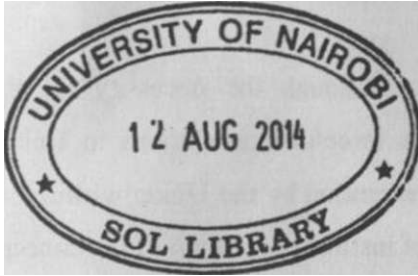


Abstract of a thesis entitled

**'FORCEFUL INTERVENTION FOR HUMAN RIGHTS PROTECTION IN
AFRICA: RESOLVING SYSTEMIC DILEMMAS IN THE
IMPLEMENTATION OF THE AFRICAN UNION'S RIGHT OF
INTERVENTION'**



Submitted by

Tom Maina KABAU

**for the degree of Doctor of Philosophy
at The University of Hong Kong
in December 2012**

This thesis examines the legal and political dilemmas in the implementation of the African Union's (AU) 'right' of forceful intervention through a systemic method of analysis. It first addresses the question of whether the AU's intervention system represents a paradigm shift in international law on intervention and the authorization role of the United Nations. It examines whether there is a justifiable basis for the implementation of the AU's intervention mandate outside the UN system, while taking into account the necessity of the international rule of law. It then analyzes the manner in which the failure to institutionalize the concept of sovereignty as responsibility within the AU system has contributed to the Union's failure to implement its intervention mandate even within the UN system.

The AU's legal framework expressly grants the Union the mandate to forcefully intervene in a member state in situations of genocide, crimes against humanity and war crimes. However, the failure of the AU's legal framework to *explicitly* require authorization by the Security Council for intervention (as required by the UN Charter) has led to uncertainty on the envisaged implementation mechanism, including allegations of its inconsistency -with the UN Charter and

international law. The Security Council may, however, be ineffective in granting authorization due to the use of the veto. There is, therefore, the question of whether the AU's legal framework exemplifies the crystallization of a customary law permitting humanitarian intervention, or is consensual (since African states have agreed by treaty to such intervention) and consequently, Security Council authorization is not mandatory.

The core argument of this thesis is that although the necessity for the international rule of law restricts African Union's forceful interventions to United Nations authorized enforcement action, robust intervention by the Union within that framework is compromised by a systemic failure of institutionalization of the concept of sovereignty as responsibility.

This thesis recommends that for robust implementation of the African Union's intervention mandate within the UN system, alternative authorization from the General Assembly be sought where the Security Council is ineffective. However, implementation of the AU's intervention mandate within the UN framework is compromised by continued concerns of protecting traditional concepts of unfettered sovereignty. This is evident in non-intervention oriented clauses within the AU's legal framework (which negate the intervention mandate) and the Union's practice of opposing forceful interventions like in the case of Libya. Possible solutions to that predicament are examined.

A systemic method of analysis is utilized in this thesis since there is an interaction of various legal norms within the AU system, in addition to the system's interaction with environmental factors such as politics and increasing global interdependence, while it is also subject to the UN and international law systems. The significance of the research is in identifying legal, policy and contextual factors that can transform the AU into an effective regional mechanism for institutionalization of the rule of law within the African region (by deterring gross human rights violations) while safeguarding the values of the international rule of law.

FORCEFUL INTERVENTION FOR HUMAN RIGHTS PROTECTION IN
AFRICA: RESOLVING SYSTEMIC DILEMMAS IN THE IMPLEMENTATION
OF THE AFRICAN UNION S RIGHT OF INTERVENTION

by

Tom Maina KABAU
LL.B and LL.M (Public International Law)

A thesis submitted in partial fulfillment of the requirements for
the Degree of Doctor of Philosophy
at The University of Hong Kong.

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December 2012

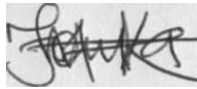


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DECLARATION

I declare that this thesis represents my own work, except where due acknowledgement is made, and that it has not been previously included in a thesis, dissertation or report submitted to this University or to any other institution for a degree, diploma or other qualifications.

Signed.



Tom Maina K.ABAU

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ABBREVIATIONS

AMIB	African Union Mission in Burundi
AMIS	African Mission in Sudan
AU	African Union
AUHLPD	African Union High-Level Panel on Darfur
CCP-AU	Centre for Citizens' Participation in the African Union
CNDP	National Congress for the Defence of the People
ECOMOG	ECOWAS Monitoring Observer Group
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
EU	European Union
HLP	High-Level Panel
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICID	International Commission of Inquiry on Darfur
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
INTERFET	International Force in East Timor
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
MONUC	United Nations Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAU	Organization of African Unity

RPF	Rwanda Patriotic Front
SADC	South African Development Community
SLM/A	Sudan Liberation Movement/Army
SOMA	Status of Mission Agreement
UK	United Kingdom
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNAMID	United Nations African Union Mission in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNEF	United Nations Emergency Force
UNGA	United Nations General Assembly
UNITAF	Unified Task Force
UNMIS	United Nations Mission in Sudan
UNOCI	United Nations Operation in Cote d'Ivoire
UNOMIL	United Nations Observer Mission in Liberia
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States of America

CHAPTER ONE

INTRODUCTION AND BACKGROUND*

1.1 INTRODUCTION

The African Union (AU) was formally launched in 2002, with its constitutive instruments granting the Union the 'right' to forcefully intervene within a member state in situations of genocide, crimes against humanity and war crimes.¹ The failure of the AU's legal framework to *explicitly* require the Union to seek prior authorization from the Security Council (before a forceful intervention) has resulted in uncertainty and differing views on the relationship between the AU and the UN, and the implementation mechanism for the AU's intervention mandate. As will be discussed in the relevant sections, although it has been postulated that the AU's legal framework is inconsistent with the UN Charter, it has also been argued that the system is compatible with international law, and that it is necessary in order to permit a robust regional response to mass atrocities. Implementation of the AU's² intervention mandate is further complicated by the fact that although the Security Council may be ineffective in providing authorization for AU's intervention, disregard for the UN system could contribute to the erosion of the international rule of law.

Forceful intervention for human rights purposes is problematic due to the principles of state sovereignty and non-intervention. Within the international community, the concept of sovereignty as responsibility is being postulated as the appropriate mechanism of addressing the legal and political dilemmas of intervention for humanitarian purposes/ The concept of responsibility to protect is based on such

" Some sections of this chapter are part of an article under the title. 'The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions.' The article has been accepted for publication in the Goettingen Journal of International Law.

¹ Under Article 4(h) of its Constitutive Act, the African Union has a right of intervention in a member state in situations of genocide, crimes against humanity and war crimes. See, Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3.

² According to the 2001 Report of the International Commission on Intervention and State Sovereignty, state sovereignty implies responsibility rather than control. International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) <<http://idl->

perceptions of sovereignty, and although it is not yet a proper legal norm, it has significant normative and political value.' Within the AU, the intervention mandate (for humanitarian purposes) may seem to represent such progress. However, the implementation of the AU's intervention mandate is compromised by contradictory efforts to protect the traditional concept of unfettered sovereignty, which is demonstrated by the presence of non-intervention oriented clauses within the Union's legal framework.⁴ The Union's subsequent practice seems to confirm the continued concern for the traditional concept of unfettered sovereignty by the AU, despite the forceful intervention mandate/

The core argument of this thesis is that although the necessity for the international rule of law restricts African Union's forceful interventions to United Nations authorized enforcement action, robust intervention by the Union within that framework is compromised by a systemic failure of institutionalization of the concept of sovereignty as responsibility.

As will be expounded in the research method section, a systemic approach is adopted as the thesis deals with legal norms that interact with environmental factors in a systemic manner. For instance, the implementation of the AU's system forceful

bnc.idrc.ca/dspace/bitstream/10625/18432/6/116998.pdf > accessed 21 November 2011 paragraphs 2.14 - 2.15. As will be examined in the relevant section, the concept of responsibility to protect, which has been endorsed by both the General Assembly and Security Council, is premised on the notion of sovereignty as responsibility. Falk observes that the concept of responsible sovereignty is replacing the traditional concept of sovereignty. Richard Falk. *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, New York 2000) 69.

For instance, see: Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge 2011) 23-25; Report of the Secretary-General: implementing the Responsibility to Protect, UN Doc A/63/677 (12 January 2009) paragraph 54; Anne Peters. The Security Council's Responsibility to Protect' (2011) 8 *International Organizations Law Review* 1,10.

Article 4(g) of the Constitutive Act provides that the AU shall also be governed by the principle of non-interference in the domestic affairs of a state by other member states. In addition, Article 4(e) of the AU Peace and Security Council Protocol provides that the Council shall be guided by the principle of respect for the territorial integrity and sovereignty of state parties. Under Article 4(f) of the Protocol, the AU Peace and Security Council is also to be governed by the principle of non-interference in the domestic affairs of a state by other states. See, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002) *Reprinted in* (2002) 10 *African Yearbook of International Law* 663, 663-694.

⁵ For instance, despite the AU's right of forceful intervention to stop or pre-empt genocide, crimes against humanity and war crimes, the AU expressly opposed military intervention (of any nature) in Libya, while asserting the state's territorial integrity. African Union, 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 6.

intervention mandate, which is regulated by the international legal system, may be a fledged by political factors. According to Kerchove and Ost. the concept of a system is useful while examining issues relating to legal norms/' In the case of the African Union system, and within the international community, there is an interaction between legal norms that protect state sovereignty and are oriented towards non-intervention on one side, and those that endorse intervention for human rights purposes on the other. A systemic approach is also helpful as it acknowledges the interaction of the system with environmental factors, which in the AU's context may be international politics and increasing global interdependence. Information for this thesis is obtained through an analysis of the relevant rules of international law, in addition to contextual analysis of the impact of critical environmental (non-legal) factors and case study analysis. This chapter basically provides an overview of the research issues, introduces essential concepts and offers a guide on what will be examined in the chapters to follow.

1.2 BACKGROUND OF THE RESEARCH

1.2.1 THE DILEMMA BETWEEN SOVEREIGNTY AND INTERVENTION AND ITS IMPLICATIONS

The UN Charter prohibits states from the use of force except in self-defence, or pursuant to the collective security mechanism after authorization by the Security Council." Article 2(4) of the Charter proscribes the "use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' The self-defence exception is provided for in Article 51 of the UN Charter as a response to an armed attack. The second exception, after authorization by the Security Council, is found in Chapter **VII** of the UN Charter. Article 42 of the UN Charter specifically authorizes the Security Council

⁶ Michel van de Kerchove and Francois Ost, *Legal System between Order and Disorder* (Iain Stewart tr, Oxford University Press, Oxford 1994) 2. The AU's forceful intervention issues are systemic, because, in part, they are subject to principles and rules of the international legal system, in addition to other environmental factors like international politics.

⁷ Ibid 10-11.

⁸ Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, vol 1 (Oxford University Press, Oxford 2009) 291. Relevant sections of the UN Charter include Articles 2(4) and Chapter VII. United Nations Charter (24 October 1945) 1 UNTS XVI.

to take the necessary action, which may involve the use of force, to maintain or restore international peace and security.' In addition, Article 2(7) of the United Nations Charter empowers the UN to intervene in the domestic affairs of a state to implement those "enforcement measures.' The Security Council has, in recent years, broadly interpreted threats and breaches of international peace and security to include issues related to gross human rights violations or humanitarian crises within a state.⁴ Therefore, based on its Chapter VII of the UN Charter powers, the Security Council can authorize forceful intervention within a state for humanitarian purposes.¹⁰

The principle of state sovereignty is central to the proscription of forcible intervention. State sovereignty is a fundamental element of the international legal order, and provides the legal foundations for the principle of non-intervention.¹¹ In addition to their formulation in Article 2(4) of the UN Charter, the doctrines of sovereignty and non-intervention have also been endorsed by states through General Assembly resolutions. The endorsements include the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,¹² the 1970 Declaration on Principles of International Law,¹³ and the 1974 Resolution on Definition of Aggression.¹⁴

On the other hand, recent years have also witnessed discourse on greater protection for human rights, with more acceptability of intervention on that ground. This is exemplified by some recent General Assembly resolutions under the concept

⁴ For example, the Security Council authorized intervention in the Somalia civil war in 1992. Determining that the nature of the humanitarian catastrophe in Somalia was 'a threat to international peace and security' the Security Council, citing its powers under Chapter VII of the UN Charter, granted states the mandate to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia'. UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

Ian Brownlie and CJ Apperley. 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *International and Comparative Law Quarterly* 878, 894-895. See also Simon Chesterman, 'Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq' (2006) 10 *Singapore Year Book of International Law* 59, 83.

Jost Delbruck. 'A Fresh Look at Humanitarian Intervention under the Authority of the United Nations' (1992) 67 *Indiana Law Journal* 887, 889.

¹² Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965).

¹³ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. UNGA Res 2625 (XXV) (24 October 1970).

¹⁴ Definition of Aggression. UNGA Res 3314 (XXIX) (14 December 1974).

of the *responsibility to protect*. Such instances include the 2004 High-Level Panel (HLP) Report¹⁵ and the 2005 World Summit Outcome Document.¹⁶ The origin of the responsibility to protect concept may be traced to the notion that sovereignty essentially implies responsibility, as comprehensively articulated in the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS).¹⁷ In September 2009, the General Assembly resolved to continue discussions on the responsibility to protect,¹⁸ and there have been annual discussions on the concept under the auspices of the Assembly.¹⁹ The UN Secretary General has also established the position of the Special Adviser on the Responsibility to Protect.²⁰ General Assembly resolutions are part of the fabric of state practice.²¹ The Security Council also expressly endorsed the responsibility to protect concept in Resolutions 1674²² and 1894.²³ The traditional theory of sovereignty is giving way to the concept of responsible sovereignty.²⁴ This way, the government's legitimacy is increasingly being viewed as being dependent 'upon adherence to minimum humanitarian norms and on a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse territorial conditions.'²⁵

The concept of sovereignty as responsibility is a concerted effort to address the problematic use of sovereignty as a convenient legal and political tool for

¹⁵ High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004).

¹⁶ World Summit Outcome Document, UN Doc A/RES/60/1 (24 October 2005).

¹⁷ See, International Commission on Intervention and State Sovereignty (n 2) paragraphs 2.14 - 2.15.

¹⁸ United Nations News Centre, 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009)

<<http://www.un.org/apps/news/stoi7.asp?NewsID=32047&Cr-responsibility+to+protect&CrI=>> accessed 22 September 2009.

" For the July 2011 informal thematic debate, see, United Nations General Assembly Department of Public Information, "'For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers no Relief', Secretary-General Cautions in General Assembly Debate' (12 July 2011) <http://www.un.org/News/Press/docs/2011/gal_1112.doc.htm> accessed on 1 August 2011.

²⁰ See, United Nations News Centre, interview with Edward Luck, Special Advisor to the Secretary-General' (1 August 2011) <<http://www.un.org/apps/news/newsmakers.asp?NewsID=38>> accessed 2 August 2011.

²¹ Rosalyn Higgins, 'The Attitude of Western States towards Legal Aspects of the Use of Force' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht 1986)435, 435.

²² UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

²³ UNSC Res 1894 (1 1 November 2009) UN Doc S/RES/1894.

²⁴ Richard Falk (n 2) 69.

²⁵ Ibid.

justifying non-intervention by the international community, and for deterrence of intervention by the territorial state. Falk aptly observes that as a way of avoiding the quagmires associated with intervention, states have often expediently avoided such responsibility by overemphasizing sovereign rights."⁶ Carty provides an illustration of the 1990s peace-enforcement in Bosnia, where troops contributing states such as the United Kingdom "actively undermined the UN Security Council mandate by claiming that the use of force would constitute intervention in a civil war." According to the UN Secretary General, the problem of implementing forceful intervention in the international community has partly been conceptual and doctrinal, especially in relation to how the relevant issues and alternatives are understood."

1.2.2 THE UN SYSTEM AND THE INADEQUACIES OF CONTRADICTORY MANDATES

Authorization of enforcement action by the Security Council for humanitarian purposes within states has also involved, to an extent, transforming traditional 'peacekeeping' to "peace enforcement/ The peace enforcement approach is also referred to as 'second generation peacekeeping.'" ³⁰ In the context of peace-enforcement. the Security Council confers the peacekeeping unit with Chapter VII of the UN Charter mandate that includes the use of force, for instance, to ensure delivery of humanitarian relief." or to protect civilians under imminent threats of attack. "

However, this approach has often not been successful in ensuring effective protection of populations from mass atrocities, as it has at times not resulted in actual

²⁶ Ibid 78.

Anthony Carty. 'Sovereignty in International Law: A Concept of Eternal Return' in Laura Brace and John Hoffman (eds), *Reclaiming Sovereignty* (Pinter, London 1997) 101, 115.

* Report of the Secretary-General: Implementing the Responsibility to Protect, UN Doc A/63/677 (12 January 2009) paragraph 7.

The International Court of Justice confirmed that one of the features of peacekeeping operations is that they are established after the consent of the territorial state. *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 170. The 2000 Report of the Panel on United Nations Peace Operations described the bedrock of peacekeeping as comprising the non-use of force except in self-defence, consent of the parties to the conflict and impartiality. Panel on United Nations Peace Operations. Report of the Panel on United Nations Peace Operations' UN Doc A/55/305 (August 2000) ix.

³⁰ Rosalyn Higgins (n 8) 284-289.

³¹ Somalia in UNSC 794 (n 9).

³³ In Liberia. UNSC Res 1509 (19 September 2003) UN Doc S/Res/1509.

enforcement action on the ground, as envisaged in Chapter VII of the UN Charter. This has led to criticism of such an approach by the UN, and partly been the cause of allegations of existence of independent legal avenues for forceful intervention outside the UN Charter framework. First, there is the issue of paralysis of the Security Council by the threat or actual use of the veto by permanent members, or the Council's outright disinterest in pursuing intervention. The 1994 Rwanda genocide is an example. An approximately 800,000 people, comprising of Tutsis and moderate Hutus, were killed in the genocide spanning only about 100 days, from April to July 1994." The UN was to blame for its failure to prevent or subsequently stop the genocide.⁴ The obvious, necessary and appropriate 'response was a serious international military force to deter the killers.'³¹ However, rather than boost the peacekeeping mission in Rwanda when the genocide began, the Security Council voted to withdraw almost all the peacekeepers.¹⁶

Second, conceptual articulation and practical implementation of the peace enforcement mandate has often continued to focus on the consent of the territorial state, despite the Chapter VII of the UN Charter mandate, thereby assuming little distinction from traditional peacekeeping. It has, therefore, in most instances, failed to stop gross violations of human rights against civilians. The failures of peace-enforcement may be attributed to the fact that it has evolved as an exception from the traditional peacekeeping, and it is therefore restrained by the concepts of impartiality and consent of the territorial state, which it should, in the new form, contradict. Noting the likely inefficiencies and inappropriateness of the peace-enforcement approach, Higgins argues that enforcement action 'should remain clearly differentiated from peace-keeping.'³² She proposes that a peacekeeping force be put

³³ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc S/1999/1257 (15 December 1999) 3.

³⁴ Ibid.

³⁵ International Panel of Eminent Personalities. 'Rwanda: The Preventable Genocide' (7 July 2000) <http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf> accessed 11 December 2009 paragraph 10.1.

³⁶ UNSC Res 912 (21 April 1994) UN Doc S/RES/912.

³⁷ Rosalyn Higgins (n 8) 288.

on the ground only after an agreement on a cease-fire, which is accompanied by commitment of achieving the undertaking. "

The HLP Report also noted that one of the greatest failures of the United Nations has been in halting ethnic cleansing and genocide since at times peacekeeping and the protection of humanitarian aid" become a 'substitute for political and military action to stop' the atrocities-⁵ ' This implies that the international community should focus on robust intervention for civilian protection in situations where there is no peace to keep, and efforts to bring the conflict to an end through mediation have also been ineffective. After stopping the conflict and the commission of mass atrocities, peacekeeping and other mechanisms to rebuild the society can be implemented. Despite the mentioned shortcomings, it can be argued that with a strong and reliable regional organization which has the capacity to lobby and undertake a robust forceful intervention role, the limitations and inadequacies of the UN collective security system can be addressed, in addition to burden sharing benefits. Part of the problem has not been the requirement that prior authorization from the Security Council be obtained, but also the willingness of regional organizations to request and implement the intervention mandate.

1.2.3 REGIONAL ORGANIZATIONS" ROLE AND AUTHORIZATION REQUIREMENTS

Article 52 of the UN Charter permits the existence of regional arrangements or agencies for purposes of the maintenance of international peace and security. In addition. Article 53(1) of the UN Charter provides that the Security Council may utilize a regional arrangement or agency for enforcement action. However, Article 53(1) of the Charter also provides that a regional arrangement or agency should not undertake enforcement action without authorization by the Security Council. Despite the authorization requirement, Article 53(1) of the Charter fails to expressly clarify the specific time of authorization, whether it is before or even during the action. That absence of an express clarification of the time of authorization has led to views that a

»Ibid.

" High-Level Panel on Threats, Challenges and Change (n 15) paragraph 87.

practice of flexible interpretation, permitting subsequent validation by the Security Council to regional organizations in extreme and emergency situations, is possible.⁴ While calling for reforms to the UN system, the AU has previously stated that in circumstances that require urgent action, Security Council authorization may be granted retroactively.⁴¹ However, it seems that as Myjer and White observe, such an argument is a *contradictio in terminis* (contradiction in terms) since intervention can only be lawful from the time authorization is granted, 'unless the Security Council explicitly makes the approval retrospective.'⁴²

1.2.4 UNCERTAINTY ON THE AU'S FORCEFUL INTERVENTION MANDATE

The Constitutive Act of the African Union was adopted in July 2000. and in its Article 4(h) conferred the AU with the right of intervention in a member state in situations of grave circumstances, namely, crimes against humanity,⁴³ war crimes⁴⁴ and genocide.⁴⁵ Although it is yet to enter into force (and therefore have a legal effect), the 2003 Protocol on Amendments to the Constitutive Act of the African Union added a further ground for intervention, that of restoring 'peace and stability'

⁴⁰ For instance, see, Ademola Abass. *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing. Oxford 2004) 53-55. Others who have advocated the option of subsequent validation also include: Thomas M Franck. 'Interpretation and Change in the Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds). *Humanitarian Intention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press. Cambridge 2003) 204. 223; Ramesh Thakur. 'Outlook: Intervention. Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33(3) *Security Dialogue* 323, 336-337.

⁴¹ African Union, 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (Addis Ababa 7-8 March 2005) Ext/EX.CL/2 (VII) part B(i).

⁴² Eric PJ Myjer and Nigel D White. 'Peace Operations Conducted by Regional Organizations and Arrangements' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford 2010) 163, 174.

⁴³ Article 7 of the Rome Statute defines crimes against humanity as systematic and widespread attacks against civilians that include acts such as: murder, enslavement extermination, torture, forced transfer of population, enforced disappearance, rape and other forms of sexual violence, crime of apartheid *et cetera*. Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

⁴⁴ Article 8 of the Rome Statute defines war crimes to include grave violations of the Geneva Conventions of 12 August 1949 and actions such as intentional attacks on civilian populations, willful killing, torture or inhuman treatment that includes biological experiments, compelling prisoners of war to serve in the forces of a hostile Power, taking of hostages *et cetera*. Ibid.

⁴⁵ Article 6 of the Rome Statute defines genocide to constitute killing members of a group, causing them bodily or mental harm, imposing measures to prevent births amongst them or forcible transfer of children of the group to another one. However, any of the mentioned actions should be 'committed with intent to destroy, in whole or in part.' such a racial, ethnical, national, or religious group. Ibid.

within a member state due to a 'serious threat to legitimate order' in the state."¹ Neither the Constitutive Act nor the legal framework established under it defines the constitutive elements of crimes against humanity, war crimes and genocide. They are generally categorized as 'grave circumstances.' The use of the phrase is probably due to the fact that they constitute gross violations of human rights, to an extent that they are also international crimes. Falk observes that the human rights protection domain has evolved to include criminalization of extreme conduct, in the context of crimes against humanity and genocide.⁴ The decision on whether to intervene is by the Assembly of the African Union, which comprises heads of state and government of member states, upon the advice of the AU Peace and Security Council.⁴⁵

The African Union's legal framework does not expressly bind the Union to seek prior authorization from the UN Security Council before commencing forceful intervention.¹ Therefore, based on that uncertainty in the conceptualization of the AU's right of intervention, there are divergent views on whether prior authorization by the Security Council is necessary. This is due to the concern that the UN Security Council may at times not be effective in providing prior authorization. Three issues may be identified in relation to the status of the AU's intervention mandate in international law, and its implementation mechanism. First, it has been argued that the AU intervention mechanism is inconsistent with the UN Charter.¹⁰ Second, some

Protocol on Amendments to the Constitutive Act of the African Union (adopted 3 February 2003 and 11 July 2003) <http://au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf> accessed 27 December 2011. According to Article 13. the Protocol shall only 'enter into force thirty days after the deposit of the instruments of ratification by a two-thirds majority of the Member States.'

⁴⁷ Richard Falk (n 2) 55.

⁴⁵ Article 7(1 Xe) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

Jeremy I Levitt. 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur. Sudan' in Niels Blokker and Nico Schrijver (eds). *The Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martinus Nijhoff Publishers, Leiden 2005) 213, 229.

See, for instance: Jean Allain. 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 *Max Planck Yearbook of United Nations Law* 237, 284-285; Kithure Kindiki, 'The African Peace and Security Council and the Charter of the United Nations' (2005) 1(*U Law Society of Kenya Journal* 77, 89. Dinstein is of the view that a treaty which seeks to empower a regional organization such as the AU to forcefully intervene within a state would be inconsistent with the UN Charter if it authorizes such action even where the government of the territorial state is opposed to the intervention. Yoram Dinstein. *War. Aggression and Self-Defence* (5th edn Cambridge University Press, Cambridge 2011) 123.

of those of the view that there exists no possible justification for an AU intervention outside the UN Charter have suggested alternative authorization through an emergency session of the General Assembly in case the Security Council is ineffective.⁵¹ Third, the alleged right permitting humanitarian intervention," in addition to the principle of consent,⁵² have been postulated as alternative means of justifying AU's intervention even in the absence of authorization by the Security Council.

1.2.4.1 The African Union's relationship with the UN system

There exists uncertainty, due to divergent views, and the ambiguous conceptualization of the AU's forceful intervention mandate, on whether the Union's intervention framework conforms to, or is inconsistent with the UN Charter. This thesis is based on the view that for the African Union to effectively execute its regional role, the nature of the AU's relationship and interaction with the UN is significant. This is due to the fact that the UN also has concurrent peace and security roles in the African region, in addition to burden sharing benefits that may arise from partnership between the two organizations.

The discourse on the AU's inconsistency with the UN Charter has been premised on the argument that the Union's legal framework, although establishing a right of intervention, fails to explicitly bind the Union to seek authorization by the Security Council before intervening in a member state.⁵⁴ Ben Kioko, Legal Adviser to the African Union, states that at the time of the formation of the Union, the issue of clarifying the implications of Security Council authorization was avoided." Kioko specifically states that this avoidance was based on regional dissatisfaction and

⁵¹ For instance, Franck is of the view that the AU can turn to the General Assembly in case of a Security Council veto. Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100(1) *American Journal of International Law* 88, 100.

⁵² For instance, see. Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53(1) *Journal of African Law* 1, 8.

⁵³ See, Ademola Abass (n 40) 109.

⁵⁴ See, for instance, Jeremy I Levitt (n 49) 229.

⁵⁵ Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-Intervention' (2003) 85(852) *International Review of the Red Cross* 807. 821. In a footnote reference, the article states that Kioko is a Legal Adviser to the African Union. Ibid 807.

frustration with the international order.⁵⁶" which mandates the Security Council to authorize interventions, and the Council had previously been ineffective on some issues relating to the African region. It is instructive to note, however, that the subsequent core African Union treaty (after the Constitutive Act) that governs the implementation of the intervention mandate recognizes the UN Charter rules conferring the Security Council primary responsibility for international peace and security, and Charter rules on the role of regional organizations.'

Further, despite the AU failing to expressly provide for the necessity of the Security Council authorization, it can be implied from the supremacy of the UN Charter provisions, as provided in Article 103 of the Charter. This is due to the fact that the African Union's legal system does not expressly state that the Union will not seek Security Council authorization, or that it will undertake action outside the collective security system of the United Nations. ^x Ambiguity on how an AU forceful intervention is to be authorized does not necessarily render the Union's framework inconsistent with the UN Charter and international law. If the perception of inconsistency is implied, it should also be acknowledged that the AU Peace and Security Protocol recognizes the provisions of the UN Charter on the role of regional organizations, and the primacy of the UN Security Council/⁴

A second allegation of inconsistency between the AU legal framework and the UN Charter relates to the question of which organization (between the AU and the UN) has the primary role for peace and security in Africa. It has been argued that while the UN Charter (in Article 24) grants the Security Council primary responsibility for international peace and security, Article 16(1) of the AU Peace and Security Council Protocol confers the African Union primary responsibility for peace and security in Africa.^{w1} It has been submitted that it is ambiguous whether the African Union 'has reserved for itself primary responsibility for peace and security in

⁵⁶ Ibid 821.

Preamble and Article 17(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

^s See, Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Wan Publishing Ltd, Oxford 2010) 342.

⁵⁹ Preamble and Article 17(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

⁶⁰ Ibid Article 16(1).

Africa rather than leaving it to the UNSC.'⁶¹ However, the AU's primary responsibility for peace and security in Africa seems to refer only to the relationship between the Union and the various African sub-regional organizations, some of which also have peace and security mandates. It can be argued that the purpose and objective of Article 16(1) of the AU Peace and Security Council Protocol is to grant the African Union supervisory roles over sub-regional organizations. An exception to the AU's primary responsibility seems to have been established in the relationship between the UN and African Union under Article 17(1) of the AU Peace and Security Council Protocol. Article 17(1) of the Protocol actually obligates the AU Peace and Security Council to work closely and co-operate with the UN Security Council, which it acknowledges to have primary responsibility.

Despite the uncertainty in the conceptualization of the AU's intervention mandate, this thesis is based on the proposition that the ambiguity does not necessarily imply that the Union's legal framework is inconsistent with the UN Charter, or even general international law. The broad conceptualization of the intervention mandate may have been a pragmatic method of avoiding internal (within the AU's legal framework) restrictions in determining the implementation options." This is in situations of an ineffective Security Council, so that other considerations could be taken into account, for instance, alternative authorization by the General Assembly. In addition, the non-consensual intervention under Article 4(h) of the Constitutive Act can even be in the form of judicial intervention, through prosecutions commenced by the African Union for genocide, crimes against humanity and war crimes, which are international crimes.⁶² The AU has previously deliberated on the possibilities of establishing an African regional mechanism for the prosecution of international crimes.⁶³ Prosecutions commenced by the African Union,

⁶¹ Jeremy I Levitt (n 49) 229. See also, Alex J Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20(2) *Ethics and International Affairs* 143, 158.

⁶² A regional organization's competence to intervene is also regulated by the constitutive instruments that establish it. Eric PJ Myjer and Nigel D White (n 42) 171.

⁶³ Under Article 5 of the Rome Statute of the International Criminal Court, genocide, the crime of aggression, crimes against humanity and war crimes are 'the most serious crimes of concern to the international community as a whole.' Rome Statute of the International Criminal Court (n 43).

⁶⁴ Decision on the Abuse of the Principle of Universal Jurisdiction (Kampala 27 July 2010) Doc EX.CL/606(XVII) paragraph 5. Kuwali is of the view that Article 4(h) of the Constitutive Act and the

for international crimes within the member states, would not require prior authorization by the UN Security Council. With regard to forceful (military) intervention, it is instructive to note that both the primacy of the UN and the role of the Security Council is recognized in other relevant clauses of the AU's core treaties.⁶¹

It seems that the more appropriate view of the AU's legal framework is that there is uncertainty on how it is to be implemented, including how various modes of implementation could relate to the UN Charter and international law. This is in addition to the effect of its implementation on various values of the international community such as the international rule of law. Based on the fact that Chapter VIII of the UN Charter expressly mandates regional organizations to carry out peace and security functions, including enforcement action, the AU legal framework would be inconsistent with the Charter only if it *expressly* contests the authority of the Security Council. Inconsistency could also arise if the African Union formally interprets its legal framework as granting it the mandate to undertake forceful intervention without the Security Council authorization. This is because the AU's legal framework acknowledges the UN Charter clauses that provide the Security Council with primary role for international peace and security, including the clauses of the Charter on the role of regional organizations."

The question may arise of what the case would be if the Security Council is ineffective due to the threat of a veto by a permanent member (due to political interests) and the AU sought alternative authorization for intervention from an emergency session of the General Assembly. Such forceful intervention certainly

principle of universal jurisdiction for international crimes can be the basis of judicial intervention by the AU within a member state. Dan Kuwali. *The Responsibility to Protect: Implementation of Article 4(h) Intention* (Martinus Nijhoff Publishers, Leiden 2011) 403-404.

"For instance, the Preamble and Article 17(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

⁶⁴ The Preamble of the AU Peace and Security Council Protocol acknowledges that the AU is 'mindful' of the UN Charter clauses that grant 'the Security Council primary responsibility for the maintenance of international peace and security' including 'the provisions of the Charter on the role of regional arrangements' on the issues of international peace and security. In addition, Article 17(1) of the Protocol provides that the AU Peace and Security Council shall work closely and co-operate with the Security Council of the United Nations, 'which has the primary responsibility for the maintenance of international peace and security.' Ibid.

maintains the action within the UN system, and it can be argued that it is consistent with the UN Charter framework. The Uniting for Peace Resolution reaffirmed the primary role of the Security Council in the maintenance of international peace and security, but resolved that where the Council was unable to discharge that duty due to lack of unanimity of permanent members, the General Assembly could assume that responsibility, including authorization of force where necessary.⁶⁷

On a preliminary basis, while interpreting the intentions of the Charter, it is essential to consider that the Security Council is obligated, under Article 24(2), to 'act in accordance with the Purposes and Principles of the United Nations.'⁶⁸ The Security Council therefore does not have unlimited powers. Its actions must conform to the purposes and principles of the UN. Therefore, when the Security Council is unable to either authorize or prohibit an action, which comprises the purposes and principles of the UN Charter, then the Security Council may be argued to be acting contrary to its responsibilities.⁶⁹ Further, by using the phrase "primary responsibility"⁷ in Article 24 of the UN Charter with regard to Security Council powers, a secondary or subsidiary responsibility which may be executed by the General Assembly is implied.⁷⁰ It is acceptable to argue that since the UN is a construction of states, the states may resolve to issue the secondary responsibility to another competent organ where the Security Council is unable to perform its functions. It has been argued that the Uniting for Peace Resolution 'represents an interpretation of Articles 11(2) and 12' of the United Nations Charter 'that has been accepted and acted upon' by UN members. ¹ The Tenth Emergency Session of the General Assembly was convened in 1997 in order to address Israeli's activities in the Occupied Palestine Territory.⁷²

The acceptability of the General Assembly alternative has considerable support from various scholars. For instance, Brownlie and Apperley argue that rather than act illegally, the North Atlantic Treaty Organization (NATO) should have sought

⁶⁷ Uniting for Peace Resolution, UNGA Res 377(V)A (3 November 1950).

⁶⁸ Juraj Andrassy. 'Uniting for Peace' (1956) 50(3) *American Journal of International Law* 563, 564.

⁶⁹ Ibid 565.

⁷⁰ Ibid 564.

⁷¹ ND White. *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press, Manchester 1993) 153.

⁷² Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory. UNGA Res A/RES/ES-10/2 (25 April 1997).

a special emergency session of the General Assembly to issue a Uniting for Peace resolution (before invading Kosovo in 1999) ⁵ Franck specifically proposes that the General Assembly can be a substitute which the African Union can use to avoid the veto prone Security Council. ⁴ Reisman and McDougal opine that in circumstances of extreme human rights violations that constitute a threat or breach of the peace, and the Security Council is unable to act. the secondary authority of the General Assembly, substantiated by the Uniting for Peace Resolution, can be brought into operation. ⁵ Myjer and White argue that where, in extreme circumstances, the Security Council fails to take action, the General Assembly should be involved, at the minimum, so that maximum legitimacy for such forceful intervention is generated. ⁶

This thesis undertakes an examination of the relationship between the AU legal framework and the UN Charter through the established rules of treaty interpretation as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. It also examines justifiable mechanisms through which the AU's forceful intervention mandate may be implemented.

1.2.4.2 Other alleged justifications for AU's intervention mandate

On the basis of the uncertainty on the implementation mechanism for the AU's right of intervention, it has been suggested that the alleged right permitting humanitarian intervention provides a justifiable avenue upon which the intervention mandate may be implemented. Humanitarian intervention has been defined as the threat or use of force by a state within another state with the intention of pre-empting or stopping 'grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force

⁷¹ Ian Brownlie and CJ Apperley (n 10) 904.

⁷⁴ Thomas M Franck (n 51) 100.

⁵ Michael Reisman and Myres S McDougal. 'Humanitarian Intervention to Protect the Ibos' in Richard B Lillich (ed), *Humanitarian Intervention and the United Nations* (University Press of Virginia, Charlottesville 1973) 167, 190.

⁷⁶ Eric PJ Myjer and Nigel D White (n 42) 183.

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

is applied.' * If such a rule permitting humanitarian intervention exists in international law, it can be a basis for intervention without Security Council authorization, and it would be outside the UN collective security system. A customary law permitting such interventions can develop outside the UN Charter framework. Customs are sources of international law.⁹ That implies that any intervention by the AU, although not based on express Charter provisions, would still be consistent with international law, if such a customary law exists.

According to Sarkin, the AU presumes the existence of the right of humanitarian intervention (or its possibility) since the AU does not expressly state that it will seek prior authorization from the Security Council (which the Union may choose not to request).⁸⁰ Levitt argues that the actions undertaken by the African Union are consistent with customary law developments, which is 'the hardening and mainstreaming of the doctrine of humanitarian intervention into treaty law and the wider corpus of international law.'⁸¹ This thesis disputes the emergence of such customary international law, and therefore examines the relevant state practice and *opinio Juris* to determine whether such a rule can provide a justification for AU's forceful intervention.⁸² Any determination that there currently lacks such a rule of humanitarian intervention would imply that the AU has lesser alternatives while implementing its intervention mandate. It would, however, not imply that the AU legal framework is inconsistent with international law, since the AU does not expressly grant itself a right of humanitarian intervention.

It has also been suggested that the AU can justify its intervention under Article 4(h) of the Constitutive Act through the principle of consent. That would also

⁷⁸ JL Holzgrefe, 'The Humanitarian Intervention Debate' in JL Holzgrefe and Robert O Keohane (eds). *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press. Cambridge 2003)15. 18.

⁷⁹ Article 38. Statute of the International Court of Justice (26 June 1945) Annexed to (he United Nations Charter (24 October 1945) 1 UNTS XVI.

⁸⁰ Jeremy Sarkin (n 52) 8.

⁸¹ Jeremy I Levitt (n 49) 232.

⁸² According to the International Court of Justice, the establishment of a new custom requires state practice and *opinio juris*. See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 paragraph 207. See also. *North Sea Continental Shelf (Federal Republic of Germany v Denmark: Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 paragraph 77.

imply that the African Union does not require prior authorization of the Security Council. Abass specifically argues that the AU can now intervene in a member state upon the decision of the Assembly, and that the advantage of desegregating consent by such a treaty is that it eliminates the need of obtaining specific consent at the time of crisis.⁵⁷

This thesis is based on the view that there is uncertainty on the possible implementation mechanism, but that does not imply that the AU mechanism is inconsistent with either the UN Charter or international law. Corten similarly acknowledges that there is uncertainty with respect to the AU's legal framework for forceful intervention. It is necessary to determine the status of the current relationship between the AU and the UN Charter to eliminate the existing incoherence on the implementation mechanism for the AU's right of intervention. This is in addition to eliminating ambiguity on the effect of the AU intervention system on the structures of international law.

1.2.4.3 The AU system and traditional concepts of sovereignty

If a customary rule permitting humanitarian intervention outside the UN system does not exist, then adherence to the international rule of law requires the AU to seek prior authorization of forceful intervention from the Security Council. This thesis also argues that in situations where the Security Council is ineffective, due to the political interests of a permanent member, the only other reasonable alternative (with proper institutional checks) is authorization by an emergency session of the General Assembly, which still maintains such action within the UN system. At the 2005 World Summit, states reaffirmed their commitment to international law and the UN Charter, 'and to an international order based on the rule of law' since it is essential for international peace.⁸⁰ One of the elements of the rule of law, even at the international level, is the supremacy of the law over other factors, for instance,

⁵⁷ Ademola Abass (n 40) 204.

⁴⁴ Olivier Corten (n 58) 341.

World Summit Outcome Document (n 16) paragraph 134(a).

arbitrary power/⁸⁶ As the Peruvian delegate to a 2006 Security Council debate affirmed, the international rule of law implies respect for the UN Charter and

* * * 87
international law. That may seem to imply that a regional organization is restricted from undertaking a timely and robust forceful intervention since the Security Council may be ineffective in authorizing forceful intervention due to the problem of the use of the veto by a permanent member.

However, a significant part of the problem could also be the unwillingness of the regional organization to constructively engage the Security Council in a timely manner for the authorization, or even the outright failure to seek a mandate for robust intervention. In some situations, a regional organization can even oppose an intervention for humanitarian purposes, like the case of the AU opposing any form of military intervention in Libya, while affirming Libya's territorial integrity. Attachment to the traditional concept of sovereignty by a regional organization can contribute to the organization's failure to engage the Security Council constructively, or even the desire to seek the alternative endorsement from the General Assembly where the Security Council is ineffective. For that purpose, based on an examination of the AU's subsequent practice, this thesis argues that the opportunity for a robust implementation of the AU's intervention mandate within the UN system is compromised by a systemic failure of institutionalization of the concept of sovereignty as responsibility.

According to Kelsen, the concept of sovereignty may have a variety of meanings.⁸⁹ Falk instructively observes that the concept of sovereignty may be conceptualized in different ways in order to facilitate the achievement of certain objectives.⁹⁰ The concept of sovereignty as responsibility implies that the authorities of a state have the responsibility to ensure that the lives and safety of a state's citizens

⁸⁶ Hisashi Owada, 'The Rule of Law in a Globalising World' in Francis Neate (ed). *The Rule of Law- Perspectives from Around the Globe* (LexisNexis, London 2009) 151, 153.

⁸⁷ UNSC Verbatim Record (22 June 2006) UN Doc S/PV 5474.

⁸⁸ African Union (n 5) paragraph 6.

⁸⁹ Hans Kelsen. 'Sovereignty and International Law' (1960) 48(4) *Georgetown Law Journal* 627. 627.

⁹⁰ Richard Falk (n 2) 68-69.

are protected, and that the state authorities are accountable to both the citizens and the international community.⁹¹

1.2.4.3.1 Conflict between sovereignty and intervention: greater sovereignty concerns

As Annan observes, although it is acceptable that both the principle of sovereignty and the value of protecting humanity should be supported, there is a dilemma in determining which value, of the two, should prevail when they conflict."⁹² The AU legal framework fails to effectively address this dilemma. It fails to provide a coherent and complementary relationship between sovereignty and intervention, which buttresses interpretative differences. The interpretative uncertainty has subsequently been constructed to the benefit and supremacy of sovereignty. Provisions that endorse the principle of intervention for human rights purposes include Article 4(h) of the Constitutive Act and Article 4(J) of the AU Peace and Security Council Protocol.⁹³ On the other hand, the principle of non-intervention is reaffirmed by Article 4 (g) of the Constitutive Act, prohibiting interference by a state in the domestic issues of another. In addition, Article 4(f) of the AU Peace and Security Council Protocol endorses the non-interference principle, while Article 4(e) of the Protocol provides that one of the guiding principles of the Peace and Security Council shall be 'respect for the sovereignty and territorial integrity' of members.⁹⁵

The fact that African states were still concerned with external (non-African) intervention may have contributed to the affirmation of the principles of non-intervention and sovereignty in that context within the AU's legal framework. There may also have been concerns that some African states could use Article 4(h) of the Constitutive Act intervention mechanism as a justification for interference in other states. Kalu describes the AU system as one which, although guarding against non-African Union interventions, enhances sovereignty (in a responsible context) and

⁹¹ International Commission on Intervention and State Sovereignty (n 2) paragraph 2.15.

⁹² Report of the Secretary-General: We the Peoples: The Role of the United Nations in the Twenty-First Century, UN Doc A/54/2000 (27 March 2000) paragraph 218.

⁹³ Kithure Kindiki (n 50)91.

⁹⁴ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

⁹⁵ Ibid.

human rights protection within the region.⁹⁶ However, Kalu's perceptions on the regional enhancement of responsible sovereignty and intervention for human rights purposes also seem not to reflect the actual practice of the African Union. An examination of the AU's subsequent practice in this thesis seems to demonstrate the failure to institutionalize the concept of sovereignty as responsibility, and specifically the failure to implement the forceful intervention mandate under Article 4(h) of the Constitutive Act. As Adejo observes, the continued state-centric nature of the AU system is demonstrated by principles that reaffirm the principle of non-interference, which have subsequently compromised implementation of the intervention framework established under Article 4(h) of the Constitutive Act." Adejo therefore correctly opines that the establishment of the AU intervention mechanism amounted to mere repainting of the preceding Organization of the African Unity (OAU) with a coat of fresh paint, but failed to tackle inner structural issues that are essential for effective intervention/"

It therefore seems that the AU intervention system had the purposes of also providing a mechanism through which African leaders could protect their interests by claiming ownership of African issues from the international community, especially on the critical issue of intervention and conflict resolution. That way, African leaders could address the risks associated with the region's historical vulnerability to external, non-African intervention at a time of increased global interdependence, including on human rights protection issues. Shortly after the formation of the AU, Udombana expressed the view that the Constitutive Act could even "provide a cover for Africa's celebrated dictators to continue to perpetrate human rights abuses."⁴⁴

The principle of sovereignty is an effective legal and political justification for non-intervention, or a shield from intervention. The concept of sovereignty provides states within the international community with an effective mechanism for avoiding

⁹⁶ Kelechi A Kalu, 'Resolving African Crises: Leadership Role for African States and the African Union in Darfur' (2009)9(1) *African Journal of Conflict Resolution* 9, 19.

⁹⁷ Armstrong M Adejo. 'From OAU to AU: New Wine in Old Bottles?' (2001) 4(I&2) *African Journal of International Affairs* 119, 136.

⁹⁸ Ibid 137.

⁹⁹ Nsongurua J Udombana. 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' (2002) 17(6) *American University International Law Review* 1 177, 1186.

the problems associated with intervention¹ In addition, the concept provides an effective veil through which states can express their interests and security concerns in a manner that is legally acceptable." For instance, it has been observed that in the case of the 1990s peace-enforcement in Bosnia, states contributing troops (like the UK) argued that forceful action would amount to an intervention in an internal conflict, and therefore undermined the Security Council mandate for intervention.¹⁰²

1.2.4.3.2 Overriding 'Westphalian sovereignty' concerns

The state based structure and configuration of the international society may be traced to the 1648 Peace of Westphalia, which brought to an end the Thirty Years War. The Westphalian model of sovereignty was premised on "iron curtain like" notion of the territorial state, which strongly affirmed "the external and internal autonomy of the state."¹⁰⁴ Westphalian sovereignty is therefore often used in reference to situations of conceptualization of sovereignty as sacrosanct, for which both internal and external interference is deemed as unjustifiable, with the preservation of such sovereignty assumed to override any other considerations, including human rights protection.¹

Whereas the African Union legal system does not preserve a Westphalian model of sovereignty in Africa in the proper sense, it nevertheless creates mechanisms that seek to protect some of the elements of the Westphalian model, which inhibit the effective institutionalization of the emerging 'responsible sovereignty' concepts. The tensions between sovereignty and intervention are maintained within the African Union legal system by enumerating the two sets of values but failing to establish complementarity and consistency, thereby condensing interpretative differences." Further, such uncertainty encourages greater influence of

¹⁰⁰ Richard Falk (n 2) 78.

¹⁰¹ Anthony Carty (n 27) 116.

¹⁰² Ibid 115.

¹ Antonio Cassese. *International Law* (Oxford University Press, Oxford 2001) 19.

⁴ Jackson Nyamuya Maogoto, "Westphalian Sovereignty in the Shadow of International Justice?: A Fresh Coat of Paint for a Tainted Concept" in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty: The End of Westphalia?* (Ashgate Publishing Ltd, Hampshire 2008)211,211.

¹⁰⁵ Richard Falk (n 2) 84.

¹⁰⁶ Kithure Kindiki (n 50)91.

contextual factors, such as political considerations and state interests, rather than the rule of law standards in AU decision making processes. As the next section indicates, there are inconsistencies between the AU intervention system and some of the emerging concepts of sovereignty as responsibility.

1.2.4.3.3 Inconsistencies with the emerging norm of responsibility to protect

Although the responsibility to protect concepts are still evolving, and are yet to translate to proper legal obligations, they would significantly assist in the institutionalization of the concept of sovereignty as responsibility within the AU system and processes. As already pointed out, the responsibility to protect has been endorsed by both the UN Security Council and the General Assembly. In 2001, the concept of responsibility to protect was coherently articulated by the ICISS Report.¹⁰ The Report advocated a conceptualization of sovereignty as a responsibility based principle.¹⁰⁸ The 2004 HLP Report argued that state sovereignty had evolved to include the obligation of a state to protect its citizens.¹¹⁰ Further, it asserted that the collective security mechanism implied that the international community could assume some of the territorial state's sovereignty responsibilities in accordance with the UN Charter.¹¹¹ The 2005 Outcome Document reaffirmed the international community's responsibility to protect, through the Security Council and in co-operation with regional organizations (where necessary), and implemented in a *timely* and *decisive* manner.^{1.2} Enforcement action is to be resorted to where peaceful means are inadequate despite state authorities, who bear the primary responsibility, being unable or unwilling 'to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'^{1.3} Having been endorsed by the General Assembly, the Resolutions are in the form of 'soft law' rather than a proper legal obligation to states.^{1.2} The concept of responsibility to protect has also been endorsed by the

¹⁰ International Commission on Intervention and State Sovereignty (n 2).

¹⁰⁸ Ibid paragraphs 2.14 - 2.15.

¹⁰⁹ High-Level Panel on Threats, Challenges and Change (n 15) paragraph 29.

¹¹⁰ Ibid.

¹¹¹ World Summit Outcome Document (n 16) paragraph 139.

^{1.2} Ibid.

^{1.3} Eric PJ Myjer and Nigel D White (n 42) 182.

Security Council."¹⁴ Even though not a proper legal norm or obligation, the concept has significant legal and political value." and is a coherent and progressive articulation of sovereignty as responsibility for both the territorial state and the international community.

Despite the significant notions of the responsibility to protect concept in addressing both the theoretical and practical dilemmas of intervention, there are some undesirable inconsistencies with the AU legal system. While the responsibility to protect concept points to the approach through which legal and political consensus may be achieved, for more effective intervention for humanity, the AU legal system is restrained by some of the traditional concepts of sovereignty. We have already observed that the AU framework fails to resolve the dilemma between state sovereignty preservation and intervention for human rights purposes. The AU is based on the principle of non-interference in a state's internal affairs by another."¹⁵ permitting Westphalian concepts of sovereignty to prevail. As Adejo has observed, the reaffirmation of the non-interference principles is an indication of the continued state-centric nature of the AU system, and this has hindered effective implementation of the intervention mandate under Article 4(h) of the Constitutive Act." In contrast, the 'responsibility to protect' concept acknowledges and preserves state sovereignty, but at the same time makes it the basis upon which the international community is to intervene. The norm conceptualizes state sovereignty as constituting a state's duty to protect its population from catastrophes, which is also the territorial state's obligation to the international community. Complementarity and synergy is therefore established between sovereignty and intervention, and between the roles of the state

¹⁴ See, UNSC Res 1674 (n 22). See also, UNSC Res 1894 (n 23).

¹⁵ Orford instructively points out that the responsibility to protect concept raises significant legal issues, even if it does not translate into binding legal obligations. She correctly observes that the concept represents a form of law that grants powers and provides jurisdiction to the international community for intervention purposes. Anne Orford (n 3) 25. The legal and political value of the responsibility to protect may also be discerned from the fact that the concept establishes a framework of complementarity between state sovereignty and intervention for human rights protection, thereby eliminating the problematic tension between the two fundamental principles. The concept limits the convenience by which sovereignty may be used as an effective legal or political justification for non-intervention by the international community, or as a shield from external action by the territorial state.

¹⁶ Article 4(g) of the Constitutive Act. See also Articles 4(e) and 4(0) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

¹⁷ Armstrong M Adejo (n 97) 136.

¹⁸ High-Level Panel on Threats, Challenges and Change (n 15) paragraph 29.

and the international community, for purposes of addressing the legal and political dilemmas of intervention.

The other inconsistency is that the African Union conceptualizes intervention for humanitarian purposes as a *right*. This conflicts with the emerging norm of responsibility to protect conceptualization of intervention, which is deemed as being a *responsibility*.¹¹⁹ A *responsibility* implies a duty, which is more helpful than viewing intervention as a right. A rights approach implies the discretion of the AU to either take action or not.¹²⁰ The ICISS Report noted that a *rights* approach is unhelpful since it focuses too much attention on the choices and concerns of the intervening states rather than on the critical requirements of the beneficiaries of the intervention.¹²¹ As Kindiki points out, conceptualizing the intervention mandate under Article 4(h) of the Constitutive Act as a right means that the AU has the discretion to either intervene or not,¹²² despite the occurrence or threat of genocide or crimes against humanity. The HLP Report notes that with regard to avoidable catastrophe, the issue is not about the *right* of states to intervene, but rather, it is about their *responsibility* to protect.¹²³ The responsibility to protect concept discards a rights approach and its corollary limitations, and therefore adopts 'the victims' point of view and interests, rather than questionable State-centred motivations.'¹²⁴ A duty generates a feeling of an obligation to its bearer to take action.'¹²⁵ The UN Secretary General has stated that the problem of intervention has partly been conceptual and doctrinal, including how states appreciate the issues and policy alternatives.¹²⁶

Ibid paragraph 201: World Summit Outcome Document (n 16) paragraph 139.

¹²⁰ Kithure 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, 106.

¹³¹ International Commission on Intervention and State Sovereignty (n 2) paragraph 2.28.

¹²² Kithure Kindiki (n 120) 106.

¹²³ High-Level Panel on Threats, Challenges and Change (n 15) paragraph 201. See also. World Summit Outcome Document (n 16) paragraph 139.

¹³⁴ Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445, 448.

¹²⁵ Pavlos Eleftheriadis, *Legal Rights* (Oxford University Press, Oxford 2008) 107.

¹²⁶ Report of the Secretary-General: Implementing the Responsibility to Protect (n 3) paragraph 7.

1.2.4.3.4 A synopsis of the AU's subsequent practice

An analysis of the AU's practice indicates that interventions have only been successful where consensual intervention or peacekeeping was adequate and appropriate, such as the case of Burundi.^{1"} In addition, the AU has commendably been successful in attaining political settlements through non-military intervention in the form of mediation, like in the case of 2008 post election violence in Kenya.¹⁰ In that sense, the AU has contributed to the improvement of security and human rights protection in Africa. However, the AU has also been unable to act in accordance with Article 4(h) of the Constitutive Act, which envisages forceful intervention to preempt or stop mass atrocities, even in deserving situations. The conflicts in Eastern Congo (since 1998), Darfur in Sudan (since 2003), Ivory Coast (2010-2011) and Libya (2011) seem to affirm the view that there has been failure to implement the forceful intervention mandate established under Article 4(h) of the Constitutive Act even in deserving situations.

In the case of the Eastern Democratic Republic of Congo, it was approximated that by April 2007 as many as 5.4 million deaths had occurred within the State due to the then nine years of civil war and the resulting humanitarian crisis.^{1"} Based on the long period that the Congo civil war has taken place, in addition to its humanitarian catastrophe, it has been regarded as the deadliest conflict in the world since the Second World War.' " Widespread atrocities of unimaginable brutality have been documented, perpetrated by both the militia and the Congolese

The 2003 African Union Mission in Burundi (AMIB), mandated to undertake a peace operation, was the first intervention by the AU. Tim Murithi, *The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia* (2008) 17(1) *African Security Review* 70, 75.

