abstained from voting. China's opposing interests in Sudan, on the one hand defending economic interests and on the other protecting civilians from further atrocities, became never more clear as in the, in terms of

¹⁷⁹ De Waal. (2007). p. 1042.

¹⁸⁰ United Nations Security Council, *Resolution 1706* (31 August 2006) S/RES/1706.

¹⁸¹ *Ibid.* p. 3 (para. 1).

¹⁸² *Ibid.* para. 1; see also: Badescu & Bergholm. (2009). p. 302; see also: Grono. (2006). p. 626.

¹⁸³ Abass. (2007). p. 429.

inconsistency and contradiction, unique statement of its UN Ambassador Mr. Wang. He stated that “China is in favour of replacing AMIS with a United Nations operation. It is a good idea and realistic option, and it will help to improve the situation on the ground and serve the interests of all parties.”¹⁸⁴ Furthermore, Mr. Wang welcomed the Darfur Peace Agreement signed some four months earlier as “positive momentum.” However, he also acknowledged that “the provisions of the Agreement have failed to yield peace” and the security as well as humanitarian situation for Darfurians has worsened.¹⁸⁵ China’s refusal to support this Resolution was based on two points of critic. First of all, China insisted to include the phrase “with the consent of the Government of National Unity” and saw the formulation of *inviting* the consent as insufficient.¹⁸⁶ Secondly, Mr. Wang criticized the timing of the voting because the adoption of this Resolution “may even cause problems with regard to implementing the Comprehensive Peace Agreement process”, while only minutes earlier stating that an actual implementation never occurred and the situation even had become worse.¹⁸⁷

The Russian Ambassador to the UN, Mr. Churkin, emphasized even more the importance of Sudan’s compliance, reaffirming “the overriding need for the consent of the Government of National Unity” for the deployment of UN troops as stated in the Resolution.¹⁸⁸ Because of the fact that Khartoum had not signaled its consent at the time of voting, Russia therefore abstained from supporting this Resolution.

Qatar, as the last of the three abstaining from voting, also emphasized Sudan’s sovereignty and would have preferred more efforts to receive Sudan’s voluntary consent. In addition, Qatar’s UN Ambassador Mr. Al-Bader stated that “ [w]e [Qatar] would have preferred to provide financial and logistical support to the African Union Mission in the Sudan (AMIS) to enable it to complete its mandate, which it has, for the most part, carried out honourably and commendably.”¹⁸⁹

There should indeed be no doubt about the faithful and honorable attempts of the AU to bring relief to the civilian populations in Darfur. On the contrary, the African Union showed most interest and passion to help ending the conflict in Darfur and primarily protecting Darfurian people. However, civilian protection is not about right intentions but it is all about results; and AMIS was not able to change the situation on the ground for good.

The abstention from voting by three countries showed Khartoum already lacking willingness of the Council to really deploy UNMIS’s troops to Darfur. In addition, the statements made by some states voting in favor of this Resolution were mostly showing lacking commitment, too. Japan also emphasized that “it is extremely important that the consent and cooperation of the Government of the Sudan be assured.”¹⁹⁰ Great Britain interpreted the Resolution as “a crystal clear message” towards Sudan to send, if deciding so, the permission for deployment as soon as possible. However, Ms. Pierce also stated that “the United Nations cannot deploy in Darfur until we have that agreement; that is not in dispute.”¹⁹¹

¹⁸⁴ United Nations Security Council, Verbatim Record (31 August 2006), UN Doc S/PV.5519

¹⁸⁵ *Ibid.* p. 5.

¹⁸⁶ UNSC, *Res.1706* (31 August 2006), p. 3 (para. 1); see also: Badescu & Bergholm. (2009). p. 302; see also: Grono. (2006). p. 626.

¹⁸⁷ UNSC, Verbatim Record (31 August 2006), p. 5.

¹⁸⁸ *Ibid.* p. 8-9.

¹⁸⁹ *Ibid.* p. 6-7.

¹⁹⁰ UNSC, Verbatim Record (31 August 2006), p. 5-6.

¹⁹¹ *Ibid.* p.3-4.

