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**Master of Law: Public International Law**

What is the extent of powers of peacekeeping forces in Darfur *ratione loci* and *ratione materiae*, both under the AU and UN peacekeeping/ peace enforcement laws?

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## ABBREVIATIONS

AMIB	- African Mission in Burundi
AMIS	- African Mission in Sudan
AMISOM	- African Mission to Somalia
AU	- African Union
GA	- General Assembly
GoS	- Government of Sudan
ICJ	- International Court of Justice
JEM	- Justice and Equality Movement
OAU	- Organization of African Unity
ONUB	- United Nations Operation in Burundi
ONUC	- Opération des Nations Unies au Congo
PDF	- Popular Defence Force
SC	- Security Council
SCRes	- Security Council Resolution
SG	- Secretary General
SLM	- Sudan Liberation Movement
UN	- United Nations
UNAMID	- African Union/ United Nations Hybrid Operation in Darfur
UNC	- Charter of the United Nations
UNEF	- United Nations Emergency Force
UNSCOB	- United Nations Special Committee on the Balkans
UNTSO	- United Nations Truce Supervision Organization
VCLT	- Vienna Convention on the Law of Treaties

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## Introduction

### A. General outline of the subject in question

In June 2007, the Sudanese government finally agreed to allow a joint African Union/United Nations peacekeeping force into the Darfur region, after months of international pressure.<sup>1</sup> On 31 July 2007 the UN Security Council, by passing resolution 1769, established UNAMID, which was intended to, and indeed did, take over its mandated tasks on 31 December 2007.<sup>2</sup> This is a unique situation of a hybrid operation and it is most likely that problems will occur.<sup>3</sup>

This thesis is aimed at evaluating the extent of powers of the joint peacekeeping force, both under the AU and the UN peacekeeping and peace enforcement laws. It will focus on the extent of powers *ratione loci* and *ratione materiae* and especially deal with the problem of a potential crossborder competence into Chad and the issue of subject matter competence over facilitators of the militias. It will also include an assessment of the extent of powers which the joint peacekeeping forces have over the Sudanese forces.

From a legal perspective, all these topics are likely to be controversial issues, since the establishment of peacekeeping forces is affiliated with some uncertainty as to their classification under the UN-Charter and under the Constitutive Act of the African Union, and as for the determination of the exact scope of their mandate.<sup>4</sup>

The particular importance of the two focal points of crossborder competence and subject matter authority over facilitators of the militias becomes evident if it is looked at from a humanitarian perspective: The Darfur crisis is a conflict which caused large numbers of refugees to flee across the Chadian border, while they were frequently pursued by their attackers.<sup>5</sup> This fact gives rise to the questions

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<sup>1</sup> Darfur – UNAMID – Background, available at: <http://www.un.org/Depts/dpko/missions/unamid/background.html> [accessed 13 December 2007]; cf. also BBC, “Libya hosts Darfur crisis talks”, 15 July 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6899323.stm> [accessed 23 July 2007].

<sup>2</sup> African Union/United Nations Hybrid operation in Darfur, available at: <http://www.un.org/Depts/dpko/missions/unamid/index.html> [accessed 12 December 2007]; BBC, “UN takes over Darfur peace force”, 31 December 2007, available at: <http://news.bbc.co.uk/2/hi/africa/7165443.stm> [accessed 8 January 2008].

<sup>3</sup> Darfur – UNAMID – Background (note 1); Said Djinnit, cp BBC, “Sudan accepts joint Darfur force”, 12 June 2007, available at: <http://news.bbc.co.uk/go/pt/fr/-/2/hi/africa/6745691.stm> [accessed 23 July 2007].

<sup>4</sup> R Wolfrum and C Philipp, *United Nations: Law, Policies and Practice*, Volume 2, p. 961, para 5.

<sup>5</sup> Cf. *infra*, chapter III., p. 31 et seq.

whether or not UNAMID peacekeepers are mandated to operate on Chadian territory and what powers they have with regard to those who back the assailants.

## **B. Approach to the topic**

In order to assess the extent of powers of a peacekeeping mission, it is first of all crucial to know from where this mission gets its authorization. Therefore the first chapter will be concerned with an outline of the UN and AU peacekeeping laws, enquiring into the origins and sources of the concept of peacekeeping and aiming to display the general principles of United Nations and African Union peacekeeping.

Since, as Chapter I will point out, authorization for a UN peacekeeping operation is, first and foremost, given by a Security Council resolution, Chapter II will address the issue of how to interpret such resolutions. With the tools developed in the second chapter, Security Council resolution 1769, which authorizes UNAMID, can subsequently be examined. However, in Chapter II it will also be argued that in order to understand such a resolution, it is necessary to have as much knowledge as possible of the political background and of the Security Council's involvement in the conflict.<sup>6</sup>

Consequently, the third chapter will delineate the history and background of the conflict in Darfur as well as the role of the Sudanese government and the conduct of both the United Nations and the African Union.

Subsequent to this descriptive evaluation, Chapter IV will first give a survey of the key documents relating to the establishment of UNAMID, followed by a detailed analysis of these resolutions, reports and peace agreements. This will result in an assessment of the extent of powers of the joint forces in Darfur under the UN and the accordant AU peacekeeping laws.

Finally the last chapter will contain a summary of the conclusions of the previous chapters.

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<sup>6</sup> Cf. MC Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yearbook of United Nations Law* (1998), 73 at 79.

## **Chapter I: UN and AU peacekeeping laws and principles**

In order to be able to evaluate the extent of powers of peacekeeping forces, it is important to be familiar with the nature of peacekeeping laws and principles under the UN Charter and the Constitutive Act of the African Union. This chapter will therefore enquire into the origins of the respective rules and will try to outline the general principles of United Nations and African Union peacekeeping. It will also examine the relationship between the UN and the AU concerning issues with regard to peace and security.

### **A. UN peacekeeping laws and principles**

#### **1. Introduction**

As a starting point it is important to know the basis of legal authority for peacekeeping operations, from which the general scope of powers of peacekeeping forces emanates. A distinction must also be drawn between observer missions, peacekeepers and peace enforcement missions.

First of all I will try to shed some light on the terminology of peacekeeping, before briefly tracing the historical development of peacekeeping principles. This will be followed by an assessment of the legal authority for peacekeeping missions. Furthermore this section will also focus on the general problems which arise from the deployment of peacekeepers into civil war conflicts as opposed to interstate conflicts.

#### **2. Definition of peacekeeping**

The UN Charter contains no provision about the deployment of peacekeeping forces,<sup>7</sup> but in light of the first of the purposes listed in Chapter I, Article I of the Charter,<sup>8</sup> peacekeeping operations are generally understood as a way for the UN to stop or contain disputes which have escalated or have the potential to escalate into armed conflicts.<sup>9</sup> The present perception of UN

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<sup>7</sup> Wolfrum/Philipp (note 4), p. 961, para 5; SD Bailey and S Daws, *The Procedure of the UN Security Council*, p. 356.

<sup>8</sup> Article I UN Charter: “The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; [...]”.

<sup>9</sup> E Clemons, ‘No peace to keep: Six and three-quarters peacekeepers’, 26 *New York University Journal of International Law & Politics* 107 (1993), at 108.

peacekeeping comprises a Security Council-authorized force, mandated to help maintain or restore peace, operating under the authority of the UN and composed of personnel voluntarily provided by UN member states.<sup>10</sup> So peacekeeping operations are designed to contain violence and promote stability in the area of conflict.<sup>11</sup> However, this definition does not determine how much force the peacekeepers may use and it says little about the definite difference between peacekeeping and peace enforcement. Therefore a closer look at the historical development of peacekeeping principles is necessary.

### **3. Historical development**

#### **a) UNSCOB**

The historical roots of UN peacekeeping can be traced back to the UN Special Committee on the Balkans (UNSCOB), which was established in 1947, when Greece faced an escalating dispute over border violations with its northern neighbours Yugoslavia, Albania and Bulgaria.<sup>12</sup> Confronted with reciprocal allegations by the four states, the UN interposed itself between the disputing states to prevent a serious armed conflict.<sup>13</sup> Since the Security Council was deadlocked due to the political impasse between the super powers, UNSCOB was established by the General Assembly (GA) and it set up two principles that would later become the cornerstones of peacekeeping operations: the impartiality of the peacekeepers and the requirement of the host state's consent.<sup>14</sup> However, as these two key elements were ignored in the course of the UNSCOB deployment when the GA sided with Greece, this early peacekeeping effort was of limited effectiveness; Yugoslavia, Albania and Bulgaria refused to cooperate with UNSCOB and they did not actively promote settling the dispute with Greece.<sup>15</sup> Therefore the powerful lesson to be learnt from this early experience is that without

at least the appearance of complete neutrality, reflected both in enabling resolutions and in behaviour on the ground, UN peacekeepers are unlikely to obtain the critical

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<sup>10</sup> J Sloan, 'The Use of Offensive Force in UN Peacekeeping: A Cycle of Boom and Bust?', 30 *Hastings Int'l & Comp. L. Rev.* 385 (2007).

<sup>11</sup> Clemons (note 9), at 121.

<sup>12</sup> Clemons (note 9), at 109.

<sup>13</sup> Clemons (note 9), at 110.

<sup>14</sup> Clemons (note 9), at 109.

<sup>15</sup> Clemons (note 9), at 112.

element of consent and the requisite levels of cooperation from all the parties to a dispute.<sup>16</sup>

## **b) UNTSO**

Shortly after UNSCOB, the UN established a Truce Supervision Organization (UNTSO), which was the first formal peacekeeping operation.<sup>17</sup> In May 1948, when the Arab-Israeli conflict over Palestine had reached a bloody impasse, the Security Council first demanded a four week cease-fire, which proved to be of little use since both sides resumed fighting after the truce had expired.<sup>18</sup> Consequently, the Security Council resorted to stronger measures when it called for the second truce.<sup>19</sup> It used its full Chapter VII authority<sup>20</sup> and increased the number of military observers who had been sent to monitor the first cease-fire.<sup>21</sup> This larger military observer mission became known as UNTSO and for the first time the United Nations adopted a structured peacekeeping approach based on a clear set of operative principles.<sup>22</sup> Since UNTSO, UN peace observer missions have been set up according to the principles of conduct which were contained in the instructions given to the UNTSO troops.<sup>23</sup> Count Bernadotte, the UN mediator for Palestine who was in charge of supervising the Truce Commission,<sup>24</sup> instructed the observers to be “completely objective in their attitudes” and to “maintain a thorough neutrality as regards political issues in the Palestine situation”.<sup>25</sup> Although the need for impartiality is a lesson that should already have been learnt from the unsuccessful UNSCOB mission, UNTSO failed again in this respect as it provided Count Bernadotte with the dual functions of observation and mediation which detracted his impartiality.<sup>26</sup> This detraction was due to the fact that Bernadotte co-mingled the authority and functions of the

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<sup>16</sup> Clemons (note 9), at 112.

<sup>17</sup> UN Department of Public Information, *The Blue Helmets: A Review of United Nations Peacekeeping*, 3<sup>rd</sup> ed, at 17 et seq.

<sup>18</sup> Clemons (note 9) at 113.

<sup>19</sup> SC Res. 54, UN SCOR, UN Doc. S/902 (1948), available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/047/79/IMG/NR004779.pdf?OpenElement> [accessed 21 November 2007], para 1 et seq.

<sup>20</sup> SC Res. 54, (note 19), para 2.

<sup>21</sup> The Blue Helmets (note 17), at 19.

<sup>22</sup> Clemons (note 9), at 112 et seq.

<sup>23</sup> The Blue Helmets (note 17), at 8; Clemons (note 9) at 114.

<sup>24</sup> Clemons (note 9) at 113.

<sup>25</sup> Cablegrams from the United Nations Mediator dated 22 and 27 July 1948 to the Secretary-General containing instructions given to observers and plans of organization of truce supervision, UN Doc. S/ 928 (1948), available at: <http://domino.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/94d91584db390c56852563ea0060cfe3!OpenDocument> [accessed 21 November 2007]; cf. also Clemons (note 9) at 114 et seq.

<sup>26</sup> Clemons (note 9), at 115 et seq.

concepts of peacekeeping (observation) and peacemaking (mediation).<sup>27</sup> Therefore, with regard to its deficiencies, UNTSO proved to be another important step on the way to successful, impartial peacekeeping missions.

Another operative principle contained in Bernadotte's instructions was the prohibition of any use of force.<sup>28</sup> This element has, alongside impartiality and the requirement of consent of the host state, become the third of the cardinal principles that guided UN peacekeeping operations ever since UNTSO.<sup>29</sup>

These three principles also composed the distinction between peacekeeping and peace enforcement missions; peace enforcement operations, deployed with Chapter VII authority, may be mandated to use force other than in self defence, can take sides with one of the parties in the respective conflict and do not necessarily rely on the consent of the host state.<sup>30</sup>

### **c) UNEF**

Eight years after UNTSO had been established, tensions between Israel and Egypt over the Suez Canal erupted into fighting and thereby triggered another UN peacekeeping operation.<sup>31</sup> This Israeli-Egyptian dispute was characteristic of a new type of armed conflict which involved frequent and reciprocal military raids by the conflicting parties.<sup>32</sup> Such parties were more likely to ignore the demarcated boundary lines of peace, and the likelihood of cooperation with the peacekeepers decreased.<sup>33</sup> Therefore a pure military observer mission like UNTSO would have been doomed to fail; the UN needed a force capable of stopping and arresting violators of the respective peace agreement.<sup>34</sup> Consequently, in 1956, the UN Emergency Force (UNEF) was positioned between the warring parties and the troops were assigned more aggressive peacekeeping duties.<sup>35</sup> UNEF, unlike the mere observer mission UNTSO, did not function under an absolute prohibition of the use of force; the peacekeepers were

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<sup>27</sup> Clemons (note 9), at 114 et seq.

<sup>28</sup> Cablegrams from the United Nations Mediator dated 22 and 27 July 1948 to the Secretary-General (note 25), at 1.

<sup>29</sup> Sloan (note 10), at 386; Clemons (note 9), at 116.

<sup>30</sup> Bailey/ Draw (note 7), p. 374; Wolfrum/Philipp (note 4), p. 967 para 28.

<sup>31</sup> Clemons (note 9), at 118.

<sup>32</sup> The Blue Helmets (note 17), at 43.

<sup>33</sup> Clemons (note 9), at 118.

<sup>34</sup> Clemons (note 9), at 118.

<sup>35</sup> Clemons (note 9), at 119.

entitled to respond with force to armed attacks, including attempts to force them to withdraw from their authorized positions.<sup>36</sup>

However, the principles of impartiality and consent were left intact.<sup>37</sup> To maintain the neutrality of the force, Dag Hammarskjöld, the UN Secretary-General from 1953 to 1961, who created this new model for peacekeeping, refused troops offered by the permanent five members of the SC as well as troops from “any country which for geographical or other reasons might have a special interest in the conflict”.<sup>38</sup> He also emphasized that the UN could not operate peacekeepers on the territory of a country without the consent of the government of that country.<sup>39</sup> Therefore, since Israel refused to accept the forces on its territory, UNEF was only deployed on the Egyptian side of the Armistice Demarcated Line<sup>40</sup> and the troops were withdrawn when Egypt expelled UNEF in 1967 in preparation for the Six Day War.<sup>41</sup>

While Hammarskjöld had “strengthened the ability of the UN to interpose itself between member states at a time when a new type of armed conflict situation had exposed the limits of the peace observation model”, there was still a great deal of uncertainty concerning the legal basis of peacekeeping operations.<sup>42</sup> As a result of this uncertainty, the constitutionality of UNEF, and by that the constitutionality of peacekeeping missions in general, was called into question. In December 1961, the GA asked the ICJ for an advisory opinion on whether the expenditures for UNEF and ONUC<sup>43</sup> constituted “expenses of the Organization”.<sup>44</sup> By answering this question in the affirmative,<sup>45</sup> the Court established the legality of peacekeeping.<sup>46</sup>

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<sup>36</sup> United Nations Emergency Force: Summary Study of the Experience derived from the Establishment and Operation of the Force: Report of the Secretary General, UN GAOR, 13<sup>th</sup> Sess., Annex 1, Agenda Item 65 (c), at 12-13, UN Doc. A/3943 (1958); Clemons (note 9), at 119.

<sup>37</sup> Clemons (note 9), at 118.

<sup>38</sup> UNEF: Summary Study of the Experience derived from the Establishment and Operation of the Force (note 36), at 10.

<sup>39</sup> UNEF: Summary Study of the Experience derived from the Establishment and Operation of the Force (note 36), at 9.

<sup>40</sup> The Blue Helmets (note 17), at 51; Clemons (note 9), at 119.

<sup>41</sup> Clemons (note 9), at 120.

<sup>42</sup> Clemons (note 9), at 120.

<sup>43</sup> Opération des Nations Unies au Congo, which was established in 1960 to “ensure the withdrawal of Belgian forces, to assist the Government in maintaining law and order and to provide technical assistance”, cf. “United Nations Operation in the Congo”, available at: <http://www.un.org/Depts/DPKO/Missions/onuc.htm> [accessed 24 November 2007].

<sup>44</sup> Press Release of the International Court of Justice of 28 December 1961 – “The United Nations General Assembly requests an Advisory Opinion of the Court”, available at: <http://www.icj-cij.org/docket/files/49/12789.pdf> [accessed 24 November 2007].

#### **d) Alteration of the basic principles**

Nevertheless, UN peacekeeping changed its face over the years, especially regarding the principle of the use of force only in self-defence.<sup>47</sup> In the early sixties, the ONUC mission broadened this concept<sup>48</sup> and in 1973, with the establishment of the Second UN Emergency Force (“UNEF II”), it was extended to include force which is used to prevent interference with the peacekeepers’ orders and duties.<sup>49</sup> In 1992, when the then Secretary-General Boutros Boutros-Ghali attempted to clarify the concept of peacekeeping in his report “An Agenda for Peace”, an increased willingness to use force became apparent.<sup>50</sup> This could, for example, be seen in his implication that consent was no longer an essential part of peacekeeping. The need for consent has “traditionally operated as a check on the use of force; states are less likely to consent to a peacekeeping operation where offensive force is authorized”.<sup>51</sup>

In the years after 1988, quite a number of peacekeeping missions came into being,<sup>52</sup> and these operations grew more complex and multifunctional, including political, humanitarian, social and economic components.<sup>53</sup> They also set up another principal characteristic of UN peacekeeping: The Security Council delegated to the Secretary General both the provision and command of the UN Forces.<sup>54</sup> At the same time, the requirement of consent of the host state became less important and was even said to be a pure legal fiction, since in some cases either no local government existed or it ceased to exist during the operation.<sup>55</sup>

In summary it can be stated that the early UN peacekeeping operations had an important impact on the evolution of the basic principles for such missions.

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<sup>45</sup> Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962 : I.C. J. Reports 1962, p. 151, at 179.

<sup>46</sup> Certain expenses Case (note 45), at 165; cf. B Simma, *Charter der Vereinten Nationen*, Artikel 10, note 27.

<sup>47</sup> Sloan (note 10), at 385 et seq.