¹ ' After ethnic violence erupted in Kenya due to the disputed December 2007 elections, the Kofi Annan team, which was constituted and mandated to act by the AU under the auspices of the Panel of Eminent African Personalities, successfully mediated a political settlement that ended the crisis. See, Kofi Annan. 'Opening Remarks to the Opening Plenary Session - Kenya National Dialogue: One Year Later" (Geneva 30 March 2009) <<http://anafrica.com/stories/200903301452.html>> accessed 12 November 2010.

' International Rescue Committee, 'Mortality in the Democratic Republic of Congo: An Ongoing Crisis' (2007) <http://www.theirc.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf> accessed 18 December 2009. ii.

¹⁵⁰ *ib,d.*

armed forces. The major reason for the failure of the United Nations Mission in the Democratic Republic of Congo (MONUC) peacekeepers seems to be the mandate, size and resources of the troops. Democratic Republic of Congo, a state approximately the size of Western Europe, had only 16,700 'peacekeeping' troops in 2005, far too below the then security challenges.¹³² Having been officially launched in July 2002,¹³³ it would have been expected that the AU would have subsequently contributed through a direct military role to the alleviation of the conflict. This could have been by either supporting the UN peacekeeping efforts or advocating and implementing a more robust intervention mechanism. The AU has, however, not directly contributed troops to support the UN initiative, nor sought a military solution to the conflict.

In the case of the Darfur region of Sudan, by the turn of 2005 there were widespread and systematic atrocities that included killing of civilians, displacements, destruction of villages, rapes and other types of sexual violence that amounted to crimes against humanity.¹³⁴ According to the UN estimates of July 2010, an approximated 300,000 people had died in Darfur since the conflict began, with 2.7 million displaced.¹³⁵ Abass regrets that despite widespread gross violations of human rights by June 2004 (when the African Union intervention in Darfur began), the AU decided to deploy peacekeepers rather than conduct a 'humanitarian intervention.'¹³⁶ He states that subsequent actions by the AU have amounted to peacekeeping rather

¹³¹ United Nations News Centre, 'Sexual Violence against Women in the DR Congo Amounts to War Crime: UN Expert' (26 October 2007) <<http://www.un.org/apps/news/story.asp?NewsID=24436&Cr=democratic&CrI=congo>> accessed 28 June 2009.

¹³² Human Rights Watch, 'MONUC: A Case for Peacekeeping Reform' (28 February 2005) <<http://www.hrw.org/en/news/2005/02/28/monuc-case-peacekeeping-reform>> accessed 18 December 2009.

¹³³ See, African Union. 'Launch of the African Union, 9 July 2002: Address by the Chairperson of the AU. President Thabo Mbeki' <http://www.africa-union.org/official_documents/Speeches_&_StatementsTE_Thabo_Mbeki/Launch%20of%20the%20African%20Union,%209%20July%202002.html> accessed 16 June 2011.

¹³⁴ International Commission of Inquiry on Darfur. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> accessed 22 November 2009, 3.

¹³⁵ United Nations News Centre. 'Darfur: UN-African Union Peacekeeping Force Extended as Tensions Rise' (30 July 2010) <<http://www.un.org/apps/news/story.asp?NewsID=35493&Cr=Darfur&CrI=>> accessed 7 June 2011.

¹³⁶ Ademola Abass. 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia'(2007) *LI V Netherlands International Law Review* 415.420-423.

than humanitarian intervention.¹³⁷ The subsequently formed joint AU and UN force, the United Nations African Union Mission in Darfur (UNAMID) was nothing more than a larger peacekeeping force, and not a robust enforcement force despite previous unsuccessful peacekeeping, continued civil war and mass atrocities. Security Council Resolution 1769 expressly stated that the forces would be under unified command 'in accordance with basic principles of peacekeeping'.¹³⁸

Despite the Security Council passing Resolutions under its Chapter VII of the UN Charter powers,¹³⁹ it continued to emphasize its preference for the Government of Sudan to consent to intervention.¹⁴¹ It indicated preference for permission rather than imposition, a basic feature of traditional peacekeeping. However, although consensual intervention was desirable, thousands continued losing their lives and millions being displaced when it was very clear that the Sudan Government was itself unwilling to end its complicity and support for the *Jartjaweed* militia responsible for some of the atrocities.¹⁴¹

In the case of Ivory Coast (2010-2011), the AU focused on attaining a peaceful and political settlement to the conflict. There were allegations of mass graves due to organized killings of civilians during the conflict¹⁴² in addition to commission of various other forms of mass atrocities. In respect to Libya (2011), the AU expressly opposed any form of military intervention, including the establishment of a no-fly zone.¹⁴⁴ This was despite the request from the Arab League (which is the

Ibid 423. However, Abass later argues that in any case, the AU cannot be expected to conduct a humanitarian intervention as it lacks such powers, and thus, the United Nations is the one that should have intervened as such given its powers under Chapter VII of the UN Charter. Ibid 425.

¹³⁸ UNSC Res 1769(31 July 2007) UN Doc S/RES/1769.

¹³⁹ For instance, UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590.

¹⁴⁰ An example is Security Council Resolution 1706 (2006) which stated that the mandate of UNMIS would be expanded. However, the Resolution proceeded to request the consent of the Government of Sudan so that the deployment could be made. UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706.

For the Government of Sudan complicity in the conflict and support to the *Janjaweed* militia, see International Commission of Inquiry on Darfur (n 134) 3.

^M: African Union, 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/AHG/COMM.I(CCLXV) paragraph 6.

David Smith. 'Ivory Coast Mass Graves Investigation Launched by UN' *Guardian* (2 January 2011) <<http://www.guardian.co.uk/world/2011/jan/02/ivory-coast-mass-graves-investigation>> accessed 7 May 2011.

" On 10 March 2011, the AU issued a statement that rejected any foreign military intervention of any nature in Libya. African Union (n 5) paragraph 6.

other relevant regional organization to which Libya is a member) for the establishment of a no-fly zone in order to protect civilians,¹⁴⁵ and the fact that some NATO states were willing to intervene.¹⁴⁶ In addition, the AU opposed any form of intervention despite the then ongoing indiscriminate aerial attacks on civilians by the Libyan Government."

1.2.5 SUMMARY OF CONTENTIOUS ISSUES AND THESIS ARTICULATION

The above background indicates that there is uncertainty on the envisaged implementation mechanism for the AU's forceful intervention mandate leading to differing views of its relationship with the UN system. This has contributed to observations that the AU's forceful intervention mechanism is inconsistent with the UN Charter and international law. Therefore, alternative justifications for its implementation have been postulated. They include the alleged rule permitting humanitarian intervention, or the principle of consent. In addition, it has been opined that regional organizations' mandate under the UN Charter may be interpreted liberally to permit subsequent authorization by the Security Council. Further, other scholars have argued that an emergency session of the General Assembly can provide alternative authorization to the AU where the Security Council is ineffective. However, any alternative to Security Council authorization should be balanced with the international rule of law considerations, for which the UN system has a fundamental role. In addition, the above background indicates that the implementation of the AU's forceful intervention mandate has been undermined by continuing constraints of the Westphalian concept of sovereignty. It seems that the drawback, non-intervention oriented provisions within the AU legal framework have provided the foundation for the traditional concepts of sovereignty to prevail over intervention for human rights concerns.

¹⁴⁵ Security Council Resolution 1973 acknowledges the request from the Arab League. See, UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

¹⁴⁶ Intervention was commenced immediately upon authorization by the Security Council by France, United Kingdom and United States with other coalition partners. See, *British Broadcasting Corporation*, 'Libya: US, UK and France Attack Gaddafi Force' (20 March 2011) <<http://www.bbc.co.uk/news/world-africa-12796972>> accessed 27 March 2011.

¹⁴⁷ For attacks on civilians, see, UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

The central argument of this thesis is that although the necessity for the international rule of law restricts African Union's forceful interventions to United Nations authorized enforcement action, robust intervention by the Union within that framework is compromised by a systemic failure of institutionalization of the concept of sovereignty as responsibility. It addresses the following questions (although not necessarily in the order stipulated here):

Can either the doctrine of humanitarian intervention or consent of member states (by ratifying the Constitutive Act) provide a justification for forceful intervention by the African Union under Article 4(h) of the Constitutive Act, in the absence of authorization by the Security Council?

Is the African Union's legal framework for intervention consistent with the UN Charter and international law?

If the Security Council is ineffective in providing prior authorization for an African Union's forceful intervention, what are the reasonable alternatives that would safeguard the value of the international rule of law?

Is there lack of complementarity between the principles of sovereignty and intervention for humanitarian purposes within the AU legal framework, and does it encourage the effective use of sovereignty as a legal and political justification for non-intervention?

Can institutionalization of the concept of sovereignty as responsibility within the AU processes resolve the Union's legal and political dilemmas of intervention?

Were the 'peace keeping' and 'peace enforcement' approaches by the AU and the UN to the conflicts in Darfur, Sudan and the Eastern Democratic Republic of Congo appropriate, timely and effective?

1.2 SIGNIFICANCE OF THE RESEARCH

The contribution of this thesis is that it identifies legal, policy and contextual alternatives and factors that can transform the AU into an effective regional mechanism for institutionalization of the rule of law in the African region (by deterring gross human rights abuses) while at the same time safeguarding the values of the international rule of law. The use of a systemic method of analysis permits a

comprehensive examination of the conflict between legal norms and concepts related to state sovereignty and intervention for humanitarian purposes within the AU system, and provides a basis of evaluating possible solutions. In addition, this thesis addresses existing uncertainty on the impact and implication of the African Union's intervention system on the international law on intervention and the evolving role of regional organizations. Further, this thesis discusses the legal and policy significance of the concept of sovereignty as responsibility, and more specifically, the value of the emerging norm of responsibility to protect as a reference point for addressing the dilemmas of intervention within the AU system and in the progressive development of the international law on intervention.

1.4 CLARIFICATION OF CONCEPTS AND IMPORTANT PHRASES

1.4.1 ENFORCEMENT ACTION AS COMPRISING OF FORCEFUL INTERVENTION OF A MILITARY NATURE

Use of force under the UN Charter, including its prohibition by Article 2(4), denotes *military* forceful intervention, and is also referred to as enforcement action. When examined in its context, the phrase "force" as used in Article 2(4) of the UN Charter denotes military force, and excludes economic or other psychological pressure, if such other action does not include use or threat of force.¹⁴⁸ The phrase 'enforcement action' or 'enforcement measures' (which denotes forceful intervention of a military nature), is subsequently used in Articles 2(7) and 53(1) of the UN Charter. Article 2(7) of the UN Charter specifically exempts enforcement measures, as identified in Chapter VII of the UN Charter, from prohibition of intervention in internal affairs of a state. Under Article 42 of the UN Charter, such measures include 'action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.' In the *Certain Expenses of the United Nations* case, the International Court of Justice (ICJ) clarified that enforcement action, as provided under the Charter of the UN, is contemplated to be without the consent of the territorial state.¹⁴⁹ In this thesis, the phrases 'enforcement action' and 'forceful

¹⁴⁸ Yoram Dinstein (n 50) 88.

¹⁴⁹ *Certain Expenses of the United Nations* (n 29) 170.

intervention' are used interchangeably and both refer to the use of military force to stop or pre-empt gross human rights violations, in accordance with the collective security system of the United Nations, without the consent of the territorial state.

1.4.2 HUMANITARIAN INTERVENTION AS INDEPENDENT ENFORCEMENT ACTION OUTSIDE THE UN SYSTEM

Although the phrase 'humanitarian intervention' usually refers to forceful intervention or enforcement action, it is often advocated as an independent alternative to the inefficiencies of the United Nations organs. In addition, the intervention is deemed to be undertaken by a state or a 'coalition of the willing' without the consent of the territorial state. Buchanan defines humanitarian intervention as the use of force across state borders, by a state, with the objective of pre-empting or stopping gross violations of the fundamental human rights of foreign nationals, in the absence of the territorial state's consent.¹¹ Teson defines such intervention as the proportionate transboundary assistance, including forcible action, to nationals in another state who face denial of basic human rights.¹¹ Developments in customary international law are often used to justify humanitarian intervention without express Security Council authorization.¹⁵²

The Security Council can authorize humanitarian intervention. In this thesis, such intervention undertaken under the auspices of the UN system is defined as enforcement action or forceful intervention for humanitarian or human rights protection purposes.¹⁵³ The purpose of the distinction is to avoid conceptual ambiguities with the predominant postulation of the alleged rule of humanitarian

Allen Buchanan. 'Reforming the International Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge 2003)130, 130.

¹¹ Fernando R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers. New York 1988) 5.

" For instance. Greenwood argues that treaties are not the only source of international law, as it also includes customary international law, which evolves through state practice and is therefore dynamic. Greenwood argues that state practice since 1945 indicates an evolution towards greater concern for human rights protection. Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 *International and Comparative Law Quarterly* 926, 929.

¹⁵ Under its Chapter VII of the UN Charter powers, the Security Council can authorize enforcement action if it is of the view that widespread violations of human rights and humanitarian law within a state are a threat to international peace and security.

intervention as an independent and acceptable basis for military action outside of the UN system. Claims of legality of humanitarian intervention are generally premised on allegations for the existence of an independent customary rule permitting such action,¹⁵⁴ even without authorization from the UN and in the absence of the consent of the territorial state. Where consent exists, there is no necessity of legally invoking the humanitarian intervention concept since it amounts to the justifiable and acceptable intervention by invitation."¹⁵⁵ Further, if the states undertaking enforcement action have been given proper mandate by the authorized bodies of the international community, for which the Security Council would be the foremost, it is not appropriate, in legal context, to connect it to the concept of humanitarian intervention.¹⁵⁶ For purposes of this thesis, humanitarian intervention means non-consensual intervention by a state, in the territory of another, to stop gross violations of human rights, involving the use of force, but without authorization by the United Nations.

1.4.3 INTERVENTION BY CONSENT AS DIFFERENT FROM ENFORCEMENT ACTION

Intervention pursuant to the consent of the territorial state, or after its invitation, is not enforcement action and therefore cannot be deemed as requiring authorization by the Security Council. According to Cassese, the principle of consent in international law is a replication of the universally accepted principle of *volenti non fit injuria* (an act that would otherwise be illegal is not if there was prior consent of the party whose rights have been infringed) in state laws.¹⁵⁷ Actions of the intervening state however must be maintained within the bounds of the consent, and

¹⁵⁴ According to Greenwood, developments in customary international law permit humanitarian intervention in extreme situations and as a last resort, where it is the only reasonable means of ending loss of lives. Christopher Greenwood (n 152) 931.

¹⁵⁵ Robert Kolb, 'Note on Humanitarian Intervention' (2003) 85(849) *International Review of the Red Cross* 119, 119.

¹⁵⁶ Ibid. Kolb argues that the view is premised on the fact that the intervening states would have a proper legal mandate delegated to them, and although the object of the action may be 'humanitarian intervention,' in the legal context, the phrase would be misleading and should therefore be avoided. Ibid 119-120.

¹⁵⁷ Antonio Cassese (n 103)316.

if consent is withdrawn, the intervening state must likewise cease its activities. Therefore, although intervention pursuant to consent or invitation may involve the use of armed force, it is not a form of enforcement action since it is premised on the permission and control of the government of the territorial state. According to Article 3(e) of the Resolution on the Definition of Aggression, consensual intervention should not exceed the terms provided in the agreement with the territorial state, or extend beyond the permitted period.¹⁵ Unlike enforcement action, the capacity of a state to request, consent to or refuse an intervention from other states is itself an expression of its sovereign independence and powers.

1.4.4 PEACEKEEPING AND PEACE ENFORCEMENT AS DIFFERENT FROM ENFORCEMENT ACTION

Peacekeeping had been invented and developed by the United Nations as an alternative for failures to undertake enforcement action under Chapter VII of the UN Charter.¹⁶⁰ It was envisaged to be an impartial activity, executed with the consent of the parties and in which force was only used in self-defence. " The nature of the post Cold War conflicts led to expanded roles for peacekeeping, and led to the advent of new terminologies such as 'wider peacekeeping,' 'second generation peacekeeping operations.' 'strategic peacekeeping.' 'peace support operations' and 'peace enforcement.'"¹⁶¹ The terminologies are more of scholarly phrases that evolved to describe the emerging Chapter VII of the UN Charter use of force powers that were being extended to peacekeeping missions.

Peace enforcement or second generation peacekeeping approach has not been effective in protecting civilians where there is no peace to keep. It has often failed to transform into robust enforcement action to create peace, and deter the perpetrators of

¹⁵ David Wippman, "Military Intervention, Regional Organizations, and Host-State Consent (1996) 7 *Duke Journal of Comparative and International Law* 209, 234-235.

^{15a} Definition of Aggression (n 14).

¹⁶⁰ Erik Suy, 'Is the United Nations Security Council Still Relevant? And was it Ever? (2004) 12 *Tulane Journal of International and Comparative Law* 7, 13.

¹⁶¹ Ralph Zacklin, 'The Use of Force in Peacekeeping Operations' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Martinus Nijhoff Publishers, Leiden 2005) 91.

^{161a} Funmi Olonisakin, *Reinventing Peacekeeping in Africa: Conceptual and Legal Issues in ECOMOG Operations* (Kluwer Law International, The Hague 2000) 6.

the atrocities, despite the use of force mandate. The concept of peace enforcement is contradictory as it has remained tied to some of the core attributes of the traditional peacekeeping such as consent of the territorial state, without robust use of military force (to enforce ceasefires). It has often not translated to enforcement action as provided in the UN Charter, which may be necessary to ensure effective civilian protection in ongoing conflicts, especially where there is no peace to maintain. Often, though referred to as peace enforcement in theory, in the implementation phase, it has proved to be nothing but peacekeeping. Higgins argues that insistence on undertaking 'the new-style UN peacekeeping operations' in situations that evidently require enforcement 'is simply a turning away from unpleasant realities.'¹⁶³ The more appropriate approach in most conflicts would be for robust enforcement action to create peace and protect civilians by stopping both the conflict and mass atrocities by the relevant parties to the conflict. Thereafter, upon the cessation of the fighting, and when the parties to the conflict are willing to cooperate, peace keeping may be undertaken, when there is peace to keep.

1.4.5 MEANING AND ATTRIBUTES OF SOVEREIGNTY

It should be acknowledged that the concept of sovereignty is, to an extent, flexible and consequently, it is not possible to provide a single, comprehensive definition.¹⁶⁴ However, the core attributes of the concept will be elucidated. Sovereignty may be described as a form of legitimate authority that is not merely a power, and which is currently prescribed by law.¹⁶⁵ An important aspect in the concept of sovereignty is territoriality, with the people upon which the sovereignty is exercised being defined by their location within certain borders, and not by other factors such as religious affiliations or kinship.¹⁶⁶ Sovereignty exemplifies the supreme right and power of a state to decide the circumstances of its internal structure

¹⁶³ Rosalyn Higgins (n 8) 287.

¹⁶⁴ Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, Oxford 2005) 6-7.

¹⁶⁵ Daniel Philpott, "Ideas and the Evolution of Sovereignty" in Sohail H Hashmi (ed). *State Sovereignty: Change and Persistence in International Relations* (Pennsylvania State University Press, Pennsylvania 1997) 15, 18.

¹⁶⁶ Ibid 19.

and order.¹⁶ According to Dinstein, in the international law context, sovereignty is conceived as an attribute of the state as part of the international society.¹⁶⁸

Sovereignty has both internal (territorial) and external (international) implications. While internal sovereignty exemplifies the competence of the state authorities to govern their affairs within the state borders, external sovereignty represents the right of independence and inviolability (non-interference) of the state by others.¹⁶⁹ Morgenthau acknowledges that sovereignty does not amount to liberty from some legal restraint.¹⁷⁰ "The sovereign liberty of states is limited by international law obligations. Independence and equality of states and the non-intervention requirement are some of the core attributes of sovereignty. In respect of independence, Max Huber, the Arbitrator in *Island of Palmas* case, noted that '[sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'¹⁷¹ The principle of non-intervention, in addition to that of sovereign equality, is intended to guarantee that each state 'respects the fundamental prerogatives of the other members of the community.'¹⁷²

As Kelsen observes, a variety of meanings may be attributed to the concept of sovereignty.¹⁷³ Sovereignty may be conceptualized in certain ways in order to achieve specific objectives.¹⁷⁴ Just like other norms and principles of international law, sovereignty evolves in the context of international community expectations and practices.¹⁷⁵ Factors influencing its evolution include the international protection of

Karl Loewenstein, 'Sovereignty and International Co-operation' (1954) 48(2) *American Journal of International Law* 222, 222.

¹⁶ Yoram Dinstein, 'Sovereignty, The Security Council and the Use of Force' in Michael Bothe, Mary Ellen O'Connell and Natalino Ronzitti (eds), *Redefining Sovereignty: The Use of Force After the Cold War* (Transnational Publishers, New York 2005) 111, 111.

¹⁶⁹ Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, Hampshire 2010) 45.

¹⁷⁰ Hans J Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948) 48(3) *Columbia Law Review* 341, 347.

¹⁷¹ *Reports of International Arbitral Awards, Island of Palmas Case (Netherlands v United States of America)* 4 April 1928, Volume II, 829, 838. Independence from all other states is regulated by and derived from international law. Yoram Dinstein (n 168) 112.

¹⁷² Antonio Cassese (n 103) 98.

¹⁷³ Hans Kelsen (n 89) 627.

¹⁷⁴ Richard Falk (n 2) 68-69.

¹⁷⁵ *Ibid* 69.

human rights and the unavoidable interdependence between states.¹⁷⁶ However, the prohibition of intervention in domestic affairs of a state, an element of sovereignty, may conflict with the value of human rights protection internationally, which may at times necessitate external intervention.¹⁷⁷ There has been a steady evolution of the conceptualization of sovereignty from the sacrosanct Westphalian model, which in recent times has been exemplified by the emerging norm of 'responsibility to protect,' amongst other factors. The concept of sovereignty as responsibility implies that authorities within a state have the responsibility to ensure the protection of the lives and safety of the population within the state, and such authorities are accountable to both the citizens of the state and the international community.¹⁷⁸ The emerging norm of responsibility to protect is actually based on the concept of sovereignty as responsibility. It implies an evolution from some of the concepts of the traditional Westphalian notions of sovereignty.¹⁷⁹

The concept of responsible sovereignty does not postulate an end to the current state based organization of the international community, an issue that is clarified in the relevant chapters of this thesis. It simply has the objective of ensuring that the principles of sovereignty and non-intervention, which are important values of the international community, become more productive and serve their core purpose, that of ensuring effective populations of a state from avoidable humanitarian catastrophes.¹⁸⁰ The phrase 'sovereignty as responsibility' is used interchangeably with 'responsible sovereignty.' Various other relevant sovereignty conceptions will

¹⁷⁶ Yoram Dinstein (n 168) 114.

¹⁷⁷ Michael Bothe, Marina Mancini and Natalino Ronzitti, "Report from Rome on Redefining Sovereignty: The Use of Force after the End of the Cold War: New Options. Lawful and Legitimate?" in Michael Bothe, Mary Ellen O'Connell and Natalino Ronzitti (eds), *Redefining Sovereignty: The Use of Force After the Cold War* 3, 5.

¹⁷⁸ International Commission on Intervention and State Sovereignty (n 2) paragraph 2.15.

¹⁷⁹ As already discussed. Westphalian sovereignty is a phrase often used in reference to the sacrosanct model of sovereignty that was attributed to statehood in the 1648 Peace of Westphalia. It has been observed that the basic rule of Westphalian sovereignty was non-intervention in the domestic matters of other states. Stephen D Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 *Michigan Journal of International Law* 1, 3.

¹⁸⁰ The UN Secretary General has instructively stated that the responsibility to protect (which actually postulates the concept of sovereignty as responsibility) 'is about reasserting and reinforcing the sovereign responsibilities of the State.' Report of the Secretary-General: The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect, UN Doc A/65/877 (27 June 2011) paragraph 10.

be expounded on in the relevant parts of this thesis, and they include the concept of 'pooled sovereignty'¹⁸¹ and 'shared sovereignty.'¹⁸²

1.4.6 THE CONCEPT OF THE RULE OF LAW WITHIN THE INTERNATIONAL COMMUNITY

The concept of the rule of law is essential to this thesis since the implementation of the African Union's forceful intervention mandate, and the general principle of intervention within the international community, have an impact on the rule of law both in the African region and internationally. Intervening to prevent systematic and egregious violations of human rights is itself enforcing the rule of law within the African region, and a deterrent towards future violations.¹⁴ An effective regional forceful intervention mechanism is likely to have a deterrent effect on gross violations of human rights and humanitarian law, and therefore contribute to the institutionalization of the rule of law in Africa.¹⁴

¹⁸¹ Although there is still the *sharing of sovereignty* in 'pooled sovereignty' context, this thesis is based on the view that the overriding theme and concern in pooling of sovereignty is to strengthen the sovereign claims or concerns of the individual states that join together. Therefore, in the 'pooled sovereignty' context, despite the states joining together to form an intergovernmental organization, sharing of sovereignty is avoided in some critical political matters, while there is tendency to assert the principle of non-interference in domestic affairs of the member states. For instance, despite the African Union framework, it has been observed that there is unwillingness of effective practical transfer of sovereignty by African governments, or to efficiently implement commonly agreed obligations and policies. Daniel Bach, 'The Global Politics of Regionalism: Africa' in Mary Farrell, Bjoro Hettne and Luk Van Langenhove (eds). *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005 London) 171, 185. It has also been argued that third world states are generally unwilling to follow European model and precedents that seem to indicate more 'genuine' intrusive regionalism. Amitav Acharya, 'Regionalism and the Emerging World Order: Sovereignty, Autonomy, Identity' in Shaun Breslin, Christopher W Hughes, Nicola Phillips and Ben Rosamond (eds), *New Regionalisms in the Global Political Economy* (Routledge, London 2002) 20. 31.

Shared sovereignty is exemplified by the joining of states to form intergovernmental agencies that result in greater and practical integration and transfer of sovereign powers on critical state issues. Establishment of the shared-sovereignty entities is characterized by voluntary agreements amongst states or between states and other external actors such as intergovernmental organization. Stephen D Krasner. 'The Case for Shared Sovereignty' (2005) 16(1) *Journal of Democracy* 69, 70.

Chesterman is of the view that the adoption of the responsibility to protect concept in the 2005 World Summit requires to be replicated by initiatives to create the rule of law in weak states, including unambiguous opposition to impunity. He also states that the interveners should also be governed by the rule of law. Simon Chesterman. 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System' *Final Report and Recommendations from the Austrian Initiative, 2004-2008*, UN Doc A/63/69 (7 May 2008) paragraph iii (executive summary).

¹⁸⁴ In 2004, Annan observed that institutionalization of the rule of law, including within states, was a core concern of the UN. Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (23 August 2004) paragraph 6. The failure of the concepts that define the rule of law within a state are what eventually translates into gross

The thesis is therefore concerned with the role of the AU in institutionalizing the rule of law within African states by deterring mass atrocities, and in the maintenance of the rule of law within the international community. Although the concept of the rule of law has been embraced by the international community, there is some ambiguity on what it refers to.¹⁸⁵ The concept of the international rule of law is characterized by some of the notions of the rule of law at the state level.¹⁸⁶ This section will highlight three of the core elements that may be associated with the rule of law within the international community, and which will be the concern of this thesis. First, a fundamental attribute of the rule of law is the supremacy of the law rather than the influence of other factors such as arbitrary power.¹⁸⁷ As the Peru delegate in a 2006 Security Council debate stated, the international rule of law implies respect for international law and the UN Charter.¹⁸⁸ Undertaking forceful intervention within the alternatives of the collective security system of the United Nations enhances the international rule of law. Disregard for the United Nations security framework could erode the international rule of law. According to Chesterman, the notion of 'supremacy of the law' is what distinguishes the rule of law from rule by the law. That implies that even the Security Council has an obligation to act in accordance with the UN purposes and principles, as required by Article 24(2) of the UN Charter, and the failure of the Council to act as such can be challenged by member states through the more representative General Assembly. As Chesterman states, the concept of the rule of law within the international community is a 'confirmation that international law applies to international organizations in general and to the UN Security Council in particular.'¹⁸⁹

violations of human rights and humanitarian law (for instance, in the form of genocide, crimes against humanity and war crimes).

¹⁸⁵ Simon Chesterman (n 183) paragraph ii (executive summary).

¹⁸⁶ After a detailed historical and philosophical analysis of the evolution of the concept of the rule of law at the state level, Chesterman summarizes the three core elements of the rule of law within a state as comprising 'government of laws, the supremacy of the law, and equality before the law.' Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, 342.

¹⁸⁷ Hisashi Owada (n 86)153.

¹⁸⁸ UNSC Verbatim Record (n 87).

¹⁸⁹ Simon Chesterman (n 183) paragraph 14.

¹⁹⁰ Ibid.

Secondly, an element of the rule of law is equality of all subjects before the law. " In the international context, the rule of law would include 'consistent application of international law to States and other entities.' Thirdly, the substantive element of the concept requires that the law itself be sound for the rule of law to be said to exist.¹¹" A significant condition of the rule of law is the requirement that the law itself should be exercised in accordance with certain standards of justice, both substantial and procedural.¹⁴⁴

1.5 REVIEW OF RELEVANT LITERATURE

There are various legal, political and contextual factors that have contributed to the uncertainty, and lack of coherence in the existing literature with respect to the meaning of the AU's right of intervention for humanitarian purposes, its implementation mechanism and its impact on the structures of international law on intervention. First, there are various sources of international law, besides treaties such as the UN Charter. Other sources of international law include customary law and principles of international law.¹⁴⁵ Second, there is uncertainty within the AU legal framework, especially on the implementation mechanism of the forceful intervention mandate. Corten acknowledges the uncertain position of the AU's legal framework for intervention.¹⁴⁶ The fact that there can be uncertainty on the meaning of a treaty, or its relationship with other treaties, is also acknowledged by the 1969 Vienna Convention on the Law of Treaties.¹⁴⁷ Article 32(a) of the Vienna Convention specifically calls for recourse to supplementary means of treaty interpretation when the general rules result in an "ambiguous or obscure" meaning.¹⁴¹ In addition, the

Hisashi Owada (n 86) 153. See also, Ian Brownlie, *Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Kluwer Law International, The Hague 1998)214.

Simon Chesterman (n 183) paragraph 15.

^{1,3} Hisashi Owada (n 86) 154.

⁴ Ian Brownlie (n 191) 215. As Watt observes, since laws can be unjust or oppressive. The supremacy of the law cannot be the sole determination of the existence of the rule of law. He instructively states that the law should be consistent with fundamental notions of justice' for the concept of the rule of law to operate. Arthur Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15, 23.

Statute of the International Court of Justice (n 79).

^{1,6} Olivier Corten (n 58) 341.

Vienna Convention on the Law of Treaties (n 77).

⁸ Ibid.

interpretation of both the UN Charter and the AU's legal framework may be modified by subsequent practice.¹⁹⁹ Third, both the principle of state sovereignty and the value of intervention for human rights protection may be manipulated by states to justify certain legal and political objectives.²⁰⁰ Fourth, the implementation of the principle of intervention (and even its establishment) is affected by environmental factors such as international politics, the African region's historical vulnerability to external interference and increasing global interdependence.

There are divergent views on whether the alleged rule permitting humanitarian intervention, or on the principle of consent, can provide a justification for an AU intervention where there is lack of Security Council authorization. If it is necessary to act within the UN system for purposes of enhancing some values in the international community, such as the international rule of law, there are varying views on whether an emergency session of the General Assembly can provide an alternative authorization where the Security Council is ineffective. In addition, there is the question of whether a liberal interpretation of Article 53(1) of the UN Charter to permit subsequent authorization of an AU intervention (by the Security Council) is justifiable.

In addition, despite the limited literature that examines the effects of the interplay between the principles of sovereignty and intervention for humanitarian purposes within the AU system, there lacks a detailed analysis of the subsequent practice by the Union which places all the relevant regional conflicts into perspective. A preliminary examination of the AU's subsequent practice, in this thesis, seems to suggest that the principle of non-intervention has continued to prevail over that of intervention for humanitarian purposes. The above mentioned factors, which inform both this literature review and the more concrete analysis of the relevant issues in the substantive part of this thesis, indicate the necessity of a systemic and comprehensive

¹⁹⁹ Under Article 31(3) of the Vienna Convention, subsequent agreements that have an impact on the application of the treaty, and the subsequent practice that contributes to such agreements, are to be considered when constructing the meaning of the provisions of a treaty. Ibid.

²⁰⁰ For instance, Falk instructively observes that the concept of sovereignty may be put to use in different ways in order to achieve certain objectives. Richard Falk (n 2) 68-69.

research on the meaning, implementation mechanism and impact of the AU's right of intervention.

1.5.1 FORCEFUL INTERVENTION: RELATIONSHIP BETWEEN THE UN AND THE AU

Allain¹ and Kindiki² have argued that the AU forceful intervention mechanism is inconsistent with the UN Charter. However, they do not carry out an extensive examination of the relevant provisions of the AU legal framework, in order to have a comprehensive analysis. For instance, they do not take into account subsequent practice and agreements between the AU and the UN. Gray³ and Dinstein⁴ have suggested that the AU's legal framework cannot prevail over the UN system. On the other hand, Corten is of the view that despite the ambiguities within the AU legal system, it is in conformity with the UN Charter. " The International Law Commission (ILC) seems to regard the AU forceful intervention mechanism as consistent with international law, even proceeding to suggest that its implementation may be justifiable on the basis of consent by treaty due to political integration of member states through the African Union. " Based on the forgoing uncertainty on the relationship between the AU and the UN systems, both of which have intervention mandates in the African region, it is necessary to examine the nature of the relationship, and provide accurate recommendations for the implementation of the AU's intervention mandate.

Jean Allain (n 50) 284-285.

Kithure Kindiki (n 50) 89.

According to Gray, despite the AU endorsing a right of humanitarian intervention at a regional level through Article 4(h) of its Constitutive Act, it cannot prevail over the UN Charter. Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 53.

⁴ Dinstein argues that a legal framework that attempts to authorize a regional organization such as the AU to undertake forceful intervention within a state (even when the government of the subject state is opposed to such action) is inconsistent with the UN Charter. Yoram Dinstein (n 50) 123.

³ Olivier Corten (n 58) 341-345.

The ILC suggests that the African Union may be an example of a regional organization whose intervention framework is not inconsistent with the peremptory norm prohibiting unlawful use of force since the AU's mandate of forceful intervention arises out of political integration of member states. ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/564 paragraph 48. The African Union example is in a footnote comment.

1.5.1.1 *Authorization by the Security Council and alternatives within the UN system*

According to Sarooshi, regional arrangements lack the legal capacity to undertake enforcement action without prior Security Council authorization on the basis of Article 53(1) of the UN Charter.²⁰⁷ Myjer and White also argue that the competence of regional organizations to undertake enforcement action without prior Security Council authorization cannot be justified from either customary or conventional international law, and that the formulation of Article 53 of the UN Charter remains central. ²⁰⁸ However, on the other hand, a flexible interpretation of the time of authorization by the Security Council, including *ex post facto* validation of an intervention, or alternative authorization by the General Assembly in instances where the Security Council is ineffective, has been postulated.

With regard to subsequent authorization by the Security Council, Franck opines that a forceful intervention may be validated retroactively by the Council either explicitly or implicitly by a "commendation" which is followed by partnership with the UN.²⁰⁹ Abass argues that since the time of authorization is not expressly stated in Article 53(1) of the UN Charter, then a regional organization can interpret the clause flexibly to include subsequent validation."²¹⁰ However, Myjer and White dispute such views, suggesting that even a claim of emerging customary law cannot provide such justification since there lacks uniformity of state practice and *opinio juris*.²¹¹ Gazzini also contends that by developing an *ex post facto* authorization, the Security Council would contradict the whole rationale of collective security system since the Council was meant to deal with ongoing matters."²¹²

In the case of the competence of the General Assembly to provide alternative authorization where the Security Council is ineffective, Gray observes that using the Uniting for Peace resolutions, the General Assembly could call emergency meetings

²⁰⁷ Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, Oxford 1999) 248.

²⁰⁸ Eric PJ Myjer and Nigel D White (n 42) 178-179.

²⁰⁹ Thomas M Franck (n 40) 223.

²¹⁰ Ademola Abass (n 40) 53-55.

²¹¹ Eric PJ Myjer and Nigel D White (n 42) 182.

²¹² Tarcisio Gazzini. *The Changing Rules on the Use of Force in International Law* (Manchester University Press, Manchester 2005) 91.

in the event the Security Council was paralyzed (by lack of unanimity of the permanent members) to execute its responsibility for the maintenance of international peace and security." The General Assembly alternative has been supported by various scholars. For instance, Franck specifically opines that the AU can seek alternative authorization from the General Assembly, and therefore avoid a veto prone Security Council.²¹⁴ Reisman and McDougal argue that where the Security Council is unable to act despite extreme human rights violations, the secondary authority of the General Assembly, which was endorsed by the Uniting for Peace Resolution, can be invoked.²¹⁵ Brownlie and Apperley are of the view that NATO should have requested a Uniting for Peace Resolution from the General Assembly (before invading Kosovo in 1999) rather than act illegally.²¹⁶ However, the acceptability of the General Assembly as an authorizing alternative has also been doubted by other scholars. Murphy observes that the Uniting for Peace resolutions basis within the UN Charter is ambiguous, while their limited contextual use leads to doubts about their continued vitality.¹⁸ According to Akehurst, by allocating the power to authorize enforcement action by regional organizations to the Security Council and not any other organ, the states intended the Council to have a monopoly of such powers.¹⁸

It should be taken into account that the Security Council is also a political organ. Therefore, political considerations by a permanent member might render the Council ineffective from discharging its primary responsibility with regard to other fundamental UN values that are related to peace and security, such as the stoppage or pre-emption of genocide and crimes against humanity. The fact that the Security Council may be ineffective is self-evident as there are instances of its failure in the past. For instance, the Council failed to authorize intervention in the early days of the 1994 Rwanda genocide. Taking into account the opposing views on the acceptability

Christine Gray (n 203) 260. See Uniting for Peace Resolution (n 67).

^{1,4} Thomas M Franck (n 51) 100.

²¹⁵ Michael Reisman and Myres S McDougal (n 75) 190.

Ian Brownlie and CJ Apperley (n 10) 904.

¹ Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, Philadelphia 1996)300.

* Michael Akehurst 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of the American States' (1967) 42 *British Yearbook of International Law* 175, 215.

of subsequent validation of a regional organization's intervention and alternative General Assembly authorization, this thesis examines whether such mechanisms provide a necessary and possible option in the context of the implementation of the AU's forceful intervention mandate.

1.5.2 AU'S ALTERNATIVES OUTSIDE THE UN SYSTEM: HUMANITARIAN INTERVENTION

It has been alleged that a rule permitting humanitarian intervention exists, either as an exception to the use of force prohibited in Article 2(4) of the UN Charter, or as having emerged within customary international law on account of state practice and *opinio juris*. If such a rule exists, then a forceful intervention premised on such a justification by a state or regional organization would not require authorization by the Security Council for the action to be acceptable. With regard to the African Union intervention framework, Levitt²¹ and Sarkin²² argue that the African Union's 'right' of intervention represents the rule of humanitarian intervention. Teson argues that humanitarian intervention is acceptable as a general exception to Article 2(4) of the UN Charter's prohibition of forceful intervention.²³ Greenwood is of the view that a custom permitting humanitarian intervention has evolved, observing that in times of severe human rights violations, states have been willing to assert such a right as the last resort for providing protection.²²² Falk also seems to endorse such views when he suggests that the 1999 NATO invasion of Kosovo exemplified 'a strong burden of persuasion' characterized by a 'rejection of the United Nations framework of legal restraint on the use of force.'^{22j} To Falk, such a burden is discharged if there are credible probabilities of a humanitarian catastrophe if action is not taken.²²⁴

On the other hand, it has also been postulated that an AU's forceful intervention requires authorization from the Security Council. In addition, it has also been argued that there lacks sufficient state practice and *opinio juris* to support the

^{2,9} Jeremy Levitt (n 49) 232.

" " Jeremy Sarkin (n 52) 8.

²²¹ Fernando R Teson (n 151) 129.

²³² Christopher Greenwood (n 152) 929.

²²³ Richard A Falk. 'Kosovo, World Order, and the Future of International Law' (1999) 93(4) *American Journal of International Law* 847, 856.

²²⁴ *Ibid.*

existence of a rule permitting humanitarian intervention. With regard to the African Union's intervention framework. Gray,"

Franck, Kindiki" and Yusuf²²⁵ have observed that the Security Council authorization is required. Brownlie and Apperley are on the view that humanitarian intervention cannot be justified either on the basis of the UN Charter or customary international law,"²²⁶ a view that is also postulated by Chesterman.²²⁷ Others who dispute the existence of an independent right of humanitarian intervention and identify the need for Security Council authorization for interventions for humanitarian purposes include Simma,²²⁸ Bowett²²⁹ and Cassese.²³⁰

Besides the existence of such a customary law being questionable, the fact that any state, or a group of states, may be allowed to intervene within other states upon their own subjective judgments, and without proper institutional regulation, either regionally or globally, can easily lead to erosion of the international rule of law through anarchy. For instance, the ICJ found that Uganda's intervention in the Democratic Republic of Congo had contributed to gross violations of human rights and humanitarian law within the state."²³¹ Based on the above uncertainty on whether the alleged rule permitting humanitarian intervention provides an alternative justifiable basis for the implementation of the AU's forceful intervention mandate, this thesis evaluates state practice and *opinio juris* to determine whether there is such an option in customary law.

²²⁵ Christine Gray (n 203) 53.

²²⁶ Thomas Franck (n 51) 100.

²²⁷ Kithure Kindiki (n 120) 108.

²²⁸ Abdulqawi A Yusuf. 'The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?' (2003) 11 *African Yearbook of International Law* 3, 21.

²²⁹ Ian Brownlie and CJ Apperley (n 10) 904.

²³⁰ Simon Chesterman. *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press, Oxford 2001) 226.

²³¹ Bruno Simma. 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1, 5.

^{1.1} He was of the view that 'humanitarian intervention* at the time required either the consent of the territorial state, or authorization from the United Nations. Derek W Bowett, 'The Use of Force for the Protection of Nationals Abroad.' in A Cassese (ed). *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht 1986) 39, 50.

^{•1} He observes that though the 1999 NATO invasion of Kosovo was *morally* justifiable, it was contrary to international law. Antonio Cassese, '£* *iniuria ius oritur*: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community' (1999) 10(1) *European Journal of International Law* 23, 25.

⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 paragraph 207.

1.5.3 WHETHER ARTICLE 4(H) OF THE CONSTITUTIVE ACT ENVISAGES CONSENSUAL INTERVENTION

Abass postulates the view that the African Union may justify its forceful intervention under Article 4(h) on *general consent*, particularly due to the ratification of the Constitutive Act by a member state.³³⁵ That would imply that considerations of the UN system can be dispensed with, as authorization from the Security Council would not be necessary. Abass, however, seems to fail to separate intervention under Article 4(j) of the Constitutive Act, which is premised on *specific* request and invitation of the territorial state, and is outside the regulation of the Security Council, with intervention under Article 4(h) of the Act, which is in the form of an enforcement action. Aneme similarly seems to disregard the conceptual differences between interventions under Article 4(h) of the Constitutive Act with that envisaged under Article 4(j) of the Act.³³⁶ He argues that it is acceptable for the AU members to consent to future interventions, and that the AU is not required to obtain the specific consent of the territorial state at the time of the intervention.³³⁷

The ILC has argued that granting general consent to another state for intervention would be in conflict with the peremptory norm prohibiting unlawful use of force.³³⁸ The ILC, however, proceeds to state that a contrary view may be held for 'regional organizations which are given the power to use force if that power represents an element of political integration among the member States/²³⁹ The ILC then suggests that the African Union may be an example of a regional organization in which the power to use force arises out of political integration, and therefore may not be inconsistent with the peremptory norm prohibiting unlawful use of force.³⁴⁰ That would seem to suggest that the AU may undertake enforcement action without the necessity of having to obtain prior authorization from the Security Council. The statement by the ILC requires to be investigated further through an analysis of both

³³⁵ Ademola Abass (n 40) 109.

³³⁶ Girmachew Alemu Aneme, *A Study of the African Unions Right of Intervention against Genocide. Crimes against Humanity and War Crimes* (Wolf Legal Publishers. Nijmegen 2011) 167.

³³⁷ Ibid.

ILC (n 206) paragraph 48.

²³⁹ Ibid.

³⁴⁰ Ibid. The AU example is given in a footnote reference.

the strictures that govern consensual interventions in international law and the nature of the AU intervention mechanism.

Carty postulates the generally accepted view that if the territorial state requests support from another, such an intervention "cannot be dictatorial and is therefore not unlawful."²⁴¹ Although Brownlie also articulates the view that a state may legally consent to intervention by treaty,²⁴² agreements are not standard, since each has its own unique provisions. In the case of the African Union, while Article 4(j) of the Constitutive Act seems to anticipate specific consent or request of a state, Article 4(h) of the Act appears to establish a mechanism for non-consensual intervention, whether of a military nature or not. Cassese seems to provide a more accurate view, stating that consent should be provided on an *ad hoc* basis, for specific situations, and cannot be a general authorization for future interventions.²⁴³ Through further analysis of the nature of consensual interventions and the African Union's legal framework, this thesis examines whether the principle of consent provides a justification for an intervention under Article 4(h) of its Constitutive Act, and whether authorization by the Security Council is necessary.

1.5.4 FACTORS CONTRIBUTING TO THE ABSENCE OF THE CONCEPT OF RESPONSIBLE SOVEREIGNTY WITHIN THE AU SYSTEM

1.5.4.1 *Lack of complementarity between sovereignty and intervention*

It seems that the objective of AU's forceful intervention framework was to proceed beyond the mere establishment of a regional intervention mechanism, to creating a system through which African states could claim regional autonomy on the sensitive issue of intervention and conflict management.²⁴⁴ The framework was envisaged to provide protection for regional sovereignty concerns against external

²⁴¹ Anthony Carty. *Philosophy of International Law* (Edinburgh University Press, Edinburgh 2007) 64.

²⁴² Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, London 1963) 317.

²⁴³ Antonio Cassese (n 103) 318.

For instance, the AU opposed any form of intervention in Libya while emphasizing the territorial integrity of the State. African Union (n 5) paragraph 6. The Preamble of the 1998 Ouagadougou Declaration, adopted by the OAU two years before the establishment of the AU, states that conflicts in the African region arise from factors such as external interferences and effects of colonization. Ouagadougou Declaration (Ouagadougou 8-10 June 1998) AHG/Decl. I (XXXIV).

(non-African) interferences in an age of increasing globalization and interdependence.²⁴⁵ That may have contributed to the affirmation of both sovereignty and intervention for humanitarian purposes without the impetus to establish complementarity between the two contradictory principles in a way that effective implementation of the intervention mandate could be facilitated.

Kindiki observes that interpretative differences are enhanced within the AU legal system by enumerating both the values of sovereignty and intervention without any guidance on their relationship.²⁴⁶ Kalu is of the view that despite the enhancement of human rights protection within the region, with the Union's intervention permissible, state sovereignty remains an important principle against external (non-African Union) threats.²⁴⁷ Adejo highlights the context in which, despite the intervention mechanism established under Article 4(h) of the Constitutive Act, principles of non-interference are also affirmed due to the state-centric nature of the AU.²⁴⁸ According to Adejo, there have only been cosmetic changes from the preceding OAU to the AU since internal mechanisms that required to be addressed for effective intervention were not resolved.²⁴⁹ On the other hand, Levitt postulates a contrary idea, which suggests that the AU intervention system has effectively contracted sovereignty away for purposes of peace, stability and security.²⁵⁰ Sarkin is also of the view that attachment to sovereignty in Africa has decreased in recent years, arguing that through the AU system, sovereignty has been subjected to the capacity of a state to protect its nationals.²⁵¹

The views postulated by Kindiki, Kalu and Adejo are instructive but brief. They do not evaluate the various systemic and environmental factors that could have

²⁴⁵ In the 1999 Algiers Declaration, adopted a year before the formation of the AU, African leaders expressed concern that globalization posed severe threats to the sovereignty of the African states, in addition to posing risks to the historical and cultural identity of the states. Algiers Declaration (Algiers 12-14 July 1999) AHG/Decl.1 (XXXV) 5. Udombana argues that concerns against the effects of globalization contributed to the adoption of the Constitutive Act of the African Union more than other factors, such as the need to enhance the protection of human rights. Nsongurua J Udombana (n 99) 1259.

²⁴⁶ Kithure Kindiki (n 50)91.

²⁴⁷ Kelechi A Kalu (n 96)19.

²⁴⁸ Armstrong M Adejo (n 97) 136.

²⁴⁹ Ibid 137.

²⁵⁰ Jeremy I Levitt (n 49) 226.

²⁵¹ Jeremy Sarkin (n 52) 5.

contributed to that kind of a legal framework by the AU, or carry out a detailed analysis of how the framework has influenced the Union's subsequent practice. In addition, they do not explore the manner in which the problems could be addressed in order to establish a more effective forceful intervention mechanism. This thesis demonstrates the manner in which uncertainty on the relationship between the principle of state sovereignty and intervention for human rights purposes could have enhanced the use of sovereignty as a convenient legal and political justification for non-intervention. It also examines the various systemic and institutional factors that could have contributed to that situation, in addition to evaluating how the issue can be addressed.

1.5.4.2 Conceptualization of sovereignty within the AU system

Although Sarkin²⁵² and Bellamy²⁵³ examine responsibility to protect in the AU context, they link it to the evolution of the doctrine of humanitarian intervention, although its acceptability in international law is doubtful. Kuwali also examines the African Union's forceful intervention mandate in the context of the responsibility to protect concept.²⁵⁴ However, Kuwali fails to carry out a detailed appraisal of the subsequent practice of the AU, and particularly fails to examine cases where the Union seems to have acted contrary to its forceful intervention mandate.²⁵⁵ In addition, Kuwali does not examine the implications of the AU's drawback, non-intervention oriented clauses.²⁵⁶

Although Kuwali gives important suggestions on the need to focus on preventive and compliance strategies due to the problems of forceful intervention within the AU and UN system (especially Security Council authorization predicaments), exceptional situations will always arise which require timely and decisive intervention.²⁵⁷ In short, it implies that a solution that would permit a robust implementation of the AU's forceful intervention mandate to stop or pre-empt

²⁵² Ibid L

²⁵³ Alex Bellamy (n 61) 157.

²⁵⁴ Dan Kuwali (n 64).

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

genocide and crimes against humanity, while taking into account the UN system, cannot be avoided. Stahn observes that it is questionable whether the sudden rise of the responsibility to protect concept from 2001 can be characterized as an emerging legal norm, or has become the organizing principle of peace and security issues within the UN system."³⁵⁸ This thesis evaluates the legal and political value of the emerging norm, especially the potential contributions it can offer in the context of resolving the dilemmas of state sovereignty and intervention within the AU system.

1.5.5 CONCLUDING REMARKS ON RELEVANT LITERATURE AND RESEARCH CONTRIBUTION

From the foregoing review of existing literature, there are issues that have previously not been comprehensively examined, in addition to discrepancies on some critical matters that are central to the effective implementation of the AU's mandate for forceful intervention for human rights protection purposes. Some of the suggested justifications of an AU's intervention outside the UN system, such as through the alleged rule permitting humanitarian intervention, have a high likelihood of compromising the international rule of law due to the lack of an institutional regulation. A system that permits any state or a group of states to intervene without any institutional regulation, such as through the UN, would be highly open to subjective judgments and strategic interests of powerful states such that it is more likely to lead to international anarchy. Such a system would precipitate rule by power rather than the rule of law within the international community. In addition, a system that would contribute to greater international anarchy would also be contributing to greater human rights violations. Therefore, while examining avenues for a robust implementation of the AU's forceful intervention mandate, this thesis balances the necessity for timely and decisive action with the need to safeguard the international rule of law.

Besides the highlighted uncertainty and discrepancies in the existing literature on the legal and policy alternatives through which the AU intervention mandate may

³⁵⁸ Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99,101.

he implemented, there is lack of a comprehensive focus on the effect of the drawback, non-intervention oriented clauses within the Union's legal framework. Further, the existing literature fails to comprehensively examine the AU's subsequent practice in various regional conflicts, or even evaluate the effect of subsequent agreements and declarations by the Union. The existing literature also fails to adequately take into consideration the environmental factors that influenced the context in which the AU's forceful intervention mandate, and the drawback non-intervention oriented clauses, were conceived and articulated. In addition to international human rights developments, factors such as the African region's historical vulnerability to external interference, increasing global interdependence and international politics (even within the UN Security Council) ought to be taken into account. Such factors may have an implication on the implementation of the AU's forceful intervention mandate.

This thesis addresses the stated discrepancies and gaps in existing literature through a systemic method that permits a comprehensive inclusion of the relevant legal, policy and contextual factors. It also includes a detailed analysis of the AU's subsequent practice through case studies, in addition to examining the effect of the Union's subsequent agreements and interactions with the UN, including joint programs on peace and security matters.

1.6 RESEARCH METHOD

1.6.1 LEGAL METHOD

Method refers to 'the application of a conceptual apparatus or framework - a theory of international law - to the concrete problems faced in the international community.'" The appropriate method of inquiry into international law is the one likely to provide the best avenue for examining the issue being addressed.²⁶⁰ As Mullerson observes, the concept of sovereignty (which is central to issues relating to intervention for human rights purposes), and the notion of the sovereign equality of

"" Steven R Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291, 292.

^oL Oppenheim. 'The Science of International Law: Its Task and Method.' (1908) 2(2) *American Journal of International Law* 313. 327.

states, involve an interplay between legal and political issues.²⁶¹ Therefore, there is need for a method which acknowledges the influence of international politics and other relevant environmental factors in the implementation of the AU's forceful intervention mandate. A systemic method also focuses on the interaction of the system with environmental factors.²⁶²

It is apparent that the functioning of the AU's intervention system is not influenced by a single factor, but rather, a set of factors, with some being legal and others non-legal, and, therefore, requires an analysis from a systemic perspective. The choice of the systemic method of inquiry in this thesis is principally motivated by the fact that such an approach recognizes the influence of environmental factors (such as international politics) in the functioning of a legal system (for instance, the African Union's intervention system). This is in addition to recognizing the dynamic interactions of the elements of a system (such as norms oriented towards state sovereignty and those concerned with intervention for human rights purposes) which is influenced by the objectives of the system. A systemic method of inquiry also acknowledges the role of other non-state actors, such as non-governmental organizations, in the formation and implementation of international law.²⁶³

The basic concept of a systemic approach is essentially the supposition that the subject or object under examination comprises of sets of integrated relationships.²⁶⁴ The general systems theory is utilized in other disciplines as a theoretical framework, and it has also been used, or advocated, as a method of inquiring into some issues of international law.²⁶⁵ Kerchove and Ost specifically

²⁶¹ Rein Mullerson, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff Publishers. The Hague 2000) 118-125. Slaughter also instructively points out that international law and international politics operate in 'the same conceptual space' within the international system, and that they constitute the systems' reality. Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6(1) *European Journal of International Law* 503. 503.

²⁶² Michel van de Kerchove and Francois Ost (n 6) 10-11.

²⁶³ See, Marcel MTA Brus, *Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework* (Martinus Nijhoff Publishers. Dordrecht 1995) 88-89. A Kiss and D Shelton. 'Systems Analysis of International Law: A Methodological Inquiry' (1986) XVII *Netherlands Yearbook of International Law* 45,55.

²⁶⁴ A Kiss and D Shelton (n 263) 49.