Tanzania indirectly rejected Qatar's argument of longer deployment of AMIS, admitting that the AU "is overwhelmed and overstretched by the magnitude and complexity of the task of restoring peace to Darfur."¹⁹²

The message sent by the Security Council due the Resolution as well as the statements during the session made it absolutely clear for Khartoum that in case of its own non-compliance the international community would not increase the pressure to cooperate. The Resolution showed clearly the missing commitment to actually protect civilians in Darfur. Khartoum had always opposed deployment of UN troops in Darfur so far and it was clear that in drafting such a weak Resolution the government would not change its attitude. Nsongurua J. Udombana even calls the insistence of the SC Member States simply euphemism.¹⁹³ There is nothing more to be added here.

Resolution 1706 was the first time the UNSC referred to R2P in an actual case.¹⁹⁴ During the session of Resolution 1706 some of the state's Ambassadors to the UN also acknowledged the WSD, such as Ms. Pierce for the United Kingdom, who mentioned the "World Summit Outcome document, noting the responsibility of each United Nations Member State to protect its citizens and the international community's responsibility to assist in this if the State could not provide for such protection alone."¹⁹⁵ Furthermore, "[t]he test before the Council today was whether it was prepared to act to mandate that United Nations mission and assume its responsibilities towards the people of Darfur. The adoption of the Resolution shows that it is."¹⁹⁶ However, this evaluation was premature. The UNSC might have shown its commitment to protect the people of Darfur by adopting Resolution 1706, but practical implementation under this Resolution was never achieved. Further support for the concept of R2P in the case of Darfur was stated by Greece¹⁹⁷, Slovakia¹⁹⁸, Argentina¹⁹⁹ and Ghana. The latter one also emphasized the AU's appreciation of the concept of R2P, namely because it is part of "the Constitutive Act of the African Union, which recognizes the right of the Union to intervene in a member State in respect of grave circumstances, namely war crimes, genocide and

¹⁹² Ibid. p. 9.

¹⁹³ Udombana, Nsongurua J., "Still Playing Dice with Lives: Darfur and Security Council Resolution 1706", *Third World Quarterly*, Vol. 28, No. 1, 2007, pp 97 – 116.

¹⁹⁴ Evans. (2008). p. 50f.; Badescu & Bergholm. (2009)p. 300. One year later the Security Council recalled in Resolution 1755 its commitment to protect civilians and the WSD again. See: United Nations Security Council, *Resolution 1755* (30 April 2007) S/RES/1755; see also: Focarelli. (2008). p. 208. The first time the Security Council reaffirmed paragraphs 138 and 139 of the WSD on protection of civilians in April 2006 generally in Resolution 1674. see: United Nations Security Council, *Resolution 1674* (28 April 2006) S/RES/1674; see also: Focarelli. (2008). p. 205.

¹⁹⁵ UNSC, Verbatim Record (31 August 2006), p. 3-4.

¹⁹⁶ Ibid.

¹⁹⁷ "Greece voted in favour of Resolution 1706 (2006) because it believes that, given the deteriorating humanitarian and security situation in Darfur, the Security Council had to shoulder its responsibilities and act swiftly." Ibid. p. 8.

¹⁹⁸ "Slovakia remains convinced that the situation on the ground in Darfur requires quick and robust action by the international community to stop an upsurge in violence against civilians and to facilitate the implementation of the Darfur Peace Agreement. In that respect, the Security Council has the moral duty and responsibility to act without delay to prevent an escalation of the crisis, which would have dire consequences not only for Darfur, but for the entire region." Ibid. p. 8.

¹⁹⁹ "Argentina was a sponsor of Resolution 1706 (2006) and voted in favour of it because we believe that one of the main obligations of the United Nations is to protect civilian populations. In that context, we believe that the Security Council cannot shirk its responsibility to protect, in particular, vulnerable groups — women and children — since they are defenceless." Ibid. p. 9-10.

crimes against humanity.”²⁰⁰ Indeed the constitution of the AU was the first document embracing the idea of the international community’s responsibility for protecting civilians against mass atrocities, signed before the ICISS report.²⁰¹

Resolution 1706 is as a further approval of *the idea* of R2P by the international community, besides e.g. the Constitutive Act of the AU, the High Panel’s and Kofi Annan’s reports as well as finally the WSD. However, for the *practical implementation* of the responsibility to protect this Resolution was a major setback in terms of protecting civilians against the will or ability of the state. In its first test-case, the UNSC failed to take over the responsibility by the state which was unwilling or unable to protect its people and, under the definition of the WSD, even did so manifestly. Sudan is not fulfilling its primary responsibility to protect its people, and the international community would have had the responsibility to take over as secondary responsible body. The unwillingness (and ability?) to challenge Khartoum in case of violations of its responsibility by the UNSC has shown that R2P has so far not been able to make a significant practical difference to the grossly negligent policy of the 1990s. What mistakes have been made and the major obstacles for practical implementation of the concept R2P in the future is, however, fully analyzable only after discussing Resolution 1769 and the deployment of the hybrid UN-AU mission UNAMID.