<sup>48</sup> Sloan (note 10), at 399.

<sup>49</sup> Sloan (note 10), at 404.

<sup>50</sup> Sloan (note 10), at 408 et seq.

<sup>51</sup> Sloan (note 10), at 409.

<sup>52</sup> for example UNAVEM II and III, 1991-1995 and 1995-1997 in Angola; UNPROFOR, 1992-1995 in the former Yugoslavia; UNOSOM, 1992-1995 in Somalia; UNOMOZ, established in 1992 in Mozambique; MINURCA, 1998-2000 in the Central African Republic; UNAMSIL, 1998-2005 in Sierra Leone; MONUC, since 1999 in the Democratic Republic of Congo; UNMEE, since 2000 in Ethiopia and Eritrea; UNMISSET, 2002-2005 in East Timor; UNMIL, established in 2003 in Liberia; ONUB, 2004-2006 in Burundi.

<sup>53</sup> Bailey/ Daws (note 7), p. 357.

<sup>54</sup> B Conforti, *The Law and Practice of the United Nations*, p. 198.

<sup>55</sup> Conforti (note 54), p. 198.

However, these tenets have altered over the years, therefore their precise bearing on UNAMID is yet to be established.

#### **4. Legal authority for peacekeeping operations**

As was mentioned above, the UN Charter contains no provision about the deployment of peacekeeping forces.<sup>56</sup> However, chapters VI and VII provide legal authority to encourage peaceful dispute settlement (Chapter VI) and enable the UN to resort to the use of force where a conflict has risen to a level which threatens international peace and security (Chapter VII).<sup>57</sup> The famous observation that the legal basis for UN peacekeeping may be found at “Chapter VI½” is frequently attributed to Dag Hammarskjöld.<sup>58</sup> What is meant by this is that peacekeeping is more than a Chapter VI peaceful measure, but something less than a forceful measure under Chapter VII.<sup>59</sup> Some legal scholars however, hold the opinion that an ad hoc customary rule has been formed with regard to peacekeeping operations, which has now taken root with the agreement of all the UN member states.<sup>60</sup>

Another opinion which has been put forward with respect to the legal authority of peacekeeping is the contention that the legal basis can be found in article 42 UNC. According to this view, article 42 of the UN Charter – although broadly interpreted – clearly enables the SC to establish a peacekeeping force, which can be seen as an “international police action”.<sup>61</sup> The practice of entrusting the Secretary-General with command over the troops has its foundation in article 98 UNC, which enables the SG to perform all the functions the Security Council deems advisable to delegate to him.<sup>62</sup>

Whether one holds that peacekeeping actions can be traced back to article 42, or that an unwritten rule has been formed, the substance does not change; either way there must be a SC resolution which constitutes the direct legal basis

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<sup>56</sup> Cf. *supra*, Chapter I, A. 2., p. 3; cp. also Bailey/ Daws (note 7), p. 356.

<sup>57</sup> Clemons (note 9), at 108.

<sup>58</sup> J Hillen, ‘Peace(keeping) in Our Time: The UN as a Professional Military Manager’, available at <http://carlisle-www.army.mil/usawc/Parameters/96autumn/hillen.htm> [accessed 19 November 2007].

<sup>59</sup> Sloan, (note 10), at 385: cf. Also Bothe, Friedenserhaltende Massnahmen, in: Simma, Charter der Vereinten Nationen, Art 38 note 38 et seq; Herdegen, Die Befugnisse des UN-Sicherheitsrates, p. 2.

<sup>60</sup> B Boutros-Ghali, ‘Agenda for Peace’, 31 *ILM* 967 (1992), para 46; Conforti (note 54), p. 202 et seq.

<sup>61</sup> Conforti (note 54), p. 196.

<sup>62</sup> Conforti (note 54), p. 202.

for the establishment of a peacekeeping operation.<sup>63</sup> It is only the legal basis for such a SC resolution which is the subject of dispute.

Generally and especially in the years since 1993, there has been the development of deploying UN peacekeeping operations with mandates under Chapter VII of the UN Charter and into situations where fighting is still ongoing.<sup>64</sup>

In November 2000, by passing resolution no. 1327, the Security Council laid down some general “decisions and recommendations” on the establishment and behaviour of peacekeeping operations, in order to give them “clear, credible and achievable mandates” and “a credible deterrent capability”.<sup>65</sup> However, resolution 1327 was not passed under Chapter VII of the UN Charter and therefore has no binding effect. In part II of the Annex to this resolution, the Security Council emphasized that the rules of engagement for UN peacekeeping forces should be fully consistent with “any relevant Security Council resolution” and should “clearly set out the circumstances in which force may be used to protect all mission components and personnel”.<sup>66</sup>

The rules of engagement are written orders that must be developed and approved by both the parties involved and the Security Council and which are intended to establish the conditions under which the forces can use their weapons as they carry out peacekeeping missions.<sup>67</sup> Rules of engagement have a two-way function; they are meant to provide a set of guidelines for the commander and his troops, and to ensure the consistency of the military operation with policy objectives.<sup>68</sup>

As was mentioned earlier, peacekeeping operations are established on the basis of a Security Council Resolution and they can assume the status of subsidiary organs of the United Nations.<sup>69</sup> Consequently the law applicable to the UN as a legal entity also applies to the peacekeeping forces.<sup>70</sup> Some of the

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<sup>63</sup> Conforti (note 54), p. 200 et seq.

<sup>64</sup> Bailey/ Daws, (note 7), p. 357.

<sup>65</sup> SC Resolution 1327 (2000), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N00/745/04/PDF/N0074504.pdf?OpenElement> [accessed 1 December 2007]; Conforti (note 54), p. 200.

<sup>66</sup> SC Res 1327 (note 65), Annex, p. 3.

<sup>67</sup> B Berkowitz, ‘Rules of engagement for UN peacekeeping forces in Bosnia’, available at: [http://findarticles.com/p/articles/mi\\_m0365/is\\_n4\\_v38/ai\\_16443484](http://findarticles.com/p/articles/mi_m0365/is_n4_v38/ai_16443484) [accessed 1 December 2007]

<sup>68</sup> Berkowitz (note 67), loc cit.

<sup>69</sup> Article 7 (2) in conjunction with article 29 of the UN Charter; cf. Wolfrum/Philipp (note 3), p. 964, para 17.

<sup>70</sup> Wolfrum/Philipp (note 4), p. 964, para 17.

important results of this determination are that the Convention on the Privileges and Immunities of the UN,<sup>71</sup> and general customary rules of international law concerning liability apply to the peacekeepers. Although the United Nations as such is not a party to any of the conventions relating to the law of war, the “principles and spirit” which they contain must nevertheless be observed by the peacekeeping forces, as these conventions codify customary international law, by which the United Nations are bound.<sup>72</sup>

Finally, special agreements between the host state and the UN can exempt the troops from the jurisdiction of the host state, which guarantees a degree of independence but at the same time bears the danger of abetting peacekeepers’ misconduct.<sup>73</sup>

### **5. Peacekeeping in intrastate conflicts**

In recent times, more and more peacekeeping missions have been established in intrastate, civil war conflicts in which the lines of hostility are not as neatly drawn as in the classic interstate dispute.<sup>74</sup> Operating experience on the ground has shown that peacekeepers are more vulnerable to violence in civil war situations and there are several explanations for the difficulties which the peacekeeping troops see themselves confronted with.<sup>75</sup>

The most obvious problem is that in intrastate conflicts, there is often a multitude of factions, each of which fights for its own agenda.<sup>76</sup> Consequently, it is very difficult to obtain the consent of all the parties to the conflict and therefore the concept of uniform consent is barely workable in the civil war context.<sup>77</sup>

Furthermore, it is almost impossible to maintain an impartial appearance, since the rebel groups in the conflict will tend to perceive the peacekeepers as biased intruders: The peacekeepers’ task is to contain violence and promote stability while in many cases the threat of violence and instability are the very tools used by rebel movements to force concessions from the government. By promoting the status quo, the peacekeepers in the first instance relieve the pressure on the challenged government and, logically, rebel groups are likely to

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<sup>71</sup> of 13 February 1946; UNTS Vol. 1 No. 4.

<sup>72</sup> Wolfrum/Philipp (note 4), p. 964, para 19.

<sup>73</sup> Wolfrum/Philipp (note 4), p. 964, para 18.

<sup>74</sup> Clemons (note 9), p. 120.

<sup>75</sup> Clemons (note 9), p. 121.

<sup>76</sup> Clemons (note 9), p. 121.

<sup>77</sup> PF Diehl, *International Peacekeeping*, at 78; K Annan, ‘Peace-keeping in situations of civil war’, 26 *N.Y.U. J. Int’l L. & Pol.* 623, at 624.

view the peacekeepers' activity as preserving the domination of the government and status quo elites.<sup>78</sup>

Finally, the principle of non-use of force had to be modified in intrastate conflicts where peacekeepers have come under assault in the course of hostile reactions of the various factions to their presence.<sup>79</sup> As a result, the respective troops have often been equipped with heavier weaponry.<sup>80</sup>

Altogether, civil war situations pose some severe new threats to peacekeepers and have therefore necessitated further adjustment of the basic principles of UN peacekeeping.<sup>81</sup>

## **6. Conclusion**

The UN peacekeeping role has expanded over the years, but it still relies on the Hammerskjöld principles that were established as a matter of practice in the early UN peacekeeping missions: impartiality, consent of the parties to the conflict and the prohibition of the use of force other than in self defence. Nevertheless, peacekeepers in recent operations (especially in civil law conflicts) are confronted with a multitude of new dangers and problems, which necessitate a continuous advancement of those principles.

### **B. AU peacekeeping and peace enforcement laws**

Since the African Union (AU) was launched as recently as 2002, it is necessary to take into account the peacekeeping approach of its predecessor, the Organization of African Unity (OAU), in order to understand AU peacekeeping principles. So, besides discussing the provisions of the Constitutive Act of the AU, which currently govern peacekeeping operations, this part will also deal with the peacekeeping missions established by the OAU. Furthermore, this section will include an assessment of the relationship between the AU and the UN in terms of issues touching on international peace and security.

#### **1. Peacekeeping principles of the Organization of African Unity**

In the early 1960s, Kwame Nkrumah, the first president of Ghana, who had a significant influence on the founding of the OAU, proposed that a collective

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<sup>78</sup> Diehl (note 77), at 78.

<sup>79</sup> Clemons (note 9), p. 122.

<sup>80</sup> Clemons (note 9), p. 122.

<sup>81</sup> Clemons (note 9), p. 123.

defence structure be included in its charter.<sup>82</sup> However, when the organization was founded in 1963, the OAU charter only contained loose provisions concerning the security structure to be adopted on the continent.<sup>83</sup> Like the UN Charter, its OAU counterpart made no provision for peacekeeping and, what is more, the Charter was very conservative on the internal affairs of member states: major emphasis lay on the autonomy of members from interference or coercion by other member states or by the organization as a whole.<sup>84</sup> This adherence to the principles of sovereignty and territorial integrity seriously limited the OAU's role in internal conflicts.<sup>85</sup> A further obstacle was created by the OAU's lack of independent executive tools capable of enforcing sanctions against members and non-members; its resolutions were only advisory and therefore OAU mediation was limited to persuasion.<sup>86</sup>

Accordingly, it was no surprise that the OAU peacekeeping forces found themselves confronted with a multitude of problems.<sup>87</sup> When the first major peacekeeping operation was established in Chad in 1981, serious obstacles stood in its way: There was no cease-fire agreement in Chad when the troops were deployed and therefore there was no peace to keep.<sup>88</sup> In addition operational problems arose, such as an inadequate troop strength, poor coordination, communication and logistical problems.<sup>89</sup> Furthermore, the missions mandate was given different interpretations by the different parties to the conflict, putting at risk the neutral stance of the force and thereby further complicating the operation's task.<sup>90</sup>

Aside from the conflict in Chad, the OAU missed some opportunities to resolve regional disputes, such as the conflict in Western Sahara in the late 1970s and the war between Somalia and Ethiopia in 1977.<sup>91</sup> In other conflicts there was a high level of foreign, especially superpower intervention, which fuelled these

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<sup>82</sup> F Olonisakin, *Reinventing Peacekeeping in Africa*, at 57.

<sup>83</sup> Olonisakin (note 82), at 59.

<sup>84</sup> Olonisakin (note 82), at 60.

<sup>85</sup> Olonisakin (note 82), at 61.

<sup>86</sup> Olonisakin (note 82), at 61.

<sup>87</sup> Olonisakin (note 82), at 49 et seq.

<sup>88</sup> Olonisakin (note 82), at 51.

<sup>89</sup> Olonisakin (note 82), at 51.

<sup>90</sup> Olonisakin (note 82), at 52.

<sup>91</sup> Olonisakin (note 82), at 55.

conflicts and made it virtually impossible for the OAU to intervene or mediate successfully in the respective disputes.<sup>92</sup>

In summary, one can say that OAU peacekeeping experience was very scarce, while the major effort in Chad was unsuccessful.<sup>93</sup>

## **2. Effect of the transformation of the OAU into the AU**

In 2002, the AU was launched and the provisions in its Constitutive Act concerning peace and security radically departed from those of the OAU Charter: Unlike its OAU counterpart, the AU Act contains express provisions mandating it to deal with issues of human rights, peace and security in member states.<sup>94</sup>

These provisions of the AU Act which are relevant for peacekeeping can be found in articles 3 (f) and 4 (j), determining that the AU shall “promote peace, security and stability on the continent”<sup>95</sup> and providing for the right of any member state of the AU to “request intervention from the [AU] in order to restore peace and security”.<sup>96</sup> At first sight, article 4 (g) of the AU Act seems to contradict these purposes, since it states that the AU shall function according to the principle of “non-interference by any member state in the internal affairs of another”.<sup>97</sup> However, it is argued that article 4 (g) only restrains individual states from intervening, but not the AU as such. An additional argument is that human right issues do not fall within the description of “internal affairs”.<sup>98</sup>

Article 4 (h) is another important provision of the AU Act and it gives the AU Assembly the “right to intervene in a member state [...] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”.<sup>99</sup> Consequently the Assembly has the discretion to decide whether or not to intervene, while the host state’s consent is not required.<sup>100</sup>

Also in 2002, after the AU had been launched, its members established a Peace and Security Council, which was intended to be a body that could anticipate

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<sup>92</sup> Olonisakin (note 82), at 56 et seq; 62 et seq.

<sup>93</sup> Olonisakin (note 82), at 56.

<sup>94</sup> K Kindiki, ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’, (2003) 3 *African Human Rights Law Journal* 97, at 112.

<sup>95</sup> Art 3 (f) of the Constitutive Act of the African Union, available at: [http://www.africa-union.org/root/au/AboutAu/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm) [accessed 3 December 2007].

<sup>96</sup> Art. 4 (j) of the Constitutive Act of the African Union (note 95).

<sup>97</sup> Art. 4 (g) of the Constitutive Act of the African Union (note 95); cf also Kindiki (note 94) at 105 et seq.

<sup>98</sup> Kindiki (note 94), at 106.

<sup>99</sup> Art. 4 (h) of the Constitutive Act of the African Union (note 95); Kindiki (note 94), at 106.

<sup>100</sup> Kindiki (note 94), at 106.

and pre-empt armed conflicts.<sup>101</sup> In the case of existing conflicts, it is the responsibility of the Council to "undertake peacemaking and peacebuilding functions for the resolution of these conflicts".<sup>102</sup> The council, consisting of 15 elected members,<sup>103</sup> is meant to function continuously<sup>104</sup> and there is a plan to allocate it an African Standby Force, "composed of standby multidisciplinary contingents" and "ready for rapid deployment at appropriate notice".<sup>105</sup>

The functions of the Peace and Security Council shall include intervention, pursuant to article 4 (h) of the AU Act.<sup>106</sup> Article 4 (h), as was mentioned above,<sup>107</sup> mandates the AU Assembly to take the decision to intervene in a member state; it is the Peace and Security Council's responsibility to make recommendations to that effect.<sup>108</sup>

However, a serious obstacle in the way of effective AU peacekeeping is set up by the financial provisions of the AU Act, a problem which I will return to in connection with the AMIS mission of the AU in Darfur.<sup>109</sup>

### **3. AU peacekeeping missions**

After the President of Burundi, Francois Ndadaye, had been assassinated in 1993, the Arusha Agreement for Peace and Reconciliation for Burundi and two subsequent ceasefire agreements were signed in August 2000 and in October and December 2002, marking the end of peace processes.<sup>110</sup> In April 2003, the African Union accepted the challenge to establish the African Mission in Burundi (AMIB), the first AU peacekeeping operation.<sup>111</sup> AMIB was a holding mission, pending the deployment of an UN Security Council-mandated peacekeeping force, and it clearly helped to create conditions suitable for the establishment of

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<sup>101</sup> Cf articles. 3 (b), 6 (b) of the Protocol relating to the establishment of the Peace and Security Council of the African Union, available at: <http://www.africa-union.org/root/au/AUC/Departments/PSC/Asf/doc/PSC%20protocol.pdf> [accessed 3 December 2007]; Kindiki, (note 94), at 112.

<sup>102</sup> Articles 3 (b); 6 (c-e) PSC Protocol (note 101).

<sup>103</sup> Art. 5 (1) PSC Protocol (note 101).

<sup>104</sup> Articles 2 (1); 8 (1) PSC Protocol (note 101); Kindiki (note 94) at 112.

<sup>105</sup> Art. 13 (1) PSC Protocol (note 101); Kindiki (note 94) at 112 et seq.

<sup>106</sup> Kindiki (note 94), at 112.

<sup>107</sup> Cf. supra p. 32.

<sup>108</sup> Art. 6 (d) PSC Protocol (note 101).

<sup>109</sup> G Prunier, *Darfur – The Ambiguous Genocide* p. 144; cf. infra, chapter III. D. 3., p. 43.

<sup>110</sup> F Agoagye, 'The African Mission in Burundi – Lessons learned from the first African Union Peacekeeping Operation', available at: [http://www.issafrika.org/dynamic/administration/file\\_manager/file\\_links/CT2\\_2004%20PG9-15.PDF?link\\_id=29&slink\\_id=264&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.issafrika.org/dynamic/administration/file_manager/file_links/CT2_2004%20PG9-15.PDF?link_id=29&slink_id=264&link_type=12&slink_type=13&tmpl_id=3) [accessed 5 December 2007], p.9.

<sup>111</sup> Agoagye (note 110), p. 10.

that UN mission (ONUB).<sup>112</sup> However, generally speaking, AMIB's contribution to political and economical stability was limited; it "cannot be said to have fully facilitated the implementation of the ceasefire agreements, nor was it able to fully ensure that the defence and security situation in Burundi was stable and well managed".<sup>113</sup> It has been argued that a major lesson which should be learned from the experiences of AMIB is that the "division of responsibilities between regional forces and UN presence should be formalised" in order to achieve better collaboration.<sup>114</sup> Furthermore it has been suggested that the "conduct of regional peace operations should be based on standardised doctrine and operating procedures and not those of the individual troop-contributing countries".<sup>115</sup>

In addition to its AMIB mission, the African Union established the Mission in Sudan (AMIS) and the recent Mission to Somalia (AMISOM), which was created in early 2007 with the approval of the UN Security Council and which is planned to consist of up to 8000 troops.<sup>116</sup> Whereas it is too early for an assessment of AMISOM, I will focus on the African Union Mission in Sudan and its transition into UNAMID in Chapter III.