²⁶⁵ See. for instance, Firew Kebede Tiba. 'Multiplicity of International Courts and Tribunals: Implications for the Coherent Application of Public International Law' (PhD thesis, University of

suggest that it is helpful to adopt the concept of a system while examining issues relating to legal norms (for instance, within the international legal order)."" The principles of state sovereignty, non-intervention and intervention for humanitarian purposes are part of the international law system. These principles are also the central concern of this thesis in the context of the African Union system. Although international organizations' functions are regulated by international law, they also generate international law. In this thesis, analysis of the relevant rules and principles of international law is essential as a basis for conceptualization of the AU's intervention mechanism, and examination of its interaction with international law. The analysis provides a foundation from which political and other environmental factors that influenced the establishment of the AU intervention system, or have an impact on its implementation, can then be examined in an informed manner.

Some issues are central to a systemic method of inquiry.""* Some critical considerations are postulated by Kerchove and Ost, and while they will be central to this thesis, their discussion will be in the manner that will enhance the coherence of the entire thesis, and not necessarily in the order provided in this section. The first issue in a systemic inquiry is concerned with 'the components or constitutive elements of a system.'"" A system can be viewed from the perspective of an organization or institution, or even from the standpoint of values, attitudes and practices." ⁰ The African Union's forceful intervention mechanism is the system that is the subject of this thesis, and it includes various elements or components in the form of rules, principles and policies aimed at regulating its functions.² ¹ The most fundamental rules that this thesis is concerned with are those relating to intervention for human rights purposes on the one hand, and those that define and preserve state sovereignty and the norm of non-intervention on the other hand.

Hong Kong 2008) 170; A Kiss and D Shelton (n 263) 68; Michel van de Kerchove and Francois Ost (n 6) 1-12; Marcel MTA Brus (n 263) 85-95;

¹⁶⁶ Michel van de Kerchove and Francois Ost (n 6) 2.

Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn Cambridge University Press, Cambridge 2009) 1.

⁶⁸ Michel van de Kerchove and Francois Ost (n 6) 10.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

According to Brus, the elements of a legal system may be deemed as comprising of various rules, principles and legal institutions since they actually form the core components of the system. Marcel MTA Brus (n 263) 85.

The second consideration of a systemic analysis concerns the types of relationships that can be developed between the various elements that constitute a system." ~ The issue is significant 'since in principle a system possesses properties that are not reducible to those characterizing its elements.'²⁷³ Therefore, since what is implied is that the nature of the whole system is more than a mere combination of its parts, modes of interaction between the various elements that comprise the system require examination.²⁷⁴ In the context of the AU's forceful intervention system, either tension or complementarity between the principles of sovereignty and those of intervention for human rights purposes can either enhance or limit the achievement of certain desirable outcomes. Despite the mandate to forcefully intervene for humanitarian purposes, the equally endorsed principles of state sovereignty and non-intervention have been the basis for justifying non-intervention, both legally and politically. This thesis is therefore based on the view that institutionalization of the concept of sovereignty as responsibility may be helpful in resolving the legal and political dilemmas of intervention, by transforming sovereignty and intervention for humanitarian purposes into complementary principles.

The third characteristic issue in a systemic analysis focuses on the relationship between the system and its environment."⁵ That requires differentiation between a system's elements and those of its environment.^{2 6} so that both are not taken to be the same thing. Luhmann acknowledges that the reproduction (evolution) of a system can only occur within an environment." He instructively opines that if the system 'were not continually irritated, stimulated, disturbed and faced with changes in the environment, it would after a short time terminate its own operations'."⁵ The above statement by Luhmann seems to contradict most of the ideas postulated in his 'autopoietic" theory of law. a variant of the systems theory. The autopoietic theory, as

³⁷³ Michel van de Kerchove and Francois Ost (n 6) 10.

³⁷³ Ibid.

³⁷⁴ Firew Kebede Tiba (n 265) 39.

⁵ Michel van de Kerchove and Francois Ost (n 6) 10-11.

³⁷⁶ Michel van de Kerchove and Francois Ost (n 6) 11.

³⁷⁷ Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter. Berlin 1987) 335. 335.

³⁷⁵ Ibid.

postulated by Luhmann and his follower Teubner. generally conceives a legal system as being a closed, self-referencing entity.² " Luhmann has also argued that a legal system is conceptually closed but cognitively open."⁸³ Luhman's argument that a legal system is conceptually closed while at the same time cognitively open has been criticized for being contradictory and ambiguous. This thesis is based on the 'open system' concept as postulated by Kerchove and Ost. in which there is focus on the nature of interactions between the system and relevant environmental factors, and not the closed, self-referencing notion of legal autopoiesis that is associated with Luhmann.⁸⁴ Kerchove and Ost dispute the sustainability of a 'closed system' concept in legal analysis.⁸⁵

In this thesis, while legal rules and principles are assumed to form the AU's intervention system, environmental factors to be considered include international politics, increasing global interdependence and the region's vulnerability to external interference (including the history of colonization). Upon the determination of the character of a system's environment, it is essential to explore the types of interaction that occur between the system and the environment.²⁸⁴ Kiss and Shelton observe that relevant extra-legal elements require to be taken into account in order to have a more informed understanding of the functioning of the international system.²⁸⁵ For instance, the development or implementation of international law may 'be influenced

" See, for instance: Niklas Luhmann. *Law as a Social System* (Klaus A Ziegert tr, Oxford University Press, Oxford 2004); Niklas Luhmann. 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419. 1419-1441. Luhmann highlights some of the perspectives of the 'theory of self-referential systems* that postulates the concept of a 'recursively closed system, which can neither derive its operations from its environment nor pass them on to that environment.' Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin 1987) 12, 18. For Teubner's ideas of an autopoietic theory of a legal system, see: Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin 1987) 1, 1-35; Gunther Teubner, 'Evolution of Autopoietic Law' in Gunther Teubner (ed). *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin 1987)217,217-241.

⁸³ Niklas Luhmann (n 277) 335-348.

See Richard Lempert. "The Autonomy of Law: Two Visions Compared" in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin 1987) 152, 186.

Brus observes that a system can be either closed or open, which seems to refer to its relationship with its environment. Marcel MTA Brus (n 263) 73-74.

Michel van de Kerchove and Francois Ost (n 6) 107-108.

¹⁴ Michel van de Kerchove and Francois Ost (n 6) 11.

⁸⁵ A Kiss and D Shelton (n 263) 72. See also, Stefan Oeter, 'International Law and General Systems Theory' (2001) 44 *German Yearbook of International Law* 72-95.

by political motives and perceptions.' and may actually be a reflection of certain political choices.²⁸⁶

Finally, it requires to be queried whether the system forms 'relations of subordination with regard to a more encompassing system,' and whether it establishes subordinate subsystems.²⁸⁷ The AU system interacts with the more superior UN collective security system, and the AU's legal framework may either conform or be inconsistent with the UN system, (with implications to the structures of international law in case of inconsistency). As Klabbers acknowledges, international organizations do not operate in a vacuum, as their functions are influenced by other systems while they also influence others.²⁸⁸

In sum, a systemic approach is relevant and useful to this thesis. First, it allows examination of the relationship between the relevant systems, in this context, the UN and AU, both of which have intervention mandates within the African region. Second, a systemic method recognizes that the nature of interactions between the elements of the system (for instance, norms oriented towards sovereignty preservation or those in favour of intervention for humanitarian purposes within the AU legal framework) may be motivated by certain objectives, leading to certain outcomes. Third, it acknowledges that there is an interaction between the AU intervention system with various environmental factors such as international politics and increasing global interdependence, and their impact require analysis. Fourth, a systemic method recognizes the growing influence of non-state actors (such as non-governmental organizations) in the establishment and implementation of international law.²⁸⁹ Fifth, the method permits a solution oriented approach, in which the acquisition of solutions for the effective implementation of the AU intervention mandate is central.²⁹⁰

²⁸⁶ Stefan Oeter (n 285) 84.

²⁸⁷ Michel van de Kerchove and Francois Ost (n 6) 11.

²⁸⁸ Jan Klabbers (n 267) 1.

²⁸⁹ See, Marcel MTA Brus (n 263) 88-89; A Kiss and D Shelton (n 263) 55.

²⁹⁰ The use of a systemic approach in the examination of international law issues may contribute to a more informed explanation of 'international life', and is, therefore, helpful in identifying more appropriate solutions for addressing international problems. A Kiss and D Shelton (n 263) 50.

1.6.2 RESEARCH METHODOLOGY

Methodology implies the various ways in which the primary and secondary sources of data are identified and applied for purposes of legal research."¹ Drawing on the systemic approach, the methodology includes a combination of international legal analysis, contextual analysis and case studies. Information for the three forms of analysis is obtained from both primary and secondary sources of data. Information that is original in character forms essential primary data for this thesis, and includes treaties, drafting history documents, communiqués, reports, archived literature, resolutions of relevant intergovernmental organizations, policy papers and decisions of international courts and tribunals. Information that was collected by other scholars and researchers (which they also subjected to their own analysis) is a source of secondary data. Such information may be obtained from encyclopedias, books, journals and theses.

1.6.2.1 *International legal analysis*

For the relevant rules and principles governing intervention within the international community, the sources recognized by Article 38 of the Statute of the ICJ are an important guide for this thesis.²⁹² The sources of law enumerated in Article 38 of the Statute of the ICJ are an important reference point for any research on international law sources, although some other sources not explicitly listed there may at times be referred to."⁴ This thesis also utilizes the rules of interpreting treaties as stipulated in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties.²⁹⁴

Steven R Ratner and Anne-Marie Slaughter (n 259) 292.

²⁹³ They are treaties, international custom as evidenced by state practice and *opinio juris* and general principles of law. In addition, the Statute lists supplementary means of determining international rules to include judicial decisions and the opinions of the most highly qualified publicists. Statute of the International Court of Justice (n 79).

" Firew Kebede Tiba (n 265) 35. See also Shabtai Rosenne, *Practice and Methods of International Law* (Oceana Publications, New York 1984) 17-19.

" ⁴ Vienna Convention on the Law of Treaties (n 77).

1.6.2.2 Contextual analysis: examination of the relevant non-legal factors

Contextual analysis of the relevant environmental factors will primarily focus on examining the impact and influence of international politics and the increasing global interdependence (especially due to the region's historical vulnerability to intervention) on the establishment of the AU's forceful intervention mandate, and the subsequent conduct of the Union. The possible role of civil society organizations will also be explored (since, as already stated, non-governmental organizations are increasingly making important contributions in the establishment and implementation of international law). As already explained in the preceding systemic method section, the AU's forceful intervention system has interactions with relevant environmental (non-legal) factors. Data for contextual analysis is obtained from primary sources such as official AU statements and communiqués, and secondary sources such as the existing scholarship that is relevant to this thesis. The analysis of the contextual (non-legal factors) is based on an examination of the African Union's subsequent practice, including the Union's official statements, in the context of issues relating to sovereignty and intervention for humanitarian purposes. The practice and statement of African states under the auspices of the preceding OAU is also relevant in analyzing contextual factors that influenced the establishment of the African Union's intervention system, especially the period leading to the formation of the AU.

1.6.2.3 Case studies

The case studies of the Eastern Congo, Darfur (Sudan) and Libyan conflicts are essential in order to practically demonstrate the AU's subsequent practice in the context of its forceful intervention mandate, and its continued relationship with the UN. The three case studies are selected on the basis that they represent instances where the grounds for forceful intervention by the African Union seem, at the minimum, to have been satisfied through the commission of crimes against humanity, but the AU failed to implement its mandate. There are also brief examinations of other significant and relevant interventions in this thesis, for purposes of elucidating

^{2,5} See, Marcel MTA Brus (n 263) 88-89; A Kiss and D Shelton (n 263) 55.

on the evolution of the practice and theory of intervention, which has an implication on the implementation of the AU's mandate. Some of the various forms of military intervention that have been postulated as acceptable within the international community include UN authorized intervention, action under the concept of humanitarian intervention and consensual intervention.

1.7 SCOPE AND LIMITATIONS OF THE RESEARCH

This thesis focuses on issues related to the implementation of the African Union's right of forceful intervention for human rights protection. It is concerned with the nature of the AU's forceful intervention mechanism, its relationship with the UN (which has a similar intervention mandate within the region) and the legal and political problems of its implementation. Therefore, issues that relate to the AU's intervention mandate in relation to international law or the UN Charter, or are connected to the elimination of the legal and political dilemmas of intervention are examined. Relevant factors that have an implication on the AU's intervention mechanism such as international politics and increasing global interdependence are examined. It is not possible to carry out a well informed and critical analysis of the AU system and its interaction with the international community, including legal and political factors affecting the implementation of the Union's intervention mandate, without establishing the international framework for military intervention for human rights purposes. Therefore, to avoid conceptual ambiguities, the thesis commences by exploring the international legal and institutional system governing intervention for humanity, both under the UN Charter and customary international law.

Lack of a precedent of forceful intervention by the African Union which can be analyzed may be a limitation to this thesis. This is due to the fact that the previous and current interventions by the African Union have been consensual. However, this is mitigated by examining the apparent weaknesses of consensual intervention in Sudan, the inaction in Congo, and the non-intervention stance with regard to Libya. This is in addition to examining other forceful intervention precedents by the UN, regional organizations and states. Such precedents provide information that demonstrates the potential role of forceful intervention in protecting civilians from

grave atrocities where the territorial government is unable or unwilling to offer protection.

1.8 RESEARCH STRUCTURE

Chapter Two focuses on the concepts of sovereignty and intervention for humanitarian purposes under the UN Charter, and subsequent practice within the international community. Subsequent practice by states has an implication on the interpretation of the UN Charter, and the evolution of customary international law. The chapter explores the framework of the UN enforcement action through the Security Council, the emergence of a greater role by the General Assembly, and developments in the role of regional organizations. Noting that other justifications for use of force have been proposed in relation to the AU intervention system, the alleged foundations and evolution of such modes of intervention, which include the doctrine of humanitarian intervention, and intervention by consent, are examined.

Chapter Three addresses the question of what is the reasonable alternative to regional organizations and states, if the Security Council is ineffective in providing authorization for forceful intervention. The necessity of preserving the international rule of law is taken into account. The legal and political value of the responsibility to protect concept in addressing the dilemmas of forceful intervention is also discussed. Chapter Four primarily focuses on the African Union's legal and institutional framework for forceful intervention. It begins by exploring various legal, political and contextual factors that led to the inclusion of the intervention mandate within the AU system. It then examines AU's subsequent practice, including legal and political dilemmas that have impinged on the effective implementation of the intervention mandate, especially the failure to institutionalize the concept of sovereignty as responsibility within the Union's processes.

Chapter Five involves case studies of the conflicts in Darfur, Sudan, the Democratic Republic of Congo and Libya. The conflicts demonstrate how elements of the Westphalian model of sovereignty have continued to compromise the capacity of the African Union to undertake forceful intervention for humanitarian purposes. Overriding sovereignty concerns, and the desire to regulate external interventions in

Africa, in addition to other contextual and political factors, are demonstrated. Alternative approaches by the African Union in the two conflicts, which would have been ideal, are proposed. Chapter Six discusses reforms that are necessary within the AU system, including the legal and political factors that could contribute to the acceptance of such reforms, and the manner in which they can be implemented. Chapter Seven comprises the thesis conclusion and a summary of recommendations.

CHAPTER TWO

INTERVENTION FOR HUMANITARIAN PURPOSES: LEGAL, POLICY AND CONCEPTUAL ISSUES

In every single case, when pressed, people preferred the option of 'No more Rwanda' where genocide took place with no intervention, to 'No more Kosovo' where there was intervention outside the framework of UN authorization.¹

2.1 INTRODUCTION

The above observation by Ramesh Thakur exemplifies the legal and political predicaments with regard to intervention for humanitarian purposes. On one hand, there were regrets over non-intervention during the 1994 Rwanda genocide. On the other hand, there was criticism of the 1999 NATO intervention in Kosovo, executed without prior authorization by the UN. This chapter explores the UN Charter foundations for the concepts of state sovereignty and intervention for human rights purposes, which had a significant impact on the structures of international law. The chapter also focuses on the subsequent practice of states and developments in international law (including interpretation of the UN Charter). While analyzing state practice, focus is on statements issued by the concerned states while justifying the intervention.

The chapter deals with the question of the kind of force that is prohibited by the UN Charter and international law, and the permissible exceptions that exist. It provides the basis for addressing the question of whether the doctrine of humanitarian intervention or consent of the territorial state can provide an alternative justification for forceful intervention by the AU, in accordance with its mandate under Article 4(h) of its Constitutive Act.² This is in situations where authorization by the Security Council is absent. The question of the relationship between the AU and the UN is introduced, by examining the role of regional organizations. It includes an examination of whether it is justifiable for a regional organization to undertake

¹ Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, Cambridge 2006) 284.

² Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3.

unauthorized forceful intervention in extreme situations pending subsequent authorization by the Security Council.

The chapter also addresses the issue of the appropriateness of the UN peacekeeping and 'peace-enforcement' approach in situations where there is no peace to keep, and where serious mass atrocities are ongoing. In addition, the chapter also evaluates other possible alternatives for authorization of forceful intervention when the Security Council is ineffective, for instance, through an emergency session of the General Assembly. While this chapter focuses on the conceptual basis of various interventions both outside and within Africa, any interventions undertaken in Africa after the formal launch of the AU in 2002 will be carried out in chapter four. Chapter five also comprises specific case studies of the conflict in Darfur (Sudan), Eastern Democratic Republic of Congo and Libya.

2.2 STATE SOVEREIGNTY AND INTERVENTION UNDER THE UN CHARTER

With the adoption of the UN Charter in 1945, there was greater protection of state sovereignty and territorial integrity from external aggression. Although all forms of intervention were not totally outlawed, there was a radical shift from unilateral action to collective action, premised on authorization by the Security Council, in situations where use of force was not in self-defence or based on consent of the territorial state. To that end, the UN Charter prohibits unlawful use of force in Article 2(4). but establishes an exception of forceful intervention that is authorized by the Security Council (Articles 24, 25 and Chapter VII). This is in addition to the preservation of the right of self-defence in Article 51 of the UN Charter as a permissible exception to the prohibition on the use of force. Although intervention for human rights protection has become part of the agenda of the UN collective security system in subsequent years, human rights are given a peripheral reference.¹ The UN

The Preamble of the UN Charter reaffirms the protection of fundamental human rights. Article 1(3) articulates the promotion and respect for human rights as one of the purposes and principles of the United Nations. However, the provisions are after those aimed at safeguarding international peace and security and prohibiting war. Thereafter, it is only in Articles 55 and 56 that the UN Charter calls for international economic and social co-operation in order to facilitate protection of human rights and fundamental freedoms. Besides, there is nowhere that the Charter expressly provides that there can be

Charter seems to have placed a higher premium on state sovereignty, whose rigid protection at the time could be linked to concerns about international peace and security.⁴

2.2.1 THE GENERAL PROHIBITION OF USE OF FORCE AND THE EXCEPTIONS

Although there is general agreement that the prohibition on unlawful use of force is part of customary law, besides its expression in treaty law, and that it even constitutes *a jus cogens*, there are, however, serious discrepancies with regard to the precise scope of the prohibition." The disagreement may be attributed to competing necessity of safeguarding both state sovereignty and protecting human rights, and developments since the drafting of the UN Charter. The tension between state sovereignty preservation and human rights protection within the international legal order is evident even within the UN Charter.⁶ The prohibition of unlawful use of force is in the nature of *a jus cogens*. The *jus cogens* nature of the prohibition of use

enforcement action to protect human rights. Recent authorizations for enforcement and peace enforcement action have arisen out of the innovation of the Security Council in categorizing internal conflicts as a threat to international peace and security. The Security Council's interpretation of internal conflicts as constituting a threat to international peace and security can be justified on the basis of the flow of refugees and the risk of spread of conflicts to neighbouring states.

* Besides prohibiting the use of force, Article 2(4) of the United Nations Charter preserves the principle of sovereignty and non-intervention in the traditional context, with Article 2(7) of the Charter prohibiting even the UN from intervening in domestic affairs of a state, except in the case of enforcement measures under Chapter VII. Article 1(1) of the UN Charter prohibits aggressive conduct while Article 2(1) of the Charter reaffirms the principle of sovereign equality of states. Save for action in self-defence under Article 51 of the UN Charter, any other enforcement action requires authorization by the Security Council by virtue of its powers under Chapter VII of the Charter.

⁵ Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 30. Euan MacDonald and Philip Alston also acknowledge that the proscription of use of force under Article 2(4) of the UN Charter is understood by most as being of a *jus cogens* nature, exemplifying its peremptory and non-derogable nature within the international legal system. Euan MacDonald and Philip Alston. 'Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intention and the Use of Force* (Oxford University Press, Oxford 2008) 1, 7.

⁶ Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations* (Oxford University Press, New York 2008) 448.

⁷ Yoram Dinstein. *War, Aggression and Self-Defence* (5th edn Cambridge University Press, Cambridge 2011) 105. Article 53 of the 1969 Vienna Convention on the Law of Treaties defines *a jus cogens* as being a peremptory norm of international law from which derogation is not allowed. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

of force was clarified by the International Law Commission in 1966/ and affirmed by the ICJ in the *Nicaragua* case.

When analyzed in its context, the phrase 'force' as used in Article 2(4) of the UN Charter denotes armed or military force, which does not include psychological or economic pressure, unless they are accompanied by the use or threat of force.¹⁰ Although other exemptions to the prohibition of unlawful use of force have been advocated by states and scholars, the UN Charter expressly provides only two exemptions; that is, after authorization by the Security Council by virtue of its Chapter VII of the Charter powers, and in self-defence in accordance with Article 51 of the Charter.

2.2.2 EFFECT OF THE UN CHARTER ON CUSTOMARY INTERNATIONAL LAW

Treaty and customary international law are not separated by "sealed compartments." and interactions do occur between the two sources of law." Article 2(4) of the UN Charter proscribes unlawful use of force against any state, and not only against members of the United Nations. In addition. Article 2(6) of the Charter requires non-members of the UN to act in accordance with the principles prohibiting the use of force for the purposes of maintenance of international peace and security. Article 38 of the 1969 Vienna Convention on the Law of Treaties notes that rules established in a treaty may become binding upon states through customary international law.¹² Further, Article 2(6) of the UN Charter is in the nature of an *erga*

⁸ Paragraph I of the ILC commentary of Article 50 of the 1966 Draft Articles on the Law of Treaties states that the UN Charter's prohibition of the use of force comprises a conspicuous example of a *jus cogens*. ILC, 'Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly' Adopted at its 18th Session (1966) II *Yearbook of the International Law Commission* 247. The same view was reasserted in the 2006 ILC Draft Conclusions on Fragmentation of International Law. ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682/Add.1 paragraph 35.

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 paragraph 190.

¹⁰ Yoram Dinstein (n 7) 88.

¹¹ *Ibid* 94.

¹² Vienna Convention on the Law of Treaties (n 7).

omnes obligation, thereby binding the entire international community, including non-members.¹³

The nature of this broad prohibition had an effect of curtailing the previously unrestrained prerogative of states to resort to force, making that prohibition part of customary international law at the time that the UN Charter was adopted. In the *Nicaragua* case, the ICJ observed that even the parties to the dispute were in general agreement that there were similarities between the UN Charter and customary international law with regard to rules regulating the use of force.¹⁴ It was, therefore, acceptable to both parties that 'the fundamental principle in this area is expressed in the terms employed in Article 2. paragraph 4. of the United Nations Charter.'¹⁵ The effect of the UN Charter is further discussed in the section that examines the ICJ's views on humanitarian intervention.

2.3 THE UNITED NATIONS CHARTER AND THE ROLE OF REGIONAL ORGANIZATIONS

The competence of the Security Council to undertake enforcement action is established under Articles 24, 25 and Chapter VII of the UN Charter. Article 24 of the UN Charter grants the Council *primary* (but not *exclusive*) responsibility for the maintenance of international peace and security. Article 25 of the United Nations Charter requires UN member states to execute Security Council decisions. Chapter VII of the UN Charter empowers the Security Council to determine threats and actual breaches of international peace and security, and to undertake necessary action, including enforcement action by use of force. Under Article 39 of the UN Charter, while authorizing enforcement action, the Security Council is required to determine a situation as comprising a 'threat to the peace, breach of the peace or act of aggression' in relation to international peace and security.

¹³ According to the ICJ, such obligations are a concern of all states due to the significance of the rights involved, for which all states are taken as having a legal interest in their observation. *Barcelona Traction. Light and Power Company Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 paragraph 33.

¹⁴ *Military and Paramilitary Activities in and against Nicaragua* (n 9) paragraph 188. "Ibid.

The Security Council has a very broad discretion in relation to threats and breaches of international peace and security¹⁶ Its legal competence is virtually unrestricted except for the prerequisite that its actions be consistent with the UN principles and purposes.' The Council, therefore, has the competence to declare breaches of human rights within a particular state as constituting a threat or breach of the peace, and authorize military action to end the violations.¹⁵ The Security Council has subsequently expanded the definitions of threats to international peace and security to include threats and breaches arising from intrastate civil wars.¹¹

The Security Council has competence to delegate its peace and security maintenance powers to certain entities such as regional organizations and states.¹¹ Within the UN Charter, the capacity to delegate may be construed from Article 25, which obligates states to execute Council decisions, and Chapter VIII, which governs the relationship between the Council and regional arrangements. Article 52 of the UN Charter permits the existence of regional arrangements for the maintenance of peace and security. Article 53(1) of the UN Charter further provide that regional organizations may undertake enforcement action provided they seek authorization from the Security Council. The UN Secretary General has pointed out that in order to permit useful flexibility for actions by a group of states in peace and security issues that may be undertaken by regional organizations, the UN Charter deliberately fails to provide any specific definition of a regional arrangement.¹¹ Due to the ineffectiveness

¹⁶ Michael Akehurst. 'Humanitarian Intervention' in Hedley Bull (ed). *Intervention in World Politics* (Oxford University Press, Oxford 1986) 95, 106.

¹ Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1622.

" Michael Akehurst (n 16) 106. Similarly, Brownlie notes that an intervention can be undertaken under Article VII of the UN Charter where breaches of human rights constitute a threat to international peace, which extends to regional actions under Article VIII. Ian Brownlie. 'Humanitarian Intervention' in John Norton Moore (ed), *Law and Civil War in the Modern World* (John Hopkins University Press, Baltimore 1974) 217, 226. See also, Ian Brownlie and CJ Apperley. 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *International and Comparative Law Quarterly* 878, 894-895; Fernando R Teson 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 323, 341.

" Simon Chesterman. *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press. Oxford 2001) 129.

³⁰ Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press. Oxford 1999) 16.

"' Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, 'An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-keeping' UN Doc A/47/277 (17 June 1992) paragraph 61.

of the Security Council in providing prior authorization (due to the use or threat of the veto by a permanent member) suggestions of possibilities of retroactive validation by the Council have been advanced.²²

Article 27(3) of the UN Charter requires that decisions of the Security Council in non-procedural issues be based on concurring votes of the Council's permanent members. This requirement forms the basis of the veto power. One of the shortcomings and limitations of the UN Charter system was that the veto powers "allowed any of the Five permanent members of the Security Council to block the collective security system at any time", making it 'dependent upon the continuing political agreement of the Five.'²¹ The ineffectiveness of the Security Council is what has led to the quest for alternative means of undertaking enforcement action, including claims of acceptability of retroactive authorization to regional organizations (where circumstances do not allow prior authorization to be obtained). This is in addition to other alternatives to Security Council authorization, both within and outside of the UN system which are considered justifiable and acceptable. Other alleged alternatives include authorization by an emergency session of the General Assembly, a rule permitting humanitarian intervention, and the principle of consent (for military intervention that is not of an enforcement nature).

With regard to authorization of regional organizations by the Security Council, while it has been argued that it must be prior to forceful intervention, it has also been suggested that an *ex post facto* validation is also acceptable or necessary. For instance, Abass argues that a regional organization can interpret Article 53(1) of the UN Charter flexibly, since the Article fails to expressly state the time of

²² For instance, see Thomas M Franck. 'Interpretation and Change in the Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge 2003) 204. 223; Rarnesh Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33(3) *Security Dialogue* 323, 336-337.

²³ Antonio Cassese. Return to Westphalia? Considerations on the Gradual Erosion of the Charter System' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers. Dordrecht 1986) 505, 506. Gray notes that during the Cold War, it was not only the actual use of the veto that rendered the Security Council inactive, but also threats of its use, and it therefore rarely succeeded in taking binding decisions under Article VII of the UN Charter. Christine Gray (n 5) 255.

authorization.²⁴ According to Franck, forceful intervention may be validated retroactively, either explicitly or implicitly, by the Security Council issuing a commendation that is followed by UN partnership."

On the other hand. Akehurst is generally of the view that enforcement action by a regional organization requires prior authorization by the Security Council."²⁵ He notes that it would amount to encouraging illegal actions, since regional organizations would be motivated to undertake interventions hoping that they would be authorized retroactively, while in reality not all actions can be approved." Myjer and White seem to give a more correct view when they argue that uniform state practice and *opinio juris* seems to lack in order to support the emergence of a customary law permitting retroactive authorization.²⁸ In addition, they persuasively state that an argument for retroactive authorization seems to be *contradictio in terminis* (contradiction in terms) since lawfulness of the intervention will commence from the moment authorization is granted (unless the Council also expressly validates the previous intervention).²⁹

Precedents by regional organizations, such as the 1999 NATO intervention in Kosovo and the Economic Community of West African States (ECOWAS) intervention in Liberia and Sierra Leone in the 1990s, are examined later in the sections that explore precedents related to the alleged rule permitting humanitarian intervention and consensual action. Chapter Three then examines some of the significant developments in the constitutive instruments of African sub-regional

Adcmola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing, Oxford 2004) 53-55.

Thomas M Franck (n 22) 223. Others who, although disputing the current legal permissibility of *ex post facto* authorization, highlight the possibility of it evolving into an acceptable practice in future, include: Erika de Wet. *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing. Portland 2004) 296-297; Marten Zwanenburg. 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11(3) *Journal of Conflict and Security Law* 483. 506-507.

" Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of the American States' (1967) 42 *British Yearbook of International Law* 175, 214. See similar arguments in Danesh Sarooshi (n 20) 248-249.

³⁷ Michael Akehurst (n 26) 214.

Eric PJ Myjer and Nigel D White. 'Peace Operations Conducted by Regional Organizations and Arrangements' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford 2010) 163, 182.

³⁹ Ibid 174.

organizations such as ECOWAS and South African Development Community (SADC), while chapter four evaluates the AU's legal framework and practice. This permits an evaluation of the evolving role of regional organization, in order to determine whether a customary rule permitting *ex post facto* authorization has emerged either in the world or within the African region.

2.4 INTERVENTION WITHIN THE UN SYSTEM: FROM PEACEKEEPING TO 'CONSENSUAL' PEACE ENFORCEMENT

The invention and evolution of peacekeeping is attributable to the failure to implement intervention as envisaged under Chapter VII of the UN Charter, and the necessity of finding a solution to that incapacity.³⁰ The governing concepts of peacekeeping were impartiality, consent of the parties to the conflict for the intervention, and use of force only for the purposes of self-defence.³¹ However, it was apparent that at times, there could be no peacekeeping operations where there lacked the peace in the first place.³¹ There was an expansion of peacekeeping roles in the post Cold War period as a response to the changing nature of conflicts, with phrases such as 'peace support operations' 'peace enforcement,' 'wider peacekeeping.' and 'second generation peacekeeping' being used in reference to the new approach. The phrases are more of scholarly descriptions of the multipurpose approach to peacekeeping.

Consequently, the post Cold War period has, to an extent, blurred the difference between peacekeeping and other military operations given that the concept is currently stretched to include activities not previously classified as inclusive of

³⁰ Erik Suy, 'Is the United Nations Security Council Still Relevant? And was it Ever?' (2004) 12 *Tulane Journal of International and Comparative Law* 7, 13.

³¹ Ralph Zacklin, 'The Use of Force in Peacekeeping Operations' in Niels Blokker and Nico Schrijver (eds). *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Martinus Nijhoff Publishers. Leiden 2005) 91. The 2000 Report of the Panel on UN Peace Operations, while recognizing some exceptional situations that may require a more aggressive response, states that the basic principles of peacekeeping should remain being the consent of the parties to the conflict, use of force only for the purposes of self-defence and impartiality. Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations' UN Doc A/55/305 (August 2000) paragraph 48.

³² Erik Suy (n 30) 15.

³³ 'Funmi Olonisakin. *Reinventing Peacekeeping in Africa: Conceptual and Legal Issues in ECOMOG Operations* (Kluwer Law International, The Hague 2000) 6.

peacekeeping (now often referred to as first generation or traditional peacekeeping).⁴ However, despite the changes and multi-purpose mandates, peace keeping and peace enforcement (which paradoxically would continue to base action on the consent of the territorial state in some situations) would still remain plagued by serious implementation deficiencies.⁰

2.4.1 TRENDS AND LESSONS OF UN PEACE KEEPING AND PEACE ENFORCEMENT

2.4.1.1 *Somalia in 1992*

Security Council Resolution 794 found that the human tragedy created by the Somalia conflict, which included obstruction of delivery of humanitarian assistance, constituted a threat to international peace and security. " The Security Council, citing its Chapter VII powers under the UN Charter, authorized member states to use "all necessary means" to create a secure environment for the provision of humanitarian assistance." Consequently, on 9 December 1992, the Unified Task Force (UNITAF), under the leadership of the United States but with contingents from other states, was deployed in Mogadishu.⁵

As the civil war continued, and in support of United Nations Operation in Somalia (UNOSOM), US troops launched an operation in South Mogadishu on 3 October 1993 with the objective of capturing key aides of General Aidid, who were suspected of perpetrating attacks on UN personnel and facilities." Although the operation was successful in apprehending 24 suspects, 18 US soldiers were killed and

³⁴ Ibid 9.

¹ The Darfur conflict in Sudan is an example of the UN seeking the consent of the territorial state despite granting peace keepers Chapter VII of the UN Charter mandate. Under Resolution 1706, despite the Security Council acting under Chapter VII of the UN Charter while authorizing United Nations Mission in Sudan to take action to protect civilians under threat of violence, amongst other duties, the Council also requested the consent of the Government of Sudan so that the deployment of the troops in Darfur could be made. UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706.

³⁶ UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

³⁸ ^{I b i d} United Nations. 'Somalia - UNOSOM 1: Background' <<http://www.un.org/en/peacekeeping/missions/past/unosom1backgr2.html>> accessed 8 June 2010.

" United Nations. 'Somalia - UNOSOM II: Background' <<http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html#three>> accessed 8 June 2010.

another 75 wounded, while two helicopters were shot down.⁴⁰ In addition, the bodies of the dead US troops were subjected to public acts of rage, with the scenes transmitted across the world by the media.⁴¹ Consequently, the then US President, Bill Clinton, announced the departure of US forces from Somalia by 31 March 1994.⁴² Despite the fact that only a few of the UNOSOM's authorized objectives had been achieved, by 28 March 1995, a complete withdrawal of UN contingents had been implemented.⁴³

The Somalia conflict, and the failure of the US led peace enforcement approach, indicates the necessity of burden sharing and partnership with regional troops, who are likely to be more acceptable to the local population. Contributions of a bulk of troops by a regional organization could probably provide a higher success rate for the operation. One of the significant negative consequences of the 'Somalia syndrome' was that it contributed to a growing reluctance by Western states to sustain military casualties in distant regions that were fundamentally motivated by humanitarian concerns.⁴⁴ The African Union has subsequently intervened in Somalia on the basis of the consent of the Transitional Federal Government of Somalia, an issue that is examined in chapter four.

2.4.1.2 Rwanda in 1994

It is approximated that about 800,000 Rwandese Tutsis and moderate Hutus were killed in widespread and systematic slaughters that lasted a mere 100 days, between April and July 1994.⁴⁵ The earlier tragic experiences of peace enforcing troops in Somalia also significantly contributed to avoidance of intervention in Rwanda.⁴⁶ The appropriate response to stop the genocide would have been "a serious

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect Research, Bibliography. Background (December 2001) <<http://web.idrc.ca/openebooks/963-1/>> accessed 28 November 2011.

⁴⁴ Ibid.

⁴⁵ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. UN Doc S/1999/1257 (15 December 1999) 3.

⁴⁶ Ibid 41.

international military force to deter the killers.⁴⁴ However, when the genocide commenced, the Security Council voted to withdraw almost all the peacekeeping troops in Rwanda, rather than increase deployments.⁴⁵ The credit for halting the genocide belongs to the Rwanda Patriotic Front (RPF) faction, which used military force to gain control of the state from Hutu extremists, and not the international community, whose reactions came too late.⁴⁶

France made a questionable and belated attempt to intervene in order to 'quell' the genocide in its last weeks. In a letter dated 19 June 1994, the UN Secretary General informed the Security Council of the offer by France to intervene under Chapter VII of the UN Charter, if authorized by the Council. " However, the political impartiality and humanitarian genuineness of the subsequent French *Operation Turquoise* intervention has been questioned and criticized on several grounds. The UN Report highlighted the ironic 'sudden availability of thousands of troops for Operation Turquoise' which had previously been unavailable for over a month for the United Nations Assistance Mission for Rwanda (UNAMIR) II expansion."⁴⁷ The OAU Report observed that as a demonstration of 'how swiftly Security Council members

International Panel of Eminent Personalities, 'Rwanda: The Preventable Genocide' (7 July 2000) <http://www.africa-union.org/OtTicial_documents/reports/Report_rowanda_genocide.pdf> accessed 11 December 2009 paragraph 10.1.

⁴⁸ UNSC Res 912 (21 April 1994) UN Doc S/RES/912. The Resolution approved the withdrawal of troops to 270, the size and mandate that had been recommended by the Secretary General in a letter dated 20 April 1994. According to the Secretary General, the small peacekeeping group, which he estimated to comprise 270 military observers, was to remain in Kigali, Rwanda. It was to mediate between the two factions with the objective of securing a cessation of the conflict. See, Special Report of the Secretary-General on the United Nations Assistance Mission for Rwanda. UN Doc S/1994/470 (20 April 1994).

On 22 May 1994, besides extending their control over the Northern and Eastern parts of Rwanda, the RPF force gained control of the Kigali Airport and Kanombe barracks, while on 4 July, it gained control of Kigali, with its leadership claiming that it would use the earlier Arusha Accords as the basis of forming a government. See *British Broadcasting Corporation*, 'Timeline: 100 Days of Genocide' (6 April 2004) <<http://news.bbc.co.uk/2/hi/africa/3580247.stm>> accessed 14 July 2010. On 19 July, a Government of National Unity was sworn into office in Kigali, with Pasteur Bizimungu as President and Paul Kagame as Vice President, bringing an end to the genocide. Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (n 45) 29.

⁵⁰ UNSC, 'Letter Dated 19 June 1994 from the Secretary General Addressed to the President of the Security Council' (20 June 1994) UN Doc S/1994/728.

Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (n 45) 49.

could move when they chose, French troops were ready to go within hours of the mission being authorized on June 22.

Regionally, the OAU, just like the UN, was equally to blame for failing to formally refer to the actions in Rwanda as genocide, or even accuse one of the factions of perpetrating the actions." The OAU Report noted that the Organization's Charter was unhelpful in the circumstances due to its focus on sovereignty preservation and non-interference in internal affairs of member states.⁵⁴ In summary, there are various lessons that emanate from the genocide. First, peacekeeping is not suitable for situations where there is no peace to keep. Robust military action to deter the perpetrators of civilian attacks, and peace creation, are the appropriate international responses. Second, timely and decisive intervention mechanisms are absolutely necessary otherwise eventual intervention can be ineffective since fast paced atrocities can be executed within a matter of weeks. Third, despite the Security Council being the UN organ with 'primary' responsibility for authorizing forceful intervention, it may not act in a reasonable manner, especially if strategic interests of a permanent member of the Council are absent. Fourth, there is need to address the legal and political dilemmas of intervention for humanity by both the regional (OAU and now AU) and international (UN) mechanisms.

⁵² International Panel of Eminent Personalities (n 47) paragraph 15.66. With regard to the alleged political biasness of the French intervention, the OAU Report is of the view that the intention of France was the carving out of safe zones in South Western Rwanda where the Hutu rule could survive after the RPF victory, *ibid* paragraph 15.67. Huge numbers of military officers and thousands of heavily armed *Interahamwe* militia, who had been responsible for the genocide, escaped the RPF advance by withdrawing to the convenience of the safe zones, while France stated that it would use force if RPF intruded the zones, *ibid* paragraph 15.68. In addition, France refused to arrest officials suspected of perpetrating the genocide who were taking refuge in its safe zones, *ibid* paragraph 15.72. Further, the massive relief efforts advanced to refugees who crossed over to Eastern Zaire (Congo) is still resented by genocide survivors, as the refugees also comprised of *Interahamwe* militia and other forces that perpetrated the killings. Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (n 45) 29.

⁵³ International Panel of Eminent Personalities (n 47) paragraph 15.86.

⁵⁴ *Ibid* paragraph 11.4.

2.4.1.3 Haiti in 1994

The ousting of the democratically elected President Aristide of Haiti in a military *coup d'etat* on September 1991 resulted in widespread international condemnation.⁵⁵ Eventually, Aristide wrote to the UN Secretary General requesting "prompt and decisive action' by the international community, through the United Nations, to enforce an earlier agreement that would have resulted in his return to the state, and his reinstatement to the presidency.⁵⁶ In Resolution 940, the Security Council found that the situation in Haiti constituted a threat to regional peace and security, and therefore opted to act under Chapter VII of the UN Charter.' It authorized member states 'to use all necessary means to facilitate the departure from Haiti of the military leadership', including ensuring the reinstatement of the legitimately elected President. Although the request and consent for intervention by Aristide was valid, it was not legally necessary, meaning that the intervention was justified under more than one ground. "

The United States was keen on resolving the Haiti issue since it could have resulted in the influx of large numbers of refugees and asylum seekers to its territory."'" Coming after the United States pullout from Somalia, and within the period that it had avoided intervening in the more serious case of Rwanda. US actions confirm the significant effect the strategic interests of the world powers can have, both in the mandate granted by the Security Council, and in the effective execution of the mandate. Second, the open mandate granted by the Security Council seems to be in the form of authorization for robust enforcement action, beyond merely peace-enforcement. aimed at forceful intervention to achieve a specific legal and political objective of reinstating the overthrown Government. It was, therefore, broader than

International Commission on Intervention and State Sovereignty (n 43).

⁵⁴ UNSC 'Letter Dated 29 July 1994 from the Permanent Representative of Haiti to the United Nations Addressed to the Secretary General' UN Doc S/1994/905 (29 July 1994).

⁵⁷ UNSC Res 940 (31 July 1994) UN Doc S/RES/940.

⁵⁸ Ibid.

⁵⁹ Fernando R Teson (n 18) 361.

Michael Pugh 'Peace Enforcement' in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press. Oxford 2007) 370, 376.

typical peace-enforcement mandates that merely focus on protection of civilians under imminent danger."⁶¹ or purely humanitarian concerns.⁶²

2.4.1.4 *Bosnia and Herzegovina from 1993*

Security Council Resolution 819, which cited the Council's Chapter VII powers under the UN Charter, demanded that Srebrenica in Bosnia, and its surroundings, be treated as a "safe area" that would be free from any attacks.⁶³ It also demanded an immediate end to attacks by Bosnian Serbs paramilitary units.⁶⁴ In Resolution 836, the Security Council mandated the United Nations Protection Force (UNPROFOR) 'to take the necessary measures, including the use of force, in reply to bombardments against the safe areas" or in cases of obstruction of humanitarian convoys.⁶⁵ The Resolution also authorized member states to use their air power to support UNPROFOR.⁶⁶ However, as the fighting escalated, Srebrenica fell to advancing Serbian forces on 11 July 1995, who faced little or no resistance from UNPROFOR.⁶⁷ While most children, women and the elderly converged at the compound of the peace-enforcers, the majority of Srebrenica's men of military age, including some families, decided to risk an escape to Tuzla, some 50 kilometres away, through forested Serb lines.⁶⁸ The Serbs began attacking the escaping Bosnian men with heavy weapons sometime before dawn.⁶⁹

On 12 July, Serb soldiers with vehicles came to where some civilians had taken refuge, outside the peace enforcers' compound, and hoarded them into the vehicles so that they could remove them from the region.⁷⁰ Consequently, the deportation of an estimated 20.000 people began, with men approximated to be aged

⁶¹ In Liberia, although after the earlier unauthorized forceful intervention by the ECOWAS sub-regional organization. See, UNSC Res 1509 (19 September 2003) UN Doc S/Res/1509.

⁶² In the Somalia case, peace enforcement activities were authorized in order to ensure safe delivery of humanitarian assistance. See, UNSC Res 794 (n 36).

⁶³ UNSC Res 819 (16 April 1993) UN Doc S/Res/819.

⁶⁴ Ibid.

⁶⁵ UNSC Res 836 (4 June 1993) UN Doc S/Res/836.

⁶⁶ Ibid.

⁶⁷ Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, UN Doc A/54/549 (15 November 1999) 70.

⁶⁸ Ibid 71.

⁶⁹ Ibid 72.

⁷⁰ Ibid 75-76.

between 16 and 65 not allowed to board the vehicles.¹ The killing of hundreds of unarmed men and boys who had been separated by Serb forces, and the approximated 15.000 who had tried to escape to Tuzla, was executed between the evenings of 12 July and 15 July.² The United Nations Secretary General Report acknowledged the failure of the UN in Srebrenica, regretting that the UN attempted "to keep the peace and apply the rules of peacekeeping when there was no peace to keep."³

2.4.1.5 East Timor in 1999

East Timor, formerly a Portuguese colony, was invaded by Indonesia in 1975 with the intention of annexation.⁴ In June 1999, Security Council Resolution 1246 was adopted, forming the United Nations Mission in East Timor (UNAMET) that was to conduct a referendum on whether East Timor should be granted independence from Indonesia.⁵ The voting resulted in an overwhelming majority of electorate voting for independence.⁶ However, just before the vote for independence, Indonesian military instigated widespread violence and looting.

Due to international concern on the probability, and possible impact of Indonesia military resistance, economic pressure was applied to Jakarta for consent to an intervention by the international community.⁷ Resolution 1264 acknowledged the consent of Indonesia for a 'peacekeeping' force, in addition to authorizing a multinational force to restore peace and security in the area, adopted under Chapter VII of the UN Charter.⁸ The East Timor intervention is not a proper precedent on issues of peace enforcement and consent for intervention since it involved an occupying power, and not factions within a state. Despite that fact, it seems there was no legal necessity in requiring Indonesia's consent for the operation, but the consent

⁷¹ Ibid 76.

⁷³ Ibid 78-87.

⁷³ Ibid 108.

⁷⁴ International Commission on Intervention and State Sovereignty (n 43).

⁷⁵ UNSC Res 1246 (11 June 1999) UN Doc S/Res/1246.

⁷⁶ International Commission on Intervention and State Sovereignty (n 43).

⁷⁷ Ibid.

⁷⁸ Ibid.

In addition, the multinational force was to support and protect UNAMET implement its mandate, besides facilitating humanitarian assistance operations. See, UNSC Res 1264 (15 September 1999) UN Doc S/Res/1264.

was sought as a practical necessity since it appeared that it would be difficult to undertake enforcement action if Indonesia was opposed to it.⁸⁰ Consequently, the International Force in East Timor (INTERFET) successfully monitored a rather peaceful withdrawal of Indonesian troops.⁸¹

2.4.2 DEFICIENCIES OF 'CONSENSUAL" PEACE ENFORCEMENT

Despite the inclusion of use of force mandates in certain circumstances, based on some of the foregoing cases, the peace-enforcement approach has at times failed to result in robust enforcement action for the creation of the peace, and for the deterrence of the perpetrators of horrendous atrocities. As a result, the peace enforcement approach has not been an effective mechanism of protecting civilians where there is no peace to keep. That is with the exception of Haiti, where the Security Council issued a broad and open mandate, and where the US was ready to effectively implement the wide mandate granted by the Council. First, despite authorization of use of force under Chapter VII of the Charter. UN troops on the ground often remain impartial, 'without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities.'⁸² Second, even the safe havens concept, like in Bosnia and Herzegovina, has equally not been effective in preempting atrocities.⁸³ This may be attributed to the fact that the mandate to use force for humanitarian purposes, granted to the UN troops, is often for 'limited and local purposes' which do not include the ending of the conflict.⁸⁴

As Koskenniemi observes, it is 'difficult to interpret the "new generation peacekeeping" as a collective security device.'⁸⁵ He points out that the mandate to use limited force may seem to indicate a move towards collective enforcement action.⁸⁶

⁸⁰ Simon Chesterman (n 19) 150. See also, International Commission on Intervention and State Sovereignty (n 43).

⁸¹ International Commission on Intervention and State Sovereignty (n 43).

⁸² Report of the Secretary General on the Work of the Organization, 'Supplement to an Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations' UN Doc A/50/60 (3 January 1995) paragraph 19.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Martti Koskenniemi. 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 455, 461.

⁸⁶ Ibid.

However. Koskenniemi notes that a critical appraisal of relevant cases, such as in Bosnia (UNPROFOR) and Somalia (UNOSOM II), provides a contrary evidence that the use of force was simply to permit the execution of humanitarian tasks rather than stopping the ongoing aggression/⁸ According to Gray, despite references to Chapter VII of the UN Charter, the consent of the host state remains an important

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consideration in the deployment of the peacekeepers. In the *Certain Expenses* case, even the ICJ rejected the view that the peace operations in Congo in the early 1960s were in the nature of an enforcement action/" The UN peacekeeping force in the Congo civil war between 1961 and 1964 illustrates the first attempt by the UN to extend the use of force mandate to peacekeepers in order to end the civil war and protect civilians." Therefore, in conclusion, despite the use of force mandate, the prominent attributes of the UN actions in the Congo were the consent of the state, making them essentially peacekeeping operations rather than enforcement action.

Third, the concept of peace-enforcement, often an extension of the peacekeeping force mandate, is inherently contradictory. Peacekeeping originates from military and conceptual foundations that are distinct from enforcement action, and whose dynamics are incompatible with the political developments that peacekeeping is often expected to facilitate. Consequently, qualification of peacekeepers as peace enforcers often fails to correspond to implementation

⁷ Ibid 461 - 462.

" Christine Gray, 'Case Study: Host-State Consent and United Nations Peacekeeping in Yugoslavia' (1996) 7 *Duke Journal of Comparative and International Law* 241, 242. For instance, Gray observes that despite UNPROFOR having been granted Chapter VII of the United Nations Charter mandate, the UN still focused on the consent of Croatia for the presence of force within the state, *ibid* 267. For example, the UN Secretary General regretted the intention of Croatia to withdraw its consent for the presence of UNPROFOR, since it could lead to withdrawal of the deployed force, and therefore requested dialogue with the Government of the State so that the issue could be resolved. Report of the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 947 (1994), UN Doc S/1995/38 (14 January 1995) paragraphs 4-5.

'Simon Chesterman (n 19) 117. See. *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 177.

Simon Chesterman (n 19) 117. Security Council Resolution 143 of 1960 authorized military assistance to Congo with its consent (peacekeeping). UNSC Res 143 (14 July 1960) UN Doc S/RES/143. However, as the situation deteriorated, the Security Council adopted Resolution 161 of 1961 that authorized the United Nations to 'take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including ...the use of force, if necessary,' as a last resort. UNSC Res 161 (21 February 1961) UN Doc S/RES/161.

" Report of the Secretary General on the Work of the Organization (n 82) paragraph 35.

realities.⁹⁰ Fourth, the issue of consent of the territorial state has continued to plague peace-enforcement. Premising enforcement action on consent is not only contradictory, but has had the effect of seriously comprising enforcement action. From a legal standpoint, the Security Council is not obligated to obtain the consent of any parties to an internal conflict while acting under Chapter VII of the UN Charter."⁹¹

It is necessary to separate peacekeeping from enforcement action, whereby robust enforcement action to protect civilians and end the conflict would be implemented in place of the current contradictory peace enforcement. Where traditional consensual peacekeeping fails, or where parties to the conflict fail to adhere to the terms of a ceasefire, it is *prima facie* evidence of the fact that any form of consensual intervention is unlikely to protect civilians from atrocities in a timely and decisive manner. It points out to the need for robust enforcement action, aimed at weakening any factions that target civilians while ensuring civilians' protection, and peace creation. As Higgins states, focusing on implementing second generation peacekeeping in situations that clearly require enforcement action is to avoid addressing 'unpleasant realities.'⁹²

The 2000 Report of the UN Peace Operations⁹³ failed to adequately resolve the problems manifested by mixed functions peacekeeping missions. It stressed that consent, impartiality and resort to force only in self-defence should continue being the basic principles of peacekeeping.⁹⁴ However, it also proposed that in some situations, peacekeepers should have the capacity to deter aggressors, including mandates that properly specify the use of force.⁹⁵ It would have been more

⁹² Erik Suy (n 30) 22. He points out that since the expected peacekeepers' use of force is a *contradictio in terminis*, inconsistent with the core principles impartiality and neutrality, peacekeepers often fail to implement their mandate even when granted robust rules of engagement Ibid.

⁹³ Brian D Lepard. *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (Pennsylvania State University Press, Pennsylvania 2002) 186.

⁹⁴ Rosalyn Higgins, *Themes and Theories: Selected Essays. Speeches, and Writings in International Law*, vol 1 (Oxford University Press, Oxford 2009) 287. She specifically opines that the Bosnian experience was proof that when peacekeepers are deployed, even where they are efficiently mandated to deliver humanitarian support, any realistic probabilities of actual enforcement of the peace disappears. Ibid.

⁹⁵ Panel on United Nations Peace Operations (n 31).

⁹⁶ Ibid paragraph 48.

⁹⁷ Ibid paragraphs 48-51.

appropriate had the Report proposed a separation between peacekeeping and enforcement action, with peacekeepers operating only in situations where there is peace to keep.

Consent of the territorial state may be essential in some situations, but in other circumstances, it can catastrophically contribute to the failure to effectively protect populations within a state from mass atrocities. There may be benefits of exploiting the consent alternative by resort to traditional peacekeeping or intervention pursuant to consent in some circumstances. However, consensual intervention may not be effective in other situations, and when it is clear in the initial period that such intervention is not effective, the international community should resort to robust enforcement action in a timely and decisive manner.⁹⁵ Lepard has pointed out that decision making by the Security Council with regard to consent requires consideration of the practical consequences.⁹ He points out that the Security Council policy of seeking consent may be favourable for some circumstances since desirable results (that of ending the conflict without losing lives through military confrontation) would not be achieved in its absence.¹⁰⁰ However, he also acknowledges that the procedure of obtaining consent may be strenuous and time-consuming, providing opportunity for factions to consolidate their positions on the ground.¹⁰¹ In addition, governments are also responsible for mass atrocities; for instance, in the 1990s the Rwandese Government systematically targeted a minority ethnic group for widespread killings.¹⁰²

Attempts to reduce casualties may be one of the significant factors that has contributed to the practice of seeking prior consent of the territorial state before an intervention, even where the relevant Security Council resolutions have been adopted under Chapter VII of the UN Charter. It has to be admitted that there is low tolerance

⁹⁵ Higgins deems it absolutely necessary to differentiate enforcement action from peacekeeping, where such peace missions should not comprise enforcement functions. Rosalyn Higgins (n 94) 288.

⁹⁶ Brian D Lepard (n 93) 195.

¹⁰⁰ Ibid.

Ibid.

¹⁰¹ John Mueller. 'Ordering the New World' in Michael Bothe, Mary Ellen O'Connell and Natalino Ronzitti (eds). *Redefining Sovereignty: The Use of Force After the Cold War* (Transnational Publishers, New York 2005) 65, 69. Higgins points out that attempts by the UN to make deals with governments that violate human rights often result in the failure of peace enforcement initiatives. Rosalyn Higgins (n 94) 289.

for casualties in interventions that are fundamentally for humanitarian purposes, especially where national interests of the respective states are non-existent, as exemplified by the US pullout from Somalia.¹⁰³ Similarly, Belgium led the pullout from Rwanda during the initial days of the genocide after ten of its nationals in the peacekeeping force were massacred."¹⁴ This is where regional organizations such as the AU should help address the problem, through the provision of troops. In addition, such a regional organization can lobby both the Security Council and the General Assembly for an appropriate mandate if it is willing to undertake a robust intervention in order to ensure effective protection of civilians.