3.9. A second Chance for the UNSC to fulfill its Responsibility to Protect

After Sudan’s rejection to include Darfur into UNMIS’s mandate, the search for a solution which all parties involved could agree on started once again. At this point, the idea was formed of a hybrid AU-UN mission. This deal would have satisfied Khartoum’s insistence not to deploy UN troops to Darfur and at the same time strengthen the AU’s efforts to enforce law and order in Darfur,²⁰² and in particular to monitor the compliance with the DPA and the protection of civilians.²⁰³ Resolution 1769 was adopted on 31 July 2007, establishing UNAMID with enforcing character under Chapter VII of the UN Charter.²⁰⁴ That is what, at least theoretically, this mission should have been about, however, by reviewing the consultations preceding the adoption of the Resolution the picture gets rather unclear. From the P5 of the UNSC, only the United States actually saw the mission as a mission under Chapter VII, while China actively opposed this conclusion. The bottom line is that the mandate of UNAMID remained unclear.²⁰⁵

China emphasized, as always, in the session dealing with Resolution 1769 its commitment to find a political solution for the conflict as well as the preservation of Sudan’s sovereignty and territorial integrity. It therefore points to the purpose of the Resolution as understood by them, which “is to authorize the launch of the hybrid operation, rather than to exert pressure or impose sanctions.”²⁰⁶ The argument that only a political solution is able to establish lasting peace is indisputable and has been supported *inter alia* by Secretary-General Ban Ki-Moon in the same session.²⁰⁷ However, it had

²⁰⁰ Ibid. p. 10. See also: Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) (2000).

²⁰¹ Evans. (2008). p. 48.

²⁰² De Waal. (2007). p. 1042.

²⁰³ Badescu & Bergholm. (2009). p. 300.

²⁰⁴ United Nations Security Council, *Resolution 1769* (31 July 2007) S/RES/1769, see also: Abass. (2007). p. 432f.

²⁰⁵ Ibid. p. 434.

²⁰⁶ United Nations Security Council, Verbatim Record (31 July 2007), UN Doc S/PV.5727.

²⁰⁷ “As we recognize the importance of today’s resolution and redouble our collective efforts to strengthen peacekeeping in Darfur, we must also acknowledge that it is only through a political process that can we

become clear in the course of then four years that without external pressure Khartoum would not take a constructive part in this undertaking.

Contrary to the session adopting Resolution 1706, China stood alone with the notion of neglecting to put any pressure on the Sudanese Government, while most of the other Members of the SC in 2007 emphasized the stricter course agreed on in Resolution 1769 against the GoS. The United Kingdom concluded in its statement that “[t]he path set out in this resolution is one of cooperation with the Sudan (...).But we call also for compliance. If compliance fails [by all parties], consequences will follow.”²⁰⁸ Belgium emphasized the robust mandate of UNAMID²⁰⁹ and the United States pointed to the “strong” mandate and mentioned that “UNAMID has the authority under Chapter VII to use force to prevent armed attacks, to protect civilians and to prevent any disruption of the implementation of the Darfur Peace Agreement.”²¹⁰

While the statements made by several countries in this session were indeed giving the impression that the UNSC would now fully take over its responsibility to protect, United Kingdom representative Sir Emyr Jones Parry emphasized that “[t]he catastrophe of Darfur will not be ended by the raising of 15 hands in this Chamber. The suffering will not be ended by our vote.”²¹¹ Then Italian Ambassador to the UN Marcello Spatafora abstracted Parry’s notion: “[t]he true challenge is now the implementation of the resolution.”²¹² This challenge has not been met.