#### **4. Relationship between AU and UN in relation to peace and security issues**

According to article 24 of the UN Charter, the UN Security Council has "primary responsibility" concerning the maintenance of international peace and security and in exercising this responsibility it has a mandate to supervise the AU, which is a regional arrangement in the sense of article 52 of the UN Charter.<sup>117</sup> In other words, this means that articles 52 et seq constrain all activities of the AU in relation to the use of force, unless such actions are authorised by the UN Security Council.<sup>118</sup> However, as was discussed above, article 4 (h) of the AU Act mandates the AU to intervene and it does not mention the requirement of seeking prior authorisation by the UN Security Council.<sup>119</sup> Therefore it seems as if the AU Act does not anticipate the supervision of the UN SC in relation to intervening in

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<sup>112</sup> Agoagye (note 110), p. 13 et seq.

<sup>113</sup> Agoagye (note 110), p. 14.

<sup>114</sup> Agoagye (note 110), p. 14.

<sup>115</sup> Agoagye (note 110), p. 15.

<sup>116</sup> Missionary International Service News Agency, 'UN approves Somalia resolution', available at: <http://www.speroforum.com/site/article.asp?id=6948&t=UN+approves+Somalia+resolution> [accessed 5 December 2007].

<sup>117</sup> Kindiki (note 94), at 108.

<sup>118</sup> Kindiki (note 94), at 108.

<sup>119</sup> Cf. supra, p. 14; cf. also art. 4 (h) of the AU Act.

AU member states.<sup>120</sup> It was argued that the omission in article 4 (h) of the AU Act was intentional, following the concern that UN bureaucratic procedures would hinder a quick response in cases of severe human rights violations.<sup>121</sup> However, the Protocol Relating to the Establishment of the Peace and Security Council of the AU<sup>122</sup> does not seem to support this assumption.<sup>123</sup> In its Preamble, it acknowledges the “provisions of the Charter of the United Nations, conferring to the Security Council primary responsibility for the maintenance of international peace and security”<sup>124</sup> and it also provides that the Peace and Security Council of the AU shall be guided, *inter alia*, by the principles of the UN Charter.<sup>125</sup> Therefore it may be argued that the Protocol aims to clarify the relationship between AU and UN and is intended to emphasize that the AU will not intervene militarily in member states without the approval of the UN Security Council.<sup>126</sup> Yet again article 16 (1) of the Protocol states that the AU “has the primary responsibility for promoting peace, security and stability in Africa”, which leads to the conclusion that the Preamble confers to the Security Council primacy only in relation to peace and security in the rest of the world, outside Africa.<sup>127</sup> A strong indication for the accuracy of this point of view is the fact that the Protocol refrains from providing that the AU Peace and Security Council or the AU Assembly require the authorisation of the UN SC before intervening in a member state pursuant to article 4 (h) of the AU Act.

Therefore neither the AU Act nor the Protocol Relating to the Establishment of the Peace and Security Council reveal the intended relation between AU and UN, but it seems likely that the AU will not hesitate to intervene in a member state without obtaining prior authorisation of the UN Security Council, if it deems immediate action necessary to respond to a severe crisis.

## **5. Conclusion**

Whereas the OAU Charter contained no express provisions mandating it to deal with issues of peace and security in member states, the AU Act has filled that

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<sup>120</sup> Kindiki (note 94), at 108.

<sup>121</sup> Kindiki (note 94), at 109.

<sup>122</sup> which was agreed on by the Heads of State and Government of the AU Member States in July 2002.

<sup>123</sup> Kindiki (note 94), at 114.

<sup>124</sup> Cf. Preamble PSC Protocol (note 101).

<sup>125</sup> Art. 4 PSC Protocol (note 101).

<sup>126</sup> Kindiki (note 94), at 114.

<sup>127</sup> Kindiki (note 94), at 115.

gap and explicitly enables the African Union to intervene in a member state in respect of grave circumstances.<sup>128</sup> So while OAU peacekeeping efforts were scarce and for the most part unsuccessful, the prospects for AU peacekeeping are quite good, provided that the normative and institutional structure of the AU Act is backed by efficient norm enforcement approaches.<sup>129</sup>

The AU Act does not define the relationship between the AU and the UN with regard to issues touching on international peace and security and it has been argued that the AU, in spite of article 24 UNC in conjunction with Chapter 8 of the UN Charter, assume primary responsibility for promoting peace, security and stability in Africa.<sup>130</sup>

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<sup>128</sup> Cf. supra Chapter I., B., 2., p. 13 et seq.

<sup>129</sup> Kindiki (note 94), p. 98.

<sup>130</sup> Cf. supra Chapter I., B. 4., p. 17.

## Chapter II: Interpretation of Security Council Resolutions

### A. Introduction

Due to the many issues which are involved, the interpretation of treaty provisions or other legal texts, including resolutions of the Security Council, is a very contentious topic in international law.<sup>131</sup> The exigence of interpretation arises in consequence of the indeterminacy of language used in a resolution or treaty,<sup>132</sup> or because of the fact that political differences between the negotiating parties necessitated a compromise solution.<sup>133</sup> Of course it is also possible that the drafters simply overlooked an ambiguity in the respective document,<sup>134</sup> and finally a legal text may also become unclear as a result of social, political or technological changes in the operating sphere of that text.<sup>135</sup>

Whenever uncertainties arise over the meaning of a particular provision, it seems appropriate to identify the intentions of the parties who drafted the provision.<sup>136</sup> In this respect, the difficulty intrinsic to the interpretation of multilateral treaties or Security Council resolutions lies in the plurality of the parties involved.<sup>137</sup> There are different opinions on where to find evidence of the parties' intentions and accordingly, there are several schools of thought on treaty interpretation.<sup>138</sup> After the delineation of these differing theories (B.), I will turn to the specific problems associated with the interpretation of Security Council resolutions (C.).

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<sup>131</sup> D Schweigmann, *The Authority of the Security Council under Chapter VII of the UN Charter*, p. 7 et seq; Shaw, *International Law*, p. 655; IM Sinclair, *The Vienna Convention on the Law of Treaties*, 69.

<sup>132</sup> B Bix, *Law, Language and Legal Determinacy*, p. 2 et seq.; Schweigmann (note 131), p. 8.

<sup>133</sup> Schweigmann (note 131), p. 8.

<sup>134</sup> E Gordon, 'The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law', 59 *AJIL* (1965) 794, at 803 et seq.

<sup>135</sup> Schweigmann, (note 131), p. 9.

<sup>136</sup> Schweigmann (note 131), p. 9.

<sup>137</sup> Schweigmann (note 131), p. 9.

<sup>138</sup> FG Jacobs, 'Varieties of Approach to Treaty Interpretation: With special reference to the draft Convention on the Law of Treaties before the Vienna Diplomatic Conference', 18 *Int'l & Comp. L. Q.*, at 318; Schweigmann (note 131), p. 9.

## **B. Main theories on treaty interpretation**

### **1. Textual, subjective and teleological approach**

There are three main schools of thought; the textual, the subjective and the teleological theory.<sup>139</sup> The three opinions are characterized by their different ways of taking into account the contracting parties' intentions: Whereas the textual school presumes that the text of a treaty adequately expresses these intentions,<sup>140</sup> the subjective school pays closer attention to what the parties intended to achieve in drafting the treaty.<sup>141</sup> Under the teleological approach however, the treaty is assumed to have an overriding object and purpose which prevails over the intentions held by the parties at the time of the conclusion of the treaty.<sup>142</sup>

Pursuant to the textual approach, effect must be given to the plain terms of the provisions, analysing the text in accordance with the ordinary meaning of the words employed.<sup>143</sup> The ICJ, in the Admission of a State to the United Nations Case,<sup>144</sup> supported this approach and held that

the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.<sup>145</sup>

It went on to state that only where the “words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result”, the court is forced to apply other methods of interpretation, in order to ascertain “what the parties really did mean when they used these words”.<sup>146</sup>

The subjective theory adopts the classical view on interpretation and tries to detect what the parties actually intended.<sup>147</sup> In order to be able to do so, the interpreter would have to consider the historical background and the circumstances in which the treaty was signed.<sup>148</sup> Therefore the interpreter must, according to this theory, refer to the travaux préparatoires of a treaty, such as the

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<sup>139</sup> Jacobs, (note 138), at 318.

<sup>140</sup> H Waldock, ‘Third Report on the Law of Treaties’, 2 *YBILC* (1964) 5, at 53.

<sup>141</sup> Schweigmann (note 131), p. 10 et seq.

<sup>142</sup> Jacobs, (note 138), at Schweigmann (note 131), p. 10.

<sup>143</sup> Schweigmann (note 131), p. 11 et seq.

<sup>144</sup> Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950, available at: <http://www.icj-cij.org/docket/files/9/1883.pdf> [accessed 6 December 2007].

<sup>145</sup> Admission of a State to the United Nations Case (note 144), p. 8.

<sup>146</sup> Admission of a State to the United Nations Case (note 144), p. 8.

<sup>147</sup> H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 16 *BYIL* (1949) 48, at 73; Schweigmann (note 131), p. 11.

<sup>148</sup> Schweigmann (note 131), p. 11.

minutes of conferences and treaty drafts.<sup>149</sup> Another aid in the interpretative process is recourse to the subsequent conduct in applying the treaty.

Finally, the teleological school places emphasis on the object and purpose of a treaty and consequently, the supporters of that theory try to ascertain the interpretation which best serves that purpose.<sup>150</sup> This opinion is particularly relevant for the interpretation of multilateral conventions of a general nature, such as the UN Charter.<sup>151</sup>

According to the teleological approach, the general aim of a treaty even prevails over the intentions of the parties held at the time of drafting that treaty, thus under this approach the effective functioning of an organization outweighs the sovereignty of its members.<sup>152</sup> This result emanates from the principle of effective interpretation, expressed in the rule *ut res magis valeat quam pereat* – “it is better for a thing to have effect than to be made void”.<sup>153</sup>

## 2. The Vienna Convention on the Law of Treaties

Furthermore it is necessary to highlight the impact which the Vienna Convention on the Law of Treaties (VCLT),<sup>154</sup> adopted in 1969 and entered into force in 1980, has on treaty interpretation.

The Convention has been described as an “important instrument”<sup>155</sup> and “a compound of codification and of progressive development of customary international law”.<sup>156</sup> The ICJ has held on several occasions that the rules on interpretation contained in the Convention amount to customary international law.<sup>157</sup> However, the Convention does not single out and codify one of the

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<sup>149</sup> Schweigmann (note 131), p. 11.

<sup>150</sup> Schweigmann (note 131), p. 10.

<sup>151</sup> G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, 28 *BYIL* (1951) 1, at 8; Schweigmann, (note 131), p. 11.

<sup>152</sup> P Malanczuk in: *Akehurst’s Modern Introduction to International Law*, p. 336; Schweigmann (note 131), p. 10.

<sup>153</sup> Schweigmann (note 131), p. 10; Fitzmaurice (note 151), at 8.

<sup>154</sup> Cf. at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) [accessed 9 December 2007], p. 1.

<sup>155</sup> Schweigmann (note 131), p. 12.

<sup>156</sup> DJ Harris, *International Law*, p. 786.

<sup>157</sup> Case concerning the Arbitral Award of 13 July 1989 (Guinea-Bissau v. Senegal), para 48 at 20 et seq., available at: <http://www.icj-cij.org/docket/files/82/6863.pdf> [accessed 9 December 2007]; Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 25 September 1997, para 46 at 38, available at: <http://www.icj-cij.org/docket/files/92/7375.pdf> [accessed 9 December 2007]; Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 8 July 1996, para 19 at 12 et seq., available at [accessed 9 December 2007]; list of cases taken from Schweigmann (note 131), p. 12.

approaches, but rather provides for a mixture of all three.<sup>158</sup> In the first paragraph of article 31 it states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>159</sup> The second paragraph of article 31 stipulates that the context

[...] shall comprise, in addition to the text, including its preamble and annexes  
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;  
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>160</sup>

Finally article 32 permits recourse to the travaux préparatoires if the meaning cannot be established using the means provided by article 31.<sup>161</sup>

In conclusion, although one must, according to the Vienna Convention on the Law of Treaties, first look at the ordinary meaning of the terms of the treaty, none of the theories is exclusively the correct one.<sup>162</sup>

### **C. Interpretation of Security Council Resolutions**

There is little authority on the interpretation of Security Council resolutions.<sup>163</sup> The main question arising in this regard is whether or not the resolutions should be treated the same way as treaties in terms of interpretation. So first of all it is necessary to assess whether resolutions are comparable to treaties regarding the way they should be interpreted. I will argue that they should be treated in a different way than treaties. Therefore the subsequent step must then be to establish a set of guidelines on how Security Council resolutions should be interpreted.

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<sup>158</sup> M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p. 292, para 89.

<sup>159</sup> Art. 31 (1) Vienna Convention on the Law of Treaties, available at:[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) [accessed 18 December 2007]; Schweigmann (note 131), p. 12.

<sup>160</sup> Art. 31 (2) VCLT (note 159).

<sup>161</sup> Schweigmann (note 131), p. 13.

<sup>162</sup> Waldock (note 140), at 54.

<sup>163</sup> Cf. Wood (note 6), at 86; E Papastavridis, ‘Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis’, (2007) 56 *ICQL* 88.

## 1. Comparability of treaties and Security Council resolutions

Security Council resolutions are neither legislation nor judgments or quasi-judgments,<sup>164</sup> nor are they treaties.<sup>165</sup> In order to figure out to what extent, if any, the rules on the interpretation of treaties can be applied to Security Council resolutions, their respective affinities and disparities must be examined.

As for their similarity, it has been stated that both treaty and resolution represent a meeting of wills, “a coming-together of the (possibly opposing) aspirations of the States whose representatives have negotiated its drafting”.<sup>166</sup>

On the other hand, there are quite a number of discrepancies between treaties and SC resolutions: Unlike treaties most SC resolutions are not intended to have an external legal effect, that is, to create rights and obligations binding on States.<sup>167</sup> In contrast to a multilateral treaty, a SC resolution is notionally a unilateral act, it does not have parties in the sense a treaty does; it is “an assertion of the will of the [Security Council], or a statement of its collective view of the situation”.<sup>168</sup> Another difference lies in the fact that SC resolutions are often not self-contained, that is, they refer to and incorporate by reference other documents.<sup>169</sup> Furthermore, while treaties do not create rights or obligations for a third party without that party’s consent,<sup>170</sup> SC resolutions may provide for obligations which are incumbent upon member states by virtue of article 25 UNC, regardless of the consent of those member state.<sup>171</sup> Finally, SC resolutions are often not drafted in clear, simple, concise and unambiguous language.<sup>172</sup> Although it may be argued that the same is frequently true for treaties, there is still a considerable difference, since SC resolutions are often drafted by non-lawyers under strong political pressure and pressing deadlines and impelled by the need to find a compromise solution with regard to antithetic interests.<sup>173</sup> The Security Council is a political organ,<sup>174</sup> and the prerequisite for the use of clear language is

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<sup>164</sup> O Schachter, ‘The Quasi-Judicial Role of the Security Council and the General Assembly’, 58 *AJIL* (1964), 960 et seq.

<sup>165</sup> Wood (note 6), at 79.

<sup>166</sup> H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989’, 67 *BYIL* (1996), 1, at 29

<sup>167</sup> Wood (note 6), at 79-81.

<sup>168</sup> Thirlway (note 166) at 29.

<sup>169</sup> Wood (note 6), p. 87.

<sup>170</sup> This follows from the principle *pacta tertiis nec nocent nec prosunt*, art. 34 VCLT.

<sup>171</sup> Papastavridis (note 6), p. 87.

<sup>172</sup> Wood (note 6), p. 82.

<sup>173</sup> Wood (note 6), p. 82.

<sup>174</sup> Bailey / Daws (note 30), p. 3 et seq.

that the policy is clear, which naturally is rarely the case.<sup>175</sup> Consequently, the ambiguous and indistinct wording which is likely to be found in SC resolutions, in conjunction with the other differences between treaties and resolutions, necessitates a different approach to interpretation than the one used for treaties.

## **2. Subject of interpretation**

In order to establish guidelines for an appropriate interpretation of SC resolutions, it is first of all crucial to have a clear idea about the nature of the terms within a resolution which need to be interpreted. Furthermore it is significant to know who is vested with the right to give an authentic interpretation of a SC resolution.

SC resolutions are not all of the same kind; a broad distinction may be drawn between provisions of resolutions which take the form of recommendations and those that are mandatory and impose obligations on third parties.<sup>176</sup> Provisions which only have an effect internal to the United Nations legal order or to the Security Council itself, such as recommendations concerning UN membership or the amendment of the Council's Provisional Rules of Procedure,<sup>177</sup> are not of great interest for our purpose and therefore will not be dealt with. When the Council intends a provision to be mandatory, it usually – but not consistently – includes in the resolution an article 39 (of the UN Charter) determination, and uses the words “acting under Chapter VII”.<sup>178</sup> Although there are no formal requirements for SC resolutions, they usually contain unnumbered preambular, and numbered operative paragraphs.<sup>179</sup> The preambular paragraphs, by giving guidance as to the object and purpose of the resolution, may assist in interpretation, but they might actually be misleading, since often they contain proposals whose integration into the operative paragraphs could not be agreed on.<sup>180</sup>

Since in many cases resolutions are not self-contained and refer to other documents, these documents also need to be taken into account when interpreting the provisions of the resolution.<sup>181</sup> The same is true for other resolutions to which

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<sup>175</sup> Wood (note 6), p. 82.

<sup>176</sup> Papastavridis (note 163), p. 87; Wood (note 6), p. 79.

<sup>177</sup> Wood (note 6), p. 79.

<sup>178</sup> Wood (note 6), p. 82.

<sup>179</sup> Wood (note 6), p. 86.

<sup>180</sup> Wood (note 6), p. 87.

<sup>181</sup> Papastavridis (note 163), p. 101 et seq.

the object of interpretation refers, because often SC resolutions are “part of a series and it is only possible to understand them as such.”<sup>182</sup>

When interpreting SC resolutions, it needs to be kept in mind that “only the Security Council, or some body authorized to do so by the Council, may give an authentic interpretation in the true sense”.<sup>183</sup> The Permanent Court of Justice stated in its *Jaworzina Advisory Opinion*,<sup>184</sup> that “it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.”<sup>185</sup>

For the purposes of this paper the role of subsidiary organs of the Council – to be more precise: of peacekeeping forces – deserves particular attention. Peacekeeping missions can be established as subsidiary organs of the Council,<sup>186</sup> but in order to give an authentic interpretation, they must be expressly vested with the respective power by the Council.<sup>187</sup>

### **3. Authority for the interpretation**

It should be reiterated that the question of the interpretation of SC resolutions has failed to attract much scholarly interest and there are very few decisions of international adjudicative bodies in this regard.<sup>188</sup> The principal judicial authority is drawn from a short passage in the *Advisory Opinion of the ICJ in the Namibia case*, which is of limited relevance because the Court did not necessarily make a general statement about the interpretation of SC resolutions, but rather was dealing with the question of binding force of the resolutions.<sup>189</sup> In the *Namibia case*, the ICJ stressed four points of reference for the interpretation of SC resolutions: “the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of Security Council”.<sup>190</sup> The ICJ made no reference to the Vienna

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<sup>182</sup> Wood (note 6), p. 87.