Higgins argues that primary peace-keeping responsibilities should remain the monitoring of security and peace on the ground.¹⁰⁴ According to Higgins, the mixed function peace-keeping has resulted in uncertainty.¹⁰⁵ She opines that the UN should cease implementing a form of peacekeeping that focuses on providing food, while not keen on ending the continuing slaughter."¹⁰⁶ The 2004 HLP Report also regretted that in some places, like Bosnia and Herzegovina, peacekeeping was used as an alternative for military and political action to curb ethnic cleansing and genocide. Quite often, peacekeeping is insufficient in deterring warmongers from committing mass atrocities.¹⁰⁹

Conflict pre-emption should also be given a priority, since preventive deployment can save both the lives of civilians and the involved force, besides saving military resources.¹¹⁰ Therefore, after unsuccessfully attempting negotiations and other non-military approaches, military preventive deployment (as a last resort, but in a timely and decisive manner) should be undertaken.¹¹¹ It has been observed that

¹⁰³ John Mueller (n 102) 74.

¹⁰⁴ Ibid 75.

¹⁰⁵ Rosalyn Higgins (n 94) 288.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004) paragraph 87.

¹⁰⁹ Joris JC Voorhoeve, 'Peace Operations: Some Lessons for the Future' in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organizations and Foreign Policy* (Kluwer Law International, The Hague 1998) 467, 468.

¹¹⁰ Ibid 467.

¹¹¹ Ibid.

clear warnings have a deterrent effect, 'and deterrence is prevention.'" Where robust enforcement action for humanity is found necessary, the application of international humanitarian law to govern the use of force will ensure even greater civilian protection. Comprehensive restrictions on the methods of warfare by the interveners are already provided by the laws of war.¹

2.5 THE GENERAL ASSEMBLY'S ROLE AND THE QUESTION OF ENFORCEMENT ACTION

Article 11(2) of the UN Charter authorizes the General Assembly to discuss matters related to international peace and security, but where action is necessary, it should refer the issue to the Security Council. Further, Article 12(1) of the UN Charter provides that the General Assembly shall not discuss an issue which is also under Security Council consideration at the time, unless with the request of the Council. Article 12(2) of the UN Charter does not state the final point at which the Security Council ceases to exercise its functions since it is merely a procedural provision."⁴ It aims at regulating procedure between the two organs by ensuring the General Assembly is informed or made aware of instances where the Security Council is not dealing with a matter in order to ascertain whether to make recommendations or not."⁵

However, the ineffectiveness of the Security Council resulted in the General Assembly assuming a greater role than originally anticipated.¹¹⁶ The General Assembly, apprehensive of the Security Council inaction in executing its functions as provided under the UN Charter, passed the Uniting for Peace Resolution in 1950," which granted the Assembly greater role in peace and security matters. The Resolution resolved that where, despite the necessity of action, the Security Council

"; Ibid 468.

¹ Julie Menus. "Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo" (2000) 41 *William and Mary Law Review* 1743, 1781.

⁴ Juraj Andrassy, 'Uniting for Peace' (1956) 50(3) *American Journal of International Law* 563, 568.

^{1,5} Ibid.

Christine Gray (n 5)259.

Ibid. Gray notes that there has been a gradual erosion of Article 12 of the UN Charter with the General Assembly considering matters concurrently with the Security Council. As a result, she observes that the General Assembly has passed resolutions which the Security Council was unable to reach unanimity on or was unable to take action against a state. Ibid 260.

was unable to discharge its *primary* responsibility in peace and security matters due to lack of unanimity, the General Assembly could take over the issue and make appropriate recommendations, including the use of force."⁸

Chesterman notes that the Uniting for Peace procedure was utilized in a number of subsequent cases, and is of the view that "the question of its legality is now probably moot."¹¹ Various scholars have supported the competence of the General Assembly to undertake emergency sessions where the Security Council is ineffective. However, according to the opponents of Uniting for Peace Resolutions, it is only the Security Council which is empowered to undertake enforcement action for purposes of maintaining international peace and security.^{1:0} According to Murphy, the foundation of the Uniting for Peace Resolutions within the UN Charter is uncertain, and the minimal contextual use casts doubts on their continued vitality.¹²¹

Akehurst, challenging the General Assembly's competence to authorize use of force, notes that even in the only occasion when the Uniting for Peace Resolution was utilized to authorize use of force in Korea, the actions could have more appropriately been justified under collective self-defence under Article 51 of the UN Charter."¹²² Second, noting that other subsequent resolutions by the Assembly did not actually include use of force (like the formation of peacekeeping missions which was premised on consent of territorial state), Akehurst asserts that the Assembly has never, in practice, asserted the mandate to undertake enforcement action."¹²³ However, Akehurst fails to take into account that in the case of Korea, the General Assembly

¹¹⁸ Uniting for Peace Resolution, UNGA Res 377(V)A (3 November 1950).

¹¹⁹ Simon Chesterman (n 19) 119. The Tenth Emergency Session of the General Assembly was convened in 1997 in connection to activities of Israel in the Occupied Palestinian Territory. *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, UNGA Res A/RES/ES-10/2 (25 April 1997).

^{1:0} Juraj Andrassy (n 114) 564.

¹²¹ Sean Murphy, *Humanitarian Intervention: 77ie United Nations in an Evolving World Order* (University of Pennsylvania Press, Philadelphia 1996) 300.

¹²² Michael Akehurst (n 26) 215. For the Korea Resolution, see. *Intervention of the Central People's Government of the People's Republic of China in Korea*. UNGA Res 498(V) (1 February 1951). Noting that the Security Council had failed to discharge its primary duty due to lack of unanimity between the permanent members, the Resolution called upon states to continue presiding all forms of assistance to the United Nations intervention in Korea.

¹²³ Michael Akehurst (n 26) 215.

was actually asserting its competence to authorize enforcement action by calling upon states "to lend every assistance" to the UN intervention in Korea.¹²⁴

Third, Akehurst argues that even with the Uniting for Peace Resolution, the General Assembly still retains power only to make recommendations, but which would not be binding upon a state since the Assembly lacks jurisdiction on such issues.¹²⁵ Fourth, Akehurst argues that while drafting the Charter, the fact that states empowered only the Security Council to authorize enforcement action, including that of regional organizations, indicates that they intended the power to be a monopoly of the Council.¹²⁶ Fifth, he is of the view that the Resolution 'did not attempt to amend the Charter', arguing that the Resolution could not even succeed in achieving such a modification, since the Charter overrides a General Assembly resolution in case of a conflict.¹²

Despite Akehurst's contentions, the General Assembly has received support from scholars such as Bowett,¹²⁸ Brownlie, Reisman¹ and Franck,^{1,1} amongst others. Further, although states could have cited the right of collective self-defence under Article 51 of the UN Charter while responding to the incursions in South Korea by North Korea and its allies, the Uniting for Peace Resolution was intended to be an

⁴ Intervention of the Central People's Government of the People's Republic of China in Korea (n 122).

¹²⁵ Michael Akehurst (n 26) 215.

¹³⁶ Ibid.

¹³⁷ Ibid 216.

¹²⁸ He is of the view that it is possible for the Security Council, or the General Assembly, to authorize an intervention where it is apparent that a certain situation is a threat to international peace and security. Derek W Bowett. 'The Interrelation of Theories of Intervention and Self-Defense' in John Norton Moore (ed). *Law and Civil War in the Modern World* (John Hopkins University Press. Baltimore 1974) 38,45.

Brownlie and his co-author argue that rather than for NATO to have acted contrary to international law in its 1999 intervention in Kosovo, it should have sought authorization by an emergency session of the General Assembly. Ian Brownlie and CJ Apperley (n 18) 904.

Reisman and McDougal opine that in situations of extreme human rights violations that amount to a threat or breach of the peace, the General Assembly can resort to its secondary authority, substantiated by the Uniting for Peace Resolution, if the Security Council is unable to act. Michael Reisman and Myres S McDougal 'Humanitarian Intervention to Protect the Ibos' in Richard B Lillich (ed), *Humanitarian Interxention and the United Nations* (University Press of Virginia, Charlottesville 1973) 167, 190.

¹ He is of the view that the African Union can utilize the General Assembly alternative as a means of evading the veto prone Security Council. Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power. International Law in an Age of Power Disequilibrium' (2006) 100(1) *American Journal of International Law* 88, 100.

alternative to an ineffective Security Council where necessary. Failure to rely on the right of collective self-defence under Article 51 of the Charter does not invalidate, or validate, actions premised on other independent acceptable alternatives. In addition, given that Article 24 of the UN Charter uses the phrase 'primary' responsibility while granting the Security Council the primary role of maintaining international peace and security, the existence of a subsidiary or secondary responsibility is implied, and it may be exercised by the General Assembly.¹³² Abass aptly notes that the actual use of the phrase 'primary' responsibility in the UN Charter contradicts 'any proposition that at San Francisco the Security Council was intended to possess exclusive authority over the maintenance of peace and security.'¹³³ As Abass observes, it seems that if states had the intention of granting the Security Council an absolute role, then they would have used a more specific phrase, such as 'exclusive.'¹³⁴

The United Nations, as an institution, is a creation of states, and they may decide to grant the secondary responsibility to any other organ which they deem competent. The failure to mention the General Assembly in Chapter VII of the UN Charter is not conclusive to imply that the General Assembly cannot take action of an enforcement nature.¹³⁵ This is due to the fact that states, as the creators of the institution of the United Nations and retainers of the residual responsibility, can grant the Assembly the competence to carry out functions that are ordinarily the duty of the Council, when it acts in a manner inconsistent with the UN purposes and principles. Article 24(2) of the UN Charter contains phrases that are essential in constructing the intention of the Charter.¹³⁶ In executing its duties, the Security Council has an obligation to 'act in accordance with the Purposes and Principles of the United Nations.'¹³⁷ Decisions and actions of the Security Council are required to fulfill those conditions. Therefore, if the Security Council is unable to reach any decision or act in matters that constitute the purpose of the United Nations that are necessary, then it

¹³² Juraj Andrassy (n 114) 564.

¹³³ Ademola Abass (n 24) 135.

¹³⁴ Ibid.

¹³⁵ Juraj Andrassy (n 114) 567.

¹³⁶ Ibid 564.

¹³⁷ Ibid. See Article 24(2) of the UN Charter.

would be construed to be acting in a manner contrary to the purposes and principles of the UN.¹³⁸

As White observes, the Uniting for Peace Resolution 'represents an interpretation of Articles 11(2) and 12* of the UN Charter 'that has been accepted and acted upon by the members of the United Nations.' including the Soviet Union and other states originally opposed to the Resolution, although almost all subsequent resolutions have not specifically authorized use of force.¹³⁹ However, the conclusion of subsequent resolutions in accordance with the principles and powers set out in the original Uniting for Peace Resolution indicates the continued acceptance of the General Assembly's competence to assume a greater role in matters of international peace and security, including authorization of use of force. In the *Certain Expenses* case, although the ICJ clarified that 'action' in Article I 1(2) of the UN Charter meant coercive action, it nevertheless, failed to specifically elucidate whether that excluded the General Assembly from authorizing coercive actions.¹⁴⁰ The vague statements from the ICJ, "in addition to the presumption against *ultra vires*, signify that the Uniting for Peace Resolution is not unconstitutional."¹⁴¹

Issues relating to the Uniting for Peace procedure were also the subject of an ICJ decision concerning admissibility of the General Assembly's request for an advisory opinion in the 2004 *Legal Consequences of the Construction of a Wall* case.¹⁴² The Tenth Emergency Session of the General Assembly was convened in 1997 in order to address the activities of Israel in the Occupied Palestinian Territory.¹⁴³ While still in session, the General Assembly referred some of the issues to the ICJ for an advisory opinion, leading to the *Legal Consequences of the*

^{1,8} Ibid 565.

ND White. *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press, Manchester 1993) 153. The Soviet Union voted in favour of Security Council Resolution 119 which referred Egypt's complaints against France and UK (which arose from the 1956 Suez Canal conflict) to the General Assembly in order to be resolved in accordance with the Uniting for Peace Procedure. UNSC Res 119 (31 October 1956) UN Doc S/RES/119.

¹⁴⁰ ND White (n 139) 153.

¹⁴¹ Ibid

" *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

" See. *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory* (n 119).

Construction of a Wall case.¹⁴⁴ The ICJ relied on the 1950 Uniting for Peace Resolution¹⁴⁵ while resolving some questions of admissibility. One of the issues before the Court was whether the request for the advisory opinion satisfied the necessary conditions outlined by Resolution 377(V)A.¹⁴⁶ the basis upon which the General Assembly's Tenth Emergency Special Session had been convened.¹⁴⁷ The ICJ found that the specific request for the advisory opinion satisfied the requirements.¹⁴⁸ It seems that by relying on the criteria established by the Uniting for Peace Resolution 377(V)A,¹⁴⁹ under which the General Assembly can assume peace and security roles in the place of the Security Council (including authorization of enforcement action), the ICJ treated the Resolution as consistent with international law. In addition, neither of the opposing parties in the preliminary proceedings at the ICJ opposed the legal acceptability of Resolution 377 (V)A.¹⁵⁰

Even the Security Council opted for the Uniting for Peace procedure in response to Egypt's complaints against Britain and France during the 1956 Suez Canal conflict, when it requested an emergency session of the General Assembly in accordance with Resolution 377(V)A procedure so that the Assembly could make appropriate recommendations.¹⁵¹ In Resolution 303 of 1971, the Security Council also referred the India and Pakistan issue to the General Assembly for action in accordance to the Assembly's Resolution 377(V)A.¹⁵² The requirement that Security Council acts in accordance with UN purposes in executing its *primary* (not exclusive) duty, and the general acceptability of the resolutions across states, confirms that states, as the retainers of secondary responsibility, may grant it to the General Assembly. Even the Security Council had accepted and utilized this development. Alternative authorization of forceful intervention by the General Assembly, which will be addressed more extensively in chapter three, is both justifiable and necessary.

¹⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 142).

¹⁴⁵ Uniting for Peace Resolution (n 118).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 142) paragraphs 29-35.

¹⁴⁹ Uniting for Peace Resolution (n 118).

¹⁵⁰ *Ibid.*

¹⁵¹ UNSC Res 119 (n 139).

¹⁵² UNSC Res 303 (6 December 1971) UN Doc S/RES/303.

Even if there is some ambiguity on the foundation of the alternative authorization by the General Assembly within the UN Charter, it seems to be the most reasonable alternative to a Security Council that is rendered ineffective by the threat of a veto that is motivated by political interests of a permanent member. It provides a proper institutional mechanism that offers safeguards against subjectivity and extreme abuse by powerful states on the basis of state interests and agenda. In addition, any reforms to modify the veto powers of the permanent members of the Security Council seem unlikely since they can be blocked by any permanent member of the Council.

An alternative authorization by the General Assembly of a forceful intervention to stop mass atrocities within a state would therefore balance the imperative of protecting populations from humanitarian catastrophes with the necessity of maintaining the international rule of law. Forceful intervention would still be maintained within the UN system. And even if the lawfulness of the General Assembly alternative authorization remains with some ambiguity, great legitimacy may be attained. As Myjer and White observe, in extreme situations where prior authorization by the Security Council is not forthcoming, the involvement of the General Assembly is at the minimum required, in order to help generate maximum legitimacy for forceful intervention for humanitarian purposes.¹⁵³

2.6 HUMANITARIAN INTERVENTION: ACTION OUTSIDE THE UN SYSTEM

2.6.1 WHETHER THE UN CHARTER PROHIBITS HUMANITARIAN INTERVENTION

There is the question of whether Article 2(4) of the UN Charter reflected existing customary international law as at 1945, or whether it was a radical departure from previous customary law.¹⁵⁴ The controversy is based on the implications of the words, 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', found in

Eric PJ Myjer and Nigel D White (n 28) 182.

¹⁵⁴ Christine Gray (n 5)31.

Article 2(4) of the Charter.¹⁵⁵ There is contention whether they require construction as a strict prohibition on all use of force against another state, or they permit use of force provided its objective is not to overthrow the government, or annex the territory of the state, and if the action is also consistent with the purposes of the UN.¹⁵⁶

In the period preceding the UN Charter, it was permissible, under customary law, for a state to cite a rule permitting unilateral humanitarian intervention as a basis for its actions in a third state for the purposes of alleviating mass atrocities. Classical writers of the law of nations generally argued that a war to punish injustice or those responsible of crimes was a just war.¹⁵⁷ For instance, Grotius provided examples of Constantine intervention in Maxentius and Licinius, and Roman Emperors' actions in Persia, as instances of state conduct that asserted a right of intervention on behalf of suffering foreigners.¹⁵⁸ Grotius viewed as acceptable an intervention in the territory of another state, including the waging of war, in order to rescue its citizens from undesirable treatment by the state.¹⁵⁹ The views of Grotius were relevant and practically significant given his extensive experience as a legal scientist, politician and diplomat.¹⁶⁰ The international rules on the use of force at the time of Grotius were to be enforced by states through self-help mechanisms.¹⁶¹

¹⁵⁵ Ibid.

Ibid.

¹⁵⁷ Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, London 1963) 338.

¹⁵⁸ Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, vol 2 book II (Francis W Kelsey tr, The Classics of International Law, Clarendon Press, Oxford 1925) 584.

¹⁵⁹ Grotius argued that where it was apparent that a ruler had subjected his subjects to severe suffering that was not warranted, intervention, which was a 'right vested in human society', could be undertaken. Ibid. He was of the view that instances where such a principle was applied included when 'Constantine took up arms against Maxentius and Licinius,' and also when some Roman Emperors threatened or waged war against the Persians in order to stop their persecutions of Christians on the basis of religion. Ibid. While advocating that other states could intervene in situations where a tyrant inflicted upon his subjects unwarranted treatment, Grotius based such a right on the natural law concept of *societas humana* (the universal community of humankind). JL Holzgrefe, 'The Humanitarian Intervention Debate' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge 2003) 15, 26.

¹⁶⁰ Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Martinus Nijhoff Publishers, Leiden 2005) 1, 3.

¹⁶¹ Ibid 3-4.

A major objective of the UN Charter was to prohibit interstate use of force, and Article 2(4) of the UN Charter was drafted for that purpose. However, there have been opposing views on the extent of prohibition under Article 2(4) of the UN Charter. Views on whether Article 2(4) of the UN Charter preserves or extinguishes the prior customary rule of humanitarian intervention may be divided into two, namely, narrow and broad interpretation of its prohibition of unlawful use of force. Article 2(4) of the United Nations Charter is interpreted narrowly by some scholars leading to the conclusion that some resort to force in interstate relations does not violate the political independence or territorial integrity of a state, and is not in conflict with the purposes of the UN.¹⁶² Such an approach is deemed to support the view that it is legally acceptable to undertake humanitarian intervention." Some of the scholars who adopt a narrow interpretation of the prohibition of use of force under Article 2(4) of the UN Charter nonetheless advocate a contextual analysis in ascertaining the meaning of the Article.

Greenwood, for instance, is of the view that Article 2(4) of the UN Charter affirms one of the principles under which the UN functions, but argues that it requires to be read in the context of other objectives, because the Charter also recognizes the promotion of human rights as one of the purposes of the UN.¹⁶³ Teson observes that genuine humanitarian intervention would not result in political subjugation or territorial conquest.¹⁶⁵ He further argues that 'the use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the U.N. Charter, serves one of its main purposes.'¹⁶⁶ He, therefore, argues that humanitarian intervention is actually in accordance with fundamental purposes of the UN."¹ Teson further argues that the application of conventional methods of interpreting treaties on Article 2(4) of the UN Charter cannot provide 'a solution to the hard case of

¹⁶² Michael Akehurst (n 16) 104-105. See also, Brian D Lepard (n 93) 335.

¹⁶⁵ Michael Akehurst (n 16) 105.

ⁿJ Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (2002) *Finnish Yearbook of International Law* 141, 153.

^o Fernando R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers. New York 1988) 131.

¹⁶⁶ Ibid.

Ibid.

humanitarian intervention.'¹⁶⁸ He therefore proposes the solution as being the adoption of an ethical theory of international law in such interpretation.¹⁶⁹

Reisman argues that the ratification of the UN Charter did not terminate or weaken the customary institution of humanitarian intervention.' " He submits that in the context of the UN Charter's substantive spirit, it strengthened and expanded humanitarian intervention.¹⁷⁰ According to Reisman, this is because the UN Charter seems to have validated the homocentric nature of international law and established an authoritative mechanism of articulating and protecting international human rights.¹⁷¹ " In Reisman's view, the Preamble and Article I of the UN Charter, drafted in the appalling shadow of atrocities of the Second World War, clearly pointed out to 'the intimate nexus that the framers perceived to link international peace and security and the most fundamental rights of all individuals.'" ' He argues that the Preamble of the UN Charter includes a commitment to ensure that armed force shall not be used except for the common interest.¹⁷² According to Reisman, the Preamble of the UN Charter reaffirms that the use of force in furtherance of common interest, for instance, humanitarian intervention or self-defence, remained lawful even after enactment of the Charter.¹⁷³ He is also of the view that the fundamental nature and ineluctable internationality of human rights are articulated in Article 1 of the UN Charter.

As earlier stated, other scholars broadly interpret the UN Charter prohibition of use of force, especially under Article 2(4), and therefore conclude that an independent rule permitting humanitarian intervention could not have survived the proscription. Such interpretation of Article 2(4) of the UN Charter seems correct, since the prohibition of forceful intervention under the Article appears to be broad in scope. According to Akehurst, the majority of scholars view Article 2(4) of the UN Charter

¹⁶⁸ Ibid 129.

¹⁶⁹ Ibid. He opines that the purposes of the UN Charter require to be interpreted by a method that ranks, in a hierarchy, its various norms, thereby concluding that the language of Article 2(4) of the Charter does not prohibit states from using force to halt serious deprivations of human rights. Ibid 132.

¹⁷⁰ Michael Reisman and Myres S Mc Dougal (n 130) 171.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid 172.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

as comprehensively proscribing resort to force in interstate relations, the only exception being where other Charter provisions expressly permit a specific exemption.¹ Brownlie argues that there is doubt that humanitarian intervention could not have survived the proscription of use of force in the UN Charter, or the express condemnations against intervention in the post Charter period.¹⁷⁸

According to Akehurst, allegations of humanitarian intervention being consistent with UN Charter purposes and, therefore, not prohibited by Article 2(4) of the Charter, are not convincing since such an intervention still violates political independence and territorial integrity of a state.⁴ Akehurst correctly argues that political independence violations 'are not limited to cases where a state is annexed or has a change of government imposed on it by another state, and violations of territorial integrity are not limited to cases where a state is deprived of part of its territory'.^{1M1} He argues that it would be unrealistic to assume that a territorial state's population can be rescued from widespread atrocities without some changes to 'either the government of the persecuting state or the legal status of the territory inhabited by the persecuted population'. Similarly, Bowett asserts that an argument which premises the lawfulness of humanitarian intervention on its failure to violate political independence or territorial integrity of a state, seems to overlook the rejection of such an argument that was submitted by United Kingdom in the *Corfu Channel* case. *

Teson has argued that while resolving the question of the legal acceptability of humanitarian intervention, conventional methods of interpreting treaties are not appropriate in ascertaining the meaning of Article 2(4) of the UN Charter.^{1X3} Teson therefore seems to acknowledge that his approach is outside the mainstream methods. There is, however, the question of practicability and appropriateness of Teson's approach compared to the ordinary methods of finding and interpreting international

¹⁷⁷ Michael Akehurst (n 16) 106. See also, Brian D Lepard (n 93) 335.

^s Ian Brownlie (n 157) 342. See also, Robert Kolb, 'Note on Humanitarian Intervention' (2003) 85(849) *International Review of the Red Cross* 119, 124.

¹⁷⁹ Michael Akehurst (n 16) 105.

¹⁸⁰ Ibid.

^m Ibid.

Derek W Bowett (n 128) 45. In the *Corfu Channel* case, the Court asserted that intervention is not permissible in international law. See, *Coifu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4, 35.

Fernando R Teson (n 165) 129.

law in the mainstream, as epitomized by the procedures of the International Court of Justice.¹⁸⁴ Brownlie faults those who advocate humanitarian intervention without putting into consideration "the mainstream of materials on the use of force by States."¹⁸⁵ Teson's views are subjective in relation to many other issues of international law that require interpretation and clarification. He also fails to consider other equally important values such as the international rule of law (rather than a system that is highly susceptible to rule by power). Institutionalization of forceful intervention within the UN system and the prohibition of unilateral use of force have been important in preventing international anarchy and, therefore, contributed to human rights protection. Permitting any state, or coalitions of states, to forcefully intervene on human rights grounds (without any form of institutional checks), is to risk serious abuse of such a mandate by powerful states due to political and strategic interests. It may result in equally catastrophic violations of human rights due to international anarchy. The more appropriate approach to the ineffectiveness of the Security Council seems to be an alternative authorization by the General Assembly.

Although the tension between sovereignty and human rights is evident from the opening words of the UN Charter, since war is outlawed while human rights are reaffirmed,¹⁸⁶ it is difficult to establish a rule permitting humanitarian intervention within the Charter provisions. The UN Charter places peace concerns at a higher normative hierarchy than those of dignity, and while there is a comprehensive prohibition of unlawful use of force in Article 2(4), human rights protection 'is limited to the more or less hortatory provisions of Articles 55 and 56.'¹⁸⁷ The UN Charter extinguished the pre-existing acceptability of unilateral humanitarian intervention under customary law. However, there is no doubt that subsequent practice, including the adoption of various human rights instruments, has modified the perception given to state sovereignty and human rights protection within the

¹⁸⁴ The Court is guided by Article 38 of the Statute of the ICJ which articulates the sources of international law. See, Statute of the International Court of Justice (26 June 1945) annexed to the United Nations Charter (24 October 1945) 1 UNTS XVI.

¹⁸⁵ Ian Brownlie, "The United Nations Charter and the Use of Force, 1945-1985" in A Cassese (ed). *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht 1986) 491. 494.

¹⁸⁶ Simon Chesterman (n 19) 45.

¹⁸⁷ Ibid.

international community. Therefore, what is required is to ascertain the nature and extent of the modification through state practice and relevant legal instruments. There is, therefore, need to investigate whether post UN Charter evolution may have rendered unilateral humanitarian intervention acceptable.

2.6.2 IMPACT OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Greenwood is of the view that Article 2(4) of the UN Charter requires to be interpreted in the context of other purposes of the United Nations, which include that of promotion of human rights.^{1^} Based on developments in international protection of human rights, Greenwood asserts that widespread and systematic human rights violations are a matter of international concern. The first major achievement of the UN in the sphere of human rights was the adoption of the Universal Declaration of Human Rights, and although it was not a binding instrument, it is now largely regarded as reflecting customary international law.^{1^}

Other important international human rights instruments include the 1949 Genocide Convention.^m the 1966 International Covenant on Civil and Political Rights^{1^} and the 1966 International Covenant on Economic, Social and Cultural Rights. Lepard notes that human rights developments in international law may be utilized in order to identify and interpret norms that favour humanitarian intervention.¹⁹⁴ He asserts that most advocates of a rule permitting humanitarian intervention deem it necessary as a means of enforcing the universally accepted human rights norms.^{1^} According to Holzgrefe, it has been suggested that since the 1948 Genocide Convention requires state parties to prevent and punish the crime of

⁵⁸ Christopher Greenwood (n 164) 153.

Ibid.

⁰ Simon Chesterman, Thomas M Franck and David M Malone (n 6) 451. See, Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948).

" Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entry into force 12 January 1951) 78 UNTS 277.

¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

^{1.3} International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.

^{1.4} Brian D Lepard (n 93) 119-136.

^{1.5} Ibid 119.

genocide, then it amounts to an exception to unlawful use of force¹⁹⁶ and, therefore, can be a basis for humanitarian intervention. It should, however, be noted that even the Genocide Convention makes it clear that state parties can only legally prevent and punish genocide by requesting the relevant competent organs of the UN to take appropriate action.¹⁹⁷

There is no doubt that there has even been a greater evolution of international human rights protection mechanisms in the post Cold War period. This has included the establishment of the International Criminal Court (ICC) to ensure judicial accountability for international crimes (genocide, crimes against humanity and war crimes) whose elements involve gross violations of human rights.¹⁹⁸ However, an appraisal of the impact of human rights developments on the evolution of a rule permitting humanitarian intervention requires to be examined together with developments that oppose forceful intervention outside the UN system. They include General Assembly resolutions such as the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States,¹⁹⁹ the 1970 Declaration on Principles of International Law,²⁰⁰ and the 1974 Resolution on Definition of Aggression.²⁰¹ Brownlie, writing in 1986, argued that some of the significant instruments requiring weighty consideration, while determining whether a rule permitting humanitarian intervention existed during the period, included the above General Assembly resolutions that seemed to oppose forceful intervention outside the UN system." "

¹⁹⁶ JL Holzgrefe (n 159) 44. Sarkin argues that the Genocide Conventions is one of the treaties from which a rule permitting humanitarian intervention can be inferred. Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53(1) *Journal of African Law*, 5.

¹⁹⁷ JL Holzgrefe (n 159) 44. See, Article VIII of Convention on the Prevention and Punishment of the Crime of Genocide (n 191).

¹⁹⁸ The International Criminal Court was established by the 1998 Rome Statute. See. Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS90.

¹⁹⁹ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965).

²⁰⁰ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

²⁰¹ Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974).

²⁰² Although such General Assembly resolutions lack legislative effect, Brownlie notes that they are essential indicators of subsequent state practice of the member states. Ian Brownlie (n 185) 494.

More recently, some General Assembly resolutions such as the 2004 HLP Report²⁰³ and 2005 Outcome Document²⁰⁴ have endorsed the international community's responsibility to protect populations from genocide and crimes against humanity through forceful intervention. However, both the 2004 HLP Report²⁰⁵ and the 2005 Outcome Document²⁰⁶ also reaffirmed the role of the United Nations in providing authorization for forceful intervention. Therefore, in the context of forceful intervention for human rights purposes, there is doubt whether international human rights protection developments could have contributed to the emergence of an independent right of humanitarian intervention outside the UN system.

There are, however, positive developments that have arisen from the progressive developments in international human rights protection mechanisms. First, despite the Security Council's ineffectiveness in some situations, it has developed a practice of categorizing internal conflicts as a threat to international peace and security, and authorizing interventions with Chapter VII of the UN Charter mandate. " Second, states have been more willing to undertake peacekeeping and consensual interventions, especially through regional and sub-regional organizations, despite the shortcomings of such an approach in some conflict situations. Third, the predicaments of forceful intervention have led to the emerging norm of responsibility to protect as a way of resolving the legal and political dilemmas of intervention, issues which are examined in chapter three.

2.6.3 IMPACT OF STATE PRACTICE ON HUMANITARIAN INTERVENTION

It is necessary to examine state practice and *opinio juris* in order to determine whether customary law permitting humanitarian intervention could have emerged. In the *Nicaragua* case, the ICJ reaffirmed its views in the *North Sea Continental Shelf* case that the formation of new customary rules required both settled state practice and

^{J03} High-Level Panel on Threats, Challenges and Change (n 108) paragraph 203.

^{24M} World Summit Outcome Document. UN Doc A/RES/60/1 (24 October 2005) paragraph 139.

²¹⁵ High-Level Panel on Threats, Challenges and Change (n 108) paragraph 203.

[%] World Summit Outcome Document (n 204) paragraph 139.

For instance, the Security Council found that the humanitarian catastrophe arising from the 1992 Somalia conflict was 'a threat to international peace and security' and acting under Chapter VII of the UN Charter, granted member states the authority 'to use all necessary means to establish... a secure environment for humanitarian relief operations' within the State. UNSC Res 794 (n 36).

opinio juris sive necessitates. In the *North Sea Continental Shelf* case, the Court clarified that *opinio juris* infers a belief that such conduct 'is rendered obligatory by the existence of a rule of law requiring it...States concerned must therefore feel that they are conforming to what amounts to a legal obligation. International human rights treaties and General Assembly declarations, which have been examined in the preceding section, are also useful in demonstrating state practice and *opinio juris*: However, we have already observed that treaties relating to international human rights protection and General Assembly resolutions could not have modified the obligation of states and regional organizations to obtain UN authorization for forceful intervention for humanitarian purposes. The next section will examine actual interventions and statements by states.

2.6.3.1 Various interventions before 1989

The 1960 Belgian intervention in the Congo overlapped with that of United Nations peacekeeping efforts. " Although some scholars have characterized it as an example of state practice affirming the alleged rule permitting humanitarian intervention, it was justified on the basis of consent of the Congolese Government." In some places such as Elizabethville, Belgium argued that the intervention was pursuant to 'the full agreement of the head of the provincial government.'"

¹⁸⁵ *Military and Paramilitary Activities in and against Nicaragua* (n 9) paragraph 207. For Court's arguments in the *North Sea Continental Shelf* case, see, *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 paragraph 77. International law is not stagnant, but continually evolves through state practice, which exemplifies actions of states and the reaction to those actions by other states. Christopher Greenwood (n 164) 162.

²⁰⁹ *North Sea Continental Shelf* (n 208) paragraph 77.

²¹⁰ Observing that there is an interrelation between treaties and customary law, Tomuschat states that if treaties are consistently concluded in a certain field, it may result in the crystallization of a rule of customary international law. Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, The Hague 2001) 347-348. The pledges articulated in a treaty may also provide evidence of the existence of *opinio juris*. Brian D. I. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, New York 2010) 220. General Assembly resolutions are part of state practice. Rosalyn Higgins, 'The Attitude of Western States towards Legal Aspects of the Use of Force' in A. Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht 1986) 435, 435.

^{2,1} Simon Chesterman (n 19) 65.

²¹² *Ibid* 67.

²¹³ Although Belgium admitted its claims would be opposed on the basis that it should have sought the consent of the Central Government and not the Provincial one, it argued that it was impossible in the

Although humanitarian factors were also cited, the significance of rescuing foreign European nationals was also emphasized as a primary factor.* In some places like Leopoldville, intervention was justified on the basis that massive and arbitrary capture of Europeans was being executed and Belgian action had rescued more than a hundred.²¹ Therefore, it seems consent and protection of foreign nationals took a more significant justification than humanitarian intervention for the protection of Congolese citizens, or the human population without consideration of nationality.

The 1964 Belgian and United States interventions in Stanleyville, Congo, were also justified on the consent of the Government of the Congo."¹ With regard to the 1971 India intervention in Bangladesh. India justified its actions on aggressive attacks by Pakistan, arguing that it had made a military retaliation necessary." The 1978 Vietnam intervention in Cambodia, although it also resulted in freeing the citizens from an oppressive regime, was, however, primarily justified on the basis of self-defence. Vietnam sought to draw a distinction between two wars, the border one for which it was part, having responded due to previous attacks by Cambodia, and the second which was a revolutionary one by the Cambodians against the dictatorial rule.²¹⁸

Similarly, despite Tanzania helping topple the oppressive regime of Idi Amin, it sought to justify its 1979 intervention in Uganda primarily as retaliation to Uganda's armed incursions that were intended to annex the Kagera region of Tanzania."¹ Despite the gross atrocities committed in Uganda. Tanzania's primary justifications

circumstances under which the Congolese State was in. Belgium asserted that reliance on consent of the 'lawful, constitutional head of a provincial government' which had been organized 'in accordance with the fundamental law of the Congolese State' was justifiable. UNSC Verbatim Record (13/14 July 1960) UN Doc S/PV/873.

³¹⁴ Ibid.

Ibid.

³¹⁶ Statement from the United States Department of State, *Reprinted* in Marjorie M White, *Digest of International Law*, vol 5 (Department of State, Washington DC 1965) 475- 476; Marjorie M Whiteman, *Digest of International Law*, vol 12 (Department of State, Washington DC 1971) 210-214.

India's representative in the Security Council debate argued that after the Pakistan's attacks, they had to take the defensive actions in order to protect their sovereignty and integrity. UNSC Verbatim Record (12 December 1971) UN Doc S/PV/1611.

UNSC Verbatim Record (11 January 1979) UN Doc S/PV/2108.

¹⁹ International Commission on Intervention and State Sovereignty (n 43).

for the intervention were not humanitarian."²²⁰ When the United States intervened in Grenada in 1983, the primary justifications advanced by President Reagan were the protection of US nationals and the reinstatement of democratic institutions in Grenada."²²¹ The protection of United States nationals in Grenada was a significant factor in the intervention. President George Bush justified the 1989 US invasion of Panama on allegations that the military ruler, Manuel Noriega, had "declared his military dictatorship to be in a state of war with the United States and publicly threatened the lives of Americans in Panama."²²² From the statement, despite some humanitarian aspect of the intervention to the Panama nationals, it is apparent the primary factors for the US intervention were the protection of its own nationals and 'self-defence' concerns.

2.6.3.2 ECOWAS in Liberia from 1990

In 1990, as Liberian rebels, led by Charles Taylor, made advances in taking over the State. President Doe is reported to have requested the US and the UN to actively intervene in order to restore peace. ' However, without such intervention forthcoming, he turned to ECOWAS. He requested the Organization 'to introduce an ECOWAS Peace-keeping Force into Liberia to forestall increasing terror and tension and to assure a peaceful transitional environment."²²⁴

It has been argued that since President Doe was not in effective control of Liberia at the time (due to rebel advances), he lacked the capacity to request foreign

²²⁰ Ibid.

²²¹ Patrick E Tyler and David Hoffman, 'US Invades Grenada, Fights Cubans' *Washington Post* (26 October 1983) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR20060328W906.html>> accessed 13 December 2009.

²²² *New York Times* 'Fighting in Panama. The President; A Transcript of Bush's Address on the Decision to Use Force in Panama' (21 December 1989) <<http://www.nytimes.com/1989/12/21/world/fighting-panama-president-transcript-bush-s-address-decision-use-force-panama.html>> accessed 16 May 2010.

²²⁵ British Broadcasting Corporation Monitoring Report. Report: President Doe not to Stand for 1991 Elections, 1 June 1990' (4 June 1990) Reprinted in M Weller (ed), *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series. Cambridge University Press, Cambridge 1994) 41.

²²⁴ Economic Community of West African States, 'Letter Addressed by President Samuel k Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee. 14 June 1990' Reprinted in M Weller (ed), *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series, Cambridge University Press. Cambridge 1994)60-61.

intervention."⁵ However, President Doe was still in control of parts of Monrovia, had not yet been removed from power, and was still recognized internationally as the legitimate President of Liberia, even by ECOWAS. It is also questionable whether the rebels represented the free will of the Liberian people. It, therefore, seems acceptable to conclude that President Doe had the capacity to invite foreign intervention. However, although initially consensual, the intervention went beyond peacekeeping (which seeks the consent of other factions to a conflict besides that of the government) since Charles Taylor, the leader of the largest rebel faction, absolutely opposed any intervention, including the one intended by ECOWAS. *

In an attempt to bring to an end the political crisis, ECOWAS invited political parties and interest groups from Liberia on 29 August 1990 to Banjul, Gambia, in order to constitute an interim government that was to be headed by Amos Sawyer as interim President." Although the Banjul Agreement was signed by various political leaders and members of interest groups, President Doe was not a signatory, nor was any signatory or participant mentioned as his representative."⁵ In addition, the Agreement, while constituting the Interim Government, acknowledged the 'total breakdown of law and order...and the collapse of the Government of President Samuel K Doe.'"⁴ The fact that ECOWAS stopped recognizing Doe's Presidency and sought to replace him indicates a sudden shift from intervention by consent to a form of enforcement action." However, despite the shift, there was no authorization

" Franck is of the view that a consensual intervention argument is unsustainable, since the authorities that could be purported to issue an invitation were not in control of any part of Liberia, with the exception of bits of Monrovia, the capital. Thomas M Franck (n 22) 222.

See, British Broadcasting Corporation Monitoring Report. Report: Taylor Opposes Foreign Interventions; US Marines to Rescue US Nationals, 3 August 1990' (5 August 1990) *Reprinted* in M Weller (ed), *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series, Cambridge University Press, Cambridge 1994) 63-64.

Economic Community of West African States. Interim Government of National Unity of Liberia. Final Communique of the National Conference of All Liberian Political Parties, Patriotic Fronts, Interest Groups and Concerned Citizens. Banjul. Republic of Gambia, 29 August 1990' *Reprinted* in M Weller (ed). *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series, Cambridge University Press, Cambridge 1994) 89 -93.

Ibid 90. Subsequent political realities and events in Liberia, therefore, seem to have forced ECOWAS to stop recognizing the Government of President Doe, despite his earlier request for intervention and to which it had responded.

Consensual intervention requires actions to be maintained within the terms of the consent, unless the consenting government expressly agrees to its replacement.

by the UN Security Council for enforcement action. In addition, ECOWAS did not justify its action on a rule permitting humanitarian intervention.

As violence escalated, ECOWAS implemented serious offensive attacks against the rebels, which included air raids, aimed at ending the conflict at the shortest time possible.²³¹ Despite enforcement action without Security Council authorization, the President of the Council later commended the significant role of ECOWAS in resolving the crisis.²³² In addition, Resolution 788 of the Security Council cited Chapter VIII of the UN Charter while commending ECOWAS actions." The enforcement action was halted in July 1993 after the signing of the Cotonou Accord that ushered in a new peacekeeping phase that included contingents from non-ECOWAS states.²³⁴ In addition, the Security Council Resolution 866 established the United Nations Observer Mission in Liberia (UNOMIL) to partner with ECOWAS Monitoring Observer Group (ECOMOG).²³⁵ A consequent rapprochement between Nigerian President Sani Abacha and Charles Taylor led to further all-party peace deliberations and United Nations monitored elections in July 1997, in which Taylor emerged the winner.²³⁶ However, there was subsequent violence that led to the resignation and departure of Charles Taylor from the state, and the adoption of Security Council Resolution 1509." After peace fermented, the

²³¹ British Broadcasting Corporation Monitoring Report. 'Report: ECOMOG on Offensive against Taylor: "Violent Fighting" in Monrovia. 16 September 1990' (18 September 1990) Reprinted in M Weller (ed). *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series, Cambridge University Press, Cambridge 1994) 99.

²³² UNSC Presides Statement 22133 (1991) UN Doc S/PRST/1991/22133.

²³³ UNSC Res 788(19 November 1992) UN Doc S/Res/788. However, the Security Council referred to ECOWAS intervention as 'peacekeeping' although it is apparent, from the issues raised (such as actions that even contravened earlier consent by President Doe, lack of impartiality in attacking the rebels and the robust military action), that the intervention was actually an enforcement action one. It has been noted that rather than condemn the intervention as establishing a dangerous precedent, the Security Council Resolution commended the actions. Jeremy Sarkin (n 196) 7.

²³⁴ International Commission on Intervention and State Sovereignty (n 43). For the provisions of the Cotonou Agreement, see, Cotonou Agreement <http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_07251993.pdf> accessed on 18 July 2010.

²³⁵ It was the first time that the UN joined a mission already established by another organization for a joint operation. UNSC Res 866 (22 September 1993) UN Doc S/Res/866.

²³⁰ International Commission on Intervention and State Sovereignty (n 43).

²³⁷ UNSC Res 1509 (n 61). Acting under Chapter VII of the UN Charter, the Security Council established United Nations Mission in Liberia, whose mandate included executing voluntary disarmament and protecting "civilians under imminent threat" of violence. Ibid.

United Nations troops began to move out of Liberia, completing the process in September 1997.²³⁸

Although the violence proceeded for several years before both ECOMOG and UN could eventually restore peace in Liberia, ECOWAS interventions were highly significant. First, ECOWAS effectively filled the security vacuum left by the burden shifting and ineffectiveness of the UN at the commencement of the conflict. Second, ECOWAS was highly flexible, alternating between consensual intervention to decisive enforcement action as civilian protection factors on the ground required. The UN should adopt such a flexible approach in place of its rigidity in favour of consensual intervention most of the time, even where the situation does not deserve a consensual approach. Third, it established a precedent for partnership between regional organizations and the UN. Fourth, it raised the issue of the possibility of *ex post facto* authorization (by the Security Council), in enforcement action by regional organizations taken in extreme situations but without prior authorization. Fifth, it set a precedent for the establishment of elaborate forceful intervention mechanisms by African regional and sub-regional organizations.

Although the commencement of the ECOWAS intervention was premised on the request of the Government of the state, since the intervention soon assumed the form of robust enforcement action without Security Council authorization, it may be assumed to form part of an assertion of the alleged rule permitting humanitarian intervention. The ECOWAS intervention may also represent an attempt to interpret Article 53(1) of the UN Charter flexibly, therefore permitting a regional organization to undertake intervention without prior authorization by the Council (while awaiting a subsequent validation or guidance from the Council). The question of whether a customary rule permitting flexible interpretation of Article 53(1) of the UN Charter is also addressed in chapters three and four. This is by examining developments within the constitutive instruments of the African sub-regional organizations such as ECOWAS and SADC, in addition to analyzing the AU's legal framework and subsequent practice. The AU and the stated African sub-regional organizations have been granted a forceful intervention mandate in their constitutive instruments.

International Commission on Intervention and State Sovereignty (n 43).

2.6.3.3 Northern Iraq from J 991 and Southern Iraqft'om 1992

Despite the absence of an express Security Council resolution authorizing use of force, the United States, United Kingdom and France forcibly intervened to protect Kurds in Northern Iraq.²³⁹ At the point the intervention began, no justifications were made for them, either as based specifically on a right of humanitarian intervention or a Security Council resolution, and neither the Security Council nor the General Assembly condemned the actions.²⁴⁰ The US, UK and France later established no-fly zones over Northern and Southern Iraq as they continued to patrol some of the areas to protect the Kurds and Shiites, but without a Security Council resolution authorizing such actions.²⁴¹

The UK later began to justify the interventions in Southern Iraq as legally acceptable since international law recognized action to address such severe humanitarian catastrophes.²⁴² In December 1992, the Legal Counsellor, Foreign and Commonwealth Office also justified the interventions in Northern Iraq, arguing that "the states taking action...did so in exercise of the customary international law principle of humanitarian intervention."²⁴³ It was one of the limited occasions that a state has justified an intervention specifically on "humanitarian intervention." The then US President George Bush had also argued that the humanitarian and refugee concerns were so overwhelming such that an intervention was acceptable,²⁴⁴ Russia specifically condemned the interventions, which it argued were done in circumvention of the Security Council.²⁴⁵ China also condemned the interventions.

²³⁹ Christine Gray (n 5) 36.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² 'United Kingdom Materials on International Law' (1992) *British Yearbook of International Law* 616-824.

²⁴³ Statement by Aust, Legal Counsellor, Before the House of Commons Foreign Affairs Committee on 2 December 1992, *Quoted* in Ian Brownlie and CJ Apperley 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *International and Comparative Law Quarterly* 878-882-883.

²⁴⁴ George Bush, 'Remarks on Assistance for Iraqi Refugees and a News Conference' (16 April 1991) in 1 *Public Papers of the Presidents of the United States: George Bush* 379. *Quoted* in International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Research Bibliography, Background' (December 2001) <<http://web.idrc.ca/openebooks/963-1/>> accessed 28 November 2011.

²⁴⁵ UNSC Verbatim Record (21 May 1999) UN Doc S/PV/4008.

calling for their stoppage/⁴⁶ Akhavan argues that despite the questionable legal basis for the intervention, it was desirable from a human rights perspective due to the serious humanitarian suffering that the Kurds would have endured."⁴

2.6.3.4 *The 1999 NATO intervention in Kosovo*

The 1999 NATO intervention in Kosovo disclosed more clearly the fundamental split with respect to the debate on the legality of humanitarian intervention.²⁴⁸ NATO forces intervened under *Operation Allied Force* in response to the subjugation of ethnic Albanians in the Kosovo region by the Yugoslavian Government under President Milosevic."⁴ ' The United States and Britain justified the action in Kosovo as essential in order to stop the humanitarian crisis, but did not specifically use the phrase "humanitarian intervention." " Brownlie and Apperley have pointed out that the NATO states used the phrase "humanitarian catastrophe' and, therefore, question the evasion of the term, 'humanitarian intervention.'"²⁵¹ It may be taken as an indication of states trying to circumvent the serious legal and political dilemmas associated with specifically expounding the existence of a right of humanitarian intervention' in international law. The intervention was both supported and opposed by states in subsequent deliberations at the Security Council introduced by Russia." "

²⁴⁶ Ibid

²⁴ Payam Akhavan, 'Lessons from Iraq Kurdistan: Self-Determination and Humanitarian Intervention against Genocide' (1993) 11 *Netherlands Quarterly of Human Rights* 41, 46.

²¹⁸ Christine Gray (n 5) 39.

²⁴⁹ Ibid.

²⁵⁰ UNSC Verbatim Record (26 March 1999) UN Doc S/PV/3989. A statement by NATO dated 30 January 1999 stated that it was ready to use any necessary means, including air strikes in Yugoslavia, to prevent a humanitarian tragedy, by compelling compliance with the international community demands and ensuring the attainment of a political settlement. North Atlantic Treaty Organization, 'Statement by the North Atlantic Council on Kosovo' (Press Release (99)12, 30 January 1999) <<http://www.nato.int/docu/pr/1999/p99-012e.htm>> accessed 18 July 2010. Christine Gray also notes that NATO did not *specifically* justify the intervention on the basis of the alleged rule permitting humanitarian intervention. Christine Gray (n 5) 40.

⁵¹ Ian Brownlie and CJ Apperley (n 18) 882.

²⁵² UNSC Verbatim Record (24 March 1999) UN Doc S/PV/3988. A subsequent vote to condemn NATO actions was overwhelmingly defeated. China, Russia and Namibia voted in favour of the condemnation while Bahrain, Gambia, Argentina, Canada, Gabon, Malaysia, France, Netherlands, United States of America, Slovenia, United Kingdom, and Brazil voted against. UNSC Verbatim Record (n 250).

The Security Council subsequently adopted Resolution 1244, and acting under Chapter VII of the UN Charter, mandated the relevant international organizations and member states to institute an international security presence.²⁵³ There have been differing views on whether the adoption of Resolution 1244 amounted to a *retrospective* acceptance of the legality of the NATO invasion, or was an endorsement of humanitarian intervention, or was basically a pragmatic recognition of the necessity of providing for the future of Kosovo.²⁵⁴ It has been argued that the intervention was either morally or ethically necessary, despite its perceived inconsistencies with international law.²⁵⁵ A subsequent Report on Kosovo acknowledged that although the intervention was unavoidable, its legitimacy remained disputed by non-Western states.²⁵⁶ The Report also admitted that the Kosovo intervention 'did not so much create a precedent' for such interventions."

Although NATO states, as Brownlie notes, avoided justification of their intervention through the phrase 'humanitarian intervention',²⁵⁷ it can still be taken as representing a humanitarian intervention practice. However, the NATO intervention ought to be assessed together with practice elsewhere and other relevant developments with regard to intervention for humanitarian purposes in order to establish whether a rule permitting humanitarian intervention has emerged. The NATO intervention could also represent a case of a regional organization attempting to interpret Article 53(1) of the UN Charter flexibly, since there was no prior authorization or prohibition by the Security Council. The issue is addressed in chapter

²⁵³ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244. Annex 2(4) specifically provided for partnership with NATO. The international security presence was to include a substantial NATO participation, for the purposes of establishing 'a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.' *Ibid.*

²⁵⁴ Christine Gray (n 5) 43. Whether Resolution 1244 amounted to a *retroactive* acceptance of the NATO intervention is discussed more substantially later while expounding on the evolving role of regional organizations in chapter three. On whether it was endorsing the alleged right of humanitarian intervention, the Resolution did not specifically address the issue or even seem to discuss the status of the then continuing NATO intervention.

²⁵⁵ See, for instance, Martti Koskenniemi. 'The Lady Doth Protest too Much': Kosovo, and the Turn to Ethics in International Law' (2002) 65(2) *Modern Law Review* 159, 162. See also, Antonio Cassese. 'Ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community' (1999) 10(1) *European Journal of International Law* 23, 25.

²⁵⁶ Independent International Commission on Kosovo. *The Kosovo Report: Conflict. International Response, Lessons Learned* (Oxford University Press, Oxford 2000) 296.

²⁵⁷ *Ibid.* 297.

²⁵⁸ Ian Brownlie and CJ Apperley (n 18) 882.

three (in the context of developments within the African sub-regional organizations) and in chapter four (while examining the AU's legal framework and subsequent practice). Although Yugoslavia was not a member of NATO. Article 53(1) of the UN Charter seems to refer to actions by regional organizations in their regions, and not within member states only. NATO is a supra-regional organization, drawing its membership from North America and Europe.

2.6.3.5 *Afghanistan from 2001 and Iraq from 2003*

The United States and United Kingdom invasion of Afghanistan and Iraq are not a proper precedent for humanitarian intervention since they were primarily motivated by self-defence and transnational terrorism concerns, precipitated by the 11 September 2001 terrorist attacks in New York.²⁵⁹ They are primarily a case of collective pre-emptive self-defence. In response to the terrorist attacks, the 2002 US National Security Strategy formally recognized pre-emptive self-defence approach in the fight against terrorism.²⁶⁰

2.6.4 THE EFFECT OF THE ICJ AND RELEVANT INSTITUTIONS

In the *Corfu Channel* case, the ICJ stated that intervention is unacceptable in international law.²⁶¹ In the *Nicaragua* case, although the United States did not invoke humanitarian intervention when it intervened in Nicaragua, the ICJ nevertheless considered whether the protection of human rights could provide a legal justification for the US resort to force.²⁶² The Court asserted that even though the US could have concerns with the human rights situation in Nicaragua, it was not appropriate to use

The US State Department states that the US and its partners in the "anti-terrorist coalition" commenced a military campaign in Afghanistan on 7 October 2001 after Taliban's refusal to expel Osama bin Laden and his associates, and cease their support for international terrorism. United States Department of State, 'Background Note: Afghanistan' <<http://www.state.gov/r/pa/ei/bgn/5380.htm>> accessed on 18 July 2010. With regard to the Iraq invasion, while ordering the attacks, President George Bush noted that terrorists, '[u]sing chemical, biological or, one day, nuclear weapons obtained with the help of Iraq...could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other.' *Cable News Network*. Bush: 'Leave Iraq within 48 hours' (18 March 2003) <<http://edition.cnn.com/2003/WORLD/meast/03/17/sprj.irq.bush.transcript/>> accessed 18 July 2010. He stated that the United States of America had the 'sovereign authority to use force in assuring its own national security.' Ibid.

²⁵⁹ *New York Times*, 'Full Text: Bush's National Security Strategy' (20 September 2002) <http://www.nytimes.com/2002/09/20/politics/20STEXT_FULL.html> accessed 18 July 2010.

²⁶¹ *Corfu Channel Case* (n 182) 35.

²⁶² Christine Gray (n 5) 35.

force to ensure their observation.²⁶³ However, it should be noted that the Court found the use of force as inappropriate in that specific case, but did not state that intervention was unlawful under all circumstances. In addition, the Court's statement is not a compelling precedent against humanitarian intervention as it was not concerned with massive atrocities and loss of lives, which are the circumstances under which humanitarian intervention is advocated.²⁶⁴ However, the above statement by the Court demonstrates its caution in endorsing the discretion of individual states to subjectively determine when to intervene, even where it involves allegations of human rights protection.

In the 2007 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ asserted that the responsibility to prevent the occurrence of genocide (by Genocide Convention members) is 'normative and compelling.'²⁶⁵ The ICJ affirmed that the obligation to prevent genocide extends beyond the duty of reporting to the relevant organs of the UN to take action as provided in Article VIII of the Genocide Convention, since that duty has its independent scope."²⁶⁶ The ICJ was of the view that even where the relevant organs of the UN are notified, such notification does not discharge states from the duty 'to take such action as they can to prevent genocide from occurring.' although the UN Charter was to be respected, including decisions made by the UN."²⁶⁷

As Orford correctly observes, the ICJ's statement seems to imply the necessity of measures that extends beyond the implementation of judicial accountability by states in actions aimed at preventing the occurrence of genocide."²⁶⁸ There is the question whether the necessity of serious action to prevent genocide implies the mandate to undertake humanitarian intervention by a state or a regional organization, even in the absence of prior authorization by the Security Council. It should be taken

²⁶³ *Military and Paramilitary Activities in and against Nicaragua* (n 9) paragraph 268.