In order to be able to judge UNAMID’s performance the UNSC requested the Secretary-General to report on the implementation every 30 days in the early phase of the mission,²¹³ extending the period later on to 90 days.²¹⁴ The mission became operational on 31 of December 2007. In theory, the United Nations planned to send 26,000 troops. However, in the end of November 2008, only some 15,444 personnel had been deployed.²¹⁵ The latest report submitted by the Secretary-General on 29 January 2010 concluded major obstacles existing over the whole period of UNAMID’s deployment.²¹⁶ The number of deployed personnel (troops, staff officers, liaison officers, military observers) changed insignificantly to 15,553 personnel, which is around 79 percent of the authorized strength.²¹⁷ The shortcomings for becoming a successful mission are partly based on lacking staff but primarily the cause is the lack of major equipment. The shortfall ranges “between 61 and 100 per cent”, which is challenging “[t]he self-sustainment capability of units in Darfur.”²¹⁸ While the

achieve a sustainable solution to the conflict.” United Nations Security Council, Verbatim Record (31 July 2007), p. 2-3.

²⁰⁸ Ibid. p. 3-4.

²⁰⁹ Ibid. p. 6-7.

²¹⁰ Ibid. p. 7-8.

²¹¹ Ibid. p. 3-4.

²¹² Ibid. p. 8.

²¹³ UNSC, *Res. 1769*, p. 4 (para. 6).

²¹⁴ Ibid. p. 6 (para. 21). The request for reports have been slightly changed by *inter alia* Resolution 1870 and Resolution 1881. The latter one is the last Resolution dealing with this issue and the SC requested the Secretary-General “to report every 90 days on progress made towards implementing the mandate of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) across Darfur, as well as on the political process, on the security and humanitarian situation and on compliance by all parties with their international obligations.” United Nations Security Council, *Resolution 1881* (6 August 2009) S/RES/1881.

²¹⁵ Badescu & Bergholm. (2009). p. 301.

²¹⁶ United Nations Security Council, ‘Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur’ (29 January 2010), UN Doc S/2010/50.

²¹⁷ Ibid. p. 1 (para. 3).

²¹⁸ Ibid. p. 2 (para. 8).

Secretary-General acknowledges certain improvements by political negotiations,²¹⁹ lacking security is still preventing “a comprehensive and sustainable solution to the humanitarian situation in Darfur [which] has yet to be achieved, and conditions conducive to the voluntary return of the more than 2 million displaced persons have not yet been established.”²²⁰ How bad the situation of UNAMID is becomes clear when deployment efforts and not the protection of civilians has been on UNAMID’s agenda for the first two years of its existence.²²¹

The organization and deployment of a UN mission is surely not an easy task. However, the structures necessary for such a mission have already been set-up at least to some extent by UNMIS, respectively by AMIS in Darfur. The fact that especially helicopters are needed for successful implementation shows the lacking commitment by major powers, which could have provided such high-tech supplies. Basic tactical needs are unfulfilled, leaving the leadership of UNAMID unprepared to actually protect civilian lives.²²² Both AMIS and UNAMID were/are unable to stop atrocities and had/have both “minimal civilian protections success.”²²³

Besides missing supplies a core problem of both AMIS and UNAMID were and are their unclear mandates concerning the use of force.²²⁴ Both have been deployed as peacekeeping missions with limited possibilities to use coercive measures to protect civilians during hostilities. Former UN Secretary-General Dag Hammarskjöld called such a mission “a ‘Chapter Six and a Half’ operation, falling in between Chapter VI measures for peaceful resolution of conflicts and Chapter VII enforcement action.”²²⁵ What has become clear though is that the deployed peacekeeping operations AMIS and UNAMID have not been able to protect civilians in a satisfying manner. The reason for this is simply because there never was ‘peace to keep’,²²⁶ leaving the troops of both missions to a huge extent unable to react to atrocities committed and therefore unable to protect civilians. As will be discussed more in detail in the next chapter, the concept of R2P as proposed by the ICISS would have prevented the UNSC from making the mistake to deploy a peacekeeping mission to a civil war region, because the deployment of peacekeeping troops was, in the ICISS’s report, only applicable in the stage of rebuild and not in the stage of reacting to the hostilities. The deployment of peacekeeping troops into a conflict zone where peace was never to be kept was exactly the wrong measure undertaken by the UNSC. Stronger sanctions as *inter alia* the expansion of travel restrictions and freezing of assets against high leaders of all parties committing mass atrocities or a full scale military intervention for human protection purposes under Chapter VII would have been the logical alternatives to this halfhearted attempt by the UNSC. The deployment of AMIS and UNAMID, both with vague and weak mandates, as peacekeeping forces to Darfur are therefore to be judged as excuses for “world leaders to claim that action was being taken”,²²⁷ knowing that those actions would not be able to stop mass atrocities against civilians in Darfur.