<sup>183</sup> Papastavridis (note 163), p. 90 et seq.

<sup>184</sup> of 6 December 1923.

<sup>185</sup> *Jaworzina Advisory Opinion*, PCIJ Series B, No. 8, 37.

<sup>186</sup> Wolfrum/ Philipp (note 4), p. 963, para 14

<sup>187</sup> Wood (note 6), p. 84.

<sup>188</sup> Papastavridis (note 163), p. 92; cf. also supra, chapter II. C. p. 22.

<sup>189</sup> Papastavridis (note 163), p. 92; Wood (note 6), p. 75.

<sup>190</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971], available at: <http://www.icj-cij.org/docket/files/53/5595.pdf> [accessed 15 January 2008], para 114, p. 53.

Convention on the Law of Treaties.<sup>191</sup> Thereby it seems to endorse the aforementioned conclusion that the interpretation of SC resolutions should not be governed by the rules laid down in the VCLT.<sup>192</sup>

#### **4. Method of interpretation**

SC resolutions differ from treaties and should not be interpreted in the same way,<sup>193</sup> but nevertheless the Vienna Convention on the Law of Treaties can be used as a starting point.<sup>194</sup> As was pointed out already, the Vienna Convention would suggest interpreting the resolution “in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose”.<sup>195</sup>

It has already been indicated that SC resolutions frequently contain indistinct language, and therefore it would be inappropriate to approach the text as if it was adopted with the care and legal input of a treaty.<sup>196</sup> Nevertheless, an interpreter will logically start to look at the ordinary meaning of the terms, ascertaining what the members of the SC collectively decided to include in the text of the resolution.<sup>197</sup>

The next step must be to take into account the context of the resolution.<sup>198</sup> The Vienna Convention does not offer much help in finding out about the context, as article 31 (2) VCLT mainly refers to the parties (of a treaty). As already mentioned, a SC resolution does not have parties in the sense a treaty does, there is only the Council itself.<sup>199</sup> However, a safe assumption is that recourse must be taken to the whole text of the resolution as well as to its preamble and, if existent, any annexes.<sup>200</sup> Logically, the context of a resolution also comprises of all the prior and subsequent resolutions which were adopted in relation to the subject matter in question.<sup>201</sup>

Finally article 31 (1) VCLT proposes that a treaty shall be interpreted in the light of its object and purpose. SC resolutions which are relevant in terms of the

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<sup>191</sup> Papastavridis (note 163), p. 93.

<sup>192</sup> Cf. supra, chapter II. C. 1., p. 23 et seq.

<sup>193</sup> Cf. supra, chapter II, C. 1., p. 23.

<sup>194</sup> Cf. Wood (note 6), p. 88.

<sup>195</sup> Article 31 (1) VCLT; see also supra, Chapter II., B. 2. p. 21.

<sup>196</sup> Cf. supra Chapter II. C. 1., p. 23.

<sup>197</sup> Papastavridis (note 163), p. 101.

<sup>198</sup> Papastavridis (note 163), p. 101.

<sup>199</sup> Cf. supra Chapter II. C. 1., p. 23.

<sup>200</sup> Cf. article 31 (2) VCLT; Wood (note 6) p. 89.

<sup>201</sup> Papastavridis (note 163), p. 101.

establishment of peacekeeping missions most often deal with a particular situation or dispute.<sup>202</sup> In such cases it is important to know the political background and to also take a close look at the exact circumstances of the Security Council's involvement.<sup>203</sup> Therefore it is crucial to take into account the object and purpose of the respective resolution, which emanates from the circumstances of the Council's involvement and the political background.<sup>204</sup> Most important in this regard are the background documents, such as reports of the Secretary-General, letters requesting the holding of a meeting and statements made by Council members in the Security Council before and after the adoption of the resolution.<sup>205</sup> Subsequent resolutions or other formal acts by the Council regarding the interpretation or application of the resolution may also be helpful.<sup>206</sup> Finally, any interpretation should be in light of the purpose of the maintenance of international peace and security, since this is the fundamental purpose of the Security Council.<sup>207</sup>

As far as article 32 VCLT permits recourse to supplementary means, it does not provide much help to gain new cognition, since all the preparatory work and the circumstances of the adoption of a resolution “are likely to have been fully examined in the search for the context and object and purpose.”<sup>208</sup>

#### **D. Proposal for the interpretation of SC resolutions**

Both customary and treaty law apply a composition of different doctrinal schools of thought to treaty interpretation, namely the textual, the teleological and the subjective approach.<sup>209</sup> The interpretation of SC resolutions is even more uncertain, but due to their disparities, they need to be interpreted in a different way than treaties.<sup>210</sup> The tools for interpretation which are provided by the Vienna Convention on the Law of Treaties are helpful only in part. Less importance should be attached to the minutiae of language, while much more attention must be paid to the circumstances of the adoption.<sup>211</sup>

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<sup>202</sup> Cf. Wood (note 6), p. 79.

<sup>203</sup> Wood (note 6), p. 79.

<sup>204</sup> Cf. Thirlway, (note 168), at 29.

<sup>205</sup> Wood (note 6), p. 90.

<sup>206</sup> Wood (note 6), p. 91.

<sup>207</sup> Papastavridis (note 163), p. 99.

<sup>208</sup> Wood (note 6), p. 94.

<sup>209</sup> Cf. supra, Chapter II. B., p. 20 et seq.

<sup>210</sup> Cf. supra, Chapter II, C. 1, p. 23 et seq.

<sup>211</sup> Thirlway (note 168), at 29; Wood (note 6), p. 95.

To summarize, an interpreter of SC resolutions should start by examining the provisions in the respective resolution, ascertaining what the members of the SC collectively decided to state in the text.<sup>212</sup> The context has to be taken into account as well as the institutional framework and fundamental purpose of the Security Council: the maintenance of peace and security.<sup>213</sup> Finally, recourse must be taken to the object and purpose of the resolution, examining prior and subsequent resolutions and other documents referred to as well as the political circumstances surrounding the drafting process.<sup>214</sup>

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<sup>212</sup> See *supra*, chapter II. C. 4., p. 26.

<sup>213</sup> See *supra*, chapter II. C. 4., p. 27.

<sup>214</sup> See *supra*, chapter II. C. 4., p. 27.

## **Chapter III: History of the conflict in Darfur**

### **A. Introduction**

In order to determinate the extent of the UNAMID mandate, it is necessary to have background knowledge of the Darfur conflict, the role of the UN, AU, the government of Sudan and of the circumstances surrounding the adoption of SC resolution 1769.

The current conflict in the Darfur Region dates back to 2003. In order to understand its occurrence, it is crucial to know the geographical, political and ethnic circumstances of that region. So I will first of all describe the background of the conflict (B), before giving an outline of the history of the conflict since 2003 (C). Subsequent to this I will assess the position of the Sudanese Government as well as the role of both the United Nations and the African Union (D). Finally I will illustrate the development which led to the acceptance of a revised plan for a joint UN-AU peacekeeping force by Sudan (E).

### **B. Geographical, political and ethnic premises in the Darfur region**

The Darfur region is located in the western part of Sudan, bordering Libya and Chad.<sup>215</sup> Sudan is Africa's largest country and Darfur alone is the size of France.<sup>216</sup> Darfur is largely an arid plateau with the volcanic peaks of the Marrah Mountains in the center of the region.<sup>217</sup> While the eastern half of the Darfur region is covered with plains and low hills of sandy soils, western Darfur is dominated by basement rock, in some places covered with a thin layer of sandy soil, too infertile to be farmed.<sup>218</sup> Within living memory, the inhabitants of these semi-desert and desert areas have always competed for the scarce resources like water, feedlots, farmland, firewood and building materials.<sup>219</sup> The line of confrontation is to be found between the herders who are mostly of Arab origin and the mostly black African farmers of the Fur, Massalit and Zaghawa peoples.<sup>220</sup> These ethnic tensions were fuelled by an ideology of Arab supremacy propagated by Libyan leader Muammar al-Gaddafi, while at the same time the

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<sup>215</sup> G Prunier, *Darfur – The Ambiguous Genocide*, p. 1 et seq.

<sup>216</sup> BBC, "Quick guide: Darfur", 6 September 2006, available at: <http://news.bbc.co.uk/2/hi/africa/5316306.stm> [accessed 23 July 2007].

<sup>217</sup> J Flint and A de Waal, *Darfur – A Short History of a Long War*, p. 2.

<sup>218</sup> Flint/ de Waal, *Darfur* (note 217), p. 1 et seq.

<sup>219</sup> Bartholomäus Grill, in: *Die ZEIT*, "Krieg im toten Winkel", 14 November 2006, available at: <http://www.zeit.de/2006/38/Darfur> [accessed 23 July 2007].

<sup>220</sup> Grill (note 219).

proxy wars between Sudan, Libya and Chad increased the instability in the region.<sup>221</sup>

Economically, the Sudan is an Arab-dominated country, while the population of Darfur is mostly black African.<sup>222</sup> The Sudanese government was blamed by opposition groups in Darfur for discriminating against the black Africans of the region.<sup>223</sup> Unlike in the second Sudanese civil war, where one side of the conflict was composed of the primarily Muslim north and the other side comprised the Christian and Animist south, almost all of the combatants and victims in Darfur are Muslim.

For decades, the central government in Khartoum has disregarded the remote Darfur region, which resulted in increasing poverty and growing anger, especially amongst the disadvantaged black Darfurians, whose leaders accused Khartoum of systematically expelling them.<sup>224</sup>

When the rains failed in 1983 and 84 and a famine hit the region, an estimated 95.000 Darfurians lost their lives. The famine perished social structures and resulted in the first significant fighting amongst Darfurians, that was followed by a low level conflict which continued for the next 15 years.<sup>225</sup> During that time, the Sudanese government began to arm Arab militias and relied on them to repress their enemies.<sup>226</sup> A rapid growth of population, periodic droughts and the increasing desertification of farmland further deteriorated the situation.<sup>227</sup>

In January 2003, the tensions gave rise to an armed uprising.<sup>228</sup> Rebels attacked police stations, army outposts and military convoys, and the government engaged in a massive air and land assault on the rebel stronghold in the Marrah Mountains.<sup>229</sup> In Darfur there are different rebel groups, notably the Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM), which is much smaller than the SLM.<sup>230</sup>

The other side of the armed conflict that erupted in 2003 is composed of the Sudanese military and the Janjaweed, a militia group consisting mostly of Arab

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<sup>221</sup> Prunier (note 215), p. 55 et seq.

<sup>222</sup> BBC, "Quick guide: Darfur", 6 September 2006, (note 216).

<sup>223</sup> BBC, "Quick guide: Darfur", 6 September 2006, (note 216).

<sup>224</sup> Grill (note 219).

<sup>225</sup> Prunier, (note 215), p. 54 et seq.

<sup>226</sup> Flint/ de Waal (note 217), p. 101 et seq.

<sup>227</sup> Grill (note 219).

<sup>228</sup> Grill (note 219).

<sup>229</sup> P Mühlbauer, *Darfur – Ethnographie und Geschichte eines Konflikts*, part IV.

<sup>230</sup> Flint/ de Waal (note 217), p. 88 et seq.

camel herding nomads from the Baggara tribes.<sup>231</sup> The Khartoum government which is behind the Sudanese military consists mainly of the Islamist National Islamic Front (NIF) regime which came to power in a military coup in 1989.<sup>232</sup>

Ever since the 2003 emergence of the large scale armed conflict, human rights organizations have repeatedly reported on what they called ethnic cleansing and stealthy genocide.<sup>233</sup> The Sudanese government has always rejected the allegations.<sup>234</sup> The following passage aims at describing the various peace agreements and their surrounding circumstances as well as the developments which led to the deployment of UNAMID. The peace deals, as I will argue in chapter IV, play a crucial role for the interpretation of the SC resolution and other documents which established UNAMID.

### **C. History of the conflict since 2003**

#### **1. The starting point**

During the weeks following 26 February 2003, the SLM rebels launched a series of successful attacks on the army headquarters in the Marrah Mountains district and the Sudanese army had little in reserve to respond to the attacks.<sup>235</sup> The army was already busy fighting in eastern Sudan, where rebels threatened the newly constructed pipeline from the central oilfields to Port Sudan, and in the south in the Second Sudanese Civil War, it seemed likely that the government would lose the whole of Darfur.<sup>236</sup> The Sudanese Army was not trained in desert warfare and the rebels' hit-and-run tactics proved devastatingly effective, therefore the Sudanese Army lost almost every encounter.<sup>237</sup>

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<sup>231</sup> Flint/ de Waal (note 217), p. 33 et seq.

<sup>232</sup> BBC, Sudan's interlocking wars, 10 May 2006, available at:

<http://news.bbc.co.uk/1/hi/world/africa/4759325.stm> [accessed 29 July 2007].

<sup>233</sup> Human Rights Watch, "Darfur destroyed - Ethnic Cleansing by Government and Militia Forces in Western Sudan", available at: <http://hrw.org/reports/2004/sudan0504/> [accessed 25 July 2007]; Sudan Human Rights Organization – Cairo Branch, "Sudan Government Fails to Insure Stability and Peace in DarFur - Continuous Genocide of Sudan's African Peoples", 1 March 2003, available at: <http://www.shro-cairo.org/pressreleases/march03/darfur.htm> [accessed 25 July 2007]; Amnesty International, "Civilians under threat in Darfur", available at: <http://news.amnesty.org/pages/sudan> [accessed 25 July 2007].

<sup>234</sup> BBC, "Bush toughens sanctions on Sudan, 29 May 2007, available at:

<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/6699479.stm> [accessed 25 July 2007].

<sup>235</sup> Flint/ de Waal (note 217), p. 101.

<sup>236</sup> Prunier (note 215), p. 96.

<sup>237</sup> Flint/ de Waal (note 217), p. 99.

## 2. Alteration of the government strategy: Janjaweed militias

The government had already used Janjaweed militias in the Nuba mountains in the early 1990s and in the oilfields of Southern Sudan starting in 1998.<sup>238</sup> The Janjaweed militias were recruited from Arab Baggara herders and they were now upgraded to a full paramilitary fighting force, with new arms, some artillery, and military advisors.<sup>239</sup> The probable outcome of such a strategy was predictable, since the previous use of Janjaweed militias had resulted in forced displacements and massive human rights violations.<sup>240</sup>

In June 2003 there were recruitment drives all over the Darfur region, both for the army and for the Janjaweed and always on a tribal basis: “The government gave weapons to the Arab youths and sent the [others] away.”<sup>241</sup> So the new army rejected the black African youths, who were traditionally its mainstay, but nevertheless it accepted some criminals, who were released from prisons and mandated to organize Janjaweed forces in West Darfur.<sup>242</sup> Not surprisingly, the Janjaweed were said to be defined by their “unbound criminality”; They “stole, burned, mutilated, killed and raped – subjecting tiny communities to unimaginable horrors”.<sup>243</sup>

The better-equipped Janjaweed quickly gained the upper hand and it is argued that the official army and the unofficial Janjaweed became indistinguishable.<sup>244</sup> The Janjaweed were supplied and accompanied by the army, which often surrounded villages as the Janjaweed attacked.<sup>245</sup> By March 2004, several thousand non-Arab Africans had been killed and a million had been driven away from their homes, causing a major humanitarian crisis in the region.<sup>246</sup> A United Nations observer team reported that the Janjaweed militias singled out non-Arab villages and left untouched Arab villages that were sometimes as close as 500 meters to an attacked village.<sup>247</sup>

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<sup>238</sup> Flint/ de Waal (note 217), p. 102.

<sup>239</sup> Flint/ de Waal (note 217), p. 102 et seq.

<sup>240</sup> Flint/ de Waal (note 217), p. 101 et seq.

<sup>241</sup> Interview with Omda Gamr Musa in Cheriko, April 2004, cf. Flint/ de Waal (note 219), p. 102/144.

<sup>242</sup> Prunier (note 215), p. 97-99.

<sup>243</sup> Flint/ de Waal (note 217), p. 104.

<sup>244</sup> Flint/ de Waal (note 217), p. 104.

<sup>245</sup> Flint/ de Waal (note 217), p. 104.

<sup>246</sup> BBC, “Darfur crisis 'tragic', UN says”, 4 May 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3683701.stm> [accessed 27 July 2007].

<sup>247</sup> United Nations Resident Coordinator: “United Nations Inter-Agency Fact Finding and Rapid Assessment Mission: Kailek Town, South Darfur”, available at:

When refugees started to pour into neighbouring Chad, the crisis took on an international dimension.<sup>248</sup> Janjaweed militiamen pursued the refugees and clashed with Chadian government forces along the border.<sup>249</sup> At the same time, United Nations coordinator for Sudan Mukesh Kapila described the situation in Darfur as the worst humanitarian crisis in the world and the United Nations called for a ceasefire agreement between the Sudanese government and the rebels.<sup>250</sup>

### **3. The 2004 ceasefire agreement and the establishment of AMIS**

In April 2004, negotiations between the Sudanese government, the SLM and the JEM resulted in the April 8 Humanitarian Ceasefire Agreement, in which the parties stipulated to guarantee free passage for humanitarian aid, to free prisoners of war and to disarm militias.<sup>251</sup> However, a group splintered from the JEM and this “National Movement for Reform and Development” did not participate in the ceasefire agreement.<sup>252</sup> The African Union sent a Ceasefire Commission to monitor observance of the agreement, but nevertheless, the Janjaweed and rebel attacks continued.<sup>253</sup>

The ongoing atrocities led to further United Nations warnings of the risk of genocide, and the US threatened measures against the Sudanese government if it refused to disarm the Janjaweed militias and protect civilians.<sup>254</sup> However, these threats had little effect since some members of the United Nations Security Council, including China, which has a veto, opposed such measures.<sup>255</sup>

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<http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64DKD6?OpenDocument> [accessed 27 July 2007].

<sup>248</sup> Report of the Secretary-General on Darfur of 28 July 2006, S/2006/591, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/447/27/PDF/N0644727.pdf?OpenElement> [accessed 5 January 2007], p.2; BBC, “Chad fears spread of Darfur war”, 18 June 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3818085.stm> [accessed 27 July 2007].

<sup>249</sup> BBC, “Chad fears spread of Darfur war”, 18 June 2004, (note 248).

<sup>250</sup> BBC, “Sudan foes to meet over Darfur”, 23 March 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3560649.stm> [accessed 27 July 2007].