²⁶⁴ Christopher Greenwood (n 164) 164.

²⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 paragraph 427.

²⁶⁶ *Ibid.* For the Genocide Convention, see Convention on the Prevention and Punishment of the Crime of Genocide (n 191).

²⁶⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 267) paragraph 427.

²⁶⁸ Anne Orford. *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge 2011) 185.

into account that the ICJ also highlighted the necessity of respecting the UN Charter and decisions that the UN may arrive at.²⁶ It seems correct to argue that while the ICJ cannot be taken as endorsing a rule permitting humanitarian intervention outside the UN system, the judgment is supportive of an alternative authorization of forceful intervention by the General Assembly where the Security Council is ineffective due to political interests of a permanent member.

2.6.5 THE STATUS OF HUMANITARIAN INTERVENTION AND ITS DESIRABILITY

Having examined UN Charter provisions and state practice, in addition to scrutinizing the views of the ICJ and other relevant factors, it is highly doubtful that an independent rule of customary law permitting humanitarian intervention, in the absence of a Security Council authorization, has evolved. It is doubtful that the few clear instances of Liberia, Northern and Southern Iraq and Kosovo, where intervention was primarily to curb humanitarian catastrophes, could have discharged the state practice and *opinio juris* necessary for a new customary rule to emerge within the international law sphere. This is due to the general lack of consensus within states on the necessity of a rule permitting humanitarian intervention outside the UN system. The problem of a rule permitting humanitarian intervention is that it may lead to high levels of uncertainty on circumstances under which a state can intervene in the territory of another. This is due to the absence of proper institutional checks (for instance, through the UN system) and the fact that such a rule would highly be open to subjective judgments, if any state or a group of states are permitted to intervene without any collective restraints. Uganda's intervention in Eastern Congo seems to indicate some of the likely outcomes if states are freely allowed to intervene in the territory of others without any institutional regulation. In the 2005 *Armed Activities on the Territory of the Congo* case, the ICJ established that Ugandan troops had caused gross and widespread breaches of human rights and international humanitarian law in Eastern Congo.²⁷⁰

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (n 265) paragraph 427.

⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 paragraph 207.

Akhavan has argued that unilateral humanitarian intervention is a necessary evil' due to the inefficiencies of the collective security system.²⁷¹ However, it seems the more reasonable approach would be for a regional organization or state, which intends to intervene for humanitarian purposes, to request alternative endorsement from the General Assembly if the Security Council is ineffective in providing authorization due to political interests of a permanent member.

At the minimum, not even a single resolution of the General Assembly has endorsed the rule permitting humanitarian intervention.²⁷² On the contrary, more recent international deliberations and resolutions (including at the General Assembly and Security Council) have focused on the concept of responsibility to protect, an emerging norm that is aimed at addressing the legal and political dilemmas of intervention. Opportunities presented by the emerging norm of responsibility to protect are examined in chapter three.

The trend within the international community, substantiated by General Assembly deliberations with regard to the emerging norm of responsibility to protect, has the objective of maintaining enforcement action within the UN collective security system. According to Orford, the concept of responsibility to protect has been embraced by the international community with more willingness, in contrast to its response to the case of humanitarian intervention.²⁷³ Gray similarly observes that humanitarian intervention is still controversial despite the responsibility to protect concept having been accepted by states."²⁷⁴

²⁷¹ Payam Akhavan (n 247) 61.

²⁷² An examination of some United Nations reports, like the 2004 IILP Report, indicate that the proscription of unilateral humanitarian intervention still exist, with use of force still envisaged as operating within the UN system, for which even the powerful international actors do not support a fundamental shift. Ryan Goodman, 'Humanitarian Intervention and Pretexts for War' (2006) 100(11) *American Journal of International Law* 107.112.

²⁷³ Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981, 1002.

²⁷⁴ Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56 *International and Comparative Law Quarterly* 157, 167.

2.7 INTERVENTION BY CONSENT: PERMISSIBLE ACTION OUTSIDE THE UN SYSTEM

2.7.1 UN CHARTER AND INTERVENTION BY CONSENT

Although one of the shortcomings of the UN Charter was that it failed to clearly resolve the issue of intervention by consent, such action still consistent with the Charter provisions." ^s According to Cassese, the traditional law on intervention by consent is still valid, as the state consenting to intervention is deemed to preclude the violation of Article 2(4) of the UN Charter" ^h Such intervention is lawful as it is clearly not dictatorial." Consent could however be an unacceptable justification for intervention if it violates another UN Charter principle, like the right of self-determination or is obtained through coercion and duress." ^s

2.7.2 STATE PRACTICE AND INTERVENTION BY CONSENT

One of the earliest post UN Charter justifications for intervention by consent of the territorial state (although with disputed validity) was with regard to the 1956 Soviet Union intervention in Hungary. The Soviet Union asserted that it had officially been requested by the Hungarian Government to assist in the restoration of order by use of its troops based in Hungary 'in accordance with the Warsaw Pact.'² " However, the Hungarian request for intervention was blurred by the fact that the incumbent government was largely regarded as being a 'puppet' and not competent of

See, Antonio Cassese (n 23) 507. Brownlie also acknowledges that although the UN Charter fails to elaborate on such intervention, the principle of consent exists as an independent principle, but at the same time it is not inconsistent with the Charter. Ian Brownlie, *Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Kluwer Law International, The Hague 1998) 209.

Antonio Cassese. *International Law* (Oxford University Press, Oxford 2001) 317.

Anthony Carty, *Philosophy of International Law* (Edinburgh University Press, Edinburgh 2007) 64.

See, Antonio Cassese (n 276) 318-319.

⁹ Report of the Special Committee on the Problem of Hungary, UN Doc A/3592 (1957) paragraph 106. The Warsaw Pact was a collective security arrangement for some East European states. See. Treaty of Friendship, Cooperation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic (Warsaw Pact) (adopted 14 May 1955, entry into force 6 June 1955) 219 UNTS 3.

making a free request that represented the aspirations of the Hungarian citizens- Invitation should not be contrary to the principle of self-determination. Higgins argues that under the principle of self-determination, citizens have a right to replace the government with one of their choice, and in her view, such a principle was affirmed in the resolutions adopted with regard to the Hungarian intervention.²⁸¹ In relation to the 1958 United States intervention in Lebanon, Brownlie notes that the constitutional status of the consenting Government was questionable,²⁸² and therefore could not be a valid basis for action.

Belgium sought to justify its 1960 intervention in the Congo on consent, although the validity of the specific consent was not convincing. Belgium argued that its intervention in Elizabethville was after the agreement of the official in charge of the Provincial Government. "According to Belgium, it was impossible, in the circumstances of the conflict in the Congo, to obtain the consent of the Central Government, and therefore, it had to rely on one from the Provincial Government." It asserted that action based on consent of the 'provincial government' which had been 'constituted in accordance with the fundamental law of the Congolese State' was necessary." After the Belgian intervention, the President and Prime Minister of Congo had written to the United Nations requesting its military intervention. They asserted that Belgium had violated the Treaty of Friendship signed between the two states on 29 June 1960, under which Belgium could only intervene after a request by the Congolese Government, but which lacked in that particular case."

²⁸⁰ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press, London 1969) 210. Similarly, David Wippman notes that the Soviet Union allegations of consent as justifying interventions in Hungary in 1956 and Czechoslovakia in 1968 were criticized on the ground that the requests were either fabricated or coerced." David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent (1996) 7 *Duke Journal of Comparative and International Law* 209, 211.

²⁸¹ Rosalyn Higgins (n 280) 211. The General Assembly Resolutions include: The Situation in Hungary, UNGA Res 1004 (ES-I) (4 November 1956); The Situation in Hungary. UNGA Res 1005 (ES-II) (9 November 1956).

²⁸² Ian Brownlie (n 275) 209.

²⁸³ UNSC Verbatim Record (n 213).

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Telegram Dated 12 July 1960 from the President and the Prime Minister of the Republic of the Congo to the Secretary-General. UN Doc S/4382 (12 July 1960).

²⁸⁷ Ibid.

Despite the questionable validity of the consent for the Belgian intervention, the precedent is essential in indicating the acceptability of such a basis for intervention in the post UN Charter period. It demonstrates a belief by Belgium that such a justification was acceptable. Subsequent Belgian and United States interventions in Stanleyville, Congo, in 1964, were also justified on consent of the Congolese Government.¹⁵⁵ The 1979 Syrian intervention in Lebanon was justified on invitation by the Lebanese Government. The legitimacy of the 1982 multinational forces (France, Italy and United States troops) intervention in Beirut, premised on the consent of Lebanon, was not challenged by the international community.¹⁵⁶

The ECOWAS intervention in Sierra Leone from the late 1990s is justifiable on the basis of the principle of consent. On 25 May 1997 military officers and a rebel faction executed a successful *coup d'etat* against the democratically elected Government of President Tijan Kabbah. " Before fleeing to Guinea (and while not in *de facto* control of the state), Kabbah had requested Nigeria and ECOWAS to intervene in order to stop the conflict and restore constitutional order within the state.²⁹¹ Since President Kabbah had been democratically elected, he had the capacity to request foreign intervention despite the lack of effective state control.²⁹³ Consequently, in response to Kabbah's request, Nigeria sent forces to Sierra Leone."⁴ Besides the request for intervention, Nigeria also justified its actions on Article 58 of the ECOWAS Revised Treaty of 1993.²⁹⁵ On 30 August 1997,

* Statement from the United States Department of State (n 216) 475- 476; Marjorie M Whiteman (n 216) 210-214.

Statement by President Hafez al-Assad of Syria to West German Television. *Damascus Domestic Service* (9 September 1978) 1 (Unpublished) Cited in Natalino Ronzitti, "Use of Force, Jus Cogens and State Consent" in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers. Dordrecht 1986) 147, 155.

Natalino Ronzitti, "Use of Force. Jus Cogens and State Consent" in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers. Dordrecht 1986) 147, 156.

International Commission on Intervention and State Sovereignty (n 43).

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" Natalino Ronzitti notes that in situations where the representativeness of the government is questionable, the consent of such a government is invalid, as it does not emanate from an authority with the legitimate right to express the will of the state in accordance with international law. Therefore, it is acceptable that the democratically elected Government of Kabbah was representative of the free will of the state, while the coup executors lacked such capacity, since their representativeness was doubtful, despite having assumed control of the state. Natalino Ronzitti (n 290) 157.

⁴ International Commission on Intervention and State Sovereignty (n 43).

Ibid. Under Article 58(1) of the Treaty, member states are obligated 'to work to safeguard and consolidate relations conducive to the maintenance of peace, stability and security within the region.'

ECOMOG was formally mandated by ECOWAS to restore law and order in Sierra Leone ^ Nigeria's intervention was therefore reinforced by the subsequent involvement of ECOWAS.²⁹⁷

Despite the earlier burden shifting by the UN, the Security Council began to take more active role in the resolution of the conflict, especially with the adoption of Resolution 1132.²⁹⁸ In February 1998, ECOWAS troops launched military offensive as a response to rebel attacks that resulted in the expulsion of the rebels from Freetown." ' President Kabbah's Government was reinstated on 10 March 1998. However, violence continued, necessitating further action by ECOWAS, UN and the international community to protect civilians and prevent the retaking of the state by rebels. As violence continued in some regions, the Security Council established the United Nations Mission in Sierra Leone (UNAMSIL) and acting under Chapter VII of the Charter, mandated it to protect 'civilians under imminent threat of physical violence'.³⁰¹ The ECOWAS and Nigeria interventions were justifiable under the principle of consent, even without a prior endorsement by the Security Council. The benefits of subsequent Council resolutions were the creation of an effective framework for burden sharing between the UN and ECOWAS, and to enable states outside the ECOWAS system to participate.

See, Economic Community of West African States (ECOWAS): Revised Treaty (adopted 24 July 1993) 35 ILM 660(1996).

²⁹⁶ International Commission on Intervention and State Sovereignty (n 43). ECOWAS was precipitated into the burden of peacekeeping in the region, particularly in states like Sierra Leone, due to a huge security vacuum and the absence of a strong UN interest. Adekeye Adebajo and David Keen. 'Sierra Leone' in Mats Berdal and Spyros Economides (eds), *United Nations Interventionism, 1991-2004* (Cambridge University Press, Cambridge 2007) 246, 247.

²⁹⁹ International Commission on Intervention and State Sovereignty (n 43).

²⁹⁸ Citing Chapter VII of the UN Charter powers, the Security Council demanded the military junta relinquish its power and that the constitutional order in the state be restored, including the return of the democratically elected Government. The Resolution further affirmed support for ECOWAS initiatives, and recommended ECOWAS to continue working 'for the peaceful restoration of the constitutional order'. See, UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

²⁹⁹ United Nations Mission in Sierra Leone, 'Sierra Leone: UNAMSIL: Background' <<http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html>> accessed 15 July 2010

³⁰⁰ Ibid.

³⁰¹ UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270. However, more support to UNAMSIL would be required from the international community in the subsequent period. For instance, in 2000, rebels were gaining an upper hand, committing atrocities and taking the 'peace-enforcement' troops hostage. Subsequently, on 7 May 2000, United Kingdom stated that it would send paratroopers and five warships for the protection of British nationals, an action that thwarted rebels from taking over Freetown, and prevented the disintegration of UNAMSIL. International Commission on Intervention and State Sovereignty (n 43).

With regard to General Assembly resolutions, the 1974 Definition of Aggression implicitly recognizes the right of a state to invite intervention. " Article 3(e) of the Resolution states that where foreign states forces exceed the time permitted or surpass the activities consented to by the host state, such actions constitute aggression. It seems that although the conduct of states validates the continued existence of the principle of consent, it has at times used as a means of justifying other unlawful actions, and that it requires strict adherence to certain conditions for it to be legally acceptable.

2.7.3 THE ICJ AND OTHER RELEVANT INTERNATIONAL INSTITUTIONS

In the *Nicaragua* case, the ICJ clarified that intervention to support a government opposition within another state is contrary to international law.¹⁴ The issue of consensual intervention was also deliberated on by the ICJ in relation to Uganda's intervention in the second Congo war.³⁰⁵ The ICJ observed that any earlier consent to the presence of Uganda troops by Congo had been withdrawn by 8 August 1998, an indication that the presence of the troops while the consent was in existence was held as legally acceptable by the Court.' " Article 20 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, formulated by the ILC, provides that where a state consents to the commission of an act, then the permitted state is precluded from any wrongfulness if it maintains the actions within the scope of the consent.³⁰ An intervention is therefore precluded from wrongfulness if it is pursuant to the consent of the territorial state, and is maintained within the limits permitted.

It should be noted, however, that consensual intervention, despite being historically essential in assuring protection of civilians and preventing aggravation of conflicts, is often not an effective approach where the government is the perpetrator,

Christine Gray (n 5) 85.

¹⁴ Definition of Aggression (n 201).

¹⁵ *Military and Paramilitary Activities in and against Nicaragua* (n 9) paragraph 209.

¹⁶ *Armed Activities on the Territory of the Congo* (n 270).

³⁰⁴ Ibid paragraph 106.

³⁰⁵ ILC. 'Responsibility of States for Internationally Wrongful Acts' Adopted at its 53rd Session (2001) and Adopted by UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

or keen to regulate the intervention. A government that is actually committing ma atrocities can also request external support in the pretext of maintaining peace am: order. Regional organizations and the UN should therefore be capable of undertaking robust enforcement action, in a timely and decisive manner, where a consensual one is inappropriate or inadequate.

2.8 CONCLUSION

In summary, we have noted that for effective protection of civilians from gros^ human rights violations in internal conflicts, it is necessary to separate peacekeeping from peace enforcement due to the inherent contradictions that compromise implementation of the latter form of intervention. This would effectively separate consensual intervention from enforcement action, thereby enabling the international community to respond appropriately, without contradictory practices on the ground. The Security Council's practice of seeking the consent of the territorial state for intervention often compromises effective protection of civilians especially if the government of the subject state is also a perpetrator of atrocities. An analysis of international law in the post UN Charter period reveals that the subsequent attempt to grant enforcement action powers to the General Assembly, exercisable where the Security Council was ineffective due to lack of unanimity of permanent members, had become acceptable. This option also seems to be the most reasonable mechanism of addressing the ineffectiveness of the Security Council.

Further, interventions by ECOWAS in Liberia and by NATO in Yugoslavia, both undertaken without prior Security Council resolution, were insufficient to have developed a rule of customary law permitting subsequent authorization of a regional organization's intervention undertaken in extreme circumstances. Humanitarian intervention did not survive the comprehensive proscription of unlawful use of force under the UN Charter. Therefore, under the UN Charter and subsequent international law, any enforcement action for human rights protection required action within the UN collective security system. However, the discretion of a state to invite or request intervention from others in order to address internal security issues, including human rights violations, although not specifically mentioned in the UN Charter, is

acceptable. Consensual intervention, however, is not effective in protecting civilians where the government of the state is also a perpetrator of atrocities, besides being open to manipulation by the subject state.

CHAPTER THREE

THE DILEMMAS OF INTERVENTION FOR HUMANITARIAN PURPOSE^ POSSIBLE SOLUTIONS AND EMERGING CONCEPTS

Who is sovereign, or what can sovereignty do, against ethnic conflict within or across state borders, against civil war, whether it spills over into other territories? And how sovereign is a state if it cannot prevent genocide?¹

3.1 INTRODUCTION

The above statement by Louis Henkin represents the notion that traditional concepts of sovereignty should not be acceptable as a justification for non-intervention by the international community where there is the necessity of protecting populations within a state from mass atrocities such as genocide and crimes against humanity. It seems to imply that sovereignty should be exercised responsibly, since its core purposes should be the protection of the population within the state.

This chapter addresses the question of what is the appropriate alternative for forceful intervention by a regional organization (which would safeguard the value of the international rule of law) where the Security Council is ineffective in providing authorization. The chapter examines the developments in the role of regional organizations, especially the forceful intervention mandates within the African sub-regional organizations such as ECOWAS and SADC. It provides a basis of addressing the question of whether international law has evolved to permit retroactive validation of regional organizations* intervention (by the Security Council) in situations that lacked prior authorization. This provides the basis of analyzing the context in which the AU relates to the UN. Other possible solutions to the legal and political dilemmas of intervention within the international community are also evaluated. They include the necessity and possibility of alternative authorization of forceful intervention by the General Assembly. The legal and political value of the

¹ Louis Henkin. That "S" Word: Sovereignty, and Globalization, and Human Rights. *El Cetera'* (2000) 68 *Fordham Law Review* 1, 9.

emerging norm of responsibility to protect in resolving the dilemmas of intervention is also discussed.

3.2 INTERVENTION FOR HUMANITARIAN PURPOSES: PROBLEMS AND PROSPECTS

In chapter two, we observed the limitations in the more established approaches to intervention for humanitarian purposes. We have observed that peacekeeping is not the appropriate mechanism where there is absolutely no peace to keep, and in situation that require cessation of attacks on civilians, since peacekeeping is based on principles of consent, non-use of force and impartiality." The concept of peace enforcement has also not been an effective mechanism, as it is highly influenced by the original peacekeeping concepts, and paradoxically, often continues to focus on the consent of the territorial state. It is also frequently characterized by limited use of force for civilians' protection. Consensual intervention is not an effective mechanism where the government is also a perpetrator of mass atrocities, or is keen on regulating the activities of the interveners, or does not permit such intervention. Such circumstances require a more robust approach, the one envisaged under Chapter VII of the UN Charter, and which is based on the actual needs of the victims of mass atrocities. The robust forceful intervention may be undertaken by a regional organization, as provided in Chapter VIII of the UN Charter.

We have also observed that the concept of 'humanitarian intervention,' as an independent enforcement mechanism outside the UN collective security system, may not offer an acceptable justification. At the least, there lacks consensus among states on whether such action is desirable. In addition, allowing any state or a group of states to intervene, without any institutional regulation, is a threat to the international rule of law. Some of the fresh approaches and possible alternatives that may be

For the basic principles of traditional peacekeeping, see Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations' UN Doc A/55/305 (August 2000) paragraph

* W ! Y B * s n - Y O P I M M W I L i f t * * * *

helpful in ensuring effective protection of populations from mass atrocities are discussed in the next section.

For purposes of enhancing the international rule of law, which is also important in ensuring protection of human rights through international peace and security, this section focuses on institutionalized alternatives that may maintain forceful intervention for humanity within the UN collective security system. Where the UN Security Council is ineffective due to political interests of a permanent member, we are of the view that the opportunity for robust intervention for humanitarian purposes is by alternative authorization for action by the General Assembly. However, for regional organizations or a state to have the impetus to lobby the Security Council for authorization for an intervention, and even shift to the General Assembly where the Council fails, political will within the relevant regional organization or state is a prerequisite. The possibility and acceptability of *ex post facto* authorization, by the Security Council, of an intervention undertaken by a regional organization in extreme circumstances, is also examined.

3.3 THE SECURITY COUNCIL: DIFFICULTIES OF MODIFYING THE VETO POWER

The veto power by the five permanent members of the Security Council is often cited as a barrier to the effectiveness and efficiency of the UN. " Under Article 108 of the UN Charter, any amendments to the Charter provisions, including the composition of the Security Council, requires endorsement by all the permanent members of the Council. This implies that any permanent member of the Security Council can block any proposal to modify the composition and privileges of members of the Council that have the veto power.

³ Simon Chesterman, Thomas M Franck and David M Malone. *Law and Practice of the United Nations* (Oxford University Press, New York 2008) 572.

This requirement makes reform to the Council extremely difficult, if not an impossibility.⁴ In fact, in 1993, the General Assembly established a working group that was tasked to consider, among other issues, the question of increased Security Council membership/ However, with more than a decade into its deliberations, there has still been no agreement on the appropriate formula for Security Council representation.⁶ Therefore, from a practical perspective, it is improbable that in the short term the veto power will substantially be limited or eliminated. Such reforms to the Security Council may, however, be possible in the long term, since there could be radical changes to the structures of international law and politics in the future. In the interim, a realistic approach is necessary, one that examines other potentials of the UN system, taking into account the evolving interpretations of the UN Charter/ This thesis, therefore, focuses on other possible alternatives within the UN collective security system.

3.4 REGIONAL ORGANIZATIONS' EVOLVING ROLF.: IS RETROACTIVE AUTHORIZATION PERMISSIBLE?

Despite the significant role that regional organizations can contribute in forceful interventions to protect civilians, Article 53(1) of the UN Charter requires that they obtain authorization for such action from the Security Council. This requirement for authorization may be an impediment for the concerned regional organization to undertake robust enforcement action if the Security Council fails to grant authorization due to political interests of a permanent member. This has contributed to arguments that Article 53(1) of the UN Charter may be interpreted flexibly to permit subsequent authorization of an intervention by the Security

⁴ It has been acknowledged that attempts to adjust the Security Council mandate amount to Utopia. Erik Suy, 'Is the United Nations Security Council Still Relevant? And was it Ever?' (2004) 12 *Tulane Journal of International and Comparative Law* 7, 24.

⁵ Simon Chesterman, Thomas M Franck and David M Malone (n 3) 568. See. Question of Equitable Representation on and Increase in the Membership of the Security Council, UNGA Res A/RES/48/26 (3 December 1993).

⁶ Simon Chesterman, Thomas M Franck and David M Malone (n 3) 568.

David D Caron, 'The Legitimacy of the Collective Authority of the Security Council (1993) 87(4) *American Journal of International Law* 552, 567.

⁷Erik Suy (n 4) 24-25.

Council.⁹ The opposing positions with regard to subsequent authorization have already been examined in chapter two. It should be noted that the ECOV. intervention in Liberia was commended by the Security Council.¹⁰ In addition, rather than the Security Council condemn both the ECOWAS actions and NATO intervention in Kosovo, it entered into partnership with both organizations."

Despite the subsequent partnership with the UN, both ECOWAS and NATO interventions cannot be proper precedents for *ex post facto* authorization since the Security Council did not *expressly* authorize them retroactively. As White and Myer observe, a forceful intervention would be lawful from the point that the Security Council authorizes it, but with previous intervention remaining unlawful (unless the Security Council explicitly authorizes the preceding actions).¹¹ In addition, even if the ECOWAS and NATO interventions are assumed to be proper precedents, they are insufficient to indicate the emergence of a customary law permitting **retroactive** authorization that is acceptable within the international community. However, since the African regional and sub-regional organizations have subsequently adopted treaties with elaborate forceful intervention mechanisms, it is necessary to examine whether an African regional custom affirming retroactive authorization could have emerged.

⁹ For instance, see: Ademola Abass. *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing, Oxford 2004) 53-55; Thomas M Franck, 'Interpretation and Change in the Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, Cambridge 2003) 204, 223; African Union. 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (Addis Ababa "8 March 2005) Ext/EX.CIV2 (VII) part B(i).

¹⁰ The President of the Security Council commended the significant role of ECOWAS in resolving the Liberian crisis. See, UNSC President Statement 22133 (1991) UN Doc S/PRST/1991/22133.

¹¹ In the case of NATO, see UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244. It was the first Resolution after the NATO invasion of Kosovo, and rather than condemn the invasion as unauthorized in paragraph 4 of annex 2 (on principles to resolve the Kosovo crisis) it was stated that 'international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control.' In the case of ECOWAS in Liberia, Security Council Resolution 866 established the United Nations Observer Mission in Liberia, which was to operate jointly with ECOMOG. See, UNSC Res 866 (22 September 1993) UN Doc S/Res/866.

¹² Eric PJ Myjer and Nigel D White, 'Peace Operations Conducted by Regional Organizations and Arrangements' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford 2010) 163, 174.

3.4.1 SIGNIFICANT DEVELOPMENTS BY AFRICAN REGIONAL ORGANIZATIONS

The most significant African regional and sub-regional organizations, notably the African Union, ECOWAS, and SADC, have found it necessary to institutionalize a forceful intervention mandate. Article 4(h) of the Constitutive Act grants the AU the 'right' to undertake forceful intervention to stop or pre-empt genocide, crimes against humanity and war crimes.¹³ In addition, under Article 4(j) of the Constitutive Act, member states may request the AU to intervene in order to restore peace and security. While issues relating to the African Union's 'right' of intervention are comprehensively examined in chapter four, this section examines some of the core provisions within the ECOWAS and SADC legal and institutional systems.

3.4. J. 1 Developments within the ECOWAS system

The ECOWAS legal and institutional framework has undergone profound reforms since the Liberian intervention in 1990, resulting in the inclusion of intervention for humanitarian purposes as one of its core functions. Article 1 of the 1999 Protocol on Conflict Management establishes the ECOWAS collective security and peace mechanism.¹⁴ Article 22 of the Protocol provides that the role of the ECOWAS Cease-fire Monitoring Group (ECOMOG), which comprises both civilian and military contingents, include humanitarian intervention to resolve humanitarian crises.' " Under Article 25 of the Protocol, the peace and security mechanism may be activated in case of an internal conflict which threatens to cause a humanitarian crisis, or is a threat to the sub-region's security."¹⁵ Further, the Article provides that the peace and security mechanism may be put into action in case of gross violations of human rights and the rule of law, or where there is an unconstitutional removal of a democratically elected government, or if such an attempt is made.' With regard to

¹³ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS3.

¹⁴ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (ECOWAS) (adopted 10 December 1999) <<http://www.oecd.org/dataoecd/55/62/38873520.pdf>> accessed 20 July 2010.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

co-operation and co-ordination with the UN. Article 27 of the Protocol provides that the Chair of the ECOWAS Mediation and Security Council 'shall submit a report on the situation' to the UN and the OAU (now the African Union).¹⁸ In addition, Article 52 of the Protocol provides that ECOWAS 'shall inform the United Nations of any military intervention undertaken' as required by Chapters VII and VIII of the UN Charter.¹⁹

Two issues arise out of the ECOWAS framework for forceful intervention. First, Article 22 of the 1999 Protocol on Conflict Management grants ECOMOG the role of undertaking humanitarian intervention to resolve humanitarian crisis.²⁰ This provision seems to affirm the alleged rule permitting humanitarian intervention. Abass observes that if ECOWAS Protocol is implemented 'to its logical conclusions, the Mechanism will allow the sub-regional organization to operate without the supervision and control of the UN Security Council.'²¹ Assuming that ECOWAS deems humanitarian intervention as necessary, it is doubtful that a sub-regional organization comprising only of some West African states could discharge the required state practice and *opinio juris*, and therefore permit an intervention to be justified on that basis. For an African regional custom that permits such intervention to emerge, there should be uniformity of practice and *opinio juris* from other relevant regional organizations such as the AU and SADC.

Further, a more contextual examination of ECOWAS mandate indicates that the sub-regional organization does not intend to operate outside the UN system, but rather, intends to have the capacity to intervene in some extreme situations pending subsequent authorization. This is evident from the fact that Article 52 of the Protocol requires ECOWAS to inform the UN of any military interventions undertaken in accordance with Chapters VII and VIII of the UN Charter.²² In this case, ECOWAS seems to recognize the necessity of authorization by UN system, but views it as one

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ademola Abass, 'The New Collective Security Mechanism of ECOWAS: Innovations and Problems' (2000) 5(2) *Journal of Conflict and Security Law* 211,212.

²² Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (n 14).

that can be granted retroactively. It may be seen as an attempt to liberally interpret Article 53(1) of the UN Charter on the requirement of authorization by the Security Council, by deeming it as inclusive of subsequent authorization. Such an interpretation of Article 53(1) of the UN Charter may be justified from a customary law perspective, but that would require uniformity of state practice, in addition to *opinio juris*.²³

Further, the capacity of ECOWAS to develop a sub-regional or regional custom of *ex post facto* authorization will in no doubt be affected by the African Union's intervention mechanism and practice.²⁴ This is in addition to the necessity of examining the conduct of other African sub-regional organizations such as SADC. Similar mechanisms by both the AU and SADC, if supported by consistency of implementation, would indicate the emergence of an African regional custom permitting *ex post facto* authorization by the Security Council. The issue of whether a regional custom permitting *ex post facto* authorization is emerging within the African region can only be addressed conclusively after examining the AU's legal framework and the Union's subsequent practice in chapters four and five.

3.4.1.2 Forceful intervention mandate within the SADC framework

The other significant sub-regional development in Africa is in relation to the Southern African Development Community. Article 2(f) of the 2001 Defence and Security Co-operation Protocol provides that one of the objectives of the SADC Organ shall be to 'consider enforcement action' as a last resort where peaceful means fail, in adherence to international law.²⁵ Under Article 11(2)(b) of the 2001 Protocol, the SADC Organ has power to resolve intra-state conflicts in a state party, which may

²³In the *North Sea Continental Shelf* cases the ICJ stated that although a new rule of customary international law could be formed within a short period of time, the practice of states had to be extensive, in addition to being almost uniform. A general perception that the conduct amounted to a legal obligation was also necessary. *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 paragraph 74.

²⁴Article 16(1) of the AU Peace and Security Council Protocol states that sub-regional arrangements are part of the AU's security framework, and that the AU has primary responsibility for peace and security in Africa. See, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002) *Reprinted in* (2002) 10 *African Yearbook of International Law* 663, 663-694.

²⁵Protocol on Politics, Defence and Security Co-Operation (SADC) (adopted 14 August 2001) <<http://www.sadc.int/index/browse/page/157>> accessed on 20 July 2010.

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include gross human rights breaches, genocide, ethnic cleansing, civil war military coups.²⁶ Article 11(3)(d) of the Protocol provides that enforcement action shall only be undertaken as a 'last resort and, in accordance with Article 53 of the United Nations Charter, only with the authorization of the United Nations Security Council. The strict emphasis of 'only with the authorization' of the Security Council in Article 11(3)(d) of the Protocol seems to indicate that SADC does not contemplate taking forceful intervention in the absence of prior authorization by the Security Council. It also seems to negate the view that an emerging practice affirming subsequent authorization of forceful interventions by the Security Council could be emerging (through uniformity of practice) within the African region. It therefore negates the provisions of the ECOWAS system with regard to developments within the African region.

3.5 THE GENERAL ASSEMBLY: POSSIBLE ALTERNATIVE TO THE SECURITY COUNCIL?

In chapter two, we examined the discourse on the necessity and viability of the General Assembly as an alternative basis for authorization of enforcement action, if the Security Council is rendered ineffective due to lack of unanimity among the permanent members. A significant and more recent contribution of the General Assembly has been in relation to the concept of responsibility to protect. Most of the deliberations and resolutions on responsibility to protect have occurred within the General Assembly, rather than within the Security Council. The General Assembly deserves credit for providing guidance in the efforts towards achieving an international consensus on intervention for humanity, including enforcement action. Issues relating to the concept of responsibility to protect and its significance are examined later within this chapter.

Building up on the views postulated in chapter two, this thesis is based on the view that alternative authorization by the General Assembly is both necessary and possible. It would be inaccurate to regard the Security Council as one that will always

²⁶ Ibid.

²⁷ Ibid.

enforce the UN Charter aims and objectives.²⁸ The Security Council is first and foremost a political body, and therefore its operation is influenced by certain issues of interest to the permanent members.²⁹ Reisman observes that the UN collective security system was based on consensus between the Security Council's veto wielding permanent members. ' He acknowledges that the expected consensus disappeared shortly after the formation of the organization, and the Security Council could not always function in accordance to the original plan, except for situations where there were short term incentives for co-operation. "

Among those who dispute the capacity of the General Assembly to substitute for an ineffective Security Council is Akehurst, who argues that states intended the power to authorize enforcement action to be a sole reserve of the Security Council, because it is the only organ expressly granted such a mandate under the UN Charter. " In addition, Akehurst is of the view that the Uniting for Peace Resolution did not amend the UN Charter, and could not even succeed in such an amendment since a Charter provision overrides a resolution of the General Assembly in case of a conflict.³³

It seems that Akehurst fails to take into account the fact that Article 24(1) of the UN Charter grants the Security Council only *primary*, and not *exclusive* responsibility for peace and security. The United Nations Secretary General has stated that the authority granted by Article 2(4) of the UN Charter to the Security Council is of a primary rather than of an absolute nature.³⁴ The use of the phrase 'primary' while granting the Security Council peace and security mandate implies the existence of

Ibrahim A Gambari. 'An African Perspective' in David M Malone (ed). *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, Boulder 2004) 512, 519.

²⁹ Ibid.

" W Michael Reisman. 'Criteria for the Lawful Use of Force in International Law' (1985) 10 *Yale Journal of International Law* 279. 280.

³; *ibid*

Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of the American States' (1967) 42 *British Yearbook of International Law* 175, 215.

³³ *Ibid* 216.

¹⁴ Report of the Secretary-General: Implementing the Responsibility to Protect, UN Doc A/63/677 (12 January 2009) paragraph 63. Similar views are postulated by the 2001 Report of the International Commission on Intervention and State Sovereignty. See, International Commission on Intervention and State Sovereignty. 'The Responsibility to Protect' (December 2001) <<http://idl-bnc.idrc.ca/dspace/bitstream/10625/18432/6/116998.pdf>> accessed 21 November 2011 paragraph 6.7.

secondary or subsidiary responsibility that states may grant to the General Assembly³⁵ when the Council fails to act in accordance with the purposes of the UN Charter. Allott correctly opines that the United Nations security structure remains in operation: even where the Security Council is unable to discharge its responsibility under the Charter, since the UN and state parties resume the residual responsibility.³⁶ Allott asserts that in accordance with the guiding principle of the Uniting for Peace Resolution, state parties or the United Nations are not discharged from their duty of maintaining international peace and security under the UN Charter.³⁷

It seems, therefore, that the Uniting for Peace Resolution is not in conflict with the UN Charter, but only progressively articulates how the General Assembly may exercise the secondary responsibility. The Uniting for Peace Resolution expressly recognizes the primary responsibility of the Security Council, and the General Assembly is to assume responsibility only when there is lack of unanimity of the permanent members.³⁸ As Tomuschat argues, it is now 'accepted that emergency special sessions have become an integral part of the legal order of the United Nations.'³⁹ In addition, as Andrassy observes, the Security Council is obligated to act in accordance with United Nations purposes and principles,⁴⁰ as expressly provided in Article 24(2) of the UN Charter. White instructively opines that the Security Council acts on behalf of the United Nations and, therefore, the exceptions to the prohibition on use of force are those authorized by the UN, in addition to action in self-defence." In the 2004 *Construction of a Wall* case, the ICJ found that the request for an advisory opinion by the General Assembly was consistent with the Uniting for Peace

³⁵ Juraj Andrassy, 'Uniting for Peace' (1956) 50(3) *American Journal of International Law* 563, 564. According to Abass, the use of the term 'primary' responsibility within the UN Charter contradicts the view that states intended the Security Council to have absolute authority on international peace and security issues. He argues that if states intended the Council to have an absolute responsibility, they would have used the term 'exclusive.' Adcmola Abass (n 9) 135.

³⁶ Philip Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (Cameron May Ltd, London 2008) 407.

³⁷ Ibid.

³⁸ Uniting for Peace Resolution, UNGA Res 377(V)A (3 November 1950).

³⁹ Christian Tomuschat, 'Uniting for Peace: General Assembly Resolution 377(V)' <<http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>> accessed 19 December 2011.

⁴⁰ Juraj Andrassy (n 35) 564.

⁴¹ ND White, 'The Legality of Bombing in the Name of Humanity' (2000) 5(1) *Journal of Conflict and Security Law* 27, 39.

procedure⁴ It can be argued that by failing to question the Uniting for Peace procedure, the ICJ regarded it to be consistent with international law. The competence of the General Assembly to alternatively authorize forceful intervention has also been endorsed by other scholars, notably Brownlie,⁴¹ Reisman,⁴⁴ Bowett,⁴⁷ and Franck.⁴⁶

Akehurst is also of the view that the General Assembly has never, in practice, affirmed the capacity to authorize enforcement action.⁴ He argues that General Assembly's subsequent resolutions were for the establishment of peacekeeping missions such as the United Nations Emergency Force (UNEF), which was based on the consent of the subject state.⁴⁵ However, the 1951 Korean case is a precedent of the General Assembly actually asserting its capacity to authorize enforcement action in a practical sense.⁴¹ In addition, ten subsequent Uniting for Peace sessions have been convened. " Even if almost all the subsequent sessions have not specifically authorized use of force, they have not contradicted the terms of the original Uniting for Peace Resolution, and they have dealt with peace and security issues. In addition,

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paragraphs 29-35.

⁴¹ Brownlie and Apperley are of the view that NATO should have requested authorization from the General Assembly, instead of taking action that was inconsistent with international law (in its 1999 intervention in Kosovo). Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *International and Comparative Law Quarterly* 878, 904.

⁴⁴ Reisman and McDougal argue that in circumstances of extreme human rights violations that amount to a threat or breach of the peace and the Security Council is unable to take action, the secondary authority of the General Assembly, which was affirmed by the Uniting for Peace Resolution, can be relied upon. Michael Reisman and Myres S McDougal, 'Humanitarian Intervention to Protect the Ibo's' in Richard B Lillich (ed). *Humanitarian Intervention and the United Nations* (University Press of Virginia, Charlottesville 1973) 167, 190.

⁴⁷ Bowett observes that the Security Council, or the General Assembly, can authorize intervention in conditions which are a threat to international peace and security. Derek W Bowett. 'The Interrelation of Theories of Intervention and Self-Defense' in John Norton Moore (ed). *Law and Civil War in the Modern World* (John Hopkins University Press. Baltimore 1974) 38, 45.

⁴⁶ Franck specifically opines that the General Assembly alternative can be utilized by the AU in order to evade the problem of the veto in the Security Council. Thomas M Franck. 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100(1) *American Journal of International Law* 88. 100.

⁴⁷ Michael Akehurst (n 32) 215.

⁴⁸ Ibid.

⁴⁹ Intervention of the Central People's Government of the People's Republic of China in Korea, UNGA Res 498(V) (1 February 1951). The Resolution called upon states to continue providing every form of assistance to the UN intervention in Korea, after observing that the Security Council had failed to discharge its primary obligation due to lack of unanimity between the permanent members.

⁵⁰ United Nations General Assembly, 'Emergency Special Sessions' <<http://www.un.org/en/ga/sessionemergency.shtml>> accessed 22 December 2011.

even the Security Council has utilized the Uniting for Peace procedure due to the lack of unanimity of its permanent members on peace and security matters.⁵¹

Alternative authorization by the General Assembly is probably the most effective way of balancing the necessity to forcefully intervene to protect populations from genocide and crimes against humanity while safeguarding the international rule of law. Cassese, referring to the 1999 NATO's unauthorized invasion of Kosovo, appears to be in a dilemma while addressing the question of whether concerns for massive humanitarian suffering should lead to disregard for the rule of law." Brownlie and Apperley have instructively opined that NATO should have requested alternative authorization by the General Assembly instead of acting in a manner inconsistent with international law in the 1999 Kosovo intervention. Alternative authorization by the General Assembly can be supported from the international rule of law perspective, especially where the Security Council is ineffective due to political interests of a permanent member, despite mass atrocities that are also a threat to regional peace and security.

According to Brownlie, for the rule of law to exist, legal matters require to be undertaken 'in accordance with certain standards of justice, both substantial and procedural.'⁵⁴ Watt also observes that the concept of the rule of law requires that issues of justice be put into consideration in the governance of a community. The question of what constitutes justice within the international community is definitely a complex issue which is not possible to examine extensively in this thesis. However,

⁵¹ After Egypt's complaints against UK and France due to the 1956 Suez Canal conflict, the Security Council requested an emergency session of the General Assembly so that it could address the issue. UNSC Res 119 (31 October 1956) UN Doc S/RES/119. The Security Council also referred the 1971 India and Pakistan conflict to the General Assembly, in order to be resolved according to Resolution 377(V)A. UNSC Res 303 (6 December 1971) UN Doc S/RES/303.

⁵² Antonio Cassese. *'Ex iniuria ins oritur. Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community'* (1999) 10(1) *European Journal of International Law* 23, 25.

⁵³ Ian Brownlie and CJ Apperley (n 43) 904.

⁵⁴ Ian Brownlie, *Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Kluwer Law International. The Hague 1998) 215. As Owada opines, there is need for soundness in the substantive element of the law for the rule of law to exist. Hisashi Owada. "The Rule of Law in a Globalising World" in Francis Neate (ed), *The Rule of Law: Perspectives from Around the Globe* (LexisNexis, London 2009) 151, 154.

⁵⁵ Arthur Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15.

the failure of the Security Council to authorize intervention to prevent genocide or crimes against humanity due to the political interests of a permanent member does not seem to be consistent with action in the interest of justice within the international community. Besides the horrendous human suffering within the state, such atrocities are also often a breach or threat to regional security through the cross border flow of refugees, militias and weapons.

The ineffectiveness of the Security Council due to the political use of the veto seems to confirm that subjecting forceful intervention to the rule of law could at times fail.⁵⁶ It is acceptable to suppose that the drafters of the UN Charter intended to establish the UN 'on the basis of the rule of law.'⁵⁷ Watts finds the desire to institutionalize the rule of law within the international community in Article 1(1) of the UN Charter's quest to base the settlement of international disputes, which can result in breaches of the peace, in accordance with principles of justice." The Preamble of the 1970 Declaration on Principles of International Law states that the UN Charter has a significant role in the promotion of the rule of law within the international community.⁵⁸

The UN is a political organ. However, as Kunz argues, 'it is a political organization based upon the rule of law'.⁵⁹ Chesterman observes that the Security Council "does not operate free of legal constraint. In strict legal terms...the Council's powers are exercised subject to the Charter and norms *of jus cogens*."⁶⁰ The Security Council may be unable to address international peace and security issues (including mass atrocities) due to political interests of a permanent member. Where genocide, crimes against humanity or war crimes are taking place within a state, and are also a breach or threat to regional peace, the international rule of law cannot be said to exist.

⁵⁶ Michael J Glennon, 'Why the Security Council Failed' (2003) 82 *Foreign Affairs* 16, 16.

Josef L Kunz, 'The United Nations and the Rule of Law' (1952) 46(3) *American Journal of International Law* 504, 507.

⁵⁷ Arthur Watts (n 55) 25.

⁵⁸ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁵⁹ Josef L Kunz (n 57) 508.

⁶⁰ Simon Chesterman, 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System' *Final Report and Recommendations from the Austrian Initiative, 2004-2008* UN Doc A/63/69 (7 May 2008) paragraph 49.

In such a case, alternative authorization of forceful intervention by the General Assembly to restore peace and security, or to stop mass atrocities such as genocide and crimes against humanity, would seem to strengthen (rather than erode) the international rule of law.

Akehurst argues that the General Assembly has only the power to make recommendations (even with the Uniting for Peace Resolution) and that since the Assembly lacks jurisdiction on such matters, its resolution would not be binding upon a state.⁶² The basis upon which the General Assembly may assume secondary jurisdiction on peace and security matters has already been discussed in this section and was also examined in chapter two. In addition, even if the General Assembly's resolution would not be binding upon a state or regional organization, the state or regional organization may be willing to implement it. Therefore, the African Union can still act on the General Assembly's recommendations for forceful intervention if the Security Council is ineffective (in situations where the AU is willing to intervene to stop or pre-empt mass atrocities).

Further, even if some legal ambiguity in relation to the General Assembly's competence remains, the Assembly is probably the only other alternative of gaining maximum international legitimacy for action not authorized by the Security Council. As White argues, the General Assembly seems to be the most representative forum within the international community.⁶³ Myjer and White have also convincingly argued that in the absence of authorization by the Security Council, the General Assembly should, at the minimum, be involved, in order to gain maximum legitimacy for such an intervention.⁶⁴ The 2001 ICISS Report also endorsed the General Assembly alternative where the Security Council was ineffective.⁶⁵ According to the ICISS Report, even if the Assembly's powers were recommendatory, an intervention that is authorized by the Assembly would have great political support.⁶⁶

⁶² Michael Akehurst (n 32) 215.

⁶³ ND White (n 41) 38.

⁶⁴ Eric PJ Myjer and Nigel D White, 'Peace Operations Conducted by Regional Organizations and Arrangements' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford 2010) 163, 183.

⁶⁵ International Commission on Intervention and State Sovereignty (n 34) paragraph 6.7.

⁶⁶ *Ibid.*

Kuwali has stated that it would be doubtful that the requisite two-thirds majority, for the General Assembly to authorize use of force, would be achieved in a situation where the Security Council is also unable to reach unanimity.⁶ However, the General Assembly has been able to convene and issue Uniting for Peace resolutions in the past despite the lack of unanimity at the Security Council. The tenth such emergency session was convened in 1997. In addition, the 53 African states that are members of the AU (with the admission of Southern Sudan to the AU making it 54 member states)" form a substantive part of the 193 UN General Assembly members.⁰ The substantive composition of the General Assembly makes it easier to lobby the Assembly members for the successful authorization of the requested forceful intervention mandate where the Security Council is ineffective. Further, despite the Security Council inability to reach unanimity of all the permanent members in order to authorize an African Union intervention, some of the Council members would still be supportive of the AU initiative. There are opportunities of forming an effective partnership between the AU and the General Assembly, if necessary, and if the AU seeks that option.

3.6 OPPORTUNITIES UNDER THE CONCEPT OF RESPONSIBILITY TO PROTECT

As international law progresses, there have been attempts to address the tension between the values of state sovereignty protection and intervention for humanity within the international community through the concept of sovereignty as responsibility. In 2001, the ICISS Report postulated a comprehensive reformulation

Dan Kuwali. *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Martinus Nijhoff Publishers, Leiden 2011) 149.

United Nations General Assembly, 'Tenth Emergency Special Session' <<http://www.un.org/ga/sessions/emergency10th.shtml>> accessed 26 January 2010.

' African Union, 'Member States' <<http://www.africa-union.org/root/au/memberstates/map.htm>> accessed 19 December 2011. As of 19 December 2011, the AU list of member states had not been updated to include South Sudan. For South Sudan membership, see, *Cable News Network*, 'South Sudan Admitted to African Union as 54th Member' (29 July 2011) <http://articles.cnn.com/2011-07-29/world/south.sudan.au_1_south-sudan-african-union-newest-nation?_s=PM:WORLD> accessed 19 December 2011.

⁰ For General Assembly membership, see. General Assembly of the United Nations, 'About the General Assembly' <<http://www.un.org/en/ga/>> accessed 19 December 2011.

of sovereignty and intervention as responsibility through the concept of 'responsibility to protect.'⁷¹

3.6.1 EMERGING CONSENSUS UNDER THE CONCEPT OF RESPONSIBILITY TO PROTECT

Amongst other factors, the ICISS Report was influenced by the views and experiences of some scholars at the time, notably Deng.¹ Responsibility to protect under the ICISS Report envisages a continuum of obligations by the international community, namely, the obligation to prevent, to react and to rebuild.² Subsequent endorsement of the responsibility to protect concept by both the General Assembly and the Security Council have provided some normative value to the concept, although it is yet to evolve into a proper legal norm.³ The concept was affirmed by the General Assembly in the 2004 HLP Report⁴ and the 2005 World Summit Outcome Document.⁵ In addition, in September 2009, the General Assembly agreed that states would continue further deliberations on the issue. There have also been annual deliberations on the responsibility to protect under the auspices of the General

¹ International Commission on Intervention and State Sovereignty (n 34) paragraphs 2.14–2.15 and 2.28–2.31.

² Years earlier, Deng, collaborating with other scholars, had asserted that states were both domestically and internationally accountable for certain responsibilities that were implied by the notion of sovereignty. Francis Mading Deng and others. *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, Washington DC 1996) 1. Those who acknowledge the influence of Deng's ideas on the ICISS Report include: Thomas G Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era' (2004) 35(2) *Security Dialogue* 135, 139; Emma McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123, 128; Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24(3) *Wisconsin International Law Journal* 703, 708.

³ International Commission on Intervention and State Sovereignty (n 34) paragraph 2.32. See Emma McClean (n 72) 131.

⁴ General Assembly resolutions are a significant part of the fabric of state practice. Rosalyn Higgins, 'The Attitude of Western States towards Legal Aspects of the Use of Force' in A Cassese (ed). *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht 1986) 435, 435.

⁵ High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004) paragraph 203.

⁶ World Summit Outcome Document UN Doc A/RES/60/1 (24 October 2005) paragraphs 138 and 139. The inclusion of the concept in the Outcome Document exemplifies 'a broader systemic shift in international law,' that is, the continuing acceptance of the notion that state sovereignty may be limited by human security concerns. Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99, 100-101.

⁷¹ United Nations News Centre, 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009) <<http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+protect&CrI=>>> accessed 22 September 2009.

Assembly, such as the July 2011 informal thematic discussions.⁵ In addition, a Special Adviser to the UN Secretary General on Responsibility to Protect has been appointed.⁶ As Orford observes, with General Assembly affirmations, the question relating to the responsibility to protect concept is no longer whether it should be endorsed, but rather on the nature of its implementation." More significantly, the Security Council explicitly affirmed the responsibility to protect concept in Resolutions 1674^{XI} and 1894."

Although some of the legal issues articulated by the responsibility to protect concept have been in existence, it has immense legal and political value by shifting the focus and terms of the international debate on intervention for humanity. It addresses the tension between the values of state sovereignty and intervention for human rights principles by conceptualizing both sovereignty and intervention as responsibility to protect populations from preventable mass atrocities. From the ICISS Report, it is apparent that mobilizing the evasive political will 'is also a matter of intelligently and energetically advancing good *arguments*, which may not be a sufficient condition but are always necessary for taking difficult political action. The concept builds on the continuing erosion of the traditional concept of state

⁵ See. United Nations General Assembly Department of Public Information, "For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers no Relief". Secretary-General Cautions in General Assembly Debate" (12 July 2011) <<http://www.un.org/News/Press/docs/2011/ga11112.doc.htm>> accessed on 1 August 2011.

⁹ See. United Nations News Centre. "Interview with Edward Luck, Special Advisor to the Secretary-General" (1 August 2011) <<http://www.un.org/apps/news/newsmakers.asp?NewsID=38>> accessed 2 August 2011.

⁸⁰ Anne Orford. *International Authority and the Responsibility to Protect* (Cambridge University Press. Cambridge 2011)21.

⁵ Resolution 1674 of 2006 affirmed the 2005 World Summit Outcome Document provisions that endorsed the responsibility to protect. UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

⁸: UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894.

⁵¹ According to Thakur. such responsibility may be traced to the responsibilities of the Security Council in relation to international peace and security. Additionally, Thakur points out duties established under human rights and humanitarian laws under both domestic legislation and international declarations and treaties, and also state practice. Ramesh Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33(3) *Security Dialogue* 323. 330. One of the political benefits of the concept is the shifting of the focus of the intervention debate in favour of those who are in dire need of actions, rather than the interveners. International Commission on Intervention and State Sovereignty (n 34) paragraphs 2.22 - 2.23.

^M Gareth Evans (n 72) 721.

sovereignty,⁸⁷ adding essential momentum to the acceptability and institutional of the concept of sovereignty as responsibility.

Under the responsibility to protect concept, the international community is deemed to have secondary responsibility to intervene where a state is unable or unwilling to protect populations within its territory.⁸⁶ Second, the protection of populations suffering from mass atrocities may be executed through timely and decisive enforcement action, where other means are inappropriate or inadequate.⁸⁷ Third, enforcement action under the responsibility to protect concept is maintained within the United Nations system (unlike in the case of the alleged rule permitting humanitarian intervention even without UN authorization).⁸⁸ As Orford observes, the institutionalization of the responsibility to protect concept has led to a process of systemic integration at and around the United Nations.⁸⁹ Fourth, the responsibility to protect concept reaffirms the role of regional organizations such as the African Union.⁹⁰

⁸⁵ International Commission on Intervention and State Sovereignty (n 34) paragraphs 2.18-2.20.

^M The collective responsibility to protect in the international community is affirmed by the HLP Report. High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203. The Outcome Document also asserts the responsibility, within the international community, of ensuring populations are protected from atrocities. World Summit Outcome Document (n 76) paragraph 139.

* The central focus of the ICISS Report was action within a state in the absence of its consent particularly the contentious military intervention. International Commission on Intervention and State Sovereignty (n 34) paragraph 1.38. The necessity for collective action, that may include the implementation of Chapter VII of the UN Charter, was affirmed by the Outcome Document, particularly if peaceful intervention proved insufficient. World Summit Outcome Document (n 76) paragraph 139. In addition, the HLP Report had also asserted the necessity for military intervention, implemented as a last resort. High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203.

⁸⁸ According to the Outcome Document, the implementation of the collective action should be through the Security Council, but in a timely and decisive manner, where peaceful approaches are insufficient, or fail. World Summit Outcome Document (n 76) paragraph 139. The same had been stressed by the HLP Report, which provided that military intervention may be undertaken, with Security Council authorization. High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203. The justification and necessity for alternative authorization by an emergency session of the General Assembly, where the Security Council is ineffective, has already been discussed. The ICISS Report, which produced the first comprehensive articulation of the concept of responsibility to protect, advocated for alternative authorization of forceful intervention by the General Assembly, if the Security Council was ineffective. International Commission on Intervention and State Sovereignty (n 34) paragraph 6.7. Thakur. an ICISS Commissioner, also asserts that where the Security Council is ineffective in implementing the concepts, the matter may alternatively be resolved by the General Assembly under an emergency session. Ramesh Thakur (n 83) 336-337.

⁸⁹ Anne Orford. 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981, 1000.

⁹⁰ High-Level Panel on Threats, Challenges and Change (n 75) paragraph 185. World Summit Outcome Document (n 76) paragraph 139.