²¹⁹ Ibid. p. 12 (para. 64).

²²⁰ Ibid. p. 11 (para. 59).

²²¹ “Two years into its mandate, UNAMID has made significant progress towards full deployment and is now focused on its critical tasks of protecting civilians and facilitating humanitarian delivery.” Ibid. p. 12 (para. 64).

²²² Badescu & Bergholm. (2009). p. 301.

²²³ Ibid. p. 304; see also: Evans. (2008). p. 124.

²²⁴ Abass. (2007). p. 434.

²²⁵ Udombana. (2007). p. 100; (citing: UN Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-Keeping*, New York: UN, 1990).

²²⁶ Badescu & Bergholm. (2009). p. 301;

²²⁷ Badescu & Bergholm. (2009). p. 302.

4. The UNSC and Darfur as the first Test-Case for R2P

4.1. Results for the Appliance of the ICISS's Concept of R2P on the Basis of the Test-Case Darfur

The concept of R2P, as proposed by the ICISS, would have been a useful framework for the Member States of the UNSC to make the right decisions in the phase of the responsibility to prevent, as well as at the level of the responsibility to react with non-coercive measures. Furthermore, if the UNGA would have been able to acknowledge the proposed concept in detail in the WSD, it would have helped to avoid the UNSC's wrong decision to deploy peacekeeping troops without having the ability to keep any peace. However, the test-case of Darfur also shows that in case a military intervention for human protection purposes is at stake, the concept by the ICISS and its focus on the 'just cause' thresholds and precautionary principles were not applicable.

The different results stated above in short will now be examined in this chapter in more detail.

4.2. Focusing on Conflict Prevention

This thesis focused on the UNSC's reaction after hostilities broke out in Darfur in April 2003 and, therefore, the performance in the phase of the responsibility to react. It has become clear though that the underlying circumstances for the civil war, which started seven years ago in Darfur, are going much deeper, and the conflict is indeed much older. The political and economic marginalization of Darfur, as well as the fighting between nomad Arabs and settled Africans for decreasing fertile land, are the major obstacles for preventing further mass atrocities against civilians. Based on this knowledge, one major result may be drawn with regard to R2P: first of all, the level of responsibility to prevent should be more in focus of the UNSC in the coming years. The outbreak of violence in Darfur was not a spontaneous incident caused by some unforeseeable developments, but a reaction to lasting injustice against one group of the population. The concept of R2P has only been acknowledged two years after the hostilities broke out by the World Summit of the General Assembly, therefore the phase of preventing this conflict could not receive more attention in this paper. Nevertheless, the accentuation on the importance of the international community's responsibility to prevent conflicts is supported on the basis of the test-case Darfur.

4.3. The Responsibility to React – Non-coercive Measures

The concept of the ICISS would have also helped to clarify which action was needed after the conflict heated up in April 2003. The hostilities started with a rebel attack on an airport of the Sudanese Army and counter-actions by the GoS would have triggered faster reactions by the UNSC, always implying that the UNSC would indeed fully apply the framework of R2P. Within weeks it would have been clear that the phase of preventing the conflict had passed and the phase of reaction was on the agenda. However, the first reaction by the UNSC, Resolution 1564, passed some 13 months after first hostilities broke out. If R2P, as proposed by the ICISS, would have been adopted in the WSD and taken over by the UNSC as primary body for the maintenance of international peace and security, the Member States would have been obligated to react sooner to the conflict in Darfur.

The ICISS emphasized that all non-coercive means should be attempted before considering military action as a 'last resort'. However, in the case of Darfur the UNSC did not exhaust non-coercive

measures at all. An ineffective arms embargo, as well as travel restrictions and the freezing of assets of only four persons to this conflict should by far not be considered as exhaustive. A general arms embargo against Sudan in total, an extension of the travel restrictions, and a freezing of assets against leaders of the rebel groups, as well as members of the Sudanese government would have been one necessary intermediate step before considering military action.