<sup>251</sup> BBC, “Sudan 'breaking Darfur ceasefire’”, 13 April 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3621347.stm> [accessed 29 July 2007].

<sup>252</sup> BBC, “Sudan seeks talks with new group”, 5 December 2004, available at: <http://news.bbc.co.uk/2/hi/africa/4070941.stm> [accessed 29 July 2007].

<sup>253</sup> SG-Report on Darfur (note 245), p. 2; BBC, “New militia atrocities in Sudan”, 28 July 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3932321.stm> [accessed 29 July 2007].

<sup>254</sup> BBC, “Annan urges UN action over Darfur”, 17 September 2004, available at: <http://news.bbc.co.uk/2/hi/africa/3664348.stm> [accessed 29 July 2007].

<sup>255</sup> BBC, “Annan urges UN action over Darfur”, (note 254).

In May 2004, the Brussels-based International Crisis Group reported that over 350,000 people could potentially die as a result of starvation and disease and comparisons were drawn to the ethnic cleansing used in the Yugoslav wars.<sup>256</sup>

In August 2004, the African Union sent 150 Rwandan troops to protect the AU-ceasefire monitors, but it soon became apparent that the small AMIS (African Union Mission in Sudan) force could not provide much help.<sup>257</sup> So another 150 Nigerian troops were sent, then another 600 in April 2005 and in July 2005, the force was increased to about 7000 troops.<sup>258</sup>

Despite repeated international calls for the Sudanese government to abandon the atrocities, talks between the government and the rebel groups went slowly and finally were deadlocked.<sup>259</sup>

In January 2005, when the Sudanese government signed a peace deal with the Sudan People's Liberation Movement (SPLM) in southern Sudan to end the 21-year war in the south, rebels in Darfur accused the government of redeploying its soldiers to Darfur in order to solve the conflict militarily.<sup>260</sup>

In December 2005, an attack on a Chadian town near the Sudanese border led to the deaths of three hundred rebels.<sup>261</sup> Sudan was blamed for the attack which was the second in the region in three days and in response, the government of Chad declared its hostility toward Sudan.<sup>262</sup> The violence triggered Libyan efforts to mediate between the two neighbouring countries and eventually Chadian President Déby, Sudanese President al-Bashir and Libyan Leader al-Quaddafi signed the Tripoli Agreement on 8 February, 2006, which was aimed at ending the Sudanese-Chadian border conflict.<sup>263</sup>

#### **4. May Agreement (2006) and renewed fighting**

The Darfur Peace Negotiations, which eventually resulted in another peace deal between the Sudanese government and a faction of the SLM, had already

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<sup>256</sup> BBC, "'Dozens killed' in Sudan Attack", 24 May 2004, available at: <http://news.bbc.co.uk/1/hi/world/africa/3741875.stm> [accessed 29 July 2007].

<sup>257</sup> H Boshoff, 'The African Union Mission in Sudan, Technical and operational dimensions', available at: <http://www.iss.co.za/pubs/ASR/14No3/AWBoshoff.htm> [accessed 1 August 2007].

<sup>258</sup> Boshoff (note 257).

<sup>259</sup> BBC, "Annan urges UN action over Darfur", (note 254).

<sup>260</sup> BBC, "Sudan peace deal 'bad' for Darfur", 11 January 2005, available at: <http://news.bbc.co.uk/2/hi/africa/4165417.stm> [accessed 29 July 2007].

<sup>261</sup> BBC, "Chad fightback 'kills 300 rebels'", 20 December 2005, available at: <http://news.bbc.co.uk/1/hi/world/africa/4544352.stm> [accessed 29 July 2007].

<sup>262</sup> BBC, "Chad fightback 'kills 300 rebels'", (note 261).

<sup>263</sup> Arabic News, Sudan, Chad sign peace agreement in Tripoli, available at: <http://www.arabicnews.com/ansub/Daily/Day/060209/2006020913.html> [accessed 15 December 2007].

started in Abuja in December 2004.<sup>264</sup> The rebels asked for re-aggregation of the three Darfur provinces, for a Vice-Presidential position, for control of the united regional government and for significant compensation for the displaced persons who had lost everything since 2003.<sup>265</sup> The “peace agreement” which the Sudanese government offered was said to be incomplete and falsely generous, but since the international community seemed to overestimate the effect such an agreement could have in terms of a durable pacification of the region, the rebels were confronted with growing pressure to sign it.<sup>266</sup>

On 5 May 2006, Minnie Minnawi, who represented a faction of the SLM, gave in and signed the “Darfur Peace Agreement”.<sup>267</sup> The agreement contained security arrangements as well as power- and wealth-sharing provisions; it called for the disarmament of the Janjaweed and for the rebel forces to disband and be incorporated into the army.<sup>268</sup>

However, since the accord was rejected by the JEM and another faction of the SLM,<sup>269</sup> things went horribly wrong right from the beginning.<sup>270</sup> The Janjaweed renewed their attacks just hours after the signing; fighting resumed on the Chadian border and major international aid organizations considered leaving Darfur due to attacks against their personnel.<sup>271</sup> Also despite the May Agreement, the efforts of the Sudanese government to end the violence in the region remained poor and a top UN envoy to Sudan stated that human rights abuses had continued with impunity in Darfur.<sup>272</sup>

All these circumstances made United Nations Secretary General Kofi Annan call for bringing a United Nations peacekeeping force of 18,600 troops to the region in order to replace the African Union peacekeepers.<sup>273</sup> This plan was

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<sup>264</sup> Prunier (note 215), p. 176.

<sup>265</sup> Prunier (note 215), p. 177.

<sup>266</sup> Prunier (note 215), p. 177.

<sup>267</sup> SG-Report on Darfur (note 248), p. 2; BBC, “Main parties sign Darfur accord”, 5 May 2006, available at: <http://news.bbc.co.uk/2/hi/africa/4978668.stm> [accessed 1 August 2007].

<sup>268</sup> Aljazeera.Net, “Main points of the deal”, 09 May 2006, available at: <http://english.aljazeera.net/English/archive/archive?ArchiveId=22564> [accessed 1 August 2007].

<sup>269</sup> BBC, “Main parties sign Darfur accord”, (note 267).

<sup>270</sup> Prunier (note 215), p. 182.

<sup>271</sup> BBC, “Darfur aid 'on brink of collapse'”, 17 January 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6272093.stm> [accessed 1 August 2007]; Prunier, (note 215), p. 182.

<sup>272</sup> VOAnews, “UN Envoy Says Sudan Rights Record in Darfur Poor”, 17 August 2006, available at: <http://www.voanews.com/english/archive/2006-08/2006-08-17-voa38.cfm?CFID=169697009&CFTOKEN=71732606> [accessed 1 August 2007].

<sup>273</sup> BBC, “Annan outlines Darfur peace plans”, 2 September 2006, available at: <http://news.bbc.co.uk/2/hi/africa/5239116.stm> [accessed 1 August 2007].

strongly opposed by the Sudanese government and President Omar el-Bashir, who vowed to never allow a UN force into Darfur.<sup>274</sup>

## 5. UNSC Resolution and Sudanese reaction

On 31 August 2006, the United Nations Security Council passed resolution 1706, which implicitly recognised the inability of the African Union force to handle the situation in Darfur<sup>275</sup> and called for 20,600 UN troops and police officers to support the 7,000-member AU force.<sup>276</sup> Although the Security Council acted under Chapter VII of the UN Charter and authorized UNMIS<sup>277</sup> to use “all necessary means”, it nevertheless invited the consent of the Sudanese Government of National Unity for that deployment.<sup>278</sup>

The Sudanese government did not only express strong opposition to the resolution, it also launched a major offensive in Darfur the very next day.<sup>279</sup> On 5 September 2006, Khartoum asked the AU force to leave Darfur by the end of the month and added that they had “no right to transfer this assignment to the United Nations or any other party. This right rest[ed] with the government of Sudan”.<sup>280</sup>

## 6. Deterioration of the situation

Since the Sudanese government remained sternly against the UN peacekeeping force, the plans for its deployment were indefinitely suspended, but the AU announced the extension of its presence until 31 December 2006.<sup>281</sup> The AU forces were reinforced by two hundred UN troops and collaterally on 6 October 2006, the UN Security Council voted to extend the UNMIS mandate until 30 April 2007.<sup>282</sup>

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<sup>274</sup> BBC, “Annan outlines Darfur peace plans”, (note 274).

<sup>275</sup> Eric Reeves, in: BBC, “Head-to-head: Darfur situation”, 27 October 2006, available at: <http://news.bbc.co.uk/2/hi/africa/6058920.stm>.

<sup>276</sup> “Security Council expands mandate of UN mission in Sudan to include Darfur”, available at: <http://www.un.org/News/Press/docs/2006/sc8821.doc.htm> [accessed 1 August 2007].

<sup>277</sup> United Nations Mission in the (until this point: southern) Sudan.

<sup>278</sup> Security Council expands mandate of UN mission in Sudan to include Darfur, (note 276).

<sup>279</sup> VOAnews, “Sudan Rejects UN Resolution on Darfur Peacekeeping”, available at: <http://voanews.com/english/archive/2006-09/2006-09-01-voa48.cfm?CFID=183775603&CFTOKEN=17147524> [accessed 1 August 2007].

<sup>280</sup> Taipei Times, “Defiant Sudan sets deadline for Darfur peacekeeper exit”, 05 September 2006, available at: <http://www.taipetimes.com/News/front/archives/2006/09/05/2003326213> [accessed 1 August 2007].

<sup>281</sup> Reuters, “AU will not abandon Darfur - AU chairman“, 02 October 2006, available at: <http://www.alertnet.org/thenews/newsdesk/L0285506.htm> [accessed 6 August 2007].

<sup>282</sup> United Press International, “Analysis: Extend Sudan U.N. mission”, 9 October 2006, available at: <http://www.upi.com/InternationalIntelligence/view.php?StoryID=20061006-063151-8650r> [accessed 6 August 2007].

Although the Nigerian President and the Nigerian Foreign Minister urged Khartoum to accept the UN force plan<sup>283</sup> and the US President imposed further sanctions against Sudan,<sup>284</sup> the government in Khartoum continued to oppose the “colonial” plan that would turn Sudan “into another Iraq”.<sup>285</sup>

In October 2006, the Sudanese government signed a peace agreement with rebels in eastern Sudan, allowing Khartoum to relocate troops from the east to Darfur.<sup>286</sup> Thereafter a deterioration of the situation in Darfur could be perceived, just as there had been an increase in violence after the Sudanese government redeployed soldiers from southern Sudan in January 2005, following the peace deal with the Sudan People’s Liberation Movement (SPLM) in the south.<sup>287</sup>

Despite renewed reports of a potential deal to place a “compromise peacekeeping force” in Darfur in November,<sup>288</sup> the Sudanese government again rejected the plan and stated that “there should be no talk of a mixed force”.<sup>289</sup>

In December 2006, Darfur Arabs created their own rebel group, the Popular Forces Troops, and distanced themselves from the government’s position and from the Janjaweed, saying the militias consisted of “a minority of mercenaries and hired individuals [and did] not represent Darfur Arabs.”<sup>290</sup>

At the same time, there was a sharp increase in violence in eastern Chad, with Chad accusing Sudan of sending Janjaweed militias across the border from Darfur.<sup>291</sup>

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<sup>283</sup> People’s Daily Online, Nigerian FM arrives in Khartoum for talks on Darfur, 12 October 2006, available at: [http://english.people.com.cn/200610/12/eng20061012\\_311117.html](http://english.people.com.cn/200610/12/eng20061012_311117.html) [accessed 6 August 2007].

<sup>284</sup> BBC, “US envoy in peace bid for Darfur”, 14 October 2006, available at: <http://news.bbc.co.uk/2/hi/africa/6049020.stm> [accessed 6 August 2007].

<sup>285</sup> Kuwait News Agency, “We don’t want Sudan to turn into “another Iraq” in the region - al-Bashir”, 06 September 2006, available at: <http://www.kuna.net.kw/home/story.aspx?Language=en&DSNO=907164>, [accessed 6 August 2007].

<sup>286</sup> Die ZEIT, “War da was?”, 19 Oktober 2006, available at: <http://www.zeit.de/2006/43/Darfur> [accessed 7 August 2007].

<sup>287</sup> See supra, chapter III. C. 3., p. 34; cp also BBC, “Sudan peace deal ‘bad’ for Darfur”, (note 260).

<sup>288</sup> Sudan Tribune, “US Rice hopes Sudan will okay Darfur force”, 18 November 2006, available at: <http://www.sudantribune.com/spip.php?article18750> [accessed 7 August 2007].

<sup>289</sup> Kuwait News Agency, “Sudan ‘did not’ give ok over international force for Darfur” - top official, 18 November 2006, available at: <http://www.kuna.net.kw/home/story.aspx?Language=en&DSNO=923290> [accessed 7 August 2006].

<sup>290</sup> Sudan Tribune, “Darfur Arabs create a rebel group, repulse army attack”, 7 December 2006, available at: <http://www.sudantribune.com/spip.php?article19124> [accessed 7 August 2007].

<sup>291</sup> BBC, No deal in Africa's Darfur talks, 22 November 2006, available at: <http://news.bbc.co.uk/2/hi/africa/6168496.stm> [accessed 6 August 2007].

## **7. New ceasefire agreement**

In January 2007, the Sudanese President Omar al-Bashir announced that his government and the rebel groups would cease hostilities for 60 days and work towards a lasting peace within that time.<sup>292</sup> However, it was not clear exactly which rebel groups had agreed to it.<sup>293</sup> Two weeks later, al Bashir admitted that government forces had been bombing northern areas of the Darfur region, while claiming that “the action did not breach [the] UN-brokered ceasefire” and that the government had “no option but to use its armed forces in response to attacks by rebel groups”.<sup>294</sup>

On 15 April 2007 African Union peacekeepers were targeted and killed and the Sudanese government was accused of flying arms and heavy military equipment into Darfur and of painting Sudanese military planes white to disguise them as United Nations or African Union aircraft.<sup>295</sup>

## **8. Attacks within Chad and the peace agreement between Sudan and Chad**

Even before the AU peacekeepers were killed, the conflict had spread over the border to Chad once again. On 31 March 2007, Janjaweed militias killed up to 400 people in the eastern border region of Chad.<sup>296</sup> More attacks followed in April, forcing up to 3000 villagers to flee their homes in south-eastern Chad.<sup>297</sup> Therefore Chad and Sudan once again accused each other of backing rebels hostile to their respective governments,<sup>298</sup> but nevertheless they both signed a Saudi-brokered reconciliation deal in May 2007, in which they agreed to political, economic and social cooperation between their countries and pledged to respect each other's sovereignty and integrity and not to interfere in each other's internal

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<sup>292</sup> BBC, “UN envoy hopeful on Darfur peace”, 12 January 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6255617.stm> [accessed 7 August 2007].

<sup>293</sup> BBC, “Sudan leader admits Darfur raids”, 24 January 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6295847.stm> [accessed 7 August 2007].

<sup>294</sup> BBC, “Sudan leader admits Darfur raids”, (note 293).

<sup>295</sup> The New York Times, “Sudan Flying Arms to Darfur, Panel Reports”, 18 April 2007, available at: <http://www.nytimes.com/2007/04/18/world/africa/18sudan.html?ex=1186718400&en=6722cd9f67f0cda1&ei=5070> [accessed 7 August 2007].

<sup>296</sup> International Herald Tribune, “Attacks in eastern Chad last month killed up to 400, U.N. refugee agency says”, 10 April 2007, available at: <http://www.iht.com/articles/ap/2007/04/10/africa/AF-GEN-Chad-Fighting.php> [accessed 7 August 2007].

<sup>297</sup> UNHCR, “Up to 3,000 villagers flee homes in south-east Chad following fresh attacks”, 3 April 2007, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/chad?page=news&id=46127a9f2> [accessed 7 August 2007].

<sup>298</sup> Reuters Africa, “Chad-Sudan pact will not halt war-Chadian rebels”, 5 May 2007, available at: <http://africa.reuters.com/top/news/usnBAN531755.html> [accessed 7 August 2007].

affairs or harbour opposition groups.<sup>299</sup> They also promised to support AU and UN efforts to stabilize the Darfur region of Sudan and neighboring border areas in eastern Chad.<sup>300</sup> But at the same time doubts were expressed as to whether the promise would have any concrete impact unless it was accompanied by peace-building initiatives on the ground in Darfur and eastern Chad.<sup>301</sup> Since Sudan still resisted the deployment of a large UN peacekeeping force and Chad claimed to want civilian UN police instead of a robust military force in its violent east,<sup>302</sup> the promises did not really improve the prospects for the region.

## **9. Summary of the relevant peace agreements**

In conclusion, there was the April 8 Humanitarian Ceasefire Agreement, signed by SLM, JEM and GoS while the National Movement for Reform and Development did not participate.<sup>303</sup> It was followed by the deployment of an AU ceasefire commission and later of AMIS, but it could not halt the violence in Darfur.<sup>304</sup> The Tripoli Agreement was concluded between Chad and Sudan on 8 February 2006 and aimed at ending the Sudanese-Chadian border conflict.<sup>305</sup> On 5 May 2006 another Darfur peace deal was signed by a faction of the SLM and the GoS, but like the 2004 agreement it could not stop the Janjaweed and rebel attacks.<sup>306</sup> In January 2007 a truce was announced by Sudanese President al-Bashir, but it was never implemented.<sup>307</sup> Finally, in May 2007, Chad and Sudan signed a reconciliation deal pledging political, economic and social cooperation.<sup>308</sup>

## **D. Positions of the Sudanese Government, the UN and the AU**

The beginning of the crisis in Darfur in 2003 went almost unnoticed by the international media and only gained its interest in 2004, when NGOs began noticing Darfur.<sup>309</sup> When the UN Human Rights Coordinator for Sudan gave an

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<sup>299</sup> PR Newswire, "Saudi Arabia Brokers Agreement Between Sudan and Chad on Darfur", 3 May 2007, available at: <http://sev.prnewswire.com/religion/20070504/CLTH16204052007-1.html> [accessed 7 August 2007].

<sup>300</sup> PR Newswire, "Saudi Arabia Brokers Agreement Between Sudan and Chad on Darfur" (note 299).

<sup>301</sup> Reuters Africa, "Chad-Sudan pact will not halt war-Chadian rebels", (note 298).

<sup>302</sup> Reuters Africa, "Chad-Sudan pact will not halt war-Chadian rebels", (note 298).

<sup>303</sup> See supra, chapter III. C. 3., p. 33.

<sup>304</sup> See supra, chapter III. C. 3., p. 33.

<sup>305</sup> See supra, chapter III. C. 3., p. 34.

<sup>306</sup> See supra, chapter III. C. 4., p. 35.

<sup>307</sup> See supra, chapter III. C. 7., p. 38.

<sup>308</sup> See supra, chapter III. C. 8., p. 39.