3.6.2 IMPORTANT POLITICAL IMPETUS: ELEMENTS OF GLOBAL CONSENSUS

It seems that aspects of universality in the origins of the concept of responsibility to protect have permitted its general global endorsement, for instance, affirmation of the concept by the General Assembly and Security Council, despite the fact that it is yet to evolve into a proper legal norm. While it was the Canadian Government that sponsored the production of the ICISS Report, the original theoretical formulations of the ideas on 'responsibility to protect' are attributed to a Sudanese national, Francis Deng.⁹¹ Deng admits that his original ideas were based on the African experience, but have subsequently undergone both expansion and mainstreaming.⁹² In addition, ICISS was well balanced with regard to professional backgrounds and regional representations by the Commissioners.⁹³ Evans observes that within four years after the responsibility to protect concept was articulated by the 2001 ICISS Report, it was endorsed by the General Assembly during the 2005 World Summit.⁹⁴ The General Assembly's 2004 HLP Report had also previously affirmed the concept. In a sense, it can be argued that while the alleged rule permitting humanitarian intervention had evoked opposition against domination on the basis of international power hierarchy, the responsibility to protect concept exemplifies elements of international solidarity.⁹⁶

⁹¹ Those who have acknowledged the influence of Deng's work on the ICISS Report include: Gareth Evans (n 72) 708; Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53(1) *Journal of African Law* 8; Thomas G Weiss (n 72) 139; Emma McClean (n*72) 128.

⁹² Francis Deng, 'JISB Interview: The Responsibility to Protect,' (2010) 4(1) *Journal of Intervention and Statebuilding* 83, 84.

⁹³ Ramesh Thakur (n 83) 326.

⁹⁴ Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?' (2008) 22(3) *International Relations* 283, 286.

⁹⁵ High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203.

⁹⁶ Ramesh Thakur (n 83) 328.

3.6.3 IMPLEMENTING THE CONCEPT: LEGAL VALUE, OBSTACLES AND OPPORTUNITIES

Despite the opportunities provided by the concept in attaining an international consensus on intervention for humanity, there are some obstacles that require to be addressed to ensure its effective practical implementation. First, the concept is yet to be effectively implemented in some deserving situations. This is in spite of the necessity of such a response in some recent internal conflicts, such as the Darfur conflict. However, it should be acknowledged that the concept is already being associated with some forceful interventions that have been necessary to protect populations from atrocities, such as in the case of Libya.⁹¹ Further, it can be argued that the concept is still in the process of evolution, and global acceptability of the concept is likely to increase in the future, including the willingness for its implementation.

3.6.3.1 Legal and political value of the concept

There have been some allegations that the responsibility to protect concept lacks significance.⁹⁸ Some of those allegations are based on the supposition that the concept 'imposes no new binding duties or obligations upon states or international organizations' and therefore it lacks normative value.⁹⁹ It has, for instance, been

In connection to Libya, UN Secretary General argues that Security Council Resolution 1973 (which authorized no-fly zones and protection of civilians) affirmed the international community's determination to implement the 'responsibility to protect' populations from state sponsored atrocities in an unambiguous manner. United Nations Secretary General, 'Secretary-General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence' (18 March 2011) <<http://www.un.org/News/Press/docs/2011/sgsmI3454.doc.htm>> accessed 29 March 2011. Security Council's Resolution 1973 reaffirmed the responsibility of the Libyan Government to protect its population before proceeding to authorize implementation of no-fly zones. See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 The Special Adviser to the UN Secretary General on the Prevention of Genocide, and the Special Adviser on the Responsibility to Protect, had warned the Libyan authorities that they could be held accountable for crimes against humanity. The Special Advisers reminded the Libyan authorities that the 2005 World Summit had resolved protection of populations from genocide and crimes against humanity United Nations Press Release, 'UN Secretary-General Special Adviser on the Prevention of Genocide. Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya' (New York 22 February 2011) <<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG.%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf>> accessed 19 November 2011.

⁹⁸ Anne Orford (n 80) 22.

⁹⁹ Ibid 23.

argued that it would be inappropriate to classify the responsibility to protect concept as an emerging norm since states accrue no consequences for their failure to implement it. and there is lack of will for its implementation. " ' However, it is not a requirement that the concept translates into binding obligations to states in order for it to have legal value. In addition, there are cases of states failing to fulfill well established human rights norms, such as the obligation not to commit torture.¹⁰¹ without such states suffering any clear consequences. As Orford observes, even if the responsibility to protect concept does not translate into binding duties, it raises significant legal issues, and exemplifies a form of law that allocates powers and provides jurisdiction¹⁰² for intervention to the international community. Under the concept, sovereignty is essentially responsibility, and such responsibility may permeate to the international community, which has secondary obligation of a complementary nature. The jurisdiction and responsibility is allocated to the international community to take action through the collective security system of the UN. In case of failure by the territorial state, the international community's *capacity to provide protection* to the population (from atrocities such as genocide and crimes against humanity) is the basis upon which it can claim the authority to intervene.¹⁰³

Recognizing the normative value of the concept, the UN Secretary General argues that it has become "well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect."¹⁰⁴ In a sense, the progressive evolution of the concept of responsibility to protect will limit the convenience with which states may rely on the concept of sovereignty as a legal and political justification for non-intervention.

¹⁰¹ Amrita Kapur. Humanity as the A and fi of Sovereignty: Four Replies to Anne Peters' (2009) 20(3) *European Journal of International Law* 560, 562.

¹ The duty not to commit torture is even regarded to be in the nature of a *ius cogens* obligation. See, ILC, 'Report of the International Law Commission on the Work of its 58th Sessional May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682/Add.1 paragraph 35.

¹⁰² Anne Orford (n 80) 25. HLA Hart is of the view that a legal system comprises of the unity of primary and secondary rules. While primary rules impose duties, secondary rules confer powers. HLA Hart, *The Concept of Law* (2nd edn Oxford University Press. Oxford 1994) 81.

¹⁰⁵ Anne Orford (n 89) 1002-1003.

¹ Report of the Secretary-General: Implementing the Responsibility to Protect (n 34) paragraph 54.

The legal and political value of the concept may also be discerned from the fact that it has the objective of limiting the tension and conflict between the value- sovereignty protection and intervention for humanitarian purposes, by establishing complementarity between them. The UN Secretary General has correctly stated that doctrinal and conceptual issues have been part of the intervention problems.⁵ The responsibility to protect concept strengthens the normative power of the various pre-existing legal obligations upon which it is based into a single novel construct. According to Peters, since '[t]he whole is more than the sum of the parts' the concept has 'added legal value, independent of whether it is qualified as a binding legal norm as such.'¹⁰⁵ According to Orford, the concept provides 'a coherent framework for understanding and integrating pre-existing practices of protection within the international community.'¹⁰⁸

The re-conceptualization of sovereignty as responsibility under the concept is welcome, as it changes the focus of intervention from an issue of 'states' rights to states' obligations' and places the needs of humanity as the starting point of the intervention debate. " Even if the responsibility to protect concept is not yet a proper legal norm, it has significant legal and political value that is helpful in addressing the dilemmas of forceful intervention for humanitarian purposes. The legal and political value of the concept is further examined in chapter four while analyzing the concept in relation to the AU's intervention system.

¹⁰⁵ Ibid paragraph 7.

¹⁰⁶ Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 *International Organizations Law Review* 1,10. Some of the existing obligations include those established under the 1948 Genocide Convention. Article VIII of the Convention establishes the obligation to prevent the occurrence of genocide upon the member states. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entry into force 12 January 1951) 78 UNTS 277.

¹⁰⁷ Anne Peters (n 106) 10.

¹⁰⁸ Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 *Global Responsibility to Protect* 400. 403.

¹⁰⁹ Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds). *The Constitutionalization of International Law* (Oxford University Press, Oxford 2009) 153, 185.

3.6.3.2 *Is the concept ambiguous and extremely open to abuse?*

There may be concern that the responsibility to protect concept is conceptually ambiguous, and that it may be open to manipulation and abuse by some states, thereby becoming an easy justification for wars motivated by self interests and agenda. It has even been observed that the 2003 invasion of Iraq contributed to the undermining of the global support for the responsibility to protect concept.¹¹¹ For instance, when initial justifications for the 2003 Iraq invasion became unconvincing, there were *ex post facto* attempts to validate the attacks on humanitarian grounds by the United States and United Kingdom.¹¹² However, viewing the concept as advocating unregulated and unilateral intervention would result from the failure to accurately analyze the parameters that define the emerging norm, and its central focus on the international rule of law. The responsibility to protect debate has developed within the General Assembly,¹¹³ an organ of the UN, and has even been endorsed by the Security Council.¹¹⁴ The responsibility to protect concept also seeks to maintain forceful intervention within the UN system.¹¹⁵ And even in the context of forceful

Cristina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge. London 2011) 137. Weiss observes that attempts to justify the Iraq war on humanitarian factors could have become an impediment for the debate on the responsibility to protect concept. Thomas G Weiss, 'RtoP Alive and Well after Libya' (2011) 25(3) *Ethics and International Affairs* 287. 290.

¹¹¹ Cristina Gabriela Badescu (n 110) 137. The original justifications for the invasion of Iraq were the threat of weapons of mass destructions and the threat of terrorism, and were linked to the right of self defence in a pre-emptive manner. President George Bush, while ordering the Iraq invasion, stated that terrorists with 'chemical, biological or. one day, nuclear weapons obtained with the help of Iraq...could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people' in the US or elsewhere. *Cable News Network*, 'Bush: 'Leave Iraq within 48 hours' (18 March 2003) <<http://edition.cnn.com/2003/WORLD/measty03/17/sprj.irq.bu> sh.transcript/> accessed 18 July 2010. Bush also asserted that the United States of America had the 'sovereign authority to use force in assuring its own national security.' Ibid. The belated humanitarian justification of the invasion of Iraq was negated by the fact that it was only put forward after other grounds of intervention became unsustainable. Simon Chestermaa 'Just War or Just Peace after September 11: Axes of Evil and Wars against Terror in Iraq and Beyond' (2005) 37 *New York University Journal of International Law and Politics* 281. 296.

¹¹² For instance, responsibility to protect has been affirmed in General Assembly meetings and resolutions such as: High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203; and World Summit Outcome Document (n 76) paragraphs 138-139. In addition, in September 2009, the General Assembly resolved that states would continue further discussions on the matter. United Nations News Centre (n 77).

¹¹³ See. UNSC Res 1674 (n 81) and UNSC Res 1894 (n 82).

¹¹⁴ High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203; World Summit Outcome Document (n 76) paragraph 139. The responsibility to protect has not changed the law prohibiting unilateral intervention since United Nations authorization is required. Anne Peters,

intervention for human rights purposes, the concept of responsibility to protect has a restrictive perspective, focusing only on genocide, crimes against humanity, ethnic cleansing and war crimes." If understood in its proper context, the application of the responsibility to protect concept should be constructed narrowly since it focuses only on the 'extreme, conscience-shocking cases of mass atrocities' and not all forms of human security concerns.¹¹⁶

3.6.3.3 *Should the concept focus on radical reforms to the UN system?*

The responsibility to protect concept has also been faulted for failing to suggest reforms to the UN Security Council that would make it more effective. However, as already pointed out in this thesis, proposing reforms to the Security Council may be unrealistic in the short-term. Any radical proposal to reform the veto privilege of the five permanent members of the Council is likely to be blocked by any of those members. Since it is the General Assembly that has been at the forefront in the development of the responsibility to protect concept, it can further contribute to the elimination of ambiguity on the Assembly's competence to alternatively authorize enforcement action where the Security Council is ineffective. A reaffirmation of the Uniting for Peace Resolution by the General Assembly in the context of the responsibility to protect concept is thus necessary.

3.6.3.4 *Vulnerable states concerns especially in Africa*

Despite some of the responsibility to protect conceptions originating from the ideas and experiences of individuals not of a Western background, including those of African origin (and the seemingly international consensus), colonial legacy and concerns against external intervention may still impede the effective implementation of the concept in some regions such as Africa. While the AU offers an opportunity for the implementation of the concept in Africa, it can also be a forum from which external intervention in the region, particularly by Western states, can be opposed.

'Humanity as the A and fi of Sovereignty' (2009) 20(3) *European Journal of International Law* 513. 537.

¹¹⁵ See. World Summit Outcome Document (n 76) paragraph 139.

¹¹⁶ Anne Peters (n 114)523.

¹¹⁷ Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan. Hampshire 2010) 124.

While African states have generally endorsed the responsibility to protect concept at the General Assembly, some of the subsequent practice by the AU have indicated concerted efforts of a contradictory regional attempt to preserve some of the traditional concepts of sovereignty ¹¹⁸ In addition, although the AU legal framework progressively incorporates a forceful intervention for humanitarian purposes mandate, there are contradictory drawback clauses that endorse the principle of non-intervention and permit traditional concepts of sovereignty.

The AU legal and institutional framework, including the subsequent practice of interpreting sovereignty in the traditional sense, is examined in chapter four. Chapter six then focuses on the various factors that can contribute to the effective institutionalization of the concept of sovereignty as responsibility in Africa. Such progressive developments would result in an effectively implemented AU intervention mechanism in deserving situations, and useful burden sharing with the international community. Some of the factors that have been identified as likely to contribute to effective institutionalization of the concept of sovereignty as responsibility within the AU include the costs and implications of conflicts in the African region, and strategic advocacy by civil society organizations. In addition, realities of the increasing global interdependence, and the realization that the African Union can only successfully avoid external, non-African intervention within the region by undertaking its own intervention, is likely to stimulate reforms within the AU.

3.6.3.5 Compatibility of the concept with the state system

There may be concern that the concept is incompatible with the current configuration of the international community under the state system, and the prohibition of unlawful use of force. The concept of responsibility to protect may, incorrectly, be viewed as postulating an end to the state system. However, both the

¹¹⁸ For instance, despite the commission of mass atrocities during the 2011 Libyan conflict, some of which could constitute crimes against humanity, the AU opposed external military intervention of any form, while affirming the territorial integrity of the Libyan state. African Union. 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 6.

principle of sovereignty and non-intervention remain central to the responsibility to protect concept. The only difference is that the concept has the objective of making the principles of sovereignty and non-intervention productive, and ensure that they achieve their primary purpose, that of ensuring the protection of humanity. In a sense, the proscription of intervention and protection of state sovereignty has the objective of protecting natural persons from catastrophes, and safeguarding international stability.¹²⁰ Permitting intervention, it may be argued, can lead to gross humanitarian catastrophes through imperialist wars and interventions, and generate global instability.¹²⁰ Such a view seems to also confirm that the protection of sovereignty and the principle of non-intervention is not serving its purpose where mass atrocities, such as genocide and crimes against humanity, are taking place and threatening regional peace and stability through the flow of refugees and the spread of militia groups and weaponry.

As Peters points out, since 'the international system does not exist for its own sake, the prohibition on intervention is, just like sovereignty, ultimately grounded in the well-being of natural persons.'¹²¹ Therefore, the concept of responsibility to protect does not represent an opposition to the principle of sovereignty, but rather, is its affirmation.'¹²¹ Deng correctly states that '[t]he state is the cornerstone of the international system and the concept of state sovereignty continues to be a fundamental norm within the international order.'¹²³ The principle of non-intervention safeguards international stability, therefore preventing interventions that could also lead to serious humanitarian catastrophes.¹²⁴ On that basis, the principle of non-intervention should be upheld as a general rule, while properly institutionalized exceptions should be accepted.¹²⁵

The responsibility to protect has proper safeguards that are consistent with reasonable protection of the sovereignty of states and the principle of non-

¹¹⁹ Anne Peters (n 109) 186.

¹²⁰ Ibid.

¹²¹ Anne Peters (n 114) 534.

¹²² Dan Kuwali (n 67) 97.

¹²³ Francis M Deng. 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 353, 353.

¹²⁴ Anne Peters (n 114) 534.

¹²⁵ Ibid.

intervention. The concept does not represent an evolution towards unilateral and unregulated interventions, but advocates timely and decisive forceful intervention with UN authorization.¹¹⁶ In situations where the Security Council is ineffective, the most appropriate recourse for a regional organization or state willing to intervene to stop genocide or crimes against humanity would be to seek an alternative authorization by the General Assembly. The viability and necessity of alternative authorization by the General Assembly has already been examined. The responsibility to protect concept also advocates forceful intervention only in situations of genocide, crimes against humanity, ethnic cleansing and war crimes.¹¹⁷ The application of the concept should therefore be constructed narrowly, since its focus is not on all forms of human security concerns, but only on extreme mass atrocities which shock the conscience of mankind.¹¹⁸

Despite some of the above concerns, some of which arise from the failure to comprehensively appreciate the strictures of the concept, and others which can be resolved by its continued evolution, it is correct to argue that some commendable progress has been achieved. It should be acknowledged that 'some extraordinary progress has been made...within a remarkably short time period given the normal pace at which international norms and patterns of behavior change.'¹¹⁹ The changes are part of the continuing transformation of international law into a system designed to safeguard certain society and humanity interests, from its traditional orientation with the protection of the state and the governing elite.¹²⁰ As Tomuschat observes, the continued progression of the international community, 'from a sovereign-centred to a value-oriented or individual-oriented system' has an influence on the meaning and strictures of the non-intervention norm.¹²¹

¹¹⁶ See. High-Level Panel on Threats, Challenges and Change (n 75) paragraph 203; World Summit Outcome Document (n 76) paragraph 139. There has been no change to the law proscribing *unilateral* intervention since the concept advocates for UN authorization. Anne Peters (n 114) 537.

¹¹⁷ See, World Summit Outcome Document (n 76) paragraph 139.

¹¹⁸ Anne Peters (n 114) 523.

¹¹⁹ Gareth Evans(n 72) 722.

¹²⁰ CarstenStahn (n 76) 101.

¹²¹ Christian Tomuschat. "International Law: Ensuring the Survival of Mankind on the Eve of a New Century; General Course on Public International Law" (1999) 281 *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, The Hague 2001) 237.

3.7 CONCLUSION

Although international consensus is unlikely to emerge with regard to the alleged rule permitting humanitarian intervention, opportunities for resolving the legal and political dilemmas of intervention are being realized through the emerging norm of responsibility to protect. The responsibility to protect concept has significant legal and political value for addressing the dilemmas of intervention for humanitarian purposes, although the concept is yet to evolve into a proper legal norm.

There have been instances of forceful interventions by regional organizations within the international community without prior Security Council authorization. However, it is doubtful that a rule permitting retroactive authorization of a regional organization's forceful intervention, by the Security Council, has emerged within the international community. This is due to the lack of uniformity and consistency in subsequent practice. Having introduced legal and institutional developments by African sub-regional organizations, chapter six will analyze whether an African regional rule permitting retroactive authorization is emerging. This is after taking into consideration the AU's legal framework and subsequent practice, which are examined in chapters four and five. In order to safeguard the international rule of law and avoid regression into the anarchy that preceded the formation of the United Nations, effective enforcement action for humanity should be implemented by exploiting possible authorization alternatives within the UN system. This thesis advocates for alternative authorization by an emergency session of the General Assembly where the Security Council is ineffective.

CHAPTER FOUR

THE AFRICAN UNION'S FORCEFUL INTERVENTION MANDATE: DILEMMAS AND OPPORTUNITIES OF IMPLEMENTATION

Africa needs alternative solutions.'

4.1 INTRODUCTION

The above statement by Mazrui, made in reference to Africa's security problems and in the context of the deficiencies of the UN system, is instructive." Made in 1999, just before the African Union was formed, it partly reflects some of the probable regional benefits that the AU's forceful intervention mechanism could provide. Mazrui seems to point to the necessity of a regional mechanism that could address some of the problems of the United Nations' contradictory and inadequate 'peace enforcement' and peacekeeping responses, which had been of a consensual nature and had often proved ineffective in protecting civilians from atrocities, often perpetrated by their own governments.

This chapter addresses the question of whether the AU forceful intervention mechanism is in conformity with the UN Charter and international law, in addition to examining how it may be implemented. Based on existing uncertainty on the possible implementation mechanism for the AU's intervention mandate, this chapter also addresses the question of whether the alleged right of humanitarian intervention, or the principle of consent, can be an effective justification for intervention under Article 4(h) of the Constitutive Act.³ The status of both the alleged rule of humanitarian intervention and consensual interventions have already been examined in chapter two, and therefore their brief discussion in this chapter is to link them to the AU intervention system. While evaluating alternatives for the implementation of

¹ Ali Mazrui. 'African Security: The Erosion of the State and the Decline of Race as a Basis for Human Relations' in Caroline Thomas and Peter Wilkin (eds), *Globalization, Human Security and the African Experience* (Lynne Rienner Publishers. Boulder 1999) 163, 166.

" According to Mazrui, the UN was more of a peacekeeper within Africa, but ineffective in making and enforcing peace within the region. Ibid.

³ Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS3.

the AU intervention mechanism, options for addressing the ineffectiveness of the IN Security Council (in providing prior authorization) are balanced with the need for the international rule of law. The chapter also examines whether the UN system can provide an opportunity for robust and effective implementation of the AU's intervention mandate.

Further, this chapter addresses the question of whether the failure to effectively institutionalize the concept of sovereignty as responsibility within the AU legal framework and processes could have contributed to the subsequent failure to implement the Union's forceful intervention mandate. The chapter therefore explores whether there is a conflict in the relationship between the principles of sovereignty and intervention for human rights protection within the AU intervention framework, and inquires whether such a situation has contributed to the effective use of sovereignty as a legal and political justification for non-intervention. Contextual factors that influenced the establishment of the AU forceful intervention system, and issues affecting its implementation, are also examined. They include political concerns and regional apprehensions against increasing risks of external (non-African) intervention due to increasing globalization.

4.2 THE AFRICAN UNION AS A FRAMEWORK FOR THE POOLING OF SOVEREIGNTY

Before examining the possible implementation mechanisms for the AU's intervention mandate, and the various dilemmas that have affected its activation, it is important to discuss what appears to have also been the intended role of the AU. Based on the historical vulnerability of African states to external interference, continuing globalization (and increasing global interdependence on issues that were traditionally within the domestic realm of states), African states would likely become even more susceptible in international affairs. This development seems to have significantly contributed to the formation of the AU, which appears to be a form of 'pooled sovereignty.' In that context, African member states confer upon the AU intervention powers, while at the same time protecting critical state sovereignty concerns from external (non-African) interference. Conclusion of treaties and

establishment of intergovernmental organizations are themselves expressions of sovereignty by states ' They result in either the pooling or sharing of sovereignty, or both. It seems that within the African Union system, various regional interests, including intervention for human rights purposes, are to be regulated within the pooled sovereignty entity. Some of the issues discussed in this part are examined more deeply in other relevant sections of this chapter.

Pooling of sovereignty is the merging of states for the purposes of strengthening their global power and autonomy in relation to other states on issues of mutual interest. In its ordinary meaning, pooling includes the promotion of common objectives and reduction of competition by a group of entities through the sharing of resources.' To share is to divide an item or entity into portions/ Pooling and sharing are both interdependent and independent actions. This is still the case in the context of pooling or sharing of sovereignty. Just like in the sharing of sovereignty, the pooling does also involve the surrender of some amount of sovereignty for some common objectives. However, in the pooling of sovereignty context, there is lesser surrender of sovereign privileges, characterized by shallow integration, as compared to a genuine case of sharing of sovereignty. There also may be concerted efforts to affirm the sovereignty of the participating states, an issue which is not very explicit within the genuine sharing of sovereignty context. Therefore, although pooling of sovereignty includes some elements of its sharing, there are some distinctions between the pooling and sharing of sovereignty concepts, evident in the motives and patterns of behaviour of the participating states, and the outcomes.

There are characteristics that indicate a greater concern toward pooling and strengthening of sovereignty in Africa and not just the sharing of it through deep integration. First, despite the right of intervention under Article 4(h) of the Constitutive Act, the principle of non-interference in the domestic affairs of member states by other states is reaffirmed within the AU's legal framework, and is among

⁴ Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (Macmillan Press, London 1998) 26.

⁵ Bryan A Garner (ed), *Black's Law Dictionary* (9th edn Thomson Reuters. St Paul 2009) 1278.

⁶ Ibid 1500.

Jacques Mangala. 'State Sovereignty and the New Globalization in Africa' in George Klay Kieh (ed), *Africa and the New Globalization* (Ashgate Publishing, Hampshire 2008) 97, 116.

the principles that govern the AU Peace and Security Council.⁸ This demonstrate efforts to strengthen the principles of sovereignty and non-interference in the domestic affairs of a state, by other member states. Yet it is reasonable to assume th^ any commencement of collective action under the auspices of the African Union including forceful intervention, would require initial concerns and interference. b\ individual states, on the events occurring in the domestic affairs of another state.

It has been suggested that the impetus for states participation in some organizations like the African Union may actually have the objective of reaffirming the inviolability of sovereignty rather than a reflection of willingness of sharing it There is continued failure by African governments to effectively implement communally agreed duties and policies, with persistent hesitation for effective transfer of sovereignty in a practical sense.¹⁰ It indicates the unwillingness for actual sharing of sovereignty. It has also been observed that the manner in which regional institutions seem to evolve in Africa at times creates international expectations of the emergence of deeper integration and practical sharing of sovereignty in Africa The international expectations of deep integration and practical sharing of sovereignty within Africa at the time of forming some regional organizations, such as the African Union, may be linked to ambitious statements and clauses, but which are subsequently not implemented effectively. It may seem as if contrary to the Asian approach of informal arrangements, there are efforts to provide real structures to the African organizations. It has, however, been observed that what may appear as deep integration in the context of a wider regional organization, with effective institutions to govern the participation of member states, may in reality be a veil for "a concerted

⁸ Under Article 4(g) of the Constitutive Act, the African Union is also to be governed by the principle of non-interference in the domestic affairs of a member state by other states. This principle of non-interference is reaffirmed in Article 4(f) of the AU Peace and Security Council Protocol, as one of the principles to govern the Council. Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002) *Reprinted in* (2002) 10 *African Yearbook of International Law* 663, 663-694. In addition, Article 4(e) of the Protocol stresses the principle of respect for the territorial integrity and sovereignty of state parties.

⁹ Mark Corner, *The Binding of Nations: From European Union to World Union* (Palgrave Macmillan, Hampshire 2010) 134.

¹⁰ Daniel Bach, 'The Global Politics of Regionalism: Africa' in Mary Farrell, Bjorn Hettne and Luk Van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2007) (London) 171, 185.

¹¹ Mark Corner (n 9) 134.

¹² *Ibid.*

effort to embed the absolute sovereignty of individual leaders in their own countries."¹³

Second, Maluwa, the first Legal Counsel of the African Union, has asserted that the formation of the AU was significantly motivated by the idea 'that the construction of a large integrated regional block' was the best approach in addressing the challenges of globalization.¹⁴ It has been observed that with the forces of globalization, African states' sovereignty has been infringed, leading to concerns on how African states could remain as entities with impact in the international community.¹⁵ According to Udombana, 'the hysteria of globalization' overrode other factors that could benefit from the adoption of the African Union Treaty, including human rights protection.¹⁶ As a result, such concerns have resulted in the notion of pooling of sovereignty as the most appropriate mechanism of protecting African states' significance within the international community from further erosion.' This may explain the reason why there is lack of effective enforcement and practical implementation of common AU standards in critical issues touching on human rights and the rule of law, in addition to other significant matters in the political, economic and social spheres.

Reference to the European Union (EU) implementation of common standards, especially in relation to human rights protection and the rule of law, is instructive on the issue of practical sharing of sovereignty. The European Union has gradually increased its membership, but this increment was only possible after non-democratic establishments had collapsed, with succeeding states portraying both the desire and capacity to adapt to new modes of governance." In the continuing expansion, before a state is admitted into the EU membership, it has to demonstrate that it will abide by

¹³ Ibid.

"Tiyanjana Maluwa, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union' (2001) 9 *African Yearbook of International Law* 3, 13. Maluwa was the AU's first Legal Counsel when it was established to replace the Organization of African Unity. See, Pennsylvania State University. 'Tiyanjana Maluwa' <http://sia.psu.edu/faculty/tiyanjana_maluwa> accessed 7 December 2011.

¹⁵ Jacques Mangala (n 7) 114.

"Nsongunia J Udombana. 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' (2002) 17(6) *American University International Law Review* 1177, 1259.

¹ Jacques Mangala (n 7) 114.

¹⁸ Mark Comer (n 9) 135.

the common standards. " The conditions are stipulated in Article 6(1) of the Treaty on the European Union and include 'principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law', as commonly shared by member states. Conversely, the African Union has been unwilling to impose demands of certain standards on state parties unlike the EU practice.²¹ Therefore, despite *prima facie* appearance of the African Union as a European Union type organization, it does not operate with comparable effectiveness." The EU example shows that through peaceful co-operation, "it is possible to replace the rule of force by the rule of law".²³

Thakur points out that some of the greatest defenders of the traditional concepts of sovereignty are to be found amongst the developing states, while, in contrast, there is the superseding of sovereignty in Europe, exemplified by the progressive establishment of a borderless continent.²¹ Although Thakur has referred to the European experience as 'pooling' of sovereignty, it is more of its 'sharing' when compared to the African practice. There are some notable contradictions within African Union summits, with radical and extremely ambitious pronouncements by some African leaders about deep integration that would be characterized by a future of a united and borderless Africa. " However, despite such radical statements, there is at the same time an apparent disinclination in sharing sovereignty in some critical areas that are indispensable in order to achieve such realities.²⁶

Third, it has been argued that although there have been many civil wars within Africa, presently and in the previous century, the feeling that there is need to regulate

²⁰ Ibid.

²⁰ Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community (29 December 2006) Official Journal of the European Union, C 321 E/1. Article 49 of the Treaty provides that any European state which adheres to the stated principles may apply for European Union membership.

²¹ Mark Corner (n 9)135.

²² Ibid 135-136.

²³ Brigid Gavin. 'Regional Integration in Europe' in Mary Farrell, Björn Hettne and Luk Nan Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005 London) **222, 222.**

²⁴ Ramesh Thakur. *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, Cambridge 2006) 265.

²⁵ Mark Corner (n 9)133.

²⁶ Ibid.

activities of rogue states has not been significant." An example is the African Union's failure to comprehensively address the conflict in the Eastern Democratic Republic of Congo, which commenced in 1998, and has security implications on some of the neighbouring states. Such action may require practical sharing of sovereignty in some core areas, in addition to strict enforcement of regional standards on issues such as human rights protection and the rule of law. Effective enforcement of African regional standards would still require evolution for a period of time. However, significant and consistent evolution towards such practice is lacking. It has been argued that amongst other factors, the origin of shared sovereignty under the European Union may be traced to concerns against continental dominance by one state, particularly Germany.⁵ This was in addition to a regional need to prevent a recurrence of the mass atrocities committed during the Second World War, based on the idea that governments that respected human rights were unlikely to advocate war with their neighbours." There was also the view that the most appropriate way of ensuring "Germany would be a force for peace" together with United Kingdom and France and other neighbouring states, was by regional amalgamation and institutionalization of shared values."

The European Union original predecessor, the 1951 Coal and Steel Community, has been viewed to have been a European solution 'to the problem of allowing Germany to recover economically without allowing it to become a danger again militarily.'³¹ On the contrary. Africa lacked a similar 'German problem,' and in its place, the African problem was connected to external influence which had a bearing to a lengthy period of colonial domination. " The concern against external intervention, coupled by continued Westphalian conceptualization of sovereignty, seems to compromise the African Union's focus on decisively addressing the problem of fragile and conflict prone states, such as the Congo. Consequently, statements about deep integration fail to translate into serious practical commitments

²⁷ Ibid.

²¹ Ibid.

¹ Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (2nd edn Oxford University Press, Oxford 2000) 786 -787.

³⁰ Ibid 787.

³¹ Mark Comer (n 9) 133.

³³ Ibid.

to share sovereignty between the states, or the strengthening of the essential institutions for such objectives."

The pooling of sovereignty does not transform the African Union into a sovereign entity. In essence, the fact that some sovereignty has evaporated at the state level, in order to establish a regional system, does not necessarily mean that it reappears at the level of the created regional entity in the same context.³⁴ It has been observed that even for the European Union, despite having an international personality, it lacks a sovereign existence." The African Union can only become a sovereign entity if member states resolve to grant it such powers, thereby transforming it into a super state. For that to happen, African states would have to lose their statehood to the new super state that they would be establishing.

4.3 THE AFRICAN UNION'S 'RIGHT' OF INTERVENTION

The African Union has the 'right' to intervene in a member state in situations of genocide, crimes against humanity or war crimes, under Article 4(h) of its Constitutive Act. Although the grounds of intervention are based on the commission of international crimes, they are referred to as 'grave circumstances' under the Article. It may be argued that the use of the phrase 'grave circumstances' was influenced by the fact that such actions, besides being international crimes, constitute serious violations of human rights and humanitarian law. The African Union's legal framework fails to define the constituent elements of crimes against humanity, war crimes and genocide.

On the face of it, the intervention powers under the Constitutive Act represent a radical departure from the non-intervention approach under the Charter of its predecessor, the Organization of African Unity. It has been argued that the focus of the OAU was state protection, rather than the security of individuals within the state, because its provisions centred more on issues such as non-interference and sovereign

³³ Ibid.

³⁴ Ulf Hedetoft, 'Sovereignty Revisited: European Reconfigurations, Global Challenges, and Implications for Small States' in Louis W Pauly and William D Coleman (eds), *Global Institutions and Autonomy in a Changing World Ordering* (University of British Columbia Press, Vancouver 2008) 214, 233'

³⁵ Ibid.

equality of states." However, despite the provision for intervention for human rights purposes under the Constitutive Act, there are also opposing provisions that buttress the principle of non-interference in the domestic affairs of member states.'

4.4 FROM PAN AFRICANISM TO THE AFRICAN UNION: HISTORICAL CONCERNS AGAINST EXTERNAL INTERFERENCE

Before examining the various factors that led to the inclusion of the right of forceful intervention for humanitarian purposes within the AU, it is necessary to briefly discuss the historical attitudes of African leaders on regional integration, especially where sovereignty is concerned. This may be helpful in understanding the historical factors that have continued to influence the construction of sovereignty under the AU framework, despite the mandate permitting the Union to intervene forcefully to prevent or stop mass atrocities. Historically, the idea of integration in Africa fundamentally originated from the desire to eradicate colonial exploitation and domination under the Pan Africanism movement. The Pan African movement originated from the ideas of intellectuals of African descent in the diaspora, mainly in the United States, Caribbean and Europe.⁵ In essence, it was an ideological vehicle for countering exploitation and racism against people of African descent. ' Therefore, Pan Africanism represented the unity of Africans, both within the African continent and in the diaspora, for purposes of liberation, integration, freedom and

Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, Cambridge 2004) 7. Article U(IXc) of the OAU Charter lists one of the purposes of the Organization as being the protection of the sovereignty, territorial integrity and independence of the member states. In addition, Article 11(1)(d) lists elimination of colonialism as an objective of the Organization. See, Charter of the Organization of African Unity (adopted 25 May 1963, entry into force 13 September 1963) 479 UNTS 39.

It has been pointed out that the African Union legal framework fails to provide a hierarchical order between sovereignty and intervention, which cements interpretative differences. Kithure kindiki, 'The African Peace and Security Council and the Charter of the United Nations' (2005) 1(1) *Law Society of Kenya Journal* 77, 91. Some of the non-interference provisions include Article 4 (g) of the Constitutive Act which prohibits interference in a member state's domestic issues by other states. The African Union Peace and Security Protocol reaffirms the same principle in Article 4(f). See, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

⁵ Abdalla Bujra, 'Africa from the OAU to the AU and from the Lagos Plan of Action (LPA) to NEPAD' <<http://www.bujra.com/documents/Bujra%20addressoa%20on%20oau-au.pdf>> accessed 13 August 2011, 1.

³⁹ Ibid.

development.⁴⁰ Within Africa, the search for political and economic integral, culminated in the establishment of the OAU in 1963. and the AU in 2002.⁴¹

After the Second World War, the Pan African ideology was utilized as a psychological weapon in the fight against colonialism within the African region. With the independence of Ghana in 1957, it heightened the momentum for the Pan African movement within the African region by organizing the First Conference of Independent African states in 1958.⁴² The resolutions and ideas generated during the meeting were later integrated into the OAU Charter, which was adopted in 1963. "Some of the core clauses in the OAU Charter related to the ending of colonialism in the region, and preservation of territorial integrity of the newly independent states." In 1964, in order to prevent secessions and disruption of territorial borders, the OAU adopted a Resolution that formally endorsed the principle of *uti possidetis juris*, and resolved that state borders inherited at independence had to be respected. "Externally, the Resolution discouraged interference by other states that might have been interested in pushing for territorial claims, an issue that could have contributed

⁴⁰ Agyemang Attah-Poku, *African Stability and Integration: Regional, Continental and Diaspora Pan-African Realities* (University Press of America. Lanham 2000) 32.

⁴¹ Paul G Adogamhe, "Pan-Africanism Revisited: Vision and Reality of African Unity and Development" (2008) 2(2) *African Review of Integration* 1, 2.

⁴² Charles F Andrain, 'The Pan-African Movement: The Search for Organization and Community' (1962) *Phylon* XXIII (I) 5, 16. The 1945 Fifth Pan African Congress in Manchester, organized by George Padmore and Kwame Nkrumah. is regarded as a significant turning point in the fight against colonialism in Africa, which, in addition to unambiguously demanding freedom, also ignited nationalism within the region. Issa Shivji, 'The Struggle to Convert Nationalism to Pan-Africanism: Taking Stock of 50 Years of African Independence' *Pambazuka News* (11 August 2011) <<http://www.pambazuka.org/enycategory/features/75620>> accessed 13 August 2011.

⁴³ Julius O Ihonvbere, 'Pan-Africanism: Agenda for African Unity in the 1990s' (Keynote Address at the All-African Student's Conference, University of Guelph. Ontario 27 May 1994) <<http://www.hartford-hwp.com/archives/30/033.html>> accessed 16 August 2011.

⁴⁴ Ibid. The liberation of the African regions that were still under colonial rule was one of the foremost concerns of African leaders at the time of the formation of the OAU. COC Amate. *Inside the OAU Pan-Africanism in Practice* (Macmillan Publishers, London 1986) 211.

⁴⁵ According to the OAU Charter, some of the Organization's purposes, as enumerated in Article II. were: to enhance the unity of African states, to protect the independence, sovereignty and territorial integrity of African states, and to eliminate all forms of colonization from the region. Under Article III of the OAU Charter, some of the fundamental principles governing the Organization were: non-interference in domestic affairs of other states, respect for other states' sovereignty and territorial integrity, peaceful settlement of disputes, and commitment to the independence of African states still under colonial rule. See, Charter of the Organization of African Unity (n 36).

⁴⁶ Organization of African Unity, 'Border Disputes among African States' (Cairo 17-21 July 1964) AHG/Res. 16(1) paragraph 2.

to forceful interventions.' Within the African states, ethnic communities were notified that secession would not be acceptable⁴⁹

When the Biafra region of Nigeria sought to secede from the state in the late 1960s and a civil war ensued, most of the African states refused to recognize the secessionists as a sovereign entity, with the exception of Zambia, Ivory Coast, Gabon and Tanzania.^{41J} Generally, the OAU was involved in the peaceful settlement of various conflicts and disagreements, some of them connected to the issues of the borders of the independent African states. ' In addition, although the OAU was based on the principle of non-interference in the domestic affairs of its member states, it did participate in peacekeeping in Chad, but in support for the established state order.¹ Peacekeeping is based on the consent of the territorial state, and, therefore, it cannot be argued as amounting to a violation of the principle of non-intervention. It is based on the sovereign right of the territorial state to request or consent to intervention in order to restore internal peace and security.

Overall, while the OAU and some progressive African leaders deserve commendation for their success in pushing for the independence of other African states, there was a subsequent incapacity to reverse the position of the African region economically, and in its role in the global context ~ In addition, the OAU could not forcefully intervene in situations of autocratic governance and gross human rights violations, due to its restrictive construction of state sovereignty, including its interpretation of territorial integrity and the principle of non-interference.⁵³

⁴ Steven R Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90(4) *American Journal of International Law* 590. 595.

Ibid. African states territorial boundaries were defined by European powers such as Britain, Germany, France, Portugal, Italy and Spain between 1880 and 1901 without any consideration of the interests of the inhabitants, or their ethnic composition. COC Amate (n 44) 403. Consequently, states that were created either run across previously existing political units, or divided homogeneous ethnic communities into different states, and such divisions were likely to contribute to internal and regional conflicts after the departure of the colonial powers. COC Amate, *ibid*.

⁴⁹ COC Amate, *ibid* 442.

⁵⁰ *Ibid* 403.

⁵¹ *Ibid* 431.

⁵² Julius O Ihonvbere(n 43).

" Paul G Adogamhe (n 41) 16.

The conduct of African leaders can, in part, be attributed to colonial heritage. After the attainment of independence, African leaders tended to adopt a pattern seeking personal advancement in terms of power and wealth.⁵⁴ The leaders of the newly independent states assumed the positions that the colonial rulers had occupied with a keen interest of preserving the power and privileges of the former masters. Post-colonial Africa was, therefore, characterized by an interchange of positions (an irresponsible conduct) between the former colonial rulers and the new African leader and their lieutenants.⁵⁶ With time, territorial nationalism, leading to conflicts defined by issues of ethnicity and citizenship, began to eclipse the earlier ideals of Pan Africanism movement. The failure of Pan Africanism ideas to transform Africa into a politically, economically and socially progressive society could be attributed to the philosophy that drove African leaders upon the attainment of independence. It seems that the struggle for freedom did not run deep into more core issues, with the focus having largely been on the attainment of political independence, leading to limited objectives in the practical sense.⁵⁵

In the post Cold War period, the concept of 'African solutions to African problems' became the common phrase that espoused the idea of regional solutions to the continent's predicaments, including in peace and security matters. The phrase arose out of the reality that, at times, Africa would be neglected by the international community in times of regional catastrophes, as exemplified by the neglect of Rwanda during the 1994 genocide.⁵⁷ African leaders began to realize that they could not always depend on external assistance, and that at times, they had to have their own solutions to regional peace and security predicaments.⁶⁰ However, even in the post African Union context, and despite the Union's mandate for forceful intervention for human rights purposes, restrictive interpretation of the concept of sovereignty has

⁵⁴ Chief Obafemi Awolowo, *The Problems of Africa: The Need for Ideological Reappraisal* (Macmillan, London 1977) 36.

⁵⁵ Ibid.

⁵⁶ Ibid 37.

⁵⁷ Issa Shivji (n 42).

⁵⁸ Julius O Ihonvbere (n 43).

⁵⁹ Chris Fomunyoh, 'African Solutions to African Problems: A Slogan Whose Time has Passed' (9 February 2005) <<http://allafrica.com/stories/200502090005.html>> accessed 28 July 2011.

⁶⁰ Ibid.

led to the continued legal and political dilemmas of addressing horrendous atrocities within African states.

In summary, the conduct of African leaders, and the absence of the concept of sovereignty as responsibility within the AU processes, may be attributed to some factors. First, African states, using the categorization developed by Cooper, are either in the pre-modern and modern stages of evolution.⁶¹ According to Cooper, some states in Africa, such as Somalia, are candidates for pre-modern categorization.⁶² In such a situation, the state is in a fragile form, and lacks the monopoly to use force.⁶³ The modern state (a category in which secure African states may fall) is characterized by stability, but with emphasis for state sovereignty and concern against external interference.⁶⁴ Such modern states may revert into the pre-modern stage if internal order is disturbed.⁶⁵ The post modern entity is characterized by the demise of the state system into a greater order (and not disorder) through regional integration, like in the case of the European Union.⁶⁶ There is less emphasis of the traditional notions of sovereignty and non-interference in domestic affairs in the context of a post modern state.⁶⁷

Second, the conduct of African leaders may, historically, be connected to their socialization into the concept of exploitation and irresponsible governance of the masses during the colonial period, the state of affairs from which African states were conceived. Third, effects of globalization, and the continuing vulnerability of Africa to intervention in an era of increasing global interdependence, may have affected the conduct of African leaders. It may have created a subconscious necessity of pooling and strengthening sovereignty in Africa.

⁶¹ Cooper divides states into categories of pre-modern, modern and post modern. See. Robert Cooper, *The Post-Modern State and the World Order* (Demos, London 1996) 17-26.

⁶² Ibid 18.

⁶³ Ibid.

⁶⁴ Ibid 19.

⁶⁵ Ibid 21.

⁶⁶ Ibid 22-23.

⁶⁷ Ibid 23.

4.5 FACTORS LEADING TO THE AU'S FORCEFUL INTERVENTION SYSTEM

Various factors that could have led to the intervention provisions within the African Union framework may be identified either from prior or subsequent AU practice, and the influence of the international community. They point to the desire to merge African states sovereignty concerns, under a pooling framework, with a need to 'own' and regulate intervention for human rights purposes in the region, while addressing undesirable elements of external intervention. The various factors discussed in this section take into account, where relevant, contextual and environmental issues such as political considerations and increasing global interdependence in human rights protection matters.

4.5.1 INEFFICIENCIES OF THE OAU

The African Union evolved from the OAU gradual political and economic integration.⁶⁸ While endorsing the 1994 Cairo Agenda for Action, the Heads of State and Government of the OAU recognized 'democracy, good governance, peace, security, stability and justice' as among the most fundamental factors for the social and economic development of the region.⁶⁹ Earlier, the 1991 Treaty Establishing the African Economic Community had called for the establishment of a peaceful environment in the region, which was identified as a prerequisite for development. In the 1999 Sirte Declaration, the formation of the African Union was resolved, guided by the objectives of both the OAU Charter and the Treaty Establishing the African Economic Community. '

Ben Kioko, the African Union's Legal Adviser, states that the Heads of State and Government resolved to include the 'right' of intervention due to the historical

⁶⁸ Konstantinos D Magliveras and Gino J Naldi, 'The African Union: A New Dawn for Africa ' (2002) 51(2) *International and Comparative Law Quarterly* 415.415.

⁶⁹ Relaunching Africa's Economic and Social Development: The Cairo Agenda for Action (Addis Ababa 26-28 June 1995) AHG/Res.236 (XXXJ) paragraph 10.

⁷⁰ Article 3 (0, Treaty Establishing the African Economic Community (adopted 3 June 1991. entry' into force 12 May 1994) 30 ILM 1241 (1991).

⁷¹ Article 8(i). See, Sirte Declaration (Sirte 8-9 September 1999) <[http://www.un.int/libya sine dc.htm](http://www.un.int/libya/sirte_dc.htm)> (accessed on 15 September 2010).

failure of the OAU to intervene to stop egregious violations of human rights. * Notable instances include the 1994 Rwanda genocide and the brutal Idi Amin regime in Uganda in the 1970s.⁷¹ The July 2000 OAU Report on the Rwanda genocide noted that, in addition to the United Nations, the OAU was also to blame for failing to condemn the genocide, which was attributed to the organization's deep focus on sovereignty and non-interference.⁴ There was a general agreement amongst African leaders on the necessity of rejuvenating the regional organization and consolidating African unity, thereby providing it with the capacity for a greater role both locally and globally. Influence in global issues, in addition to safeguarding regional peace and security, was therefore expected to accrue from the pooling of sovereignty under the AU framework.

4.5.2 SOVEREIGNTY CONCERNS IN AN INCREASINGLY GLOBALIZED WORLD

Issues related to the concerns against increasing globalization, and the unique vulnerability of the African region to external (non-African) interference, have been discussed in the sections that examine the pooling of sovereignty within the AU system, and the historical concerns of African political leadership in regional integration matters. The further discussion of such issues in this section is to demonstrate that the inclusion of the AU's forceful intervention mandate was also motivated by the necessity of responding to the threats of increasing globalization, and therefore the need to claim ownership of interventions within the African region.

In the 1999 Algiers Declaration (one year before the adoption of the Constitutive Act of the AU), African leaders asserted that globalization posed a serious threat to the sovereignty and historical identity of the African region.⁶ They

" Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-Intervention' (2003) 85(852) *International Review of the Red Cross* 807, 812. A footnote in the introductory part of the article describes Kioko as a Legal Adviser to the African Union. Ibid 807.

⁷³ Ibid 812.

⁴ International Panel of Eminent Personalities. 'Rwanda: The Preventable Genocide' (7 July 2000) <http://www.africa-union.org/Official_documents/reports/Tleport_rowanda_genocide.pdf> accessed 11 December 2009 paragraph 11.4.

⁷⁵ Ben Kioko (n 72)810.

⁷⁶ Algiers Declaration (Algiers 12-14 July 1999) AHG/Deci.I (XXXV) 5.

adopted the view that globalization should operate within 'democratically conceived dynamics' that permit collective benefits. African leaders also declared their concern against growing disrespect for the UN system, stressing that unilateral forceful intervention, without UN Security Council authorization, was a threat to global peace and security.⁷⁵ Udombana is of the view that the adoption of the Constitutive Act of the AU was largely motivated by 'the hysteria of globalization rather than the euphoria of unity or, for that matter, human rights.'⁷⁹

4.5.3 EFFECTS OF INTERNATIONAL HUMAN RIGHTS PROTECTION DEVELOPMENTS

The acceptance of grave violations of human rights and humanitarian law as the basis for intervention by the AU may also be linked to the gradual evolution of international human rights protection regimes. Maluwa, the first AU Legal Counsel, states that the grounds of intervention under Article 4(h) of the Constitutive Act were limited to situations of genocide, crimes against humanity and war crimes due to developments in international law, including the adoption of the Rome Statute of the International Criminal Court.⁸⁰ However, that does not mean that the African Union framework effectively institutionalized human rights protection concerns, or that it has continued to efficiently endorse and affirm emerging concepts fully.

At inception, the OAU Charter had few provisions relating to human rights issues since the Organization reflected the dominating concerns of the region at the time.^M The OAU central focus included independence for people still **under** colonial

⁷⁷ Ibid.

⁷⁸ Ibid 6.

Nsongurua J Udombana (n 16) 1259.

⁸⁰ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union' (2004,) *LI Netherlands International Law Review* 195, 217. Maluwa was the first Legal Counsel of the AU upon its establishment to replace the OAU. See, Pennsylvania State University (n 14). Under Article 5(1) of the Rome Statute of the ICC, genocide, crimes against humanity and war crimes are listed as international crimes that are of serious concern to the entire international community. See, Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

⁸¹ Rachel Murray (n 36) 7. For instance, Article 11(1)(c) of the OAU Charter focused on the preservation of the sovereignty, territorial integrity and independence of the state parties. Further, elimination of colonialism was listed as an objective of the Organization in Article 11(1)(K). See, Charter of the Organization of African Unity (n 36).

domination, and preservation of the statehood that had just been acquired.⁸² Even where issues of human rights were included, they were largely in connection with the principle of self-determination in the context of decolonization, with broad and general provisions that focused on the relationships among states/' Subsequent establishment of regional mechanisms would gradually result in greater protection for human rights. These include the mechanisms established under the African Charter on Human and Peoples' Rights⁸⁴ and the Cairo Agenda for Action on Relaunching Africa's Economic and Social Development.⁸⁵

It had increasingly been acknowledged that socio-economic progress could not be achieved in the absence of peace and security, both of which tend to require respect for human rights to thrive/" Kalu observes that the Heads of State and Government intended the African Union to have intervention capacity that would prevent the regional recurrence of other grave circumstances, such as the Rwanda genocide.⁸ However, despite the intervention mechanisms, and the desire to intercede for human rights purposes, there was also the concern against intervention from external (non-African) sources. Kalu argues that the concept of state sovereignty remains an important shield against external, non-African interventions, but should not be a barrier to intervention by the AU for purposes of human rights protection within a member state.⁸⁸

⁸² Rachel Murray (n 36) 7.

⁸³ Ibid 8.

⁸⁴ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU DOC. CAB/LEG/67/3 rev. 5. Besides enumerating various fundamental rights and freedoms. Article 30 of the African Charter established the African Commission on Human and Peoples' Rights which was mandated to protect and ensure the promotion of human rights in Africa.

Relaunching Africa's Economic and Social Development: The Cairo Agenda for Action (n 69). In paragraph 10. the Resolution noted that 'democracy, good governance, peace, security, stability and justice' were some of the most essential ingredients for the region's socio-economic prosperity, and proposed various ways of addressing such challenges.

⁶ Evarist Baimu . 'The African Union: Hope for Better Protection of Human Rights in Africa?' (2001) *African Human Rights Law Journal* 299, 300.

BenKioko (n 72)814-815.

⁸¹ Kelechi A Kalu. 'Resolving African Crises: Leadership Role for African States and the African Union in Darfur' (2009) 9(1) *African Journal of Conflict Resolution* 9. 19.

One of the effective ways to avoid external (non-African) intervention in the region would be by African states undertaking such action.⁸⁹ In the Ouagadougou Declaration, just two years before the formation of the African Union, the OA' member states expressed the view that conflicts in the region 'originate from such external factors as the sequels of colonization and foreign interferences' and resolved to tackle impunity and ensure protection of human rights.⁹⁰ However, despite an elaborate intervention mechanism, the African Union is yet to undertake enforcement action of the nature envisaged under Article 4 (h) of the Constitutive Act since its establishment in July 2000, even in deserving situations. During this period, some exceptionally serious and protracted regional conflicts that have involved grave violations of human rights have occurred in places such as Eastern Democratic Republic of Congo and Darfur, Sudan. From a humanitarian perspective, they have warranted forceful intervention for protection of civilians. However, the AU's interventions have either been through pacific negotiations or consensual military action, an issue that is examined at a later stage in this chapter

4.5.4 INEFFICIENCIES OF THE UN SECURITY SYSTEM AND THE ECOWAS PRECEDENT

The UN's poor intervention record in the African region was also a significant cause for the emergence of intervention clauses in African treaties such as the Constitutive Act.⁹¹ In the case of Liberia in 1990, President Doe requested intervention from the United Nations and the United States as rebels advanced and threatened to take over the state.⁹² However, having failed to obtain assistance, he sought ECOWAS' intervention, requesting the organization to introduce a

⁸⁹ Helene Gandois, 'Sovereignty as Responsibility, or African Regional Organizations as Norm-Setters' (British International Studies Association Annual Conference, University of Saint Andrews 2 December 2005) <<http://oxford.academia.edu/documents/0001/2131/GandoisBISApaper2005.pdf>> accessed 10 October 2010. 16.

⁹⁰ Ouagadougou Declaration (Ouagadougou 8-10 June 1998) AHG/Decl. I (XXXIV).

⁹¹ Jeremy I Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan' in Niels Blokker and Nico Schrijver (eds). *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Martinus Nijhoff Publishers Leiden 2005) 213, 236.

⁹² British Broadcasting Corporation Monitoring Report, 'Report: President Doe not to Stand for 1991 Elections, 1 June 1990' (4 June 1990) Reprinted in M Welter (ed). *Regional Peace-keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Senev Cambridge University Press, Cambridge 1994) 41.

peacekeeping force." It seems that the 1990s interventions by ECOWAS, for instance, in Liberia, brought the African states to the realization that they could intervene without prior Security Council authorization.⁴ It could have contributed to the view that Security Council authorization could be issued retrospectively in extreme circumstances that necessitated an intervention without prior authorization.

In addition, the interventions may have propelled African states to take the view that if there was failure to assume greater responsibility for peace and security in the region, it was likely that, at times, there would be no action from other sources.' The 1993 United States-led intervention in Somalia was disastrous and resulted in withdrawal of troops. The 'Somalia syndrome' significantly contributed to the growing reluctance by Western states to sustain military casualties in foreign interventions which were primarily for humanitarian purposes."⁴ In the case of the 1994 Rwanda genocide, the UN admitted failure to intervene to stop the atrocities, but attributed the inaction to lack of political will and resources.⁴

While formulating the legal and institutional system for intervention, the AU avoided binding itself explicitly to prior authorization by the Security Council.⁴⁸ It has, therefore, been observed that some of the structural dilemmas that require resolution include conflicts of law between the UN and the AU." The AU Legal Adviser has argued that the AU will have to consider, on a case by case basis, whether to seek authorization by the Security Council while undertaking an

" Economic Community of West African States, 'Letter Addressed by President Samuel K Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee, 14 June 1990' *Reprinted* in M Weller (ed), *Regional Peace-keeping and International Enforcement: The Liberian Crisis*, vol 6 (Cambridge International Documents Series, Cambridge University Press, Cambridge 1994)60-61.

"⁴ Jean Allain. 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 *Max Planck Yearbook of United Nations Law* 237, 260.

International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Research, Bibliography. Background (December 2001) <<http://web.idrc.ca/openebooks7963-1/>> accessed 28 November 2011.

Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda. UN Doc S/1999/1257 (15 December 1999) 3.

Thomas Franck is of the view that the Constitutive Act creates a framework for intervention with or without the approval of the United Nations. Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100(1) *American Journal of International Law* 88. 100.

Jeremy I Levitt (n 91) 228.

intervention, in accordance with Article 53 of the UN Charter.¹⁰⁰ Article 53(1) of the UN Charter provides that the Security Council may utilize regional agencies for the purposes of undertaking enforcement action. However, there is the requirement that regional agencies should not undertake such enforcement action without Security Council authorization. Kioko argues that the decision to leave interventions open, with regard to authorization by the Security Council, originated from 'frustration with the slow pace of reform of the international order,' and previous neglect of serious African issues by the international community.¹⁰¹

However, despite the views stated above, AU's obligations under the United Nations collective security system are external, arising out of the provisions of the UN Charter. In addition, the AU's legal framework is only silent on the issue of authorization of forceful intervention, but does not *expressly* dispute the authorization role of the UN Security Council.¹⁰² Further, interpretation of the UN Charter provisions can be modified by subsequent customary practice. That may include a flexible interpretation of Article 53(1) of the UN Charter whereby the Security Council could subsequently endorse an emergency intervention by a regional organization in extreme circumstances.

4.6 THE AU'S INTERVENTION FRAMEWORK: AUTHORIZATION OF ACTION

Article 4(h) of the Constitutive Act provides that intervention in a state party in situations of war crimes, crimes against humanity and genocide shall be pursuant to a decision of the Assembly of the Union. According to Article 6 of the Constitutive Act, the Assembly comprises of Heads of State and Government, and is the supreme organ of the Union. Granting the Assembly the final authority on intervention matters is reasonable since it is the Heads of State and Government who can effectively bind their states to implement such AU decisions through provision of troops and other resources. Article 7(1) of the Act provides that decision making in the Assembly shall

¹⁰⁰ Ben Kioko (n 72) 821. Kioko was a Legal Adviser of the African Union at the time of writing the article. Ibid 807.

¹⁰¹ Ibid 821.

¹⁰² See. Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Wan Publishing Ltd. Oxford 2010) 342.

be by consensus, and if that fails, by a two thirds majority. There is also a Protocol establishing the African Union Peace and Security Council which performs various peace and security matters, including advising the Assembly." "The intention of establishing the AU Peace and Security Council was to provide a more effective framework for conflict resolution than the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, the predecessor organ. ""⁴ The Central Organ, formed under auspices of the OAU, had the objective of anticipating and preventing conflicts, and in situations of conflict, the duty of peace-making and peace-building.¹⁰⁵

The AU Peace and Security Council is required to recommend to the Assembly situations that require intervention, in accordance with Article 7(e) of its Protocol, after evaluating the situation in reference to applicable international instruments and covenants. Article 5 of the Protocol further provides that the AU Peace and Security Council shall comprise fifteen members, elected by the Assembly under the principle of rotation and equitable representation of regions, through an established criterion that includes commitment to African Union principles. Members of the AU Peace and Security Council are in continuous session.¹⁰⁶ In addition, it should be noted that the Peace and Security Council also convenes at the level of the Permanent Representatives to the African Union, that of Ministers and at the level of Heads of State and Government."⁷ While the AU Peace and Security Council is required to meet at least twice a month at the level of the Permanent Representatives, the Ministers and Heads of State and Government meet once a year, at the minimum.¹⁰⁸ Decision making at the AU Peace and Security Council meetings is by consensus, and where not possible, a simple majority for procedural matters and a

¹ See. Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

⁰⁴ Ben Kioko (n 72)817.

¹⁰⁵ Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution (Cairo 28 - 30 June 1993) AHG/DECL.3 (XXIX) paragraph 15.

¹⁰⁶ Article 8(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

¹⁰⁷ Ibid Article 8(2).

¹⁰⁸ Ibid.

two thirds majority for all other issues.¹⁰⁹ Article 2(2) of the AU Peace and Security Council Protocol provides that the Council 'shall be supported by the Commission, the Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund.'

The African Union Commission is established under Article 20 of the Constitutive Act, and is the Union Secretariat. The AU Peace and Security Council is required to work jointly with the Chairperson of the AU Commission on various peace and security matters, including forceful intervention under Article 4(h) of the Constitutive Act.¹¹⁰ The Panel of the Wise comprises 'five highly respected African personalities' who are mandated to advise the AU Peace and Security Council and the Chairperson of the AU Commission on issues relating to peace and security in the African region.¹¹¹ The Continental Early Warning System is established with the objective of anticipating and preventing conflicts.¹¹² It is required to co-operate with 'United Nations, its agencies, other relevant international organizations, research centers, academic institutions and NGOs' in order to operate effectively.¹¹³ The African Standby Force is to be established for purposes of peacekeeping and various forms of intervention.¹¹⁴ In addition, the Special Fund is to be set up for purposes of facilitating peace missions and supporting other peace and security operations.¹¹⁵

With such comprehensive peace and security organs and institutions, the failures of the African Union may be attributed to the problem of implementation. The implementation dilemma arises from the African Union's failure to institutionalize the concept of sovereignty as responsibility within its processes, and the continuing attachment to Westphalian concepts of sovereignty that generates hesitation for intervention, including activation of an efficient mechanism. In addition, although African intervention predicaments are often viewed from the perspective of lack of financial and military resources, an effective establishment of

¹⁰⁹ Ibid Article 8(13).

¹¹⁰ Ibid Article 7.

¹¹¹ Ibid Article 11.

¹¹² Ibid Article 12(1).

¹¹³ Ibid Article 12(3).

¹¹⁴ Ibid Article 13.

¹¹⁵ Ibid Article 21.

the already mentioned Special Fund and African Standby Force would help address the issue.

4.7 THE AU'S INTERVENTION MECHANISM: CONSISTENCY WITH INTERNATIONAL LAW AND IMPLEMENTATION UNCERTAINTY

4.7.1 CAN THE CONCEPT OF HUMANITARIAN INTERVENTION JUSTIFY AN AU INTERVENTION?

It has been alleged by some that intervention under Article 4(h) of the Constitutive Act is legally permissible on the basis of a rule permitting humanitarian intervention.¹¹⁶ As we have already pointed out, the alleged rule permitting humanitarian intervention is often advocated as an alternative to the UN collective security system. However, such a view is not persuasive. There is no basis for such a rule under the UN Charter, and it is doubtful that the intervention mandate under the AU treaties could have resulted in the crystallization of a rule permitting humanitarian intervention. Based on interactions between treaties and customary law, Tomuschat observes that the conclusion of treaties in a certain sphere, which is also supported by consistency of practice, may lead to the crystallization of a new custom.¹¹ The existence of *opinio juris* may also be deduced from the pledges contained in a treaty. However, the African Union's legal framework does not expressly base its intervention clauses on the 'humanitarian intervention' concept. An examination of customary international law in chapter two indicated that there lacks sufficient state practice and *opinio juris* to permit the existence of such a right in the absence of Security Council authorization. In addition, at the minimum, there is no consensus within the world states on whether such a rule is necessary. An

¹¹⁶ For instance, Levitt is of the view that the actions undertaken by the African Union are consistent with customary law evolution, 'namely, the hardening and mainstreaming of the doctrine of humanitarian intervention into treaty law and the wider corpus of international law.' Jeremy I Levitt (n 91) 232. See also, Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53(1) *Journal of African Law*, 5. " Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century; General Course on Public International Law' (1999) 281 *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, The Hague 2001) 347-348.

¹¹ * Brian D Lepar, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, New York 2010) 220.

examination of African Union subsequent interventions indicates that they have been peacekeeping or consensual actions, and, therefore, could not have contributed to the crystallization of a regional customary law permitting humanitarian intervention.

4.7.2 CAN THE PRINCIPLE OF CONSENT JUSTIFY AN AU INTERVENTION

There is the question whether an intervention under Article 4(h) is justifiable on the basis of the principle of consent. The legal basis for intervention pursuant to the consent or invitation of the territorial state has already been examined in chapter two. Abass¹ and Kuwali²⁰ have argued that an intervention under Article 4(h) of the Constitutive Act may be justified on the basis of consent. The ILC also seems to endorse the principle of consent as a justifiable basis for an AIJ intervention. On the contrary, Franck,¹²² Gray,¹²³ Yusuf,¹²⁴ Kindiki,¹²⁵ and Sarkin,¹²⁶ amongst others, have recognized that intervention under Article 4(h) of the Constitutive Act may

¹ He has particularly argued that the African Union has desegregated territorial state consent through its treaty, thereby eliminating the necessity of specific consent at the time of the conflict should the Assembly decide to authorize intervention. Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing, Oxford 2004) 204.

²⁰ He argues that intervention under Article 4(h) of the Constitutive Act may be excused from the prohibition of use of force provided there is no fraud, error, coercion or aggressive objectives. Dar Kuwali, 'Protect Responsibly: The African Union's Implementation of Article 4(h) Intervention' (2008) 11 *Yearbook of International Humanitarian Law* 51, 86.

In a footnote comment the ILC suggests that intervention under Article 4(h) of the Constitutive Act of the AU may represent a situation where the peremptory norm that proscribes the unlawful use of force is not violated. ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/564 paragraph 48.

He proposes that the African Union can resolve discrepancy with Article 53 of the UN Charter requirement of prior authorization by the Security Council by relying on the General Assembly to authorize interventions if the Council is ineffective due to the use of the veto. Thomas M Franck (n 100).

¹²² She opines that the Constitutive Act of the African Union endorses a regional right of humanitarian intervention, though she disputes its legal acceptability. Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 53.

¹²³ He is of the view that although the Union does not require a Security Council decision that a regional crisis constitutes a threat or breach of the peace, it still requires support and endorsement of the Council in accordance with Chapter VIII of the UN Charter. Abdulqawi A Yusuf, 'The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?' (2003) 11 *African Yearbook of International Law* 3, 21.

¹²⁴ He asserts that Article 4(h), which permits intervention to pre-empt or stop war crimes, genocide and crimes against humanity, envisages humanitarian intervention under the auspices of the AU. Kithure 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, 110

¹²⁵ He is of the opinion that the African Union framework seems to be premised on a rule permitting humanitarian intervention outside the UN Charter system. Jeremy Sarkin (n 116) 8.

include enforcement action, but have differing opinions on whether such action requires UN authorization. It seems Article 4(h) of the Constitutive Act primarily focuses on enforcement action, which regional organizations are empowered to undertake under Chapter VIII of the UN Charter. Within the African Union, issues relating to consensual intervention and peacekeeping are specifically provided for under Article 4(j) of the Constitutive Act. Article 4(j) provides that state parties have a right to request intervention by the Union for the purposes of restoring peace and security. The principle of consent therefore provides a sufficient justification for intervention under Article 4(j) of the Constitutive Act. if the territorial state requests or consents to an intervention, and Security Council authorization is not necessary.

On the other hand, if military action is involved in an intervention pursuant to Article 4(h) of the Constitutive Act, then authorization by the UN is required since it is of an enforcement nature. The primary focus of Article 4(h) of the Constitutive Act is regional enforcement action since action is pursuant to a decision of the Assembly, without the specific consent of the territorial state. To be acceptable, consent for intervention should not amount to a general or blanket authorization for interventions, but must be issued on an *ad hoc* basis, in relation to specific situations. Even where a treaty permitting intervention exists, the 1974 Definition of Aggression implicitly infers the necessity of specific permission for the principle of consent to be an acceptable justification, otherwise the intervention may be deemed as amounting to aggression.¹²⁸

The AU seems to recognize the necessity for specific request for consensual interventions and peacekeeping since the alternative Article 4(j) of the Constitutive Act provides that a member state may request intervention from the Union in order to restore peace and security. The suggestion by the ILC that political integration by

Antonio Cassese, *International Law* (Oxford University Press, Oxford 2001) 318. According to Myjer and White, a 'blanket' authorization would be inconsistent with the UN Charter's purposes and principles. Eric PJ Myjer and Nigel D White, 'Peace Operations Conducted by Regional Organizations and Arrangements' in Terry D Gill and Dieter Fleck (eds). *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford 2010) 163, 180.

Intervention after the consent of the territorial state is exempted from aggression except where the interveners contravene the terms or exceed the period authorized. Article 3(e) of the Definition of Aggression. UNGA Res 3314 (XXIX) (14 December 1974). The need for the interveners to act within the terms of the agreement, and not to exceed the period permitted, implies that consent for intervention has to be in relation to a specific case.

African states under the AU framework may render the principle of consent a justifiable basis for intervention"" seems incorrect since African states have not lost their statehood. Despite their membership to the AU. African countries remain as independent states within the international community. Further, the fact that intervention and incidental military action under Article 4(h) of the Constitutive Act may actually be aimed at the government of the territorial state, if it is the perpetrator of atrocities, confirms that action is of an enforcement nature. The possible military nature of the intervention is confirmed by Article 13 of the AU Peace and Security Council Protocol which establishes the African Standby Force and grants it the mandate to intervene pursuant to Article 4(h) of the Constitutive Act.¹³⁰ Consensual intervention and peacekeeping at times have deficiencies of ensuring effective protection of populations especially where the state government is involved in the conflict. In such circumstances, forceful intervention is probably the only reasonable way of ensuring effective protection of civilians.

4.7.3 IS THE AU'S INTERVENTION SYSTEM IN CONFORMITY WITH THE UN CHARTER AND INTERNATIONAL LAW?

Inconsistency of the AU system with the UN Charter and international law has an implication on the structure of the international legal system governing forceful intervention for humanitarian purposes, since it could be setting precedents for action outside the UN system. In addition, unregulated implementation of the AU forceful intervention mechanism outside the UN system may compromise the international rule of law. There is also the likelihood of burden sharing benefits if the AU operates within the UN collective security system, and reduction of uncertainty due to conflict of roles between the UN and the AU. This is due to the fact that both institutions have concurrent forceful intervention mandates in the African region. On the other hand, ineffectiveness of the Security Council in providing prior authorization due to differing political interests of permanent members can be an

¹²⁹ ILC (n 121) paragraph 48.

¹³⁰ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

impediment to a robust implementation of the AU's intervention mandate in deserving situations.

There are opposing views on whether the African Union's framework for forcible intervention, as envisaged in Article 4(h) of the Constitutive Act and related provisions within the Union's legal framework, is in conformity with the United Nations Charter and international law.¹³¹ It has been observed that there is no provision either in the Constitutive Act or the AU Peace and Security Council Protocol that *explicitly* requires the AU to request prior authorization from the UN Security Council before initiating interventions.¹³² It has been opined that the AU's legal framework does not bind the Union to seek authorization from the Security Council, although there is no consensus on whether it leads to inconsistency with the UN Charter, or it merely establishes flexibility, anticipating other alternatives that may be permissible under international law. Allain is of the view that the AU intervention mechanism does not conform to the UN Charter system.¹³³ Kindiki similarly argues that the AU legal framework is inconsistent with the UN Charter.¹³⁴ Gray observes that the AU seems to endorse a regional right of humanitarian intervention, but that it cannot supersede the UN Charter provisions.¹

According to Sarkin¹³⁶ and Levitt,¹³ there exists a rule permitting humanitarian intervention which can provide an effective justification for an AU intervention even in the absence of Security Council authorization. Yusuf has argued that in extreme circumstances where the Security Council is also ineffective, the AU may choose to sacrifice strict adherence to the law and opt to undertake emergency

" Article 53(1) of the Charter allows regional organizations to undertake enforcement action but with Security Council authorization. As we have already observed in chapter three, it is doubtful that the alleged independent rule permitting humanitarian intervention exists either under customary international law or treaty in order to permit intervention without authorization by the relevant organ of the United Nations.

¹³¹ Jeremy I Levitt (n 91) 229.

¹³² According to Allain, rather than conform to the requirements of the Chapter VIII of the UN Charter, the AU Peace and Security Protocol diffuses the primary role that is endowed on the UN Security Council. Jean Allain (n 94) 284-285.

¹³⁴ Kithure Kindiki (n 37) 89.

¹³⁵ Christine Gray (n 123)53.

Jeremy Sarkin (n 116)8.

¹³⁷ Jeremy I Levitt (n 91) 232.

intervention without prior authorization."¹³⁸ Although Franck is of the view that AU intervention mechanism does not strictly conform to Article 53(1) of the Charter (on requirement of authorization by the Security Council), he is of the view that such a "discrepancy" may be addressed by the General Assembly providing alternative authorization (if the Council is ineffective).¹³⁹

The ILC argues that military intervention by 'regional organizations which given the power to use force if that power represents an element of political-integration among the member States' may not violate the peremptory norm prohibiting forceful intervention.¹⁴⁰ The ILC proceeds to state that intervention under Article 4(h) of the Constitutive Act may be such a case, where the intervention does not violate the peremptory norm prohibiting unlawful use of force.¹⁴¹ The ILC is therefore, suggesting that the AU intervention system could be compatible with both the UN Charter and international law. According to Corten, despite the uncertainty in the AU intervention framework, it is still in conformity with the UN system.¹⁴² Since both the AU and the UN have concurrent forceful intervention mandates in the African region, either conformity or inconsistency between the two intervention systems would have significance on their operations. Further, due to divergent positions on the implementation mechanism, uncertainty on the relationship between the AU and UN systems is enhanced.

4.7.3.1 *Resolving the uncertainty: recourse to the relevant rules of treaty-interpretation*

In order to resolve uncertainty on whether the AU's forceful intervention system, as established under the Constitutive Act, is in conformity with the UN Charter, it is necessary to resort to the guidelines for interpreting treaties. Guidelines of treaty interpretation laid down in the Vienna Convention on the Law of Treaties will be an essential guide since they also reflect the approach under customary

¹³⁸ Abdulqawi A Yusuf (n 124) 14-15.

¹³⁹ Thomas M Franck (n 98) 100.

¹⁴⁰ ILC (n 121) paragraph 48.

¹⁴¹ Ibid.

¹⁴² Olivier Corten (n 102) 341-345.

¹⁴³ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

international law.¹⁴⁴ Article 32 of the Vienna Convention on the Law of Treaties stipulates that 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' may be resorted to in order to ascertain the treaty meaning where the *general rules* are unable to resolve ambiguity.¹⁴⁵ The *general rules* of interpreting the AU's legal system requires according the terms of a treaty their ordinary meaning and in their context, bearing in mind the object and purpose of the treaty.' In addition, the *general rules* require that any subsequent agreement and practice, and any relevant rules of international law be taken into account, with special meaning being given to terms if it is established that there was such an intention by the parties ¹⁴⁶

An examination of the ordinary meaning of the terms of the Constitutive Act indicates that although it expressly empowers the Assembly of the Union to authorize enforcement action in Article 4(h) of the Constitutive Act. it fails to explicitly bind the Assembly to seek authorization from the Security Council. However, this is not necessary since the source of that obligation is external, arising from the UN Charter, to which the Constitutive Act of the African Union is subordinate. In addition, the AU legal framework does not expressly exclude the necessity of obtaining authorization from the Security Council.¹⁴⁷ The Preamble and Article 3 of the Constitutive Act articulate the core objectives of the Union. According to Article 3(e) of the Constitutive Act, one of the objectives of the Union is the encouragement of

¹⁴⁴ The ICJ has specifically stated that Articles 31 and 32 of the 1969 Vienna Convention 'may in many respects be considered as a codification of existing customary international law' on the interpretation of treaties. *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53 paragraph 48. During the drafting of the Vienna Convention, it was clarified that the intention of the Treaty was to clarify, codify and supplement rules of customary international law. United Nations Conference on the Law of Treaties, 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, Second Session' UN Doc A/CONF.39/11/Add.1 (9 April-22 May 1969) 1. According to the drafting records, clauses relating to general and supplementary rules of treaty interpretation were adopted by all members, without any single vote against the provisions. United Nations Conference on the Law of Treaties, *ibid* 57-58. Rules codified in Articles 31 and 32 of the Vienna Convention are comprehensive, as they include the three traditional approaches to treaty interpretation under the teleological, subjective and textual schools. See. David Schweigman. *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, The Hague 2001) 10-14.

¹⁴⁵ Vienna Convention on the Law of Treaties (n 143).

¹⁴⁶ *Ibid* Article 31.

¹⁴⁷ *Ibid*.

¹⁴⁸ Olivier Corten (n 102) 342.

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international co-operation, which takes into account the UN Charter. In addition, the Preamble of the AU Peace and Security Council Protocol indicates concern for the UN Charter, specifically noting that under the Charter, the Security Council has granted primary responsibility for international peace and security.¹⁴⁹ The Preamble of the Protocol also specifically indicates concern for 'the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership' with the UN.¹⁵⁰

There has also been a divergent view on which organization, between the UN and the AU, has primary responsibility for peace and security in Africa. Article 24 of the UN Charter grants the Security Council primary responsibility for maintenance of international peace and security. On the other hand, Article 16 of the AU Peace and Security Council Protocol grants the Union primary responsibility for promoting peace and security in the African region.¹⁵¹ It has been argued that it is uncertain whether the African Union 'has reserved for itself primary responsibility for peace and security in Africa' instead of recognizing the superseding role of the UN Security Council.¹⁵² However, it seems that such an argument fails to consider that Article 16(1) of the AU Peace and Security Protocol specifically deals with the relationship between the African Union and other African regional mechanisms. Article 7 of the Protocol provides that such other regional mechanisms are part of the African Union security framework. Article 17(1) of the Protocol is the relevant clause when examining the relationship between the African Union and the United Nations. The Article specifically points out that the UN Security Council 'has the primary responsibility for the maintenance of international peace and security.' Africa is par-

¹⁴⁹ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002) (2002) 20(21) - 20(28).

¹⁵⁰ Ibid.

¹⁵¹ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002) (2002) 20(21) - 20(28).

¹⁵² Jeremy I Levitt (n 91) 229. Alex Bellamy also argues that the Constitutive Act provides a strong impression that the African Union is to assume primary responsibility in relation to humanitarian catastrophes, rather than the Security Council of the United Nations. Alex J Bellamy, 'Whither -- Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20(21) - 20(28) and *International Affairs* 143, 158.

of the international community. Article 17(1) of the Protocol also obligates the AU Peace and Security Council to cooperate with the UN Security Council.

Therefore, the AU system recognizes provisions of the UN Charter on issues related to peace and security. Further, even if such recognition lacked, it would still be implicit that the Constitutive Act and other relevant African Union treaties are subject to the UN Charter. An examination of subsequent agreements and practice indicates that there have been co-operation between the UN and the AU on matters related to peace and security, and that the primary role of the United Nations Security Council has been reaffirmed.

4.7.3.1.1 Subsequent practice and agreements

There has been subsequent practice and agreements that enhance cooperation between the United Nations and the African Union, which indicate that the AU did not intend to operate outside the UN framework. The AU has a Permanent Observer Mission to the United Nations,¹ while the UN has a Liaison Office at the African Union head office.^{1M} There are also subsequent agreements within the AU system that prohibit member states from any use of force in a manner incompatible with the UN Charter, for instance, the 2005 Common Defence Pact.¹ There has also been partnership between the UN and the AU through the peacekeeping initiatives of United Nations African Union Mission in Darfur. In November 2006, a Ten Year Framework for Capacity Building was jointly launched by the African Union and United Nations to address various peace and security issues within the African region, which emphasized the need for cooperation between the two institutions.^{1^6} In a few instances, such as in the case of the 2005 Ezulwini Consensus, the AU

United Nations, 'New Permanent Observer for African Union Presents Appointment Letter' (New York 9 November 2009) <<http://www.un.org/News/Press/docs/2009/bio4143.doc.htm>> accessed 8 May 2011.

See, United Nations General Assembly, 'Fifth Committee Takes Up Proposed \$10.6 Million Budget for United Nations Office to African Union' UN Doc GA/AB/3952 (27 May 2010).

See, Article 3(a). African Union Non-Aggression and Common Defence Pact (adopted 31 January 2005, entry into force 4 January 2010) <<http://www.africa-union.org/root/au/documents/treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf>> accessed 15 March 2012.

United Nations General Assembly, 'Letter Dated 12 December 2006 from the Secretary-General Addressed to the President of the General Assembly' with an Annex, 'Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity Building Programme for the African Union' UN Doc A/61/630 (12 December 2006) paragraph 1.

affirms that regional organizations require Security Council authorization in order to undertake interventions, but argues that in some circumstances that require urgent action, such authorization may be granted retroactively.¹⁵⁷ Such a statement by the AU indicates the Union's recognition of the primacy of the UN system, and the role of the Security Council, but calls for a flexible interpretation of Article 53(1) of the UN Charter with regard to the time of authorization.

A further examination of subsequent practice between the two systems indicates that the UN Security Council and the AU Peace and Security Council have been conducting annual joint consultative meetings. The fifth consultative meeting was convened in May 2011, and reaffirmed the role of regional organizations under Chapter VIII of the UN Charter, in addition to stressing the primary role of the UN Security Council with regard to international peace and security matters.¹⁵⁸ The primary role of the Security Council with regard to international peace and security in the relationship between the UN and the AU has been endorsed by various subsequent resolutions by both organizations.¹⁵⁹

4.7.3.1.2 Preparatory work and the drafting circumstances of the AU Treaty

According to Article 32 of the Vienna Convention on the Law of Treaties, *supplementary* means of treaty interpretation, such as the preparatory work and circumstances under which a treaty was concluded, may be resorted to when the *general rules* are unable to eliminate ambiguity.¹⁶⁰ Despite having clarified the conformity of the African Union legal framework with the UN Charter from the *general rules*, it is necessary to utilize the *supplementary* means in order to be

¹⁵⁷ African Union, 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (Addis Ababa 7-8 March 2005) Ext/EX.CL/2 (VII) part B(i).

¹⁵⁸ African Union. 'Communique of the Consultative Meeting between Members of the Security Council of the United Nations and the Peace and Security Council of the African Union' (Addis Ababa 21 May 2011) <[http://www.au.int/en/sites/default/files/Communique%20A9%20AU PSC-UNSC%20_Ene_%20Final.pdf](http://www.au.int/en/sites/default/files/Communique%20A9%20AU%20PSC-UNSC%20_Ene_%20Final.pdf)> accessed 9 March 2012 paragraph 2.

¹⁵⁹ See, for instance, UNSC Presidential Statement 26 (2009) UN Doc S/PRST/2009/26; UNSC Res 1809 (16 April 2008) UN Doc S/RES/1809; African Union. 'Communique of the 123^d Meeting of the Peace and Security Council' (Addis Ababa 29 April 2008) Psc/Pr/Comm (CXXIII) paragraph 11; UNSC. 'Report of the African Union-United Nations Panel on Modalities for Support to African Union Peacekeeping Operations' (2008) UN Doc S/2008/813 paragraph 63. Security Council Resolution 2033 of 2012 even acknowledged the progressing co-operation between the UN and the AU. UNSC Res 2033 (12 January 2012) UN Doc S/RES/2033.

¹⁶⁰ Vienna Convention on the Law of Treaties (n 143).

exhaustive, and as a way of effectively resolving any remaining uncertainty. We therefore examine the circumstances under which the African Union treaty was negotiated, and the right of intervention included within the legal framework.¹⁶¹

The Preamble of the 1998 Ouagadougou Declaration noted that among the causes of regional conflicts were 'the sequels of colonization and foreign interferences', indicating that there was growing desire within the OAU to regulate external interference through an internal, African, mechanism.¹⁶² There also seems to have been concern for the primacy of the UN system. In the 1999 Algiers Declaration (one year before the adoption of the Constitutive Act), African leaders reaffirmed their respect for the UN system, including the Security Council, on international peace and security matters.¹⁶³ They, however, called for reforms to the UN and its Security Council, in order to make it democratic.¹⁶⁴ The 1999 Sirte Declaration affirmed the necessity of eliminating the plague of conflicts, which was noted to be a major obstacle to development and integration.¹⁶⁵ The Council of Ministers was also mandated to draft the Constitutive Act of the African Union.

Ben Kioko, the AU Legal Adviser, has pointed out that the idea to include a right of intervention arose from Libya's proposals, which were discussed in various forums, including the Ministerial Committee and the Executive Council prior to

¹⁶¹ I specifically visited the African Union Head Office in Addis Ababa, Ethiopia, in August 2010. for purposes of searching for preparatory documents that may have discussed issues relating to the inclusion of the right of intervention under Article 4(h) of the Constitutive Act. Despite a diligent and thorough search, and consultation with the relevant staff, I was unable to find any document specifically relating to the ministerial or diplomatic conferences during the formation of the African Union. I specifically visited and searched documents at the African Union's Archives, the Library, and the International Relations Centre. I have resolved the issue in several ways. First, I have relied on the explanations and accounts of Ben Kioko in his published article, who was an African Union Legal Adviser at the time of publishing the article. See, Ben Kijoko (n 72) 807. Second, I have examined relevant declarations made between 1998 and 1999 by African leaders under the auspices of the OAU, which was just before the formation of the African Union in 2000. They include: Ouagadougou Declaration (n 90); Algiers Declaration (n 76); Sirte Declaration (n 71). Third, I have considered the Explanatory Memorandum submitted by Libya on the right of intervention, as quoted and described by Kioko, the African Union Legal Adviser. See, Explanatory Memorandum by Libya. *Quoted* in Ben Kioko. 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-Intervention' (2003) 85(852) *International Review of the Red Cross* 807, 811-812.

¹⁶² Ouagadougou Declaration (n 90).

¹⁶³ Algiers Declaration (n 76) 6.

¹⁶⁴ *Ibid.*

¹⁶⁵ Sirte Declaration (n 71) paragraph 6.

¹⁶⁶ *Ibid* paragraph 8(iii).

endorsement by the Assembly.¹⁶⁷ The original proposal submitted by Libya advocated intervention in case of 'unrest or external aggression in order to restore peace and stability to the Member of the Union/¹⁶⁸ An Explanatory Memorandum was also subsequently submitted by Libya, justifying its request for an intervention mechanism, which it deemed necessary in order to safeguard 'the sovereignty and territorial integrity of the African Continent as well as the sovereignty and territorial integrity of each Member State/¹⁶⁹ Kioko points out that Libya's proposal was varied by the delegates, a majority of whom were of the view that a provision with such wording was not necessary since a common security and defence structure envisaged under the Constitutive Act would address the issue.¹⁷⁰ Maluwa has stated that in deciding to alternatively premise the basis of intervention on the commission of genocide, crimes against humanity and war crimes, the AU was influenced by developments in international law.' '

Kioko also argues that the AU will have to decide whether to seek Security Council authorization, as obligated under Article 53 of the UN Charter, on a case by case basis.' " He notes that during the negotiations, the question of whether the AU could have alternative means of intervention, without reliance on Security Council authorization, was dismissed.' ' According to Kioko, it 'reflected a sense of frustration with the slow pace of reform of the international order," including 'instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa."¹⁷¹ Kioko also states that the 1999 NATO intervention, and the earlier ECOWAS intervention in Liberia, which were executed without prior authorization by the Security Council.

¹⁶⁷ Ben Kioko (n 72) 811.

¹⁶⁸ Proposal by Libya, *Quoted* in Ben Kioko. 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-Intervention' (2003) 85(852) *International Review of the Red Cross* 807, 811.

¹⁶⁹ Explanatory Memorandum by Libya (n 161) 811-812.

¹⁷⁰ Ben Kioko (n 72)812.

¹⁷¹ Tiyanjana Maluwa (n 80) 217. Maluwa was the first Legal Counsel of the African Union. See. Pennsylvania State University (n 14).

¹⁷² Ben Kioko (n 72) 821.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

contributed to the failure to expressly bind the AU to seek prior authorization from the Council.¹⁷⁵

However, even if the Constitutive Act did not intend to expressly bind the AU to seek prior authorization from the Security Council, there was also concern for the UN system in some of the declarations leading to the AU formation. For instance, in the 1999 Algiers Declaration, there was a reaffirmation of respect for the UN system and the Security Council, including condemnation of interventions not authorized by the Council.¹⁷⁶ Yet even with the respect for the UN system and the Security Council role, the Declaration also expressed concern for lack of democratization within the Council.¹⁷⁷ It can, therefore, be argued that while the AU acknowledged the primacy of the UN system and role of the Security Council, it did not want to restrict its internal competence (through the AU constitutive instrument) to the Council authorization only, in case there were other justifiable means of intervention, including those that could develop in future. As Myjer and White observe, the competence of a regional organization to intervene is also regulated by the legal instruments that establish it.¹⁷⁸ In addition, Article 4(h) of the Constitutive Act can be a basis of other non-consensual forms of intervention by the Union, which do not involve the use of military force and therefore authorization by the Security Council is not necessary. They include judicial prosecutions for the commission of international crimes by the African Union, under the concept of universal jurisdiction.¹⁷⁹ The AU has previously deliberated on the possibilities of granting the African Court on Human and Peoples' Rights the mandate to prosecute international

¹⁷⁵ Ibid.

¹⁷⁶ Algiers Declaration (n 76) 6.

¹⁷⁷ Ibid.

¹⁷⁸ Eric PJ Myjer and Nigel D White (n 127) 171.

¹⁷⁹ " Since the grounds of intervention under Article 4(h) of the Constitutive Act (genocide, crimes against humanity and war crimes) are also international crimes, then it can be a basis for intervention by the AU through the concept of universal jurisdiction. Dan Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Martinus Nijhoff Publishers, Leiden 2011) 403-404. Genocide, crimes against humanity and war crimes are categorized as international crimes under the Rome Statute of the ICC. See. Articles 5 to 8 of the Rome Statute of the International Criminal Court (n 80). The AU Peace and Security Council is to be guided by the definition of genocide, crimes against humanity and war crimes under 'relevant international conventions and instruments' when making recommendations to the AU Assembly to authorize an intervention. See, Article 7(1) (e) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

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crimes. As Corten observes, despite the uncertainty on the implementator mechanism of the AU's intervention system, it is in conformity with the UN Charter.¹⁸¹

The African Union's legal framework does not render the AU system to be incompatible with the UN system or international law in the absence of an express clause that disputes the authorization mandate of the UN Security Council. In addition, subsequent agreements adopted by the AU, and consequent practice between the AU and the UN (including joint ventures and agreements), which have been examined in the preceding section, reaffirm the primacy of the UN system including the role of the UN Security Council. If all the relevant factors are put into place, including consideration of the relevant rules of treaty interpretation, it seems incorrect to argue that the AU system is incompatible with the UN Charter, or even the international law system.

In sum, the UN Security Council's responsibility is primary, on behalf of the United Nations, but it is not exclusive. Where the Security Council fails to discharge its primary responsibility, in relation to a conflict in Africa, the African Union can request the General Assembly to assume the subsidiary responsibility through an emergency session and authorize the AU to undertake appropriate enforcement action for humanitarian purposes. Such an approach provides an opportunity for robust implementation of the AU's forceful intervention mandate where the Security Council is ineffective in discharging its primary responsibility in a deserving situation.

¹⁸⁰ Decision on the Abuse of the Principle of Universal Jurisdiction (Kampala 27 July 2010) Doc EX.CL/606(XVII) paragraph 5.

¹⁸¹ Olivier Corten (n 102) 341-345.

4.8 OPPORTUNITY FOR ROBUST INTERVENTION BY THE AU UNDERMINED BY THE ABSENCE OF THE CONCEPT OF SOVEREIGNTY AS RESPONSIBILITY

The opportunities for a robust implementation of the AU's forceful intervention mandate within the UN system are compromised by the continuing constraints of traditional concepts of sovereignty. The AU's subsequent practice, which at times seems to be inconsistent with its forceful intervention mandate, may be attributed to the failure to effectively institutionalize the concept of sovereignty as responsibility within the AU's legal framework and processes. The AU has already established a precedent of expressly opposing an intervention in a deserving situation, where even the UN system and specifically the Security Council, was not an impediment to robust action for the protection of populations from mass atrocities. The case of Libya is an illustration of the AU opposing any form of military intervention, including implementation of no-fly zones, while reaffirming the concerned State's territorial integrity. Such contradictory policy by the AU, especially in the case of Libya, seems to have been aimed at deterring the UN. The Libyan case also seems to indicate that the UN will proceed without regard to AU opposition, where there is a conflict of policies between the two institutions with regard to intervention for humanity. Unlike the case of the AU, there has been progress in developing the concept of sovereignty as responsibility within the UN, especially within the General Assembly operations.¹⁸³

¹⁸²: African Union, 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 6.

¹⁸³ See, High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004) paragraph 203; World Summit Outcome Document. UN Doc A/RES/60/1 (24 October 2005) paragraphs 138 -139; United Nations News Centre. 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009) <<http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+protect&CrI=>> accessed 22 September 2009. Annual informal thematic debates on the responsibility to protect have been taking place within the General Assembly, such as the one in July 2011. See, United Nations General Assembly Department of Public Information. "'For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers no Relief', Secretary-General Cautions in General Assembly Debate' (12 July 2011) <<http://www.un.org/News/Press/docs/2011/ga1112.doc.htm>> accessed on 1 August 2011. There is also an Adviser to the UN Secretary General on Responsibility to Protect. See, United Nations News Centre. Interview with Edward Luck. Special Advisor to the Secretary-General' (1 August 2011) <<http://www.un.org/apps/news/newsmakers.asp?NewsID=38>> accessed 2 August 2011. The Adviser to the UN Secretary General can play a significant role of norm

4.8.1 NORMATIVE CONFLICT OF VALUES WITHIN THE AU SYSTEM: PREVALENCE OF SOVEREIGNTY

The tension between the values of sovereignty and intervention for humanity within the AU legal framework has established a foundation for the use of sovereignty as a convenient legal and political justification for non-intervention. The principle of sovereignty and the value of intervention for human rights are affirmed within the AU system, but without developing a framework for complementarity between the two contradictory elements. Articles 4(h) of the Constitutive Act and 4(j) of the AU Peace and Security Council Protocol grant the AU the mandate to forcefully intervene in situations of genocide, crimes against humanity and war crimes. On the other part, Article 4(g) of the Constitutive Act proscribes states from interfering in the domestic issues of others, thereby affirming the principle of non-intervention. Further, according to Article 4(e) of the AU Peace and Security Protocol, the Peace and Security Council shall be guided by the principle of "respect for the sovereignty and territorial integrity" of member states, while Article 4(0) of the Protocol reaffirms the principle of non-interference.¹⁸⁵

Kindiki traces the failure to resolve the dilemma between sovereignty and intervention within the AU legal system to the lack of a coherent articulation of how the two principles may relate to each other, thereby enhancing subsequent interpretative differences.¹⁸⁶ Kalu has pointed out that state sovereignty is still critical for non-African Union interventions.¹⁸⁷ Dembinski and Reinold are also of the view that 'the right to intervene belongs to the AU, and only to the AU. In relations between Africa and the outside world, the non-intervention principle continues to reign supreme.'¹⁸⁸ According to Adejo, the state-centric nature of the African Union is adequately demonstrated by provisions of the Constitutive Act that assert the

entrepreneurship with regard to the development and implementation of the concept of responsibility to protect.

¹⁸⁴ Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n

¹⁸⁵ Ibid.

¹⁸⁶ Kithure Kindiki (n37)91.

¹⁸⁷ Kelechi A Kalu (n 88) 19.

¹⁸⁸ Matthias Dembinski and Theresa Reinold. *Libya and the Future of the Responsibility to Protect - African and European Perspectives* (Peace Research Institute Frankfurt. Frankfurt 2011) 9.

principle of non-interference, which compromise the principle of intervention established under Article 4(h) of the Act.^{1*} ' Adejo views the contradictions between provisions relating to both intervention and non-interference in the domestic affairs of states as indicative of the continued sensitivity of African states on issues touching on the delicate matter of state sovereignty. ^{1"} Consequently, despite the forceful intervention mandate under Article 4(h) of the Constitutive Act, there are also draw back non-intervention oriented clauses that indicate the AU's concerns with protecting traditional concepts of unfettered sovereignty. Adejo correctly observes that the African Union, to an extent, amounts to a repainting of the OAU with fresh paint but without addressing inner mechanisms that would have required resolution for effective intervention.'"

It has, however, also been argued that the AU legal framework effectively eliminates traditional notions of sovereignty and non-intervention, thereby elevating intervention for human rights to a higher plane. For instance, Sarkin argues that there has been less attachment to sovereignty in recent years in Africa. He is of the view that through membership of the African Union, states have eroded the significance of sovereignty by conceptualizing it as subject to the ability of a state to protect its nationals.¹⁹³ Further, according to Levitt, the AU intervention system has effectively subdued the values of sovereignty for those of peace and security.¹⁴

Subsequent practice by the AU indicates that, contrary to the assertions by Sarkin and Levitt, Westphalian concepts of sovereignty continue to prevail over those of sovereignty as responsibility to protect populations from humanitarian catastrophes, including through intervention. As the next section on previous AU interventions will demonstrate, the Union's success has only been in relation to peaceful negotiations and consensual interventions. Where such approach is inadequate or inappropriate, the AU has been incapable of implementing its forceful

^{1M} Armstrong M Adejo, 'From OAU to AU: New Wine in Old Bottles?' (2001) 4(1&2) *African Journal of International Affairs* 119, 136.

¹⁹⁰ Ibid 136-137.

¹⁹¹ Ibid 137.

¹⁹² Jeremy Sarkin (n 116)5.

¹⁹³ Ibid.

¹⁹⁴ Jeremy I Levitt (n 91) 226.

intervention for human rights mandate as envisaged under Article 4(h) of the Constitutive Act. The sovereignty protection and non-intervention oriented clause within the AU framework have effectively negated the Union's forceful intervention mandate. They have enhanced a restrictive Westphalian construction of the concept of sovereignty in a manner that the Union has been incapable of effectively implementing its forceful intervention mandate under Article 4(h) of the Constitutive Act. They have also provided a justification upon which external (non-African) interventions have been opposed, as was the case of Libya.¹⁹⁵

As Carty observes, the principle of sovereignty affords a convenient mask through which state security concerns and interests can be articulated in a legally acceptable form.¹⁹⁶ He gives an example of the United Nations peace enforcement in Bosnia and Herzegovina in the 1990s, where participating states such as the United Kingdom 'actively undermined the UN Security Council mandate by claiming that the use of force would constitute intervention in a civil war.'¹⁹⁷ According to Falk, assertion of sovereign rights provides a reliable mechanism of avoiding the predicaments associated with intervention for humanity.¹⁹⁸ In the case of the African Union's response to the Libyan conflict, it issued a statement in March 2011 that opposed any form of foreign military intervention,¹⁹⁹ despite the then ongoing gross violations of human rights and indiscriminate attacks on civilians. Earlier, Sudan had used the AU system as a shield from decisive and timely forceful intervention by the international community in relation to the Darfur mass atrocities. After the adoption of Security Council Resolution 1556 of 2004, the Sudanese Representative protested, arguing that the Resolution was essentially an expropriation of the Darfur issue 'from the African Union, revealing an attitude of contempt for the African continent's capabilities and potential.'²⁰⁰ He also protested that the United States Congress had

¹⁹⁵ The AU opposed any form of military intervention in Libya, and reaffirmed the state's territorial integrity. African Union (n 182) paragraph 6.

¹⁹⁶ Anthony Carty, 'Sovereignty in International Law: A Concept of Eternal Return' in Laura Brace and John Hoffman (eds), *Reclaiming Sovereignty* (Pinter, London 1997) 101, 116.

¹⁹⁷ *Ibid* 115.

¹⁹⁸ Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, New York 2000) 78.

¹⁹⁹ African Union (n 182) paragraph 6.

²⁰⁰ UNSC Verbatim Record (30 July 2004) UN Doc S/PV/5015.

concluded that genocide and ethnic cleansing was taking place in Darfur, contrary to what an AU Summit had established.¹¹

According to Falk, there is an impression in Africa that sovereignty is not an evolving concept that is progressing towards the notion of responsibility."¹² Deng notes that while some states are evolving towards the concept of sovereignty as responsibility, others, especially those vulnerable to intervention, are paradoxically struggling to preserve the traditional notions of sovereignty."¹³ Statements by Falk and Deng seem accurate in relation to the operations of the AU system. Subsequent practice by the AU generally implies that there is lack of desire to implement Article 4(h) of the Constitutive Act, even in deserving cases.

4.8.2 AN APPRAISAL OF AU INTERVENTIONS: CONSENSUAL ACTION

As already discussed in chapter two, a state has the sovereign right to request, or consent to a military intervention, which is legally acceptable under the principle of consent. However, the intervention has to be kept within the precincts of the permission.¹⁴ and therefore it may not be helpful where the government of the state is also a perpetrator of mass atrocities for which intervention is necessary. An appraisal of previous interventions by the African Union indicates that they are consensual or of a peacekeeping nature, and consistent with Article 4(j) of the Constitutive Act. Even where circumstances have warranted more robust action that is consistent with Article 4(h) of the Constitutive Act (forceful intervention to stop or pre-empt genocide, crimes against humanity or war crimes), the AU has failed to adopt such an approach.

Peacekeeping and consensual intervention is not necessarily a wrong approach, and should be the first priority. It should be noted that some of the

¹¹ Ibid.

¹² Richard Falk (n 198) 84.

Francis M Deng, "Sovereignty, Responsibility and Accountability: A Framework of Protection, Assistance and Development for the Internally Displaced' (Brookings Institution-Refugee Policy Group Project 1995) <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1448> accessed on 14 June 2011, 5-6.

¹⁴ See, for instance, Article 3(e) of the General Assembly's 1974 Resolution on Aggression. Definition of Aggression (n 128).

consensual and peacekeeping interventions have been successful and commendable and the AU deserves credit for the achievement of such interventions in Burundi and Comoros. The AU was also instrumental in mediating the post election crisis in Kenya.²⁰⁵ However, on the other hand, the AU has failed where mediation and consensual intervention were inadequate, or inappropriate. Although enforcement action should be undertaken as a last resort, it also requires implementation in a timely and decisive manner where other consensual and peaceful means fail, or are inadequate. The conflicts in Eastern Democratic Republic of Congo and Darfur required more decisive and timely action to protect civilians. In addition, in Ivory Coast and Libya, the African Union assumed a non-intervention stance with regard to military action. While this section briefly examines some of the AU's interventions, an extensive examination of the Eastern Congo, Darfur and Libya conflicts is done in chapter five.

4.8.2.1 Eastern Democratic Republic of Congo

Briefly, the African Union has neither forcefully intervened nor been involved in 'peace enforcement' activities in the Congo. The conflict in Eastern Congo seems to be an instance of burden shifting of responsibilities for peace and security in Africa by the AU to the UN. A burden sharing approach would have been more appropriate, and is likely to be more beneficial (due to scarcity of resources and troops). The AU's involvement in Eastern Congo has only consisted of non-military efforts in the form of negotiations and fact finding missions. For instance, an African Union multidisciplinary assessment mission visited Congo in January and February of 2010.²⁰⁶ Previous peacekeeping and peace enforcement efforts in Congo have been

²⁰⁵ The disputed December 2007 elections in Kenya precipitated ethnic based violence within the country. International Coalition for the Responsibility to Protect. 'Crisis in Kenya <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>> accessed 12 November 2010. The Panel of Eminent African Personalities, led by Kofi Annan, and constituted after a request by President Kufiior of Ghana who was by then the Chairman of the African Union, successfully mediated a political solution to the crisis on behalf of the Union. Kofi Annan. 'Opening Remarks to the Opening Plenary Session - Kenya National Dialogue: One Year Later' (Geneva 30 March 2009) <<http://allafrica.com/stories/200903301452.html>> accessed 12 November 2010.

²⁰⁶ Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa (Kampala 27 July 2010) Assembly/AU/6(XV) paragraph 13. See also. Africa-Union, 'Communique: Visit of a Multidisciplinary Assessment Mission in the Democratic Republic of Congo (DRC) and Burundi (Addis Ababa 21 January 2010) <<http://www.africa-union.org/root/ar/ind ex/Communique%20DRC%20%20Burundi%20 Eng .pdf>> accessed 10 March 2012.

by the United Nations Mission in the Democratic Republic of Congo, established in 1999.²⁰⁸ There are various issues that require examination with regard to the response by the African Union. For instance, it is questionable why, despite the mass atrocities and the unending cycle of the conflict in Eastern Congo, the AU has avoided a military intervention, considering the express mandate for such action in its legal instruments. Second, since a consensual approach in resolving a conflict is not necessarily wrong, and forceful intervention should be a last resort, there is the question whether the response by the UN has been appropriate. A more extensive examination of the Congo conflict is carried out in chapter five in order to address those issues.

4.8.2.2 *Darfur, Sudan*

Abass observes that the AU decided to deploy peacekeepers in Darfur in June 2004 instead of undertaking a 'humanitarian intervention,' although there were widespread grave breaches of human rights.²⁰⁹ He also opines that the subsequent response by the AU has been through peacekeeping rather than humanitarian intervention.²¹⁰ However, he attempts to exonerate the African Union from blame, arguing that the mandate to conduct such an intervention belongs to the UN under its Chapter VII powers, and not the AU.²¹¹ As the violence escalated, the UN and the AU formed a joint mission, the United Nations African Union Mission in Darfur.²¹² UNAMID was, however, still of a peacekeeping nature, despite the previous failures of such an approach and the continuing atrocities. It is evident in the fact that the joint AU and UN force arose out of a concession due to opposition, by the Government of Sudan, to a non-consensual intervention by UN troops.²¹³ This is in addition to the express statement by Security Council Resolution 1769 that the forces would be commanded 'in accordance with basic principles of peacekeeping'.²¹³

See. UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279.

²⁰⁸ Ademola Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia'(2007) *LIV Netherlands International Law Review* 415, 420-423.

²⁰⁹ *Ibid* 423.

²¹⁰ *Ibid* 425.

²¹¹ UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769.

²¹² Report of the African Union High-Level Panel on Darfur (Abuja 29 October 2009) PSC/AHG/2(CC VII) 41.

²¹³ UNSC Res 1769 (n 211).

There are some issues that require deeper examination in connection to the conflict and the African Union response. They include the question whether there have been grave circumstances to warrant forceful intervention by the African Union in accordance with Article 4(h) of its Constitutive Act. Second, there is also the question whether the AU could have adopted a different, more robust approach than the UN one. Chapter five includes a more extensive examination of the Darfur conflict in order to address some of those issues.

4.8.2.3 *Burundi*

The African Union Mission in Burundi (AMIB) was established in 2003, and was primarily modelled as a peace operation.²¹⁴ The consensual nature of the mission is apparent from the fact that it was formed to manage the 2 December 2002 ceasefire agreement, in addition to earlier ones between the Transitional Government of Burundi and the insurgents.²¹⁵ The African Union intervention, despite its consensual and peacekeeping nature, was of great significance in pre-empting violence and preventing possible widespread violation of human rights. The intervention established peace in a fragile situation since the State could easily degenerate into civil war.²¹⁶ It also confirmed the capacity of the African Union to fill the regional peace and security gaps through peacekeeping where the United Nations is unwilling to act, particularly when there is political will within the AU. The establishment of the mission was influenced significantly by the absence of a desire by the United Nations to intervene before a comprehensive peace agreement, in addition to insistence on an African operation.²¹⁷ The African Union mission successfully resolved the tension such that, by February 2004, it had made a United Nations

²¹⁴ Tim Murithi, 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia' (2008) 17(1) *African Security Review* 70, 75.

²¹⁵ Communiqué of the Eighty-Eighth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level (Addis Ababa 2003) Central Organ/MEC/AMB/Comm. (LXXXVIII).

²¹⁶ Tim Murithi (n 214) 75.

²¹⁷ Emma Svensson, 'The African Mission in Burundi: Lessons Learned from the African Union's First Peace Operations' (Swedish Defence Research Agency 2008) <http://www.foi.se/upload/projects/Africa/FOI2561_AMIB.pdf> accessed 2 June 2010, 11.

evaluation panel convinced that circumstances were appropriate for a UN peacekeeping operation to take over."²¹⁸

4.8.2.4 *Somalia*

Peace and stability has been elusive in Somalia, despite various attempts to resolve the conflict, including the tragic intervention by the United States in the early 1990s.²¹⁹ The consent of the Government of Somalia to the African Union member states intervention since 2007 is apparent in the conclusion of agreements permitting the deployment of African Union troops. Consensual intervention has been an appropriate framework for the AU action since the conflict and atrocities have arisen from rebel groups that have focused on overthrowing the internationally recognized Transitional Federal Government through forceful means."²²⁰ Although the Security Council adopted Resolution 1744 authorizing the deployment of African Union troops.²²¹ it was not a legal necessity since there was specific consent of the Transitional Government. However, the adoption of Resolution 1744 has significant political value as it demonstrates the United Nations policy of endorsing and supporting AU's regional interventions. In addition, such Security Council endorsement has the benefit of promoting burden sharing and partnership between the United Nations and the African Union.

The AU intervention in Somalia deserves commendation since it has filled a security gap arising from the neglect of the State by the UN.²²¹ It has also protected

²¹⁸Tim Murithi. 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur' <http://www.humansecuritygateway.com/documents/JPCD_AUsForayIntoPeacekeepingHybridMissionDarfur.pdf> accessed 3 June 2010, 6. See also, Integrated Regional Information Networks, 'Burundi: UN Mission Favours Takeover of AMIB' (Bujumbura 26 February 2004) <<http://www.irinnews.org/report.aspx?reportid=48762>> accessed 3 June 2010.

Jeremy Sarkin (n 116)24.

²¹⁹ African Union, 'The Commissioner for Peace and Security of the African Union Signed the Status of Mission Agreement (SOMA) for the AU Mission in Somalia with the Ambassador of Somalia' (Addis Ababa 6 March 2007) <<http://www.africa-union.org/root/au/AUC/Departments/PSC/PSC.htm>> accessed 12 December 2009.

With regard to the international recognition of the Transitional Government, Security Council Resolution 1744 expressed support for the Transitional Federal Institutions while authorizing the deployment of African Union troops. UNSC Res 1744 (20 February 2007) UN Doc S/RES/1744.

²²¹ Ibid.

There has been no peace enforcement under the auspices of the UN in Somalia since the United States pullout after the catastrophic killing and public display of its dead soldiers in 1993. For the

Somalia from a complete takeover by rebel groups, and shielded the Transition: Federal Government from total collapse. However, despite the positive role of the African Union intervention, a more robust approach (in terms of the size of troop- and military resources) by both the AU and the UN is necessary, since the AU troops have at times been overwhelmed by the rebels.²²⁴

4.8.2.5 Comoros

The 2008 intervention in Comoros was carried out after the AU resolved to send troops in order to support the State's President to regain control of Anjouan, one of Comoro's islands, after Mohamed Bacar, a renegade leader, had unilaterally declared himself president.²²⁵ After Bacar declared himself president in July 2008 elections, which the Central Government had declared illegal, he proceeded to defy the AU and international community's requests that he relinquishes power.²²⁶ The island had proceeded to hold elections despite their postponement by the Federal Government for a week due to security concerns.²²⁷ The intervention followed a request by the Comoros Government for military assistance from the African Union in order to regain control of the island.²²⁸ Comoros Government, with the support of African Union troops, was able to regain control of the rebelling island towards the end of March 2008.²²⁹

attacks on the US soldiers and the subsequent pullout. see United Nations, 'Somalia - UNOSOM 11 Background' <<http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html>> accessed 8 June 2010. One of the serious security challenges are attacks by the Al Shabab militants (formerly known as the Islamic Courts Union) since 2006, and as of April 2010, the rebels controlled large areas of Central and Southern Somalia, in addition to some parts of Mogadishu, the capital city > Amnesty International, 'Somalia's Al-Shabab Group Urged to Free Human Rights Activist' (19 April 2010) <<http://www.amnesty.org/en/news-and-updates/somalias-al-shabab-group-urged-free-human-rights-activist-2010-04-19>> accessed 15 March 2012.

²²⁴ It was only towards the end of 2011 that the African Union troops were able to drive out the Al Shabab militia from parts Mogadishu, the capital city, that they controlled. Jeffrey Gettleman, 'African Union Force Makes Strides Inside Somalia' *New York Times* (24 November 2011) <<http://www.nytimes.com/2011/11/25/world/africa/africa-forces-surprise-many-with-success-in-subduing-somalia.html?pagewanted=all>> accessed 15 March 2012.