4.4. The Responsibility to React – Peacekeeping Forces or a Military Intervention for Human Protection Purposes?

The hostilities did not stop by the non-coercive measures applied by the UNSC. Hence, Resolution 1706 was drafted to deploy a UN mission under Chapter VII. However, Khartoum rejected the deployment of UN troops in Darfur under Chapter VII and the UNSC terminated its efforts. Therefore, the UN deployed a peacekeeping mission with the intention to stop hostilities in the case troops were on-site, a so-called Chapter 'six and a half' mission. The missions AMIS and UNAMID with such a Chapter 'six and a half' mandate were/are, however, not capable to stop the mass atrocities against civilians in Darfur. In the case R2P would have been fully acknowledged by the UN in the WSD and the Security Council itself, such a deployment of peacekeeping troops at this stage of the conflict would have been unjustifiable. Peacekeeping troops should be deployed when all actors agreed on a political solution to the conflict. In the case of Darfur the HCA has been signed in 2004 and the DPA in 2006, however, either the agreement was ineffective due to lacking commitment by all sides (HCA), or not all main groups to the conflict signed the deal, as in the case of the DPA in 2006. Peacekeeping troops are to be deployed only after a political solution for a conflict is agreed on, and the troops should secure the enforcement of the agreement. Indeed, "peacekeeping is no credible substitute for timely and united emphasis on prevention, peace talks and sustained pressure on a regime in power."²²⁸ However, in the test-case of Darfur peacekeeping forces were deployed without having the possibility to actually secure any peace.²²⁹ The idea of peacekeeping has been turned upside-down.

Assuming that stricter sanctions as discussed above (chapter 5.3.) would not have ended the hostilities and the suffering of the civilian population, a military intervention for human protection purposes, according to R2P, would have been the next step. As has been shown in chapter 4.3., the 'just cause' thresholds, both by the definition of the ICISS as well as the WSD, would have justified military action in the case of Darfur. However, the ICISS insisted that not only the 'just cause' thresholds but also the four precautionary principles needed to be fulfilled, namely 'last resort', 'proportional means', 'right intention', and 'reasonable prospects'.

In the previous chapter, it has been established that the principle of 'last resort' has not been fulfilled; stronger sanctions against leaders of the conflicting parties and an effective arms embargo were not applied. Therefore, the precautionary principle of 'last resort' is not fulfilled.

The principles of 'right intention' and 'proportional means' may be considered as fulfilled. All Member States of the UNSC, who supported to increase the pressure on Khartoum, such as the US or the UK, are mainly acting on their belief that the suffering should stop - but also because national interests of those countries are marginal in Sudan. Although, all of them are interested in stabilising the situation in Darfur for preventing Sudan to become, once again, a safe haven for terrorists as in

²²⁸ Badescu & Bergholm. (2009). p. 303.

²²⁹ De Waal. (2007). p. 1046.

the 1990s. Therefore, the Western countries are not acting on pure altruistic reasons but also out of self-interests. This does, however, not mitigate the main reason and, therefore, the fulfilment of the principle of 'right intention', namely to stop the suffering.

Secondly, by the precautionary principle of 'proportional means' the UNSC should take into account the magnitude of the threat and that it must be put into perspective to the possible outcome as well as commensurate with the ends. The Darfur conflict is fought mostly within the region itself. Nevertheless, a huge amount of displaced people fled to the neighboring country Chad. This problem is a huge burden for the relations between Chad and the Sudan. The UNSC may see this principle as fulfilled, because a further spreading of the conflict, even to become an international conflict, is not excludable.

The last of the four principles, 'reasonable prospects', is surely the most controversial in the case of Darfur. Alex de Waal stated that "[m]any activists [who support a military intervention] and some political leaders simply assumed that an international force could succeed in the Herculean task of providing physical protection to Darfurian civilians in the middle of continuing hostilities."²³⁰ However, it seems unrealistic that a UN mission of around 26,000 troops, by actually deploying only around 15,000 of the latter with insufficient material, is capable of protecting all civilians in a territory as big as France. It also has become clear that the Darfur conflict is caused by the political marginalization of the African population and the everlasting struggle of nomads and farmers for fertile land. A great deal of different factors, numerous actors such as militia tribes, rebel groups and the Sudanese Army, would make it very difficult for any UN mission to secure civilians effectively. The expectations of what the currently deployed UNAMID forces could achieve are unrealistically high. However, for the deployment of a strong military operation under Chapter VII of the UN Charter, which might be able to make a real difference, the political will is clearly missing.²³¹ But even in the case a coercive military intervention for human protection purposes with tens of thousands of troops deployed, there would be no certainty that mass atrocities against civilians would come to an end for good.