<sup>309</sup> Prunier (note 217), p. 125 et seq.

interview to the UN's own IRIN network in March 2004 and declared that Darfur was "the world's greatest humanitarian crisis",<sup>310</sup> newspapers took up the issue and the New York Times started writing about "genocide".<sup>311</sup> Nevertheless, the world at large was not very clear about which direction it wished to take concerning the complex crisis, which is rooted in ethnic and historical factors that few understood and which is devoid of any identifiable practical interest for the rich countries.<sup>312</sup>

Knowledge of the positions taken by the Sudanese government, the United Nations and the African Union is crucial for understanding the background of the progression towards the acceptance of a revised plan for a joint UN-AU peacekeeping force and consequently for the understanding of the UNAMID mandate. Therefore the following paragraphs will discuss the conduct of Khartoum, the UN and the AU.

### **1. The Sudanese government**

The attitude of the Sudanese government can be summed up in a statement of Najib al Kheir, the Sudanese Secretary of State for Foreign Affairs, after the US government offered its mediation in April 2004 for at least facilitating humanitarian deliveries: "They have a right to propose and we have a right to decide. The [...] proposal does not conform to our vision, which considers that the conflict is a matter regarding only the sons of Darfur".<sup>313</sup>

All along the way Khartoum tried to diminish the dimension of the crisis, declaring itself a victim of foreign propaganda.<sup>314</sup> The government did not hesitate to deliver the most unrealistic statements, as when in April 2004 Foreign Minister Mustafa Osman Ismail announced: "I can assure you that all those who have been killed, whether militia, rebels, soldiers or civilians caught in the fighting, do not reach one thousand".<sup>315</sup>

At times Khartoum pretended to be cooperating with the international demands and President Omar al Bashir would promise "unimpeded access" for humanitarian aid workers, but shortly after, "Refugees International" stated that

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<sup>310</sup> Grill (note 213); Prunier (note 215), p.127.

<sup>311</sup> The New York Times, "Genocide in Sudan, And Our Silence", 30 March 2004, available at: <http://query.nytimes.com/gst/fullpage.html?res=980CE5DB1F30F933A05750C0A9629C8B63> [accessed 10 August 2007].

<sup>312</sup> Prunier (note 215), p. 124.

<sup>313</sup> 4 March 2004, cf. Prunier (note 215), p. 134.

<sup>314</sup> Prunier (note 215), p. 135.

<sup>315</sup> Interview with the Voice of America, 28 April 2004, cf Prunier (note 215), p. 135.

“there is absolutely no access to any place. Things are not changing and if they are [...], they are changing for the worse”.<sup>316</sup>

When the Commission chairman of the African Union, Alpha Oumar Konaré, proposed to al Bashir the idea of an African inquiry into Darfur, Bashir rebuffed the AU and set up his own commission instead.<sup>317</sup> Its report, released in January 2005, was said to be completely unbalanced; no suspected perpetrators of war crimes were named and no government culpability was admitted.<sup>318</sup> This finding came shortly after Musa Hilal, a Janjaweed commander had asserted that he was only following government orders when attacking villages in Darfur.<sup>319</sup> Correspondingly, the Sudanese government was accused of taking this position of denial and refusal in order to gain time to create an irreversible situation.<sup>320</sup> And there was one statement that Khartoum repeated over and over again: “We will not tolerate the presence of foreign troops, whatever their nationality”.<sup>321</sup>

## 2. The United Nations

The Security Council raised the issue of Darfur in May 2004,<sup>322</sup> and ever since that date, the United Nation’s position was influenced by several setbacks.<sup>323</sup> The UN were deeply involved in the peace process for southern Sudan, therefore Khartoum could play Darfur against the South.<sup>324</sup> In addition, the Arab/Black African split that was implicit in the conflict had many echoes inside the UN, and furthermore it was an open secret that Kofi Annan and the UN were not US administration’s favourites and the US might make the world body take potentially false avenues.<sup>325</sup> Finally Darfur is an exemplary demonstration of practical limitations arising from a crisis in which the heavyweight member states do not want to act.<sup>326</sup> Proposals of a widened arms embargo to include the Sudanese army were rejected by Russia, which sold MiGs to Khartoum, and a ban on Sudanese oil exports was blocked by China, the biggest investor in Sudanese

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<sup>316</sup> Prunier (note 215), p. 133et seq.

<sup>317</sup> Flint/ de Waal (note 217), p. 130.

<sup>318</sup> Flint/ de Waal (note 217), p. 130.

<sup>319</sup> Flint/ de Waal (note 217), p. 125.

<sup>320</sup> Prunier (note 215), p. 132.

<sup>321</sup> Prunier (note 215),, p. 145; statement by Khartoum’s Minister of the Interior Abd-er-Rahim Mohamed Hussein in an Interview in ash-Sharq al-Awsat, 6 August 2004.

<sup>322</sup> Flint/ de Waal (note 217),, p. 126.

<sup>323</sup> Prunier (note 215), p. 141.

<sup>324</sup> Prunier (note 215), p. 142

<sup>325</sup> Prunier (note 215), p. 142..

<sup>326</sup> Prunier (note 215), p. 143.

oilfields.<sup>327</sup> Consequently, although the UN carried over 60% of the financial burden of the humanitarian efforts, it became increasingly unable to do anything political about it as the crisis developed.<sup>328</sup>

In June 2004, the Security Council passed Resolution 1556, which called for the disarming of the Janjaweed, the arrest of their leaders and unobstructed humanitarian access, and determined a deadline for the implementation of these stipulations.<sup>329</sup> The deadline was ignored by Khartoum, and Sudanese officials even hinted that they would stall the peace process for southern Sudan if the world got tough on Darfur.<sup>330</sup>

The Security Council then passed Resolution 1564, which mandated an international Commission of Inquiry on Darfur (ICID) to investigate human rights violations,<sup>331</sup> but off the record everyone worried about naming the perpetrators of the Darfur war crimes, since these were the same people who were supposed to implement the peace deal with the SPLM in southern Sudan.<sup>332</sup>

Therefore, when the AU appeared on the scene, the SC was more than happy to invoke the “Bahimi principle”, proposing that regional organizations take primary responsibility for the problems in their own backyards.<sup>333</sup>

### **3. The African Union**

Darfur was the first major crisis to face the African Union since its transformation from the Organization of African Unity.<sup>334</sup> Knowing that the world would judge the AU by its competence in conflict management, the Commission’s chairman Alpha Konaré and the AU chairman in 2004/05, President Obasanjo of Nigeria, were eager to act.<sup>335</sup> But ever since the AU took up the file of Darfur, it faced financial problems, because the financial provisions under which the AU operated were highly unrealistic.<sup>336</sup> Therefore the initial cost of a peacekeeping operation in Darfur had to be financed entirely by foreign donors, who were only too glad to do so in order to shift the responsibility to the AU.<sup>337</sup> However, when

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<sup>327</sup> Flint/ de Waal (note 217), p. 127.

<sup>328</sup> Prunier (note 215), p. 143.

<sup>329</sup> Flint/ de Waal (note 217), p. 128.

<sup>330</sup> Flint/ de Waal (note 217), p. 128.

<sup>331</sup> Flint/ de Waal (note 217), p. 129.

<sup>332</sup> Prunier (note 215), p. 143.

<sup>333</sup> Flint/ de Waal (note 217), 127.

<sup>334</sup> Prunier (note 215), p. 144.

<sup>335</sup> Prunier (note 215), p. 144.

<sup>336</sup> Prunier (note 215), p. 144.

<sup>337</sup> Prunier (note 215), p. 144.

the African Union Mission in Sudan started in 2004 with its first 300 troops, the mandate of the force was restricted to protecting the 132 observers who had also been sent by the AU.<sup>338</sup> Consequently, Gérard Prunier, a renowned analyst of East Africa, described the AMIS task as a “mission impossible”:

“It was supposed to substitute itself to the coalition of the unwilling, to stop what it was only mandated to observe, to operate on a shoestring and to keep the pretence of serious international involvement for its tight-fisted sponsors. Predictably all it achieved was a token presence.”<sup>339</sup>

#### **E. Acceptance of a revised plan for a joint UN-AU peacekeeping force by Sudan**

Although the UN Security Council resolution 1706 of 31 August 2006, which gave UNMIS a mandate for Darfur,<sup>340</sup> was passed under Chapter VII of the UN Charter and conferred enforcement authority upon a deploying force,<sup>341</sup> it explicitly guaranteed the Sudan’s national sovereignty and invited Khartoum to give its consent to strengthening the UNMIS force by 20,600 troops.<sup>342</sup> The Sudanese government remained firm in its rejection of the plan, but it saw itself confronted with growing international pressure and tightened US sanctions.<sup>343</sup>

In June 2007, after the AU and UN had revised their plans to circumvent the Sudanese objections, Khartoum finally gave in and vowed to accept the joint UN-AU peacekeeping force in Darfur.<sup>344</sup> The government of Sudan announced that it accepted the three-phased plan to bolster AMIS and transform it into UNAMID, which had already been adopted by the AU Peace and Security Council in November 2006, and by the UN Security Council in December 2006.<sup>345</sup> The approach arranges for an amplification of the existing AMIS forces by a Light Support Package (LSP – first phase), a Heavy Support Package (HSP – second

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<sup>338</sup> Prunier (note 215), p. 144.

<sup>339</sup> Prunier (note 215), p. 145 et seq.

<sup>340</sup> UN SC Resolution 1706, para 1, p.3, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/484/64/PDF/N0648464.pdf?OpenElement> [accessed on 13 December 2007].

<sup>341</sup> UN SC Resolution 1706 (note 340) para 12, p. 6; cf. also Eric Reeves, in: BBC, “Head-to-head: Darfur situation”, 27 October 2006, available at: <http://news.bbc.co.uk/2/hi/africa/6058920.stm> [accessed 15 August 2007].

<sup>342</sup> Eric Reeves, in: BBC, “Head-to-head: Darfur situation”, loc cit.

<sup>343</sup> BBC, “Bush toughens sanctions on Sudan”, 29.5.2007, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/6699479.stm> [accessed 17 August 2007].

<sup>344</sup> BBC, “Sudan accepts joint Darfur force”, 12 June 2007, available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/6745691.stm> [accessed 17 August 2007].

<sup>345</sup> Darfur – UNAMID – Background, (note 1).

phase), and a culmination in the AU/UN hybrid force (third phase).<sup>346</sup> The LSP consisted of 187 military staff officers, police advisers and civilians and had, for the most part, been deployed as of the end of July 2007.<sup>347</sup> The HSP, which was deployed during the second half of 2007, comprised a total of 4107 troops and finally UNAMID took over by the end of December 2007.<sup>348</sup>

In August 2007 Alpha Konaré had already announced that African countries would provide all of the 26,000 peacekeepers to be sent to Darfur.<sup>349</sup>

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<sup>346</sup> UNAMID homepage (note 1).

<sup>347</sup> UNAMID homepage (note 1).

<sup>348</sup> UNAMID homepage (note 1); BBC, “UN takes over Darfur peace force” (note 2).

<sup>349</sup> BBC, “Darfur force 'to be all-African’”, 13 August 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6943435.stm> [accessed 17 August 2007].

## **Chapter IV: Extent of powers of the peacekeeping forces in Darfur**

As was explained above, the mandate of a UN peacekeeping force emanates, inter alia, from the Security Council resolution which forms the basis of that operation's deployment. Likewise, UNAMID obtains its authorization from the Security Council resolution 1769 of 31 July 2007,<sup>350</sup> in conjunction with other documents.<sup>351</sup> Therefore, in order to understand the exact extent of the UNAMID mandate, it is necessary to examine these underlying documents. Before turning to the provisions relevant for determining the extent of the peacekeeper's powers *ratione loci* (B) and *ratione materiae* (C), I will briefly outline and describe the key documents relating to the establishment of UNAMID and single out the ones of particular importance.

### **A. The structure of UNAMID**

#### **1. Relevant documents for the establishment of UNAMID**

Security Council resolution 1769 of 31 July 2007 refers to a multitude of other documents, the most important of which for our purposes are (1) the report of the Secretary-General and the Chairperson of the African Union Commission of 5 June 2007,<sup>352</sup> (2) the Darfur Peace Agreement of 5 May 2006 and (3) the reports of the Secretary-General of 22 December 2006 and 23 February 2007.<sup>353</sup>

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<sup>350</sup> S/Res/1769 of 31 July 2007, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/445/52/PDF/N0744552.pdf?OpenElement> [accessed 6 December 2007].

<sup>351</sup> S/Res/1769 (2007), (note 350), para 1 which refers to the report of the UN Secretary General and the Chairperson of the African Union Commission of 5 June 2007, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/369/68/PDF/N0736968.pdf?OpenElement> [accessed 6 December 2007].

<sup>352</sup> which will be referred to as UN/AU report.

<sup>353</sup> the full list of referrals includes:

- all previous [SC] resolutions and presidential statements concerning the situation in Darfur
- the conclusions of the Addis Ababa high-level consultation on the situation in Darfur of 16 November 2006 as endorsed in the communiqué of the 66<sup>th</sup> meeting of the Peace and Security Council of the African Union held in Abuja on 30 November 2006
- communiqué of 79<sup>th</sup> meeting of the Peace and Security Council of the African Union on 22 June 2007
- statement of [AU Peace and Security Council] President of 19 December 2006 endorsing the Addis Ababa and Abuja agreements
- various SC resolutions: 1325 (2000)/ 1502 (2003)/ 1612 (2005)/ 1674 (2006)
- report of its Mission to Addis Ababa and Khartoum from 16 to 17 June 2007
- report of the Secretary-General and the Chairperson of the African Union Commission of 5 June 2007
- conclusions of the high-level AU/UN consultations with the Government of Sudan in Addis Ababa on 12 June 2007
- Darfur Peace Agreement of 5 May 2006

The report of the Secretary-General and the Chairperson of the African Union Commission provides the details of the mandate of UNAMID in its articles 54 and 55 and consequently is of the utmost importance with regard to evaluating the extent of powers of the UNAMID peacekeepers.<sup>354</sup>

The referral to the Darfur Peace Agreement might also be helpful in this respect, because it contains ceasefire and security arrangements that may help to clarify the scope of the peacekeepers' mandate.

Finally, the two reports of the Secretary-General are, *inter alia*, concerned with the improvement of the security situation in the neighbouring regions along the borders between the Sudan and Chad<sup>355</sup> and therefore might assist in examining a possible crossborder competence into Chad.

## **2. Structure and leadership**

UNAMID is an unprecedented AU/UN hybrid operation, which means that it also has a unique organisational and leadership structure. The details of the control structure and force administration envisaged under the UNAMID mandate can be found in paragraphs 7 and 8 of the SC resolution 1769, which for their part refer to other documents.<sup>356</sup>

Paragraph 7 provides for unity of command and control and states that, in accordance with the basic principles of peacekeeping, a single chain of command will be established.<sup>357</sup> It goes on to stipulate that “command and control structures and backstopping will be provided by the United Nations” and in this context it refers to the conclusions of the high level consultation on the situation in Darfur

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- communiqué of the second international meeting on the situation in Darfur convened by the African Union and United Nations Special Envoys in Tripoli from 15-16 July 2007
  - General Assembly resolution 58/82 on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel
  - General Assembly resolution 61/133 on the Safety and Security of Humanitarian Personnel and the Protection of United Nations Personnel
  - model status-of-forces agreement dated 9 October 1990 (A/45/594)
  - Joint Communiqué between the Government of Sudan and the United Nations on Facilitation of Humanitarian Activities in Darfur
  - reports of the Secretary-General of 22 December 2006 (S/2006/1019) and 23 February 2007 (S/2007/97) which detail the need to improve the security of civilians in the regions of eastern Chad and north-eastern Central African Republic;

cf. SCRes 1769, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/445/52/PDF/N0744552.pdf?OpenElement> [accessed 13 December 2007].

<sup>354</sup> Cf. SCRes 1769 (note 350), para 1, p. 3.

<sup>355</sup> S/2006/1019, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/682/07/PDF/N0668207.pdf?OpenElement> [accessed 13 December 2007]; S/2007/97, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/242/07/PDF/N0724207.pdf?OpenElement> [accessed 13 December 2007].

<sup>356</sup> Cf. SCRes 1769 (note 350), para 7 et seq.

<sup>357</sup> Cf. SCRes 1769 (note 350), para 7.

of 16 November 2006.<sup>358</sup> In practice this means that a joint AU-UN Special Representative (JSR), who reports to both the UN Secretary-General and the AU Commission Chairperson, is designated to lead UNAMID.<sup>359</sup> The JSR receives directives from the AU Peace and Security Commissioner and the UN Under-Secretary-General for Peacekeeping Operations.<sup>360</sup> The next link in the chain of command is the Force Commander of UNAMID, who reports to the JSR.<sup>361</sup>

Paragraph 8 of the SC resolution 1769 regulates the personnel generation and administration and refers to the report of the Secretary-General and the Chairperson of the African Union Commission of 5 June 2007, which in its paragraph 114 sets out that,

[f]or unity of effort and efficiency, all United Nations and African Union personnel deployed to the operation will be administered in accordance with United Nations rules, regulations, policies, directives and administrative instructions, as well as standard operating procedures, including, but not limited to, those relating to performance, conduct and discipline.<sup>362</sup>

### 3. General extent of powers

UNAMID is a peacekeeping mission and as we have already seen,<sup>363</sup> one of the most crucial questions with regard to the mandate of a peacekeeping force is whether the troops are merely on the ground to observe the implementation of a ceasefire agreement and, if their task exceeds mere observation, to what extent they may use force. As was outlined in chapter I, the traditional approach was a complete prohibition on the use of force other than in self-defence,<sup>364</sup> but this strict point of view was abandoned in the course of the various UN peacekeeping missions, especially in intrastate conflicts.<sup>365</sup> For UNAMID, the UN/AU report is quite distinct in this respect; it states in paragraph 71: “The operation’s military force must be capable and ready to deter violence, including in a pre-emptive manner.”<sup>366</sup> This directive must be kept in mind for the detailed determination of UNAMID’s extent of powers *ratione loci* and *ratione materiae*.

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<sup>358</sup> SCRes 1769 (note 350), para 7.

<sup>359</sup> Darfur – UNAMID – Background (note 1).

<sup>360</sup> Darfur – UNAMID – Background (note 1).

<sup>361</sup> Darfur – UNAMID – Background (note 1).

<sup>362</sup> Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur, S/2007/307/Rev.1 of 5 June 2007, available at: <http://daccess-ods.un.org/TMP/5266181.html> [accessed 11 January 2008], para 114.

<sup>363</sup> See supra chapter I. A. p. 3 et seq.

<sup>364</sup> See supra, chapter I, A. 3. b), p. 6.

<sup>365</sup> See supra, chapter I. A. 5., p. 12.

<sup>366</sup> Para 71 of the UN/AU report (note 362).

## **B. Extent of powers *ratione loci***

### **1. Introduction**

This section aims to critically evaluate all the relevant provisions in the various documents in order to establish the exact extent of UNAMID's powers *ratione loci*, focussing especially on a potential cross-border competence into Chad. To assess the respective provisions, I will revert to all the conclusions which were drawn earlier in this thesis with regard to the general principles of peacekeeping operations and the interpretation of non-treaty documents.