In conclusion, a military intervention for human protection purposes is, in the case of Darfur, not justifiable based on the concept of R2P by the ICISS. Two of the four precautionary principles have not been fulfilled. The UNSC could at least fulfil the principle of 'last resort' and put harder sanctions on Khartoum, as the previously discussed arms embargo or freezing of assets and travel bans for high political leaders.

Therefore, the question, which the concept of the ICISS is not able to answer, is the following: what can the UNSC do, if harder sanctions are not sufficient to better the situation of the civilians in Darfur and the precautionary principles are not fulfilled to justify a military intervention for human protection purposes? Basically this means, if the concept of R2P, as proposed by the ICISS, would have been followed in detail, the UNSC could do nothing in the case of Darfur anymore and has to hope that the conflicting parties abstain from further molesting the civilian population. Surely, there is no easy solution for this tricky problem. Based on the test-case of Darfur, some preliminary suggestions might be formulated though.

²³⁰ De Waal. (2007). p. 1044.

²³¹ De Waal. (2007). p. 1045ff.

4.5. Challenges for the Future

4.5.1. Calibrating the Precautionary Principles

In order to secure the UNSC's capacity to act within the framework of R2P, in Darfur and conflicts in the future, one approach to tackle the problem might be discussed. Primacy should be given to the 'just cause' thresholds in terms of judging a state's non-performance in fulfilling its primary responsibility to protect its people. Those thresholds have to be crossed, which is an absolute necessity in order to consider a military intervention at all. The precautionary principles, however, should be used in a different way to the ICISS's approach.

In order to overcome the problem of a possible deadlock of the UNSC, the precautionary principles should be calibrated within a weighting system. The aim of the interveners, the 'right intention', should be particularly emphasized and receive higher importance than e.g. the principle of 'reasonable prospects'. A military intervention should not worsen the situation for the civilian population, as has been argued by Ramon Das (see chapter 2.3.3.2.). However, there is no justification in refusing the deployment of troops in general, when protection for *all people* may not be guaranteed. If such a military intervention might be able to protect a *majority* of the people, the principle of 'reasonable prospects' is only partially fulfilled and might be likewise weighted. In the end, a number x would stand for 'all four principles are fully fulfilled', which would justify a military intervention, according to the concept by the ICISS; the number y, however, would mark a 'threshold' which has to be crossed in order to justify a military intervention for human protection purposes, if total fulfilment is not possible. This system would take out the absolute necessity of fulfilling all four principles in total and increase the applicability of the concept. Specific features and characteristics of an individual conflict could be taken into account during the decision-making process.

4.5.2. Veto-power Abstention

In the case of Darfur, a voluntary abstention by the P5 from using their veto-power in case national interests are not at stake might have helped to bring relief to the Darfurian people at an early stage. More effective sanctions against Khartoum, particularly cutting off Sudan from arms supplies, might have helped to finish this conflict in an early phase. The whole discussion about the abstention from veto-power by the P5, although it would have been helpful in the case of Darfur, should however not be in the focus; the chance that the P5 are able to agree and finally support this idea of the ICISS is too narrow. The lacking veto-power abstention had rather negative effects in the case of Darfur. However, the veto-power for the P5 is still a useful tool to prevent that unjustified action is undertaken by a majority in the UNSC²³² - in this case, (military) intervention which is only disguised to be for human protection purposes.

²³² According to Article 27 of the UN Charter nine out of the 15 Members of the UNSC have to vote in favor of a Resolution. According to the Charter, all P5 have to vote in favor, too. However, a code of practice developed over the decades of the UNSC's existence that a Member State might abstain from voting in order to ensure the UNSC's capacity to act. See: United Nations, *Charter of the United Nations*, Article 41.

4.6. The Norm of State Sovereignty as an Excuse for missing Political Will - the real Problem for protecting Civilians from Mass Atrocities

The ICISS developed the concept of R2P to initiate a discussion on a new understanding of state sovereignty. State sovereignty should not be seen as an unlimited power of a state to treat its own citizens as it please. Instead, sovereignty should be seen as a reward given for protecting civilians from harm, namely from mass atrocities. The norm of state sovereignty in international affairs is of outstanding importance; in the test-case of Darfur every Resolution *reaffirmed* the sovereignty of the Sudan. Not only, but primarily states supporting Khartoum, such as China and Russia, repeatedly referred to the norm of state sovereignty, in order to justify their abstentions from voting for Resolutions which might have compromised, to their opinion, this norm. Badescu & Bergholm argued, that the test-case Darfur showed, that the norm of sovereignty is still stronger than R2P, basing their argument on the fact that no 'real' action has been realized, because the GoS refused to accept such intervention (namely the deployment of UN troops in Darfur).²³³ Although the concept of R2P has been able to raise attention concerning the protection of civilians and human security, the UNSC failed, in the case of Darfur, to stick up to its commitment as stated in Resolution 1706.

What has become clear by the test-case Darfur is, however, that the real problem for the UNSC to implement useful measures for protecting civilians under the R2P framework is lacking political will, misusing the norm of state sovereignty as a useful excuse. The statements made by the different state's ambassadors to the UN concerning Resolution 1706 brought this finding particularly to light. Almost all states emphasized, by referring to the norm of state sovereignty, that the deployment of UN troops to Darfur is fully dependent on Khartoum's consent; and of course it would have been a welcomed gesture by Khartoum. However, the fact that Khartoum had constantly rejected the deployment of UN troops to Darfur for three years made it highly unlikely that it would agree to this Resolution. The other Member States to the UN were aware of this fact, and the norm of state sovereignty was abused as tool for pulling-back from the commitment.

In addition, lacking political will of the UNSC to stick up to the commitments, made by referring to the concept of R2P in the case of Darfur, is provable by the lacking support in equipment and personnel to both missions who were/are deployed to Darfur, namely AMIS and UNAMID.

The test-case of Darfur unfolded and increased the gap between the moral ambition of R2P and its implementation in the political reality.²³⁴ In the end, political will decides whether an intervention is taking place, and not the perception of a country's sovereignty.²³⁵

²³³ Badescu & Bergholm. (2009). p. 302.

²³⁴ Ibid. p. 296.

²³⁵ Bellamy. (2006). p. 145; citing: Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2003); see also: Hamilton. (2006). P. 294.

5. Conclusion

The conflict in Darfur is “a textbook example” of both a state, in this case Sudan, and the international community’s unwillingness or inability to fulfil their responsibility to protect civilians from mass atrocities.²³⁶ The UNSC excessively discussed the Darfur conflict in the last seven years. However, practical action was minimal. Resolutions were passed for the first six years but those Resolutions did not effectively stop the human rights abuses in Darfur. Both the GoS and the UNSC are not fulfilling their responsibility to protect civilians from mass atrocities in Darfur.

The situation in Darfur remains difficult. Although hostilities are not carried out anymore in the intensity of the beginning of the conflict, almost none of the displaced persons have been able to return to their homes. Peace negotiations between the government and the JEM have been halted, due to accusations of JEM that the Sudanese government launched new raids.²³⁷ The CPA, signed to end the North-South civil war in 2005, scheduled a referendum by the South concerning independency in 2011. Tensions may flame up again between the contesting parties GoS and SPLM/A, presenting also a serious danger for the conflict in Darfur.

This thesis argues that the full acknowledgement of the concept of R2P as proposed by the ICISS might have helped the UNSC, however, only up until the stage of a military intervention, to react faster and more consistent to the conflict in Darfur. A remodelling of the precautionary principles, as proposed in this thesis, might remedy the lacking applicability of the concept in terms of military intervention for human protection purposes. The idea of R2P received broad support in theory. In the case the concept of R2P would be fully implemented in the future, as proposed by the ICISS with the changes suggested in this thesis, it would be a useful tool for the UNSC to react more effectively to situations of mass atrocities against civilians as in Darfur.

However, this thesis also showed that lacking political will of the Member States of the UN may foreclose a possible successive implementation of the concept of R2P, and that this threat is very real. The commitment made by the UNSC to protect civilians from mass atrocities has been, in the case of Darfur, circumvent by using the norms of state sovereignty and non-intervention as excuses. This procedure of by-passing is an essential threat to the concept of R2P, and might finally downgrade the concept to a notion of intent instead of a workable framework.

²³⁶ Hamilton. (2006). p. 293.

²³⁷ BBC News Africa. “Jem Darfur rebels snub Sudan peace talks over 'attacks'”, (04.05.10), <http://news.bbc.co.uk/2/hi/africa/8659037.stm> (12.05.2010).

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Statement of Integrity

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