The examination on whether the peacekeepers are mandated to cross the Chadian border is of particular interest because throughout the Darfur conflict, refugees have fled across the border into Chad and they have been frequently pursued by their attackers.<sup>367</sup> SC resolution 1769 authorises the peacekeeping forces to operate on Sudanese territory and the Sudanese government gave its consent to the presence of the UNAMID peacekeepers.<sup>368</sup> As a basic principle, the forces have to respect the sovereignty of a third state, unless that state consented to operations on its territory.<sup>369</sup> On the other hand, it has already been explained that a peacekeeping operation which is vested with Chapter VII authority, is hypothetically discharged of the requirement to obtain the consent of the respective state.<sup>370</sup>

To draw a drastic picture which clarifies the issue at stake: how much help can be provided by a peacekeeper who is vested with a mandate that allows him to halt atrocities on the Sudanese side of the border with Chad, but at the same time disables him from interfering if the assailant moves a short distance over the border to continue to kill.

### **2. Relevant provisions with regard to the mandate *ratione loci***

In its para 1, SC resolution 1769 states that the mandate of UNAMID shall be "as set out in paragraphs 54 and 55 of the report of the Secretary General and the Chairperson of the African Union Commission of 5 June 2007".<sup>371</sup> Among the enlisted competences in para 54 of this report, there are several provisions which

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<sup>367</sup> See supra, chapter III., p. 34 et seq.

<sup>368</sup> See supra, chapter III. E., p. 43 et seq.

<sup>369</sup> Cf. the UN Charter provisions in article 2 (4) and (7).

<sup>370</sup> See supra chapter I. A., p. 4 et seq.

<sup>371</sup> SCRes 1769 (note 350), para 1.

are relevant for the establishment of the extent of powers *ratione loci*; para 54 mandates UNAMID to

(b) contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment, [...]

(c) monitor, observe compliance with and verify the implementation of various ceasefire agreements signed since 2004, as well as assist with the implementation of the Darfur Peace Agreement and any subsequent agreements [...]

(h) monitor and report on the security situation at the Sudan's borders with Chad and the Central African Republic.

Paragraph 15 of SC resolution 1769 vests UNAMID with Chapter VII authority to “take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to:

(i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers,

(ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan.

### **3. Extent of powers *ratione loci***

Having determined the relevant provisions, the next step is to examine the extent of powers *ratione loci* and to assess whether or not these provisions furnish the peacekeepers with the competence to cross the border into Chad.

Paragraph 54 (b) of the UN/AU report refers to the “areas of deployment” and thereby triggers the question of the exact area of deployment for UNAMID.

SC resolution 1769 is silent with regard to this matter; it only authorises the establishment of UNAMID in “Darfur”.<sup>372</sup> The report of the UN Secretary-General and the Chairperson of the AU Commission also only mentions Darfur in general.<sup>373</sup> However, the Darfur Peace Agreement of June 2006, which para 54 of the UN/AU report refers to, clarifies that the area of deployment excludes any Chadian border regions.<sup>374</sup> Therefore the area of deployment is indeed confined to

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<sup>372</sup> Cf. para 1, 3, 7, 9, 10, 13 of SC Res 1769 (note 350).

<sup>373</sup> Cf. para 54 and 55 of the report (note 362).

<sup>374</sup> Cf. also the UNAMID Background Factsheet published by the Peace and Security Section of the United Nations Department of Public Information, which states as for the terrain: “from as far west as the Chad border to as far east as eastern North Darfur”.

Darfur; 500 km wide, from as far west as the Chadian border to as far east as eastern North Darfur.<sup>375</sup>

**a) Para 54 (h) report of the SG and the Chairperson of the AU Commission**

Paragraph 54 (h) of the report of the UN Secretary-General and the Chairperson of the AU Commission does expressly mention the Chadian border, but it only entrusts the peacekeepers with the task of monitoring and reporting on the security situation along that border. It might be argued that the peacekeepers would be hampered from effectively monitoring the situation if they are deprived of the possibility of crossing the border. Although it has been pointed out that the interpretation of SC resolutions demands that less importance be attached to the minutiae of language, there is no indication that the wording in para 54 (h) was meant to entail the directive to cross the border into Chad.

**b) Para 54 (b) report of the SG and the Chairperson of the AU Commission**

Paragraph 54 (b) of the UN/AU report mandates the peacekeepers to prevent attacks against civilians, within its areas of deployment.<sup>376</sup> A textual approach to this provision reveals that the forces could invoke this paragraph as a ground for a cross-border competence, if attacks occurred against civilians in the Chadian border region, provided that this region would still fall within the area of deployment of the UNAMID force. But the area of deployment excludes all Chadian territory,<sup>377</sup> and consequently paragraph 54 (b) of the UN/AU report does not provide a basis for a cross-border competence of the UNAMID peacekeepers.

**c) Para 54 (c) report of the SG and the Chairperson of the AU Commission**

Paragraph 54 (c) of the UN/AU report mandates UNAMID to, inter alia, verify the implementation of various ceasefire agreements signed since 2004. Alongside the Darfur Peace Agreement of May 2006,<sup>378</sup> this could also include the peace deals that were concluded between Chad and Sudan, namely the Tripoli Peace Agreement of February 2006,<sup>379</sup> and the Reconciliation Agreement of May 2007.<sup>380</sup> Consequently, if the UNAMID task included verifying the

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<sup>375</sup> UNAMID deployment background fact sheet, available at: [http://www.un.org/Depts/dpko/missions/unamid/UNAMID\\_Deployment.pdf](http://www.un.org/Depts/dpko/missions/unamid/UNAMID_Deployment.pdf) [accessed 4 January 2008].

<sup>376</sup> Paragraph 54 (b) of the report of the UN Secretary-General and the Chairperson of the AU Commission (note 362).

<sup>377</sup> See supra, chapter IV. B. 3., p. 49.

<sup>378</sup> See supra chapter III. C. 4., p. 35.

<sup>379</sup> See supra chapter III. C. 3., p. 34.

<sup>380</sup> See supra, chapter III. C. 7., p. 38.

implementation of these peace agreements, paragraph 54 (c) of the UN/AU report might constitute a basis for a cross-border competence of the peacekeepers, depending on the exact substance of the peace deals. However, this assumption raises several problems: First of all it must be examined whether or not the referral in paragraph 54 (c) includes the Chadian-Sudanese agreements. Then, provided that it does, it needs to be determined whether the respective peace agreements contain provisions which constitute a sufficient basis for a cross-border competence of the UNAMID troops. This must include an interpretation of what “verification” of the peace deal means. If a sufficient basis for the competence can be found, the sovereignty of Chad is the next obstacle, triggering the question of whether Chad must consent to such a task in order for the peacekeepers to be permitted to cross the border. Finally, if this question is answered in the affirmative, it must be established whether there is the possibility of an exception from this requirement.

#### **(1) Referral to peace agreements between Sudan and Chad**

Paragraph 54 (c) of the UN/AU report only mentions the “implementation of various ceasefire agreements signed since 2004”. Within this period of time the April 8 Humanitarian Ceasefire Agreement,<sup>381</sup> the Darfur Peace Agreement of May 2006,<sup>382</sup> the 60 day-truce in January 2007<sup>383</sup> and the two aforementioned peace deals between Chad and Sudan – the Tripoli Peace Agreement and the 2007 Reconciliation Agreement – have been signed. The UN/AU report does not clarify whether or not the declarations signed by Chad and Sudan were meant to be included, neither do the other documents which established UNAMID provide any help.

From a textual point of view, these two Chadian-Sudanese agreements would be included, since they constitute “ceasefire agreements”. However, it seems to be problematic that these peace deals were, inter alia, signed by a party which is external to the proximate Darfur conflict and, to be more precise, is a foreign sovereign state. But although the two declarations have this external element, they also comprise obligations for the Sudanese government, which gave its consent to the presence of the peacekeepers and to their responsibility to verify the implementation of peace deals. Therefore it seems to be logical to view the

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<sup>381</sup> See supra, chapter III. C. 3., p. 34.

<sup>382</sup> See supra, chapter III. C. 4., p. 35.

<sup>383</sup> See supra, chapter III. C. 7., p. 38.

two agreements between Sudan and Chad to be included by the referral in paragraph 54 (c) of the UN/AU report. The fact that another sovereign state is also party to the agreement is a separate problem which will be dealt with in section (3).

## **(2) Content of the Sudanese-Chadian peace agreements**

The next essential questions are what “verification” of the peace agreements mean and whether these deals between Chad and Sudan contain provisions for whose implementation the peacekeepers would need to cross the Chadian border.

Paragraph 54 (c) of the UN/AU report authorizes UNAMID to “monitor, observe compliance with and verify the implementation of [...] ceasefire agreements”. Both the ordinary meaning of that term and the context of the provision suggest that “verification” is meant to comprise “all necessary means” and thereby denotes the authority to use force: If the term was understood to fall short of that meaning, it would constitute a mere repetition of the instruction to observe compliance with the peace agreements. For the context, recourse may be taken to the provisions of SC resolution 1769, where paragraph 15 (a) (ii) authorises the peacekeepers to take the necessary action to support early and effective implementation (of the Darfur peace agreement). All this indicates that verification must be understood in a broad sense. The question which remains to be answered is whether the Chadian-Sudanese peace deals contain provisions that require the peacekeepers to cross the border.

The Tripoli Peace Agreement stipulates in its article 4 that both parties “pledge to prohibit forthwith the presence of rebel elements from either country in their respective territories”.<sup>384</sup> In article 7 it states that the two parties agree to establish, inter alia, “a peace and security force to secure the common border”.<sup>385</sup>

If article 4 is to be implemented, this inevitably necessitates access to the regions on both sides of the Chadian-Sudanese border and a peace and security force, established in accordance with article 7, would likewise be inhibited from performing its duties if it could only operate on one side of the border.

Therefore the provisions of the Tripoli Peace Agreement would notionally authorise the UNAMID troops to cross the border. Consequently it needs to be examined whether the sovereignty of Chad can overcome that conclusion.

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<sup>384</sup> Article 4 of the Tripoli Peace Agreement of 8 February 2006, S/2006/103.

<sup>385</sup> Article 7 of the Tripoli Peace Agreement (note 384).

### (3) Sovereignty of Chad

As a general rule, the United Nations have to respect the sovereignty of each member state, which means that they are not authorised to intervene in the internal affairs of a member state unless that state consented to the interference.<sup>386</sup> There is, however, an exception to this rule: the Security Council can decide to apply enforcement measures under Chapter VII of the UN Charter.<sup>387</sup>

Consequently, the hypothetical presence of UNAMID troops on Chadian territory could either be authorised by the consent of the government of Chad or by an enforcement mandate under Chapter VII of the UN Charter.

The Chadian government did not participate in the negotiations between the UN Secretary General and the Sudanese government which led to the agreement concerning the establishment of the UNAMID force.<sup>388</sup> Nevertheless Chad might have given its consent to the presence of the peacekeepers in the Chadian border areas. In this regard it is necessary to examine whether, by signing the Sudanese-Chadian Reconciliation Deal in May 2007,<sup>389</sup> Chad agreed to allow the peacekeeping forces on its territory. In this Saudi-brokered agreement, Chad promised, *inter alia*, to support AU and UN efforts to stabilize the Darfur region of Sudan and neighbouring border areas in eastern Chad.<sup>390</sup> This pledge was given in May 2007, when the plan for a joint UN/AU peacekeeping force has already been finalised, its deployment only pending the consent of the Sudanese government.<sup>391</sup> So it might be argued that, since the Chadian government was fully aware of the possible deployment of a strong peacekeeping force in the border region, it meant to allow them unconfined access to Chadian territory. However, this assumption has no ground, for the simple reason that by signing the Reconciliation Agreement the Sudanese government made the same pledge to support AU and UN efforts, yet at the same time it had not given its consent to the establishment of the UNAMID force.<sup>392</sup> Therefore it is highly unrealistic to conclude from the declaration which was delivered by the Chadian government in the course of the Reconciliation Agreement in May 2007, that Chad gave its

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<sup>386</sup> Cf. article 2 (7) of the UN Charter.

<sup>387</sup> Art 2 (7) UNC.

<sup>388</sup> Cf. Darfur – UNAMID – Background (note 1).

<sup>389</sup> Cf. *supra*, chapter III, C. 8., p. 39.

<sup>390</sup> PR Newswire, “Saudi Arabia Brokers Agreement Between Sudan and Chad on Darfur” (note 299).

<sup>391</sup> PR Newswire, “Saudi Arabia Brokers Agreement Between Sudan and Chad on Darfur” (note 299).

<sup>392</sup> See *supra*, chapter III, C. / D., p. 36 et seq.

consent for the presence of UN/AU peacekeepers on its territory. In the absence of other statements by the Chadian authorities, which could suggest an approval of UNAMID operations in Chadian border areas, it must be concluded that there is no such consent.

#### **(4) Consent of Chad**

Since Chad did not permit UNAMID forces to operate in its territory, it must be examined whether the peacekeepers are mandated to operate in the border areas even without Chadian consent.

Paragraph 15 (ii) of SC resolution 1769 vests UNAMID with Chapter VII authority to “take the necessary action [...] to prevent [...] armed attacks and protect civilians”.<sup>393</sup> Therefore, given the situation of a civilian crossing the border to Chad while being pursued by an attacker, paragraph 15 might be interpreted to give a sufficient mandate to the peacekeepers to enable them to cross the border into Chad even without Chad consenting to their presence on its territory. At least at first sight; because a closer look reveals that paragraph 15 only authorises UNAMID to enforce action “in the areas of deployment of its forces”.<sup>394</sup>

Consequently it must be concluded that SC resolution 1769 does not provide a sufficient basis for operations in the Chadian border areas: the lack of consent by Chad cannot be overcome and therefore paragraph 54 (c) of the UN/AU report does not provide UNAMID with a mandate to cross the border into Chad.

#### **d) UN/AU laws and customary international law**

Finally it has to be examined whether the UN and AU peacekeeping laws or customary international law provides a different ground for a cross border competence in such a case.

##### **(1) Article 4 (j) PSC Protocol**

Article 4 (j) of the Protocol relating to the establishment of the Peace and Security Council, which vests the African Union with the right to intervene in a Member State, does not provide any help because it requires an antecedent decision by the African Union Assembly and cannot be invoked directly by a peacekeeping force.<sup>395</sup>

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<sup>393</sup> Para 15 of SC Res 1769 (note 350).

<sup>394</sup> Para 15 of SC Res 1769 (note 350).

<sup>395</sup> See supra, chapter I. B. 2., p. 15.

## **(2) Responsibility to protect**

Another possible basis for the competence to cross the border in order to protect civilians could be contained in the so called “responsibility to protect”. This concept was incorporated into the outcome document of the 2005 World Summit and adopted by the United Nations General Assembly, and the idea behind it is that, although the responsibility for protecting civilians resides primarily with the host state, the principle of non-intervention will yield to the international responsibility to protect in cases in which the host state proves to be unable or unwilling to fulfil its duties.<sup>396</sup> So it might be argued that peacekeepers who operate on the Sudanese side of the border with Chad have the responsibility to protect civilians on Chadian territory if Chad does not secure their inviolacy. However, for two reasons this assumption is a very problematic one: first it has been asserted that rather than being a solid legal norm, the concept only constituted political rhetoric and therefore was not capable of superseding claims of national sovereignty.<sup>397</sup> Second, paragraph 139 of the 2005 World Summit Outcome Document, which addresses the responsibility to protect, cannot be invoked directly as a basis for a cross border competence by the peacekeepers; it only declares that the world’s heads of state and government “are prepared to take collective action, in a timely and decisive manner, through the Security Council”.<sup>398</sup> Therefore the concept of the responsibility to protect does not provide a sufficient basis for UNAMID presence on Chadian territory.

## **(3) Hot pursuit**

The right of hot pursuit might allow the peacekeepers to cross the border into Chad. There may be a rule of customary international law which justifies the UNAMID forces to follow attackers over the border in continuation of their chase within Darfur, provided the pursuance in Darfur is covered by the UNAMID mandate.

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<sup>396</sup> AJ Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’, *Ethics & International Affairs*, June 2006 - Vol. 20 Issue 2 p. 143 et seq.; C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, 101 *AJIL* 100; cf also para 138/139 of the 2005 World Summit Outcome Document, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> [accessed 5 January 2008].

<sup>397</sup> NJ Wheeler, ‘A Victory for Common Humanity? The responsibility to protect after the 2005 World Summit’, p.12; Stahn (note 396) p. 120; AJ Bellamy, *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit*, p. 15.

<sup>398</sup> Para 139 of the 2005 World Summit Outcome Document (note 396).

As an extension of the right to self-defence, the right of hot pursuit entitles a state to continue the chase of wrongdoers outside its frontiers, provided that the pursuit begins immediately after the attacker's wrongful act and is continued without interruption.<sup>399</sup> Although this right may also find expression on land and in the air, it has only been codified in the international law of the sea.<sup>400</sup> However, the problematic aspect is that the right of hot pursuit only extends the territorial jurisdiction of a state into the high seas, into the air space over high seas or into no man's land; crossing of the boundaries of another state is not permitted unless an agreement exists to that effect.<sup>401</sup>

Therefore the UNAMID peacekeepers once again have to respect the sovereignty of Chad and cannot invoke the right of hot pursuit to cross the border.

#### **(4) Necessity**

The last possible ground for a cross-border competence is necessity. This concept of customary international law can be invoked by a state to justify the use of force in protection of important domestic interests, e.g. the protection of its citizens.<sup>402</sup> But in order for necessity to be successfully invoked, a hazard which emanates from Chad and takes effect in Darfur is required. In other words, necessity might be relied on to cross the border if rebels from Chadian territory launched attacks on their victims in Darfur, without entering Sudan. In reality, rebels enter Darfur and operate there, and they cross the border into Chad and attack civilians on the Chadian side of the border. While the offenders are in Darfur, the UNAMID troops are within their area of deployment and might be mandated to confront the rebels.<sup>403</sup> But when the rebels cross the border into Chad, the concept of necessity cannot authorize the peacekeepers to follow them.

#### **e) Conclusion**

Paragraphs 54 (b), (c) and (h) of the UN/AU report may at first sight seem to authorise the peacekeepers to operate on Chadian territory, but it has been shown that neither of the three paragraphs provides a valid basis for such a competence. Since the relevant documents which established UNAMID contain no further provisions that might mandate the peacekeepers to cross the border and since the

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<sup>399</sup> NM Poulantzas, *The Right of Hot Pursuit in International Law*, p.2

<sup>400</sup> Poulantzas (note 399), p. 1; cf article 23 of the Geneva Convention on the High Seas (1958) and article 111 of the Convention on the Law of the Sea (1982).

<sup>401</sup> Poulantzas (note 399), p. 2.

<sup>402</sup> M Herdegen, *Völkerrecht*, p. 233.

<sup>403</sup> This will be dealt with in chapter IV. C., see *infra*, p. 57.

UN and AU peacekeeping laws provide no further grounds, it must be concluded that UNAMID is not authorised to operate in the Chadian border regions. The peacekeepers' powers *ratione loci* comprise the whole of Darfur, but end at the Sudanese border.

## **C. Extent of powers *ratione materiae***

### **1. Introduction**

It has been repeatedly asserted that paragraphs 54 and 55 of the report of the UN Secretary-General and the Chairperson of the AU Commission establish the mandate of UNAMID. From these provisions it arises that the core mandate of the peacekeepers is the protection of civilians, as well as “contributing to security for humanitarian assistance, monitoring and verifying implementation of agreements, assisting an inclusive political process, contributing to the promotion of human rights and rule of law, and monitoring and reporting on the situation along the borders with Chad and the CAR”.<sup>404</sup>

This section will focus on the extent of powers *ratione materiae* with regard to the various militias and those supporting them. As was delineated in chapter III, the Darfur conflict is dominated by the presence of different militias; the Janjaweed with its support from the government and, on the other side of the conflict, several rebel movements.<sup>405</sup>

In order for the peacekeepers to effectively halt the warring factions from fighting, it is important to know if and to what extent they have subject matter competence over the militia forces and over those who back them.

### **2. Relevant provisions with regard to the mandate *ratione materiae***

The relevant provisions concerning subject matter competence over Janjaweed and other militia groups as well as over their facilitators can be found in paragraph 55 of the UN/AU report, which specifies the broad tasks outlined in paragraph 54.

Para 55 mandates the force to

- (b) (i) promote the re-establishment of confidence, deter violence and assist in monitoring and verifying the implementation of the redeployment and disengagement provisions of the Darfur Peace Agreement, including by actively

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<sup>404</sup> Darfur – UNAMID – Background (note 1); para 54, 55 and 69 of the UN/AU report (note 362).

<sup>405</sup> See chapter III, p. 29 et seq.

providing security and robust patrolling of redeployment and buffer zones, by monitoring the withdrawal of long-range weapons, and by deploying hybrid police, including formed police units, in areas where internally displaced persons are concentrated [...]

(b) (iii) monitor, verify and promote efforts to disarm the Janjaweed and other militias

(b) (v) assist in the establishment of the disarmament, demobilization and reintegration programme called for in the Darfur Peace Agreement

Since paragraph 55 bears reference to the Darfur Peace Agreement, the relevant provisions of this agreement must be singled out as well. Chapter three of the peace deal is concerned with ceasefire and security arrangements and in various parts it reflects the duty of the signatories to co-operate with AMIS, the predecessor of UNAMID.<sup>406</sup>

Article 27 of the Darfur Peace Agreement is, *inter alia*, concerned with military disengagement and arms control and states in paragraph 315 that

a. The GoS shall restrict all Janjaweed/armed militia and PDF to their headquarters, garrisons, cantonment sites or communities and take other steps to contain, reduce and ultimately eliminate the threat posed by such forces.

b. The GoS shall completely disarm the above forces of heavy weapons.

c. [...] the GoS shall ensure that no Janjaweed/armed militia pose a threat to the Movements' assembly and disarmament.

In paragraph 367 it specifies this duty to disarm the Janjaweed militia and stipulates that

The GoS shall implement the relevant stages of its plan for neutralising, controlling and disarming the Janjaweed/armed militia in its areas of control. Its operations shall be conducted in coordination with AMIS and with prior notification to the Ceasefire Commission. This stage of the plan shall include:

(a) Enforcement operations in selected localities with the intent of apprehending and disarming.

(b) Confiscation of heavy and long-range weapons systems, crew operated weapons and motor vehicles.

(c) Prosecutions and punitive actions against criminal elements.

(d) Any other such actions as are contained in the plan and agreed by the Ceasefire Commission.

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<sup>406</sup> Cf. article 24 (h), para 226 of the Darfur Peace Agreement, available at: [http://www.unmis.org/english/2006Docs/DPA\\_ABUJA-5-05-06-withSignatures.pdf](http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf) [accessed 6 January 2008].

### **3. Extent of powers *ratione materiae* over those supporting the militias**

Now the exact extent of the powers which emanate from the pertinent provisions in paragraph 55 needs to be established, taking into account all the conclusions which were drawn earlier in this thesis and also bearing in mind the relevant passages of the Darfur Peace Agreement.

The point of departure of this examination will be the observation that the warring factions have the duty to disarm their militias. So it has to be determined what consequences are triggered in case of non-compliance with that duty. It also has to be scrutinized what exactly “verification of the disarmament” by UNAMID means.

#### **a) Duty to disarm the Janjaweed and other militias and its consequences**

Paragraph 55 (b) (i), (iii) and (v) of the UN/AU report mandates UNAMID to monitor, verify and assist in the disarmament process which on its part is governed by the provision in chapter III of the Darfur Peace Agreement. The assumption which I seek to examine in this section is the following: If the parties to the Darfur conflict have a duty to disengage and disarm their respective militias and UNAMID is authorized to verify this disarming, then maybe this means the peacekeepers are simultaneously mandated to forcefully proceed against any fighting militiamen as well as against anyone who supports the Janjaweed or other militias, since fighting and any support constitutes an infringement of this duty to disarm.

First of all the term “verification” must be interpreted, but since it is used in the same context as in paragraph 54 (c) of the UN/AU report, it is possible to draw on the respective conclusions and to understand “verification” to comprise the use of force.<sup>407</sup> But it remains to be examined whether paragraph 55 (b) of the UN/AU report mandates the peacekeepers to proceed against supporters of the militias.

A textual approach to the provisions in paragraph 55 (b) reveals that there is no express authorization to actively stop a facilitator of the militias. At the same time it is perspicuous that the purpose of the provisions presupposes the peacekeepers to be able to stop anyone who infringes their duty to comply with the peace deal. Therefore, concluding from the mere existence of the provisions in paragraph 55 (b), internal logic demands a wide interpretation which includes the

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<sup>407</sup> Cf. *supra*, chapter IV. B. 3. c) (2), p. 52.

mandate to prevent any activities contrary to the disarming process. However, taking into account the general principles of peacekeeping and the circumstances of adoption of the provisions in paragraph 55 (b) of the UN/AU report might result in a different conclusion.

The most important contextual factor of the provision's enactment is the fierce opposition by the Sudanese government against the deployment of UNAMID and the fact that Khartoum not only backed the Janjaweed, but even relied on them in its conflict with the Darfurian rebel factions.<sup>408</sup> Considering the historical – yet unfirm – principle of relying on the consent of the host state for the deployment of a peacekeeping force,<sup>409</sup> it is obvious that a wide interpretation of the UNAMID mandate *ratione materiae* with regard to those supporting the militias endangers the continuity of Sudanese consent. Yet again the principle of neutrality, which is also a key concept of peacekeeping operations,<sup>410</sup> demands of the peacekeepers to treat all supporters of the militias equally, no matter whether they are members of the GoS or of any other party to the Darfur Peace Agreement.

If one seeks to weigh the two principles, which lead to contesting assumptions concerning the interpretation of paragraph 55 (b) (i), (iii) and (v) of the UN/AU report, one must bear in mind that in intrastate conflicts the need for consent no longer plays such a prominent role;<sup>411</sup> it was overridden by humanitarian concerns.<sup>412</sup> Moreover, UNAMID is vested with chapter VII authority to “support early and effective implementation of the Darfur Peace Agreement”,<sup>413</sup> which applies in this case, other than for a potential *ratione loci* cross border competence, because here UNAMID is within its area of deployment as required by paragraph 15 (a) of SC resolution 1769.

In conclusion, a wide interpretation of the tasks in paragraph 55 (b) (i), (iii) and (v) of the UN/AU report takes preference over a narrow one, therefore UNAMID must be regarded as being authorised to proceed not only against fighting militia forces, but also against any facilitator of Janjaweed or other militias. Nevertheless the peacekeepers must act with caution, since a withdrawal

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<sup>408</sup> See supra, chapter III, C., p. 31 et seq.

<sup>409</sup> See supra, chapter I, A. 3. a), p. 4 et seq.

<sup>410</sup> See supra, chapter I, A. 3. a), p. 4 et seq.

<sup>411</sup> See supra, chapter I, A. 5., p. 11.

<sup>412</sup> Annan, (note 77) at 624.

<sup>413</sup> Para 15 (a) (ii) of SCRes 1769 (note 350); cf also supra chapter IV. B. 3. c) (4), p. 54.

of the Sudanese consent, although it would not necessarily determine the UNAMID mission, would impair the already poor cooperation of the Sudanese government. The UN/AU report provides the following estimation: “The operation’s success depends critically on whether the Government of the Sudan will come to see the United Nations and the hybrid operation as part of the solution to the conflict in Darfur.”<sup>414</sup>

## **b) Conclusion**

Along with the other signatories of the Darfur Peace Agreement, the Sudanese government has a duty to disarm the Janjaweed and other militias. By being mandated to “verify” the implementation of this obligation, UNAMID is authorized to arrest all support given to Janjaweed and other militias.

## **D. Extent of powers over Sudanese forces**

### **1. Introduction**

The final question this thesis will deal with is the extent of UNAMID’s powers over the Sudanese army. As a general principle, peacekeeping forces do not have command over the host state’s army; they have to respect the sovereignty of that state and in addition, handing down instructions to the army would run contrary to the principle of neutrality of the peacekeepers.<sup>415</sup> The only exception and therefore the only possible way for the UNAMID troops to issue imperatives to the Sudanese forces is the hypothetical consent of the Sudanese government with regard to UNAMID tasks which would involve a super ordinate position of the peacekeepers in relation to the Sudanese army. Consequently it has to be examined whether such consent is existent. Furthermore it is crucial to determine the exact mandate of UNAMID in relation to the Sudanese forces, which must correspond to that consent.

### **2. Relevant provisions and extent of powers over Sudanese forces**

Paragraph 19 of SC resolution 1769 refers to the Joint Communiqué on Facilitation of Humanitarian Activities in Darfur.<sup>416</sup> This Communiqué refers to the earlier Joint Communiqué on the Occasion of the Visit of the Secretary-

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<sup>414</sup> Para 127 of the UN/AU report (note 362).

<sup>415</sup> See supra, chapter I. A. 3. a), p. 4 et seq.

<sup>416</sup> Joint Communiqué between the Government of Sudan and the United Nations on Facilitation of Humanitarian Activities in Darfur, available at: <http://www.unjlc.org/sudan/coord/jointcommuniquedarfur/2007-04-17.8160616366/view> [accessed 8 January 2008].

General to Sudan on 3 July 2004.<sup>417</sup> At first sight it seems possible for UNAMID to invoke the agreements as a basis for powers over the Sudanese army, because the government offered to facilitate full access for humanitarian activities. So as far as the Sudanese army might obstruct the peacekeepers in their task of implementing the facilitation of humanitarian assistance, UNAMID, it might be argued, is mandated to issue orders to the Sudanese forces. However, the two Joint Communiqués do not contain provisions which would elaborate on the role of the Sudanese Army. Therefore paragraph 19 of SC resolution 1769 does not provide any help in establishing the relationship between the peacekeeping forces and the Sudanese army.

Paragraphs 54 and 55 of the report of the UN Secretary-General and the Chairperson of the AU Commission remain silent on the issue of peacekeepers' powers with regard to the Sudanese forces. Both these paragraphs and paragraph 15 of SC resolution 1769, which vests UNAMID with Chapter VII authority,<sup>418</sup> only contain the task of implementing the Darfur Peace Agreement, to prevent armed attacks and to protect civilians.

Therefore it must be asserted that there is a lack of provisions which could express Khartoum's consent to a super ordinate position of the peacekeepers in relation to the Sudanese army. This conclusion is fortified by the wording of paragraph 63 of the UN/AU report, which only mentions the peacekeepers' "close cooperation with national and local authorities".<sup>419</sup>

### **3. Conclusion**

The various documents which establish UNAMID contain no provisions which would grant the peacekeeping forces axiomatic powers over the Sudanese army. Consequently the peacekeepers can only exercise power over the Sudanese forces by resorting to their Chapter VII authority if paragraph 15 of SC resolution 1769 applies. That requires a situation in which UNAMID needs to "protect its personnel, facilities, installations and equipment [...]",<sup>420</sup> implement the Darfur Peace Agreement, prevent armed attacks or protect civilians.<sup>421</sup>

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<sup>417</sup> Joint Communiqué on Facilitation of Humanitarian Activities in Darfur (note 416), para 1.1.

<sup>418</sup> See supra chapter IV. B. 3. c) (4), p. 54.

<sup>419</sup> Para 63 of the UN/AU report (note 362).

<sup>420</sup> Para 15 (a) (i) SCRes 1769 (note 350).

<sup>421</sup> Para 15 (a) (ii) SCRes 1769 (note 350).

## **Chapter V: Conclusion**

### **A. UN and AU peacekeeping principles**

Early UN peacekeeping missions established three basic principles for their operations: impartiality, consent of the parties to the conflict and the prohibition of the use of force other than in self defence.<sup>422</sup> However, in recent times and especially in civil war conflicts, the peacekeepers find themselves confronted with a multitude of new dangers and problems.<sup>423</sup> This made it necessary to advance these principles and hence to back away from both the strict prohibition of the use of force and the absolute requirement of the parties' consent.<sup>424</sup>

As for the AU peacekeeping rules, it was concluded that the AU Act has some powerful provisions, expressly enabling the African Union to intervene in a member state in respect of grave circumstances.<sup>425</sup> On the other hand both the AU's and its predecessor, the OAU's list of successful peacekeeping missions is barely existent and therefore the AU is hindered from resorting to its own established principles.<sup>426</sup>

Chapter I also stated that the relationship between the African Union and the United Nations is somewhat uncertain with regard to issues related to international peace and security.<sup>427</sup> This is a realm which remains to be shaped by the new type of co-operation of the joint African Union/United Nations peacekeeping mission.

Finally chapter I drew the conclusion that there is disunity when it comes to the exact basis for the authorisation of UN-peacekeeping missions.<sup>428</sup> However, irrespective of that dispute, we will always find a Security Council resolution mandating the respective operation.<sup>429</sup>

### **B. Interpretation of SC resolutions**

Chapter II reflected the problem that there is little authority available with regard to the interpretation of Security Council resolutions.<sup>430</sup> The different

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<sup>422</sup> See supra, chapter I, A. 3., p. 4 et seq.

<sup>423</sup> See supra, chapter I, A. 5., p. 11 et seq.

<sup>424</sup> See supra, chapter I, A. 5., p. 11 et seq.

<sup>425</sup> See supra, chapter I., B., 2., p. 14 et seq.

<sup>426</sup> See supra, chapter I, B. 1. and 3., p. 13 and 15.

<sup>427</sup> See supra, chapter I, B. 4. p. 16 et seq.

<sup>428</sup> See supra, chapter I, A. 4., p. 9.

<sup>429</sup> See supra, chapter I, A. 4., p. 9 et seq.

<sup>430</sup> See supra, chapter II. C., p. 22.

doctrinal schools of thought to treaty interpretation, namely the textual, the teleological and the subjective approach,<sup>431</sup> should only be applied to SC resolution interpretation with caution.<sup>432</sup> Since SC resolutions are often drafted by non-lawyers under immense political pressure, less attention should be paid to the precise wording, while a stronger focus should lie in the circumstances of the adoption.<sup>433</sup> Consequently, in order to understand the provisions of a SC resolution, one must always be familiar with the background of the drafting process and with the underlying conflict.

### **C. The background of the Darfur conflict**

Chapter III gave a short version of a long and complex conflict, which is dominated by various rebel movements and which is strongly affected by the position of the Sudanese government.<sup>434</sup> Five different peace agreements were singled out, because SC resolution 1769 refers to them and thus they play an important role in understanding UNAMID's mandate.<sup>435</sup> These peace agreements were concluded between the Sudanese government and the different rebel movements or between the Sudan and Chad and each of them was only a small step on the long way to a peaceful Darfur.<sup>436</sup>

After its persistent and fierce opposition against a joint peacekeeping force, the Sudanese government finally gave in and thereby cleared the path for the deployment of UNAMID.<sup>437</sup>

### **D. Mandate *ratione loci***

It has been demonstrated that UNAMID's mandate emanates from paragraph 1 of SC resolution 1769 in conjunction with paragraphs 54 and 55 of the report of the UN Secretary-General and the Chairperson of the AU Commission.<sup>438</sup> The peacekeepers' powers *ratione loci* comprises the whole of Darfur and several provisions of paragraph 54 of the UN/AU report at first sight seem to even authorise the peacekeepers to operate on Chadian territory.<sup>439</sup> However, it has been shown that neither of the stipulations provide a valid basis

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<sup>431</sup> See supra, chapter II. B., p. 19 et seq.

<sup>432</sup> See supra, chapter II C. 4., p. 26.

<sup>433</sup> See supra, chapter II. C. 4., p. 26 et seq.

<sup>434</sup> See supra, chapter III. B., p. 29 et seq. and D. 1. p. 40 et seq.

<sup>435</sup> See supra, chapter III. C. 9., p. 39.

<sup>436</sup> See supra, chapter III. C. 9., p. 39.

<sup>437</sup> See supra, chapter III. E., p. 43 et seq.

<sup>438</sup> See supra, chapter IV. A. 1., p. 45 et seq.

<sup>439</sup> See supra, chapter IV. B. 3. e), p. 56.

for such a competence.<sup>440</sup> At the same time there are no UN or AU peacekeeping laws or rules of customary international law which could furnish the peacekeepers with authorisation to cross the border into Chad.<sup>441</sup> Therefore it must be concluded that the extent of powers *ratione loci* only stretches as far as to the Chadian border.

#### **E. Mandate *ratione materiae***

It has been noted that the core mandate of the UNAMID peacekeepers is the protection of civilians, the implementation of the Darfur Peace Agreement and the establishment of a stable and secure environment in Darfur.<sup>442</sup>

The question that has been examined in the last part of this thesis was the extent of powers which the peacekeepers have with regard to belligerent militia forces and those supporting them and also with regard to the Sudanese army.<sup>443</sup>

From the existence of some provisions in paragraph 55 of the UN/AU report and from the duty of the warring factions to disarm their militias, which arises from these provisions, it has been concluded that the peacekeepers task to verify the disengagement and disarming of the militias must be interpreted in a broad sense.<sup>444</sup> Consequently it must be regarded as including authorisation to proceed not only against fighting militia forces, but also against any facilitator of Janjaweed or other militias.<sup>445</sup>

At the same time, due to a lack of authorisation, UNAMID is not mandated to exercise powers over the Sudanese army, except for situations in which paragraph 15 of SC resolution 1769 applies.<sup>446</sup>

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<sup>440</sup> See *supra*, chapter IV. B. 3. e), p. 56.

<sup>441</sup> See *supra*, chapter IV. B. 3. d), p. 54 et seq.

<sup>442</sup> See para 69 of the UN/AU report (note 362); See also *supra*, chapter IV. C. 1., p. 57.

<sup>443</sup> See *supra*, chapter IV. C. and D., p. 57 et seq.

<sup>444</sup> See *supra*, chapter IV. C. 3. a), p. 59 et seq.

<sup>445</sup> See *supra*, chapter IV. C. 3. a), p. 60.

<sup>446</sup> See *supra*, chapter IV. D. 3., p. 62.