²²⁵ *British Broadcasting Corporation*, 'AU Troops Arrive in the Comoros' (11 March 2008) <<http://news.bbc.co.uk/2/hi/africa/7289318.stm>> accessed 7 May 2011.

²²⁶ Ibid.

²²⁷ *Reuters*, 'Comoros Appeals for AU Military Intervention' (16 June 2007) <<http://www.reuters.com/article/2007/06/16/idUSL16331085>> accessed 7 May 2011.

²²⁸ Ibid.

²²⁹ Integrated Regional Information Networks, 'Comoros: Union Government Takes Control of Rehe Island' (Port Louis 25 March 2008) <[http://www.irinnews.org/Report.aspx?ReportID=""440](http://www.irinnews.org/Report.aspx?ReportID=)> accessed 7 May 2011.

4.8.2.6 Ivory Coast

The Ivory Coast crisis commenced in late 2010 after the outgoing President Laurent Gbagbo refused to acknowledge election results that indicated he had lost to Alassane Ouattara. and had the State's highest judicial organ declare him as the president." ⁰ However. Ouattara was recognized by the African Union, ECOWAS and the rest of the international community as the legitimately elected President of Ivory Coast.²³¹ The African Union sought to seek a peaceful solution to the crisis and appointed a High-Level Panel to conduct negotiations. ^{23"} The African Union approach to the conflict was based on the view that it required a peaceful and political settlement. ^{*v"} The AU therefore failed to seek a military intervention despite continuing attacks on civilians by Gbagbo forces and his refusal to step down. There was commission of mass atrocities, including allegations of mass graves, indicating that organized mass killings were carried out during the post election violence."³⁴

In March 2011, the Security Council, acting under Chapter VII of the UN Charter, expressed full support for its authorization of United Nations Operation in Cote d'Ivoire (UNOCI) to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence' including preventing the use of heavy weaponry on civilians.^{23^} All parties to the conflict were required to co-operate with UNOCI.²³⁶ United Nations and French troops began using attack helicopters to immobilize heavy weaponry that was being used by the forces loyal to Gbagbo." By

²³⁰ See, Tim Cocks and David Lewis, 'US Leads Calls for Gbagbo to Concede Ivory Coast Vote' *Reuters* (Abidjan 3 December 2010) <<http://www.reuters.com/article/2010/12/03/us-ivory-coast-election-idUSTRE6B04V920101203>> accessed 7 May 2011.

²³¹ The recognition of Ouattara by the AU, ECOWAS and the rest of the international community was noted in Security Council Resolution 1975. UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975.

²¹ African Union. 'Communique of the 265^h Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/AHG/COMM.1(CCLXV) paragraph 3.

²⁵³ *Ibid* paragraph 6.

²³⁴ David Smith. 'Ivory Coast Mass Graves Investigation Launched by UN' *Guardian* (2 January 2011) <<http://www.guardian.co.uk/world/2011/jan/02/ivory-coast-mass-graves-investigation>> accessed 7 May 2011.

²³⁵ UNSC Res 1975 (n 231).

²³⁴ *Ibid*.

²³ *British Broadcasting Corporation*. 'Ivory Coast: Gbagbo Held after Assault on Residence' (11 April 2011) <<http://www.bbc.co.uk/news/world-africa-13039825>> accessed 7 May 2011.

mid of April 2011, Gbagbo had surrendered after a military assault by French and I N troops, backed by forces loyal to Ouattara.²³⁸

4.8.2.7 *Libya*

Although a more extensive examination of the Libyan conflict is done in chapter five, it is important to note that the African Union *expressly* opposed any military intervention, including implementation of no-fly zones, while affirming Libya's territorial integrity.²³⁹ It represents the continued overriding Westphalian sovereignty concerns, given the indiscriminate aerial attacks on civilian targets by the Government.⁴⁰ This is in addition to the fact that the Arab League, the other relevant regional organization to which Libya is a member, requested the implementation of no-fly zones.⁴¹ and some NATO states were willing to act.⁴²

4.8.3 FAILURE TO INSTITUTIONALIZE THE CONCEPT OF SOVEREIGNTY AS RESPONSIBILITY

4.8.3.1 *Pooling of sovereignty: Non-African intervention concerns*

Some of the issues relating to this section have already been discussed while expounding on the nature and characteristics of the African Union pooled sovereignty framework. The intervention framework established under Article 4(h) of the Constitutive Act goes beyond the establishment of a system for enforcement action for humanity to that of safeguarding regional autonomy in the sensitive issue of intervention and conflict management. It seems that it also has the objective of protecting regional concerns against external interferences by claiming a central role

^f Ibid.

While there were general discussions within the international community on the possibilities of implementation of a no-fly zone, the African Union issued a statement on 10 March 2011 which specifically rejected 'any foreign military intervention' of any nature. African Union (n 182) paragraph 6.

⁴⁰ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

⁴¹ On 12 March 2011, the Council of the League of Arab States requested the imposition of a no-fly zone on Libyan military aviation,' in addition to the establishment of 'safe areas in places exposed to shelling.' UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

²⁴ France, United Kingdom, United States, and other coalition partners, commenced the forceful intervention without delay upon authorization by the Security Council. See. *British Broadcasting Corporation*. 'Libya: US, UK and France Attack Gaddafi Force' (20 March 2011) <<http://www.bbc.co.uk/news/world-africa-12796972>> accessed 27 March 2011.

in the international community's responses to African problems. It has correctly been argued that one of the ways an external (non-African) intervention can be avoided is by African states undertaking such actions.⁴¹

There are two major views with regard to the African Union intervention framework. The first assumption is that the Union members have fully contracted away sovereignty, without reservations. From that perspective, it is assumed that member states do not have other considerations that can impinge on the right of intervention established under the AU legal framework. The second assumption is that African states were essentially creating an intervention framework that would also give them greater autonomy on such issues within the international community. The AU mechanism would therefore protect the interests of African states from unregulated foreign interference, while also establishing a foundation of taking internal action for human rights purposes. With regard to the first assumption, Levitt argues that through the intervention mechanism, sovereignty has willingly been contracted away for 'greater aspirations of peace, security, stability, and development, actions that were not imaginable a decade earlier.'²⁴⁴ With regard to the second assumption, Kalu argues that 'while sovereignty remains essential against non-AU threats, sovereignty and human rights are enhanced within the continent', whereby a Union intervention in the territory of a state party cannot be obstructed on the basis of the sovereignty of the state.⁴² Dembinski and Reinold opine that the principle of non-intervention continues to prevail with regard to the AU's relation with the rest of the world.²⁴⁶ Udombana instructively observes that concerns against globalization prevailed over perceived benefits that human rights protection could obtain through the adoption of the AU Treaty."⁴

²⁴¹ Helene Gandois (n 89)16. In 2012, the former South African President Thabo Mbeki cited the interventions in Ivory Coast and Libya while asserting that the AU required to be strengthened in order to address regional matters rather than leave such issues to external (non-African) interveners. Thabo Mbeki. Address by Thabo Mbeki at the Makerere University Institute of Social Research Conference on the Architecture of Post-Cold War Africa - between Internal Reform and External Intervention' *Daily Monitor* (Kampala 19 January 2012) <<http://www.monitor.co.ug/News/National/-/688334/1310170/-/item/0/-/tuhtmhz/-/index.html>> accessed 9 March 2012.

²⁴⁴ Jeremy I Levitt (n 91) 226.

²⁴⁵ Kelechi A Kalu (n 88)19.

²⁴⁶ Matthias Dembinski and Theresa Reinold (n 188) 9.

²⁴ Nsongurua J Udombana (n 16) 1259.

resources for an African Union intervention, and therefore it is fitting that they be the ones to authorize such action through the AU Assembly.

Noting that the need to have a forceful intervention mechanism that was African owned (but unfortunately one that would be susceptible to African leader-interests), it has been observed that the intervention framework was motivated by concerns against state failure, which often results in humanitarian crises. ~ Therefore, although external intervention was undesirable, the necessity for internal intervention had been found necessary and acceptable. That authority was, therefore, granted to the African Union. It has been argued that the adoption of the Constitutive Act eliminated the preceding OAU concept of 'absolute non-intervention' in the internal affairs of its members." "The previous approach of non-interference, it has been submitted, had facilitated the cementing of a culture of impunity within some African states."^ Despite the occurrence of grave atrocities in some African states, the non-intervention approach had turned the OAU into a mere silent observer." Kioko has stated that 'Article 4(h) was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member States.'³⁵⁹ However, if an effective, forceful intervention mechanism by the Union was the *only* objective of the AU intervention system, there is the question why such an approach has not been implemented in Eastern Congo, Darfur, and Libya, where grave atrocities deserved such a response. It is questionable why, despite an elaborate legal and institutional framework for forceful intervention by the Union, it has proved difficult to implement intervention of an enforcement action nature.

Such outcomes may be attributed to the African Union's effort to preserve some concepts of Westphalian sovereignty rather than embracing those of sovereignty as responsibility without reservations. Non-intervention in the internal

²⁵⁵ Ramesh Thakur (n 24) 271-272.

²⁵⁶ Charles Riziki Majinge, 'The Future of Peacekeeping in Africa and the Normative Role of the African Union' (2010) 2 (2) *Goeitingen Journal of International Law* 463,484.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ben Kioko (n 72)817.

affairs of other states is one of the foremost attributes of Westphalian concept of sovereignty.²⁶⁰ The Westphalian approach strongly affirms 'the external and internal autonomy of the state' and is founded on an 'iron curtain like' concept of the state²⁶¹ whereby intervention is deemed as undesirable. In the context of the African Union's subsequent practice, it seems that military intervention is only permissible where the government of the territorial state consents to such action. Yet Article 4(h) of the Constitutive Act seems to imply that the AU recognizes that forceful intervention may be necessary, at times, in order to stop or pre-empt crimes against humanity, war crimes and genocide. It, therefore, seems that there has been failure to effectively institutionalize the concept of sovereignty as responsibility within the African Union's legal framework and processes. Sovereignty as responsibility is premised on the concept that governmental authority 'depends upon adherence to minimum humanitarian norms and on a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse territorial conditions.'²⁶² Udombana regrets that human rights protection issues may not receive the concern they deserve despite the African Union framework, based on the view that '[t]he AU Treaty is an old wine in a new wineskin; and the AU is a reincarnation of the OAU.'²⁶³

State building factors could have contributed to the continued view of sovereignty as order and control. There are some states in Africa which resemble the chaotic situations in the 16th century Europe which influenced Bodin's ideas of sovereignty in a state.²⁶⁴ Bodin formulated his ideas of sovereignty on his perceptions

²⁶⁰ Stephen D Krasner. 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 *Michigan Journal of International Law* 1, 3.

²⁶¹ Jackson Nyamuya Maogoto. 'Westphalian Sovereignty in the Shadow of International Justice?: A Fresh Coat of Paint for a Tainted Concept' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty: The End of Westphalia?* (Ashgate Publishing, Hampshire 2008) 211,211.

²⁶² Richard Falk(n 198)69.

²⁶³ Nsongurua J Udombana (n 16) 1258.

²⁶⁴ Robert Jennings. 'Sovereignty and International Law' in Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth de Vos and John Dugard (eds). *State, Sovereignty, and International Governance* (Oxford University Press, Oxford 2002) 27, 30. Bodin viewed sovereignty as both a perpetual and absolute power. Jean Bodin. *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Julian H Franklin tr. Cambridge University Press, Cambridge 1992) 1. Within that period, sovereignty was often attributed to a powerful ruler, whose legitimacy over territory and its inhabitants was viewed as emanating from divine or historic authority rather than the consent of the citizenry. W Michael

of the urgent necessity of domestic order.²⁶⁵ It has been observed that the fundamental problem of states like Rwanda, Sierra Leone, Somalia, Sudan and Democratic Republic of Congo, and others that have had internal conflicts in recent times, is largely attributable to the absence of a government with real sovereign powers.²⁶⁶ The situations in Somalia and Democratic Republic of Congo, and previously in Liberia and Sierra Leone, exemplify state failure at its best.²⁶⁷ Possible solutions to the African Union and African states predicament are discussed in chapter six.

4.8.3.3 *Inconsistencies with the concept of responsibility to protect*

Concepts postulated under the emerging norm of responsibility to protect, including its potential benefits in addressing the legal and political dilemmas of intervention, have been discussed in chapter three. This section examines the inconsistencies between the responsibility to protect concepts and the African Union's legal and institutional framework. Besides hindering the African Union from benefiting from a constructive approach to the problematic issue of sovereignty and intervention, the inconsistencies also reduce the positive role that the African Union can have in the crystallization of the concept into a proper rule of international law and its implementation. Although the responsibility to protect concept is yet to evolve into a proper legal norm, it has significant normative and political value which could help address the sovereignty and intervention dilemmas of the African Union. As Orford instructively points out, '[t]he responsibility to protect concept rejects the automatic priority of claims to authority based on right, whether that right be understood in historical, universal, or democratic terms.'²⁶⁸ The responsibility to protect makes the capacity to provide effective protection to the populations, from atrocities such as genocide and crimes against humanity, the basis of legitimacy to

Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84(4) *American Journal of International Law* 866, 867.

³⁶⁵ W Michael Reisman, *ibid* 866.

²⁶¹ Robert Jennings (n 264) 30.

²⁶⁷ Gerard Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcut to Statehood' in Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth de Vos and John Dugard (eds) *State, Sovereignty, and International Governance* (Oxford University Press, Oxford 2002) 45.45

²⁶⁸ Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981, 1002.

govern by the territorial state, and the basis under which the international community can claim authority to intervene. "

The first inconsistency between the AU legal system and the responsibility to protect concept is that while sovereignty is viewed as responsibility under the emerging norm subject to effective human rights protection,"¹¹ a Westphalian approach to sovereignty is still inherent within the AU framework." ' According to Annan, the intervention dilemma within the international community arises from the fact that both the values of sovereignty and protection of humanity require support, but there is difficulty of determining which of the two 'should prevail when they are in conflict."²⁷²

Tomuschat also acknowledges that there is difficulty in determining which norms, between those in favour of sovereignty and those that endorse protection of human rights, should prevail." ³ The UN Secretary General has instructively observed that the predicament of undertaking forceful intervention for humanitarian purposes has partially been conceptual and doctrinal, particularly the manner in which the international community appreciates the relevant issues and alternatives."⁴ Within the emerging norm, the traditional tension between sovereignty and intervention is theoretically addressed by establishing complementarity between the two values. The principle of sovereignty is deemed as constituting primarily of the duty to provide protection of populations from humanitarian catastrophes. However, such

²⁶⁹ Ibid 1002-1003.

" ⁰ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) <<http://idl-bnc.idrc.ca/dspace/bitstream/10625/18432/6/16998.pdf>> accessed 21 November 2011 paragraph 2.14-2.15.

" ¹ In Article 4(h) of the Constitutive Act. sovereign equality (without any qualifications for instance, in the context of effective protection of the state's population from humanitarian catastrophes) and non-interference in domestic affairs of state parties are protected and listed among core principles of the African Union. The AU Peace and Security Council is also to be guided by the principle of respect for territorial integrity and sovereignty of states, and since there is no qualification to the responsibilities that arise out of sovereignty, it permits a Westphalian construction of the concept. Article 4(e) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 8).

" Report of the Secretary-General: We the Peoples; The Role of the United Nations in the Twenty-First Century. UN Doc A/54/2000 (27 March 2000) paragraph 218.

²⁷⁵ Christian Tomuschat (n 117) 161-162.

⁴ Report of the Secretary-General: Implementing the Responsibility to Protect. UN Doc A/63/677 (12 January 2009) paragraph 7.

complementarity is absent within the AU's legal system.²⁷⁵ thereby create foundation for continued construction of sovereignty in the traditional Westphalian context.

Sovereignty protection concerns have continued to be expressed in subsequent resolutions, like the 2005 Ezulwini Consensus which, although reaffirming the 'obligation of states to protect their citizens.' stressed that it should not be an excuse to 'undermine the sovereignty, independence and territorial integrity of states.'² Conceptualizing sovereignty as responsibility for effective human rights protection within the African Union processes would be helpful in eliminating non-interventionist arguments and increase chances of regional consensus for action. In addition, such an approach may reduce the convenience with which the principle of sovereignty may be invoked as a convenient legal and political justification for non-intervention.

Second, while intervention is deemed as a 'responsibility' under the emerging norm," it is still conceptualized as a 'right' under the AU's legal framework. A rights approach to intervention implies discretion.²⁷⁶ Under a rights approach, there is the perception of a choice, and the prerogative within the African Union to either take action or not. which may motivate states to focus on situations that promote their interests. A rights approach emphasizes the "prerogative of the intervener' and establishes a 'hierarchy' between those whom the intervener can afford to ignore, and those that he decides to protect.²⁷⁷ Kindiki has observed that conceptualizing the intervention mandate under Article 4(h) of the Constitutive Act in the context of a 'right' implies that the AU has the discretion on whether to intervene or not."²⁷⁸ The 2001 ICISS Report observed that a 'rights' approach is unhelpful, since it focuses on the interests of the intervening states instead of the grave requirements of the

²⁷⁵ According to Kindiki, both the values of sovereignty protection and intervention for human rights purposes are enumerated within the AU's legal framework without establishing an orderly and coherent relationship, which establishes interpretative differences. Kithure Kindiki (n 37)91.

²⁷⁶ African Union (n 157) part B(i).

²⁷⁷ High-Level Panel on Threats, Challenges and Change (n 183) paragraph 201; World Summit Outcome Document (n 183) paragraph 139.

²⁷⁸ Louise Arbour. 'The Responsibility to Protect as a Duty of Care in International Law and Practice (2008) 34 *Review of International Studies* 445,447.

²⁷⁹ Ibid.

²⁸⁰ Kithure Kindiki (n 125) 106.

populations at risk.²⁸¹ According to the HLP Report, the 'responsibility to protect' and not the 'right to intervene' by states is increasingly being accepted as the basis for dealing with populations exposed to avoidable catastrophes.²⁸²

A duty obligates its holder to take action.²⁸³ Kindiki argues that it would have been more helpful if the AU's intervention mandate was conceptualized in the context of a duty, since 'a sense of obligation to intervene is more likely to move the AU into action.'²⁸⁴ According to Evans, the ICISS Report demonstrated that the mobilization of political will for intervention "is also a matter of intelligently and energetically advancing good *arguments*, which ... are always necessary for taking difficult political action."²⁸⁵ The concept of responsibility to protect is a mechanism for mobilizing political will for timely intervention.²⁸⁶

Despite the inconsistencies mentioned above, the UN Secretary General has observed that amongst the roots for the development of the responsibility to protect concept was the spirit of non-indifference that arose from the African Union.²⁸⁷ However, although some of the principles enshrined within the AU legal framework inspired the development of the concept of responsibility to protect, it is apparent that the emerging norm has subsequently adopted a more progressive and helpful approach to intervention for humanity. The AU intervention mechanism can therefore benefit from the concept, which can be an important reference point for reforms to address the continuing dilemmas of intervention due to conflicts between the values of sovereignty and intervention for humanity within the Union. African states have also generally endorsed the responsibility to protect concept in General Assembly debates. For instance, in the 2009 debate on the responsibility to protect, only Sudan and Morocco (which is not a member of the AU) are reported to have expressed

²⁸¹ International Commission on Intervention and State Sovereignty (n 270) paragraph 2.28.

²⁸² High-Level Panel on Threats, Challenges and Change (n 183) paragraph 201. See also, World Summit Outcome Document (n 183) paragraph 139.

²⁸³ Pavlos Eleftheriadis. *Legal Rights* (Oxford University Press, Oxford 2008) 107.

²⁸⁴ Kithure Kindiki (n 125) 106.

²⁸⁵ Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24(3) *Wisconsin International Law Journal* 703, 721.

Dan Kuwali (n 179)378.

²⁸⁶ United Nations General Assembly Department of Public Information (n 183).

opposition to the concept.²⁸⁸ However, this thesis has demonstrated that African states have, at the regional level and acting through the AU, at times acted in a manner that is grossly inconsistent with the responsibility to protect concept. Among the most explicit instances of such inconsistency is when the AU expressly opposed military intervention of any nature in Libya while reasserting the territorial integrity of the State, despite systematic attacks on civilians that could constitute crimes against humanity.²⁸⁹

The fact that the AU framework could be in conformity with the UN Charter and international law system and yet there be inconsistencies with some emerging norms, such as the concept of sovereignty as responsibility, is due to the fact that the relevant principles are legally and conceptually flexible. For instance, sovereignty and intervention for human rights protection are dynamic concepts that are still evolving. Therefore, they are susceptible to interpretation in different ways depending on the specific circumstances and the objectives they can help achieve. Falk illustrates the flexibility of the concept of sovereignty, pointing out that it can be constructed differently in order to achieve certain objectives.²⁹⁰ Possible ways, through which inconsistencies with the emerging norm may be resolved, in addition to institutionalizing the concept of sovereignty as responsibility within the African Union processes, are examined in chapter six.

4.9 CONCLUSION

This chapter has demonstrated that despite the necessity of greater regional human rights protection in the establishment of the AU legal framework, there were also concerns against external (non-African) interventions. Therefore, despite some concerns about the effect of conflicts and mass atrocities that led to the AU's forceful

²⁸⁸ United Nations General Assembly Department of Public Information, 'Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect' (23 July 2009) <<http://www.un.org/News/Press/docs/2009/ga10847.doc.htm>> accessed 22 November 2011. Morocco is however the only African state that is not a member of the African Union. See African Union, 'Member States' <<http://www.au.int/en/member-states/countryprofiles>> accessed 26 November 2011.

²⁸⁹ African Union (n 182) paragraph 6.

²⁹⁰ See, Richard Falk (n 198) 68-69.

intervention system, there were also other factors such as the desire to 'own' interventions within the region, and regulation of external intervention.

The chapter has also demonstrated that the AU's legal framework for intervention is in conformity with the UN Charter and international law, and that it is within the acceptable strictures of the decentralization of peace and security responsibilities to regional organizations. Since the Security Council may be ineffective in issuing timely authorization for intervention due to political interests of a permanent member, the necessity of alternative action requires to be balanced with the need to safeguard the international rule of law. The alleged rule permitting humanitarian intervention and the principle of consent cannot provide an acceptable alternative justification for the implementation of the AU's intervention mandate under Article 4(h) of the Constitutive Act. Alternative authorization by an emergency session of the UN General Assembly is the most viable and reasonable option (in case of Security Council ineffectiveness), since, besides maintaining action within the UN system, it is likely to safeguard the international rule of law.

The chapter has also examined the manner in which the conflict between the principles of sovereignty and the values of intervention for human rights protection is maintained within the AU legal framework. Non-intervention oriented drawback clauses have negated the AU's intervention mandate, as evidenced by the subsequent practice of the Union, which indicates a continuing attachment to Westphalian concepts of sovereignty. The AU's legal and institutional framework, especially its failure to effectively institutionalize the concept of sovereignty as responsibility, has permitted the effective use of the principle of sovereignty as an efficient legal and political justification for non-intervention. The next chapter demonstrates the manner in which Westphalian concepts of sovereignty, as discussed in this chapter, compromised the implementation of the AU's forceful intervention mandate in the Eastern Congo, Darfur and Libyan conflicts. Chapter six will then examine how such legal and political dilemmas of intervention may be addressed.

CHAPTER FIVE

THE AU'S RESPONSES IN EASTERN CONGO, DARFUR AND LIBYA: THE NECESSITY OF RESPONSIBLE SOVEREIGNTY CONCEPTS

The truth is that the el-Bashir regime is engaged in a dangerous brinkmanship, which explains why all the AU-brokered peace talks have collapsed like a house of cards. One wonders if the AU is not unwittingly playing a game sketched in Khartoum or, for that matter, wittingly showing solidarity with a much maligned "African brother."

5.1 INTRODUCTION

The above statement by Udombana concerns the nature and impact of the AU's involvement in the conflict in the Darfur region of Sudan. The Government of Sudan has committed gross violations of human rights and humanitarian law, to which the AU has responded through mediation, consensual intervention and peacekeeping. Udombana highlights the effectiveness of the Sudanese Government in manipulating AU's response. Udombana also demonstrates the deficiency of the AU's approach to the Darfur conflict that seems inconsistent with Article 4(h) of the Constitutive Act (which mandates the Union to undertake forceful intervention to stop crimes against humanity and war crimes).¹ The observation seems to affirm the view that there has been failure to institutionalize the concept of sovereignty as responsibility within the AU processes, which failure has compromised the Union's capacity to effectively implement Article 4(h) of the Constitutive Act in conflicts such as the one in Darfur.

This chapter addresses the question of whether the 'peace keeping' and 'peace enforcement' responses by the AU and UN to the conflicts in Darfur, Sudan, and Eastern Congo have been appropriate and effective. It inquires whether circumstance-requiring forceful intervention for humanity in accordance with Article 4(h) of the Constitutive Act and Chapter VII of the UN Charter existed in the two situations. Second, the chapter discusses the question of whether the AU has effectively

¹ Nsongurua J Udombana 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanity - Intervention in Sudan' (2005) 27 *Human Rights Quarterly* 1149, 1188.

² Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2000 UNTS 3.

institutionalized the concept of responsible sovereignty and, specifically, whether it is implementing its forceful intervention mandate in deserving situations, as envisaged under Article 4(h) of its Constitutive Act. An examination of the AU's response to the recent Libyan conflict is instructive on the issue, in addition to the Eastern Congo and Darfur case studies. The chapter therefore examines whether authorization for forceful intervention in Libya by the UN was appropriate, and whether the AU was justified in its express opposition to any military intervention within the State.

5.2 THE CONFLICT IN EASTERN DEMOCRATIC REPUBLIC OF CONGO

5.2.1 THE GENESIS OF THE CONFLICT AND FACTORS CONTRIBUTING TO ITS SUSTAINABILITY

The origin of the second Congo war,³ waged in the Eastern region of the Congolese state, and one of the most complex African conflicts, was precipitated and has been sustained by various factors. The phrase 'Africa's First World War' has often been used in reference to the Eastern Congo conflict due to the fact that it involved up to eight African states and other transnational actors at one time.⁴ It was estimated that there had been 5.4 million deaths in the Congo between August 1998 and April 2007, which were attributable to the conflict and the accompanying humanitarian crisis.⁵ Spanning over a decade, the Congo war has been referred to as 'the world's deadliest crisis since World War II.'⁶

³ The second Congo war refers to the conflict that commenced in August 1998. See, John F Clark, 'Museveni's Adventure in the Congo War: Uganda's Vietnam?' in John F Clark (ed), *The African Stakes of the Congo War* (Palgrave Macmillan, New York 2002) 145, 146. The earlier conflict, waged in 1996 and 1997, is often referred to as the first Congo war, and it resulted in the ousting of President Mobutu from power. Ibid.

⁴ Dennis Dijkzeul, 'Developing Security in the Eastern Democratic Republic of the Congo: MONUC as a Practical Example of (Failing) Collective Security' in Peter G Danchin and Horst Fischer (eds), *United Nations Reform and the New Collective Security* (Cambridge University Press, Cambridge 2010) 313, 313. See also, Katharina P Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (Cambridge University Press, Cambridge 2007) 121.

⁵ International Rescue Committee, 'Mortality in the Democratic Republic of Congo: An Ongoing Crisis' (2007) <http://www.theirc.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf> accessed 18 December 2009, ii. Since the estimates were specifically based on the period that the Eastern Congo region has been in conflict, it is prudent to conclude that the high prevalence of the deaths were due to the war in the Eastern region.

⁶ Ibid.

The conflict erupted on 2 August 1998 when some of the Congolese military in the Eastern region called for a revolt against President Laurent Kabila, which was immediately followed by fighting in army bases in Kinshasa, the State capital. Although loyal forces were able to quickly regain control of Kinshasa, the rebelling soldiers successfully captured some sections of the Eastern region, including the border cities of Bukavu and Goma.⁵ Various factors contributed to the genesis and the continuation of the Eastern Congo conflict.

First, the conflict was ignited by ethnic animosity between some communities and militia groups who escaped into Eastern Congo after participating in the 1994 Rwanda Genocide.⁷ The conflict was in part precipitated by the actions of the Congolese Tutsi (Banyamulenge) ethnic group in resorting to armed fighting in order to protect themselves from unjustified attacks by Government supporters. There had been previous reports of persecution of the Congolese Tutsis by the Hutu militia and some elements within the Congolese army.⁸ The Congolese Tutsis were particularly unsettled when President Laurent Kabila ordered the Rwandan troops out of the State, who were mostly of Tutsi ethnicity, and had been in the Eastern region since he assumed power.¹⁰ The Banyamulenge felt unsafe with the departure of the Rwandan forces, leading to the commencement of the conflict.¹³ Ethnicity has been manipulated by elites in the society and neighboring states to create legitimacy to:

⁷ Karl Vick, 'Rebellion Breaks Out on Congo Army Bases' *Washington Post Foreign Service* (4 August 1998) <<http://www.washingtonpost.com/wp-srv/inatl/longterm/congo/storiev080498.htm>> accessed 6 June 2011.

⁸ Ibid.

⁹ For the linkage of the Eastern Congo conflict to the 1994 Rwanda genocide, see, International Panel of Eminent Personalities, 'Rwanda: The Preventable Genocide' (7 July 2000) <http://www.africa-union.org/Official_documents/reports/Report_rwanda^genocide.pdf> accessed 11 December 2011, paragraph 20.2.

Timothy Longman, 'The Complex Reasons for Rwanda's Engagement in Congo' in John F Clark (ed), *The African Stakes of the Congo War* (Palgrave Macmillan, New York 2002) 129. It has been observed that in the previous years, the Government had contested the Banyamulenge ethnic community's right to citizenship, despite having lived in the region long before independence. Carr Faubert, 'Case Study: Democratic Republic of the Congo' (United Nations Development Programme, 2006) <<http://www.undp.org/evaluation/documents/thematic/conflict/DRC.pdf>> accessed 6 April 2011: 7. The Banyamulenge were referred to as the Tutsis of Zaire due to their Rwandan origin. Carr Faubert, *ibid.*

¹¹ *British Broadcasting Corporation*, 'Kabila: The Rwanda Connection' (4 August 1998) <<http://news.bbc.co.uk/2/hi/africa/144517.stm>> accessed 6 June 2011.

¹³ Karl Vick (n 7).

¹³ Ibid.

military action, consolidation of political power and for access to economic resources.¹⁴

The tension relating to the Congolese Tutsis was highly amplified by the effects of the 1994 Rwanda genocide. It is unlikely that the Eastern Congo conflict would have become so extensive and grave had the Rwanda genocide been deterred by the UN. It has been noted that conflict was inevitable within the region around Eastern Congo after the entry of armed Hutu militia groups who were escaping from Rwanda.¹⁵ Eastern Congo was, therefore, of prime security concern to Rwanda due to the existence of the Hutu militia. On 4 August 1998, Rwandan and Uganda soldiers landed in Lower Congo, at the Kitona army base near Cabinda, in support of the Congolese soldiers in the uprising against President Laurent Kabila, and they succeeded in capturing some towns in the days that followed.¹⁶ There were also other dimensions of ethnic animosity that contributed to the conflict. In the Masisi region, to the north of Kivu, there were violent clashes between farming communities and cattle breeders due to conflicts on utilization of land.¹⁷ Similarly, conflicts over land utilization would lead to clashes between the Henia and Lendu communities in Ituri region.¹⁸ Ethnic hatred contributed to the conflict, in addition to the war causing more ethnic animosity, due to regional protagonists using ethnic groupings to promote their war agenda.¹⁹

Second, the complicity of Government troops in attacks on civilians has contributed to the continuance of the conflict and the humanitarian suffering. There

¹⁴ Dennis Dijkzeul (n 4) 337.

¹⁵ International Panel of Eminent Personalities (n 9) paragraph 20.2. Rwanda was concerned when the refugee camps in Congo turned into centres of extremist Hutu militia, the perpetrators of the Rwanda genocide. *British Broadcasting Corporation* (n 11). It is estimated that up to 2 million refugees, who had largely co-operated with the regime that had perpetrated the Rwanda genocide, settled in Bukavu, Goma and Uvira. Carrol Faubert (n 10) 7. Elements of the Hutu militia within the refugees would subsequently use the camps as bases for organizing incursions into Rwanda, with the objective of regaining power, a situation that precipitated the Rwandese troops to cross the border while seeking genocide perpetrators, and in order to disband the camps. Carrol Faubert. *ibid.*

Herbert Weiss, "War and Peace in the Democratic Republic of the Congo" (American Diplomacy 2000) <http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_16/weiss/weiss_congo4.html> accessed 6 June 2011. Rwanda was accused by President Kabila of supporting the rebellion that was allegedly being led by Tutsis. *British Broadcasting Corporation*. "Congo Talks Fail to Secure Truce" (8 August 1998) <<http://news.bbc.co.uk/2/hi/africa/147676.sUn>> accessed 6 June 2011.

¹⁷ Carrol Faubert (n 10) 7.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

have been allegations of the Government forces contributing to the conflict and atrocities by targeting certain ethnic communities and civilian population. When war broke out in August 1998, official broadcasts, through television and radio stations based in Kinshasa, accused the Tutsi community for working with the rebels and dissenting soldiers.²⁰ In addition, Government security agents and those sympathetic to the Kabila regime targeted the Banyamulenge and those of Rwandan origin.²¹ As the conflict continued, there were reports of Government security forces perpetrating gross violations of human rights, such as killings, torture and rapes, in addition to the general failure and inability to offer sufficient protection to civilians. The Congolese Government agencies also lacked both the discipline and capacity to restore law and order, conditions which are necessary to ensure effective human rights protection. The institutions that would help augment security by mediating between the state and the society are exceptionally fragile."

Third, various states neighbouring Congo have at one time been directly engaged in the conflict, either in support of the Government or rebels, and that has contributed to the intensification of the war. The involvement of regional states has primarily been motivated by state interests, economic benefits from Congo's diverse minerals and, in some instances, security concerns. As of 2001, Rwanda, Burundi, Uganda, Angola and Zimbabwe were all directly engaged in the Congo conflict.²⁴ There were security concerns in Rwanda's involvement, as it had the interest of eradicating the threat posed by its former soldiers and Hutu Militia (*Interahamwe*).

²⁰ United Nations Human Rights, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf> accessed 6 June 2011 paragraph 312.

²¹ Ibid.

²² Amnesty International. DR Congo' (2009) <<http://thereport.amnesty.org/en/regions/africa/democratic-republic-congo>> accessed on 18 December 2009. The overstretched UN peacekeepers numbering approximately 17,000 in 2009, have been the ones wholly in charge of protecting civilians in Eastern Congo, although they have not been effective in all circumstances. Ibid. In 2006, the United Nations Development Program reported that the Congolese armed forces were also committing gross atrocities against the civilian populations, especially rapes and gender based violence. Carrol Faubert (n 10) 9.

²³ Dennis Dijkzeul (n 4) 337. The state lacks an effective judiciary, a professional armed force-efficient police system, has a weak civil society and ineffective civil service, while education and health systems are also in a fragile state. Ibid.

²⁴ Elizabeth Blunt. 'DR Congo War: Who is Involved and Why' *British Broadcasting Corporation* (Z- January 2001) <<http://news.bbc.co.Uk/2/hi/africa/1136470.stm>> accessed 6 April 2010.

who escaped into Eastern Congo after executing the 1994 genocide." There was limited involvement of Burundi in the Congo war due to the conflict at home, but Burundian rebels were hired to fight in support of the Congolese Government.^{2h} In the case of Uganda, its participation in the Congo conflict was a profitable venture as Ugandan citizens had the opportunity to exploit resources in the region that Uganda controlled.² Uganda's participation in the conflict was later the subject of a 2005 ICJ case in which it was found to have acted illegally.⁵ Angola was interested in pursuing its rebels who had bases in Southern Congo, in addition to supporting the Congolese Government, in order to avoid a hostile government assuming power in the Congo.²⁹ In the case of Zimbabwe, despite lack of security concerns, there was a desire to have a greater regional role, in addition to protecting economic agreements and contracts signed with the Laurent Kabila regime.¹⁰

Fourth, an obstacle to resolving the Eastern Congo conflict was the evolution of a war economy, whereby the economic benefits to the parties to the conflict that could have arisen out of a political settlement were much lower than those obtained from the continuing warfare." The Congolese state is immensely rich in minerals and other resources.³² The Eastern Congo conflict eventually turned into concerns about access and control of mineral resources, especially diamond, coltan, gold, copper and cobalt.³¹ The political economy of the Congo war arose from local, national and transnational factors.³⁴ With time, economic benefits of the war prevailed over security concerns, with the losers in the big enterprise being only the Congolese

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 paragraphs 147 - 165.

Elizabeth Blunt (n 24).

³⁰ Ibid.

³¹ Sagaren Naidoo. 'The Role of Track Two Diplomacy in the Democratic Republic of the Congo Conflict' (2000) 1(2) *African Journal of Conflict Resolution* 85. 97. Eastern Congo is a 'fragmented war economy' that is founded on illegal exploitation of natural resources. Dennis Dijkzeul (n 4) 335.

³² Carrol Faubert (n 10) 7.

³³ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2001/357 (12 April 2001) paragraph 213. It has been observed that in the context of the incapacity of the Congolese Government to govern and the lack of law and order in the region, it is difficult for the various participants to resist the appeal of the local wealth. Ibid.

³⁴ Dennis Dijkzeul (n 4) 335.

people. It has been noted that armed forces from Rwanda, Uganda and Bur., looted minerals, wood, livestock and coffee in the regions that they controlled, a h . were then transferred to the respective states or exported.³⁶ In the 2005 *Armed Activities on the Territory of the Congo* case, Ugandan forces were found to ha . plundered, looted and exploited Congo's resources in the region they occupied.

As the Eastern Congo conflict became a lucrative venture, the continuance r the conflict became a matter of interest to military officers from participating state- who began to protect criminal networks, which have a capacity of taking over in th- region should foreign armies (including peacekeepers), leave. "8 Congolese rebe groups and warring ethnic communities have also funded their war activities through illegal exploitation of minerals. For instance, it has been reported that in the period leading to 2006. Lendu and Hema communities fought in order to gain control of goldmines in the town of Mongbwalu within the Ituri region, with the town chan^ir- hands five times during the 18 months conflict.^{3"}

5.2.2 INADEQUACIES OF THE UNITED NATIONS PEACEKEEPING AND PEACE ENFORCEMENT APPROACH

The UN decision to undertake peacekeeping in Eastern Congo was crucial in filling the existing vacuum in the protection of civilians and preventing commission of horrendous crimes. However, as we shall observe, the UN force was unable to end the conflict, and ensure effective protection of civilians from gross violations of human rights. At the time the Congo conflict commenced, it was generally believed that a military response could not succeed in establishing lasting security that was essential if the state was to be rebuilt.⁴⁰ Consequently, the initial responses comprises of several attempts to find a diplomatic solution through negotiations, which was

³⁵ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Form-Wealth of the Democratic Republic of the Congo (n 33) paragraph 218. The beneficiaries of the conflict continually sustain it since it provides both wealth and power. Dennis Dijkzeul (n 4) 335

³⁶ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Form-Wealth of the Democratic Republic of the Congo (n 33) paragraph 5.

³⁷ *Armed Activities on the Territory of the Congo* (n 28) paragraph 250.

³⁸ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Form-Wealth of the Democratic Republic of the Congo (n 33) paragraph 217.

³⁹ Carrol Faubert (n 10)7.

⁴⁰ Sagaren Naidoo (n 31) 86.

characterized by the use of special envoys and meetings by heads of state.⁴¹ It was an appropriate approach since negotiations and other peaceful means should be given priority in trying to resolve such a conflict. However, enforcement action should be undertaken in a timely and decisive manner where the peaceful means fail. The United Nations Mission in the Democratic Republic of Congo was established by the Security Council in 1999.⁴² MONUC's mandate was expanded by Resolution 1291 of 2000, which granted the peacekeepers authority to take action in order to 'protect civilians under imminent threat of physical violence' and increased the Mission personnel to 5,537.⁴³

In 2003 the UN turned to the European Union, which undertook *Operation Artemis*, in order to contain the escalating conflict in the Ituri region, and to create an opportunity for the upgrading of MONUC I (which was unsuccessful) to MONUC II (which had a Chapter VII of the UN Charter mandate).⁴⁴ The short term enforcement approach under *Operation Artemis* should have been undertaken in the Congo on a long term basis, ideally with the full participation of the African Union for burden sharing purposes, until there was peace to keep. The necessity for *Operation Artemis* also indicates that regional organizations can fill the gap where capacities of the UN

⁴¹ Ibid.

⁴² UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279. Under the Resolution, MONUC would comprise the personnel previously authorized under Resolutions 1258 of 1999 and 1273 of 1999. Under Resolution 1279, MONUC's mandate comprised peacekeeping functions such as ensuring delivery of humanitarian aid, disengagement of forces, observation of the ceasefire, and availing information on security conditions.

⁴³ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291.

⁴⁴ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, Washington DC 2008) 123. In Resolution 1484 of 2003, the Security Council, acting under Chapter VII of the UN Charter, authorized a short term deployment of Interim Emergency Multinational Force in Bunia, Ituri, for 'stabilization of the security conditions and the improvement of the humanitarian situation' including some specific security and protection mandates. UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484. *Operation Artemis* was undertaken in the context of the authorized Multinational Force. It has been observed that the original incapacities of MONUC to respond to massive violence were demonstrated in this particular instance in Ituri. Cristina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, London 2011) 83. The UN had to turn to the European Union for the implementation of *Operation Artemis*, and after the situation stabilized after three months, MONUC took over. Ibid. Resolution 1493 of 2003 was to follow, in which the Security Council cited Chapter VII of the UN Charter while increasing MONUC's military strength to 10,800 and authorizing it to take necessary measures to 'protect civilians and humanitarian workers under imminent threat of physical violence', amongst other tasks. UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493.

are inadequate. As will be examined later in this chapter, the African Union has failed in this respect in the context of the Congo conflict.

In Resolution 1925 of 2010, adopted twelve years after commencement of the endless cycle of mass atrocities, the Security Council acknowledged and condemned attacks on civilians, killings, use of child soldiers and extensive sexual violence.⁴⁵ In Resolution 1925, the Security Council cited Chapter VII of the UN Charter while renaming and reconstituting MONUC into the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), which took effect on 1 July 2010.⁴⁷ In addition, Resolution 1925 authorized MONUSCO to use any necessary means to implement its protection mandate, which included 'effective protection of civilians...under imminent threat of physical violence', amongst other responsibilities.⁴⁸

The failures of MONUC and MONUSCO can largely be attributed to factors relating to the size of military personnel and the mandate. First, Congo is an exceptionally large state, approximated to be equal to Western Europe, and therefore 16,700 peacekeeping troops in 2005 were simply insufficient to effectively protect civilians in the Eastern Congo region.⁴⁹ The region is also underdeveloped in terms of transport and communication infrastructure, posing even greater challenges for the deployed troops. There has not been much subsequent improvement, with MONUSCO total military and police personnel totaling 19,995 as of 30 April 2011. Armed groups are still active in the Eastern Congo region, mass atrocities are still being committed, and MONUSCO is still engaged in peace keeping operations (for which it is overwhelmed).⁵⁰

⁴⁵ Cristina Gabriela Badescu (n 44) 84.

⁴⁶ UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Human Rights Watch. 'MONUC: A Case for Peacekeeping Reform' (28 February 2005) <<http://www.hrw.org/en/news/2005/02/28/monuc-case-peacekeeping-reform>> accessed 18 December 2009.

⁵⁰ United Nations Organization Stabilization Mission in the Democratic Republic of the Congo. 'MONUSCO Facts and Figures' (June 2011) <<http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml>> accessed 6 June 2011. States contributing military and police personnel are from both within and outside Africa.

⁵¹ For instance, between 23 and 28 May 2011, MONUSCO troops based at Sud Kivu area launched military operations in order to address increasing human rights violations in the region. United Nations

Second, peace enforcement has been executed in a contradictory and restrictive manner, with the peacekeepers failing to effectively implement the extended Chapter VII of the UN Charter mandate. The overwhelming challenge of MONUC and MONUSCO, including general failure to successfully protect civilians, has been reported. For instance, on 30 July 2010, widespread rapes and sexual violence were committed in Luvungi village by gangs of rebels, with at least 200 rapes carried out on that day and the following three days.⁵⁵ This was despite the village's proximity to some peacekeepers based nearby, and taking into account the peacekeepers ten years of experience (and expanded mandate), there should have been improvements in the protection of civilians. The case demonstrated the continued failure by the UN Mission to effectively implement its fundamental task of protecting civilians, by its failure to respond to villages under attack.⁴ Those events were similar to the 2008 Kiwanja massacre, in which 150 civilians were killed by rebels next to a UN peacekeeping base. ^

Third. MONUC's reputation in respect of protection of civilians has been diminished by sex scandals.⁵⁶ There have been joint operations between the UN peacekeepers and the Congolese army which, besides failing to resolve the conflict, has also contributed to mass atrocities as the Congolese army has been accused of brutally killing civilians and committing widespread rapes/ There have also been programs of integrating some of the rebels into the Congolese army. For instance, a Security Council Report noted that the National Congress for the Defence of the People (CNDP) and other rebels in the North Kivu region were being integrated into

Organization Stabilization Mission in the Democratic Republic of the Congo, 'MONUSCO Puts Pressure on Armed Groups in Eastern DRC' (Bukavu 30 May 2011) <<http://monusco.unmissions.org/Default.aspx?tabid=932&ctl=Details&mid=1096&ItemID=13880>> accessed 6 June 2011.

⁵² Jeffrey Gettleman, 'Mass Rapes in Congo Reveals UN Weakness' *New York Times* (3 October 2010) <<http://www.nytimes.com/2010/10/04/world/africa/04congo.html?ref=congo>> accessed 3 June 2011.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Dennis Dijkzeul (n 4) 324.

Human Rights Watch, 'UN Peacekeeping Force Knowingly Supports Abusive Military Operations' (2 November 2009) <<http://www.hrw.org/en/news/2009/11/02/eastem-dr-congo-surge-amiy-atrocities>> accessed 18 December 2009.

the Congolese army.⁵⁸ The integrated troops were then deployed in the region u participate in the Kimia II operations/⁴ However, it is questionable whether former rebels who have committed heinous atrocities and profited from the war should **be** integrated into the national army, and whether they can uphold the discipline required. They may as well aggravate indiscipline and commission of atrocities, such as extrajudicial killings and sexual violence by the Congolese army, and **generally** contribute to an endless cycle of the conflict and the political economy of the war.

Therefore, while MONUC was effective in organizing both the 2005 referendum and 2006 elections in difficult circumstances, it has, however, been inefficient in saving lives and protecting women from attacks in the Eastern region. It has been observed that since establishment of peace in the region would threaten the operations of those benefiting from the conflict situation, they are likely to wait until MONUC leaves, and in the meantime, try to compromise MONUC activities.⁶¹ Regarding MONUC, it has correctly been observed that:

Deployed in the DRC in 1999 and evolving into a Chapter VII operation with more troops, MONUC epitomizes the challenges for missions that start under-staffed and ill-equipped, address crises during ongoing civil conflicts, cover very wide and unstable regions, and apply force that places the mission between peacekeeping and warfighting.⁶²

There has therefore been a serious security and conflict problem in Eastern Congo. According to Wiessner and Willard, where 'atrocities are already under way, the most urgent goal is to arrest the disturbance, to bring the ongoing violation to an immediate end', followed by 'broader objectives' to prevent its recurrence/ The suggested approach by Wiessner and Willard would have been the ideal response by both the UN and AU in addressing the Eastern Congo conflict. In summary, MONUC (and later MONUSCO) has been unable to bring to an end the political economy of

⁵⁸ Report of the Security Council Mission to the African Union: Rwanda and the Democratic Republic of the Congo; and Liberia, UN Doc S/2009/303 (11 June 2009) paragraph 24.

⁵⁹ Ibid.

⁶⁰ Gareth Evans (n 44) 124.

⁶¹ Dennis Dijkzeul (n 4) 335.

⁶² Cristina Gabriela Badescu (n 44) 83.

⁶³ Siegfried Wiessner and Andrew R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' in Steven R Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (William S Hein and Co. Washington DC 2004) 47, 51.

the Congo war, which is self-sustaining⁶⁴ and has resulted in the most heinous violations of human rights and international humanitarian law upon the Congolese population.

5.2.3 OAU AND AU RESPONSES

When the Eastern Congo conflict broke out in August 1998, the African Union had not yet been established, and the relevant African regional organization was the OAU. Both the OAU and SADC (the relevant sub-regional organization) were involved in mediation efforts with the objective of establishing a ceasefire. For instance, both OAU and SADC participated in the negotiation and conclusion of the July 1999 Lusaka Ceasefire Agreement.⁶⁵ Mediation efforts by OAU and SADC were, however, marred by various negotiation and implementation obstacles."¹ The African Union was formally launched in July 2002," when the Eastern Congo conflict had already commenced. Zimbabwe sought to brand its initial intervention in the Congo conflict (in support of President Kabila) as having been executed under the auspices of SADC, the local sub-regional organization."⁵ Unlike in the Darfur conflict, where the African Union undertook peacekeeping initiatives before the UN, and which was followed by partnership with the UN, the AU has not been directly involved in peacekeeping activities in the Congo. The military intervention in the form of peacekeeping in the Congo has solely been an initiative of the UN, although at some point it also involved a short intervention by the EU in the form of *Operation Artemis*.

^M Dennis Dijkzeul (n 4) 335.

⁶⁵ See, Ceasefire Agreement signed on 10 July 1999 by Congo, various concerned states and relevant rebel movements, and witnessed by OAU and SADC. United States Institute of Peace. 'Peace Agreements: Democratic Republic of the Congo' (23 August 1999) <<http://www.usip.org/publications/peace-agreements-democratic-republic-congo>> accessed 16 June 2011.

International Crisis Group. 'Africa's Seven-Nation War' (21 May 1999) <<http://www.crisisgroup.org/-media/Files/afnca/central-africa/dr-congo/Africas%20Seven-Nation%20War.ashx>> accessed 16 June 2011, i.

See, African Union, 'Launch of the African Union, 9 July 2002: Address by the Chairperson of the AU. President Thabo Mbeki' <http://www.africa-union.org/official_documents/Speeches_&_Statements/HEThabo_Mbiki/Launch%20of%20the%20African%20Union,%209%20July%202002.htm> accessed 16 June 2011.

"* For instance, see, Integrated Regional Information Networks. 'DRC: Zimbabwe says SADC to Back Kabila' (Nairobi 19 August 1998) <http://www.africa.upenn.edu/Hornet/irin_81998.html> accessed 16 June 2011. On regional legitimacy concerns that necessitated Zimbabwe to brand its intervention in Congo as executed under the auspices of SADC, see, Katharina P Coleman (n 4) 122-159.

5.2.4 THE NECESSITY OF IMPLEMENTING THE AU'S FORCEFUL INTERVENTION MANDATE

Some of the grave violations of human rights and international humanitarian law suffered by the people of Eastern Congo have already been pointed out. Although some of the mass atrocities were committed before the formal launch of the African Union in 2002, similar heinous violations of human rights have been carried out in the subsequent period. This would have necessitated intervention by the African Union in a manner consistent with the mandate provided in Article 4(h) of its Constitutive Act. The Article mandates the Union to forcefully intervene in "grave circumstances," namely, in situations of genocide, war crimes or crimes against humanity. However, the African Union has not even directly participated in the United Nations peacekeeping, although its role in mediating the conflict and attempting to achieve political settlement requires commendation. *⁹ Grave circumstances, situations envisaged to warrant forceful intervention by the AU, have occurred against the Congolese population, warranting action by the AU in the spirit of Article 4(h) of the Constitutive Act. The inadequacies of the UN peacekeeping approach have already been discussed, pointing to the necessity of both the UN and AU to have undertaken decisive and timely forceful intervention.

In 2005, MONUC discovered three mass graves in North Kivu, which was evidence of gross human rights violations in the region. " A United Nations Report, focusing on the period between 1993 and 2003, documents some of the worst violations of human rights and international humanitarian law in the Congo, concluding that some of those atrocities amounted to crimes against humanity, war

⁶⁹ Mediation efforts of the preceding OAU may be deemed to form part of the initiatives of the African Union, the successor regional organization. In addition, the Secretariat of the International Conference on the Great Lakes Region (ICGLR), whose duties include addressing peace and security issues in the region, was established in 2000 under the auspices of the African Union and the United Nations. See, International Conference on the Great Lakes Region, "Background" (25 November 2010) <<http://www.icglr.org/spip.php?article1>> accessed 27 June 2011. The AU and UN have continued to facilitate ICGLR meetings and conferences, for instance, the 2006 meeting under the auspices of a Joint United Nations/African Union Secretariat. See, Reliefweb, 'Joint United Nations/African Union Secretariat of the International Conference on the Great Lakes Region' <<http://reliefweb.int/node/217879>> accessed 27 June 2011.

⁷⁰ United Nations Human Rights (n 20) paragraph 1.

crimes and, probably, genocide.¹ In the 2005 *Armed Activities on the Territory of the Congo* case, the ICJ found Ugandan troops to have committed 'massive human rights violations and grave breaches of international humanitarian law' in the regions they occupied. * Rape and sexual violence have become some of the greatest instruments of war in the Eastern Congo conflict. It has been stated that the magnitude of sexual violence and rapes being committed in Eastern Congo constitute war crimes and crimes against humanity.³ A 2009 Security Council Mission Report emphasized the necessity of addressing the sexual violence scourge, due to its horrendous impact on girls and women in the region.⁴ A 2011 survey of rapes of women aged 15 to 49 in the previous twelve months translated 'into approximately 1150 women raped every day, 48 women raped every hour, and 4 women raped every 5 minutes.'⁵ It should be noted that the research does not include minors and women above the age of 49, and since it focused on the entire Congolese State, the Eastern region is likely to have contributed significantly to the statistics since that is where the conflict is centred, including widespread sexual violence.

The Eastern Congo conflict became a cycle of breached ceasefire agreements, and the inability of the UN peacekeepers to enforce them.⁶ The conflict therefore turned into a continuous cycle of violence and mass atrocities. In the early stages, the

Ibid paragraphs 463- 524. With regard to the crime of genocide, despite the high threshold required, the Report argues that the Hutu community in Eastern Congo, which included refugees from Rwanda, comprised of an ethnic group in the context of the 1948 Genocide Convention. Ibid paragraph 514. It also argues that in reference to the relevant international instruments and jurisprudence, even an intention to partially destroy a group may be classified as genocide. Ibid paragraph 514. On that basis, the Report argues that it is possible that 'even if only a part of the Hutu population in Zaire was targeted and destroyed, it could nonetheless constitute a crime of genocide, if this was the intention of the perpetrators.' Ibid paragraph 514.

¹ *Armed Activities on the Territory of the Congo* (n 28) paragraph 207.

² United Nations News Centre. 'Sexual Violence against Women in DR Congo Amounts to War Crime: UN Expert' (26 October 2007) <<http://www.un.org/apps/news/story.asp?NewsID=24436&Cr=democratic&CrI=congo>> accessed 28 June 2009.

³ Report of the Security Council Mission to the African Union: Rwanda and the Democratic Republic of the Congo; and Liberia (n 58) paragraph 30.

⁴ Amber Peterman, Tia Palermo and Caryn Bredenkamp, 'Estimates and Determinants of Sexual Violence against Women in the Democratic Republic of Congo' (2011) 101(6) *American Journal of Public Health* 1060, 1064-1065.

⁵ For instance, in 2009 it was reported that an earlier peace agreement was followed by heavy fighting some months later in the North Kivu area between the CNDP armed group, other rebels and the Congolese army. Amnesty International (n 22). CNDP rebels succeeded in capturing large areas while forcing the Congolese army to flee, as it resorted to widespread killings, rapes and looting, especially around Kanyabayonga town. Ibid.

conflict intensified despite the conclusion of the 1999 Lusaka Ceasefire Agreement. It has been observed that participating states and rebel groups devised various strategies in order to sustain the profitable cycle of conflict and exploitation. '

There have been more recent reports of gross violations of human rights and international humanitarian law. In 2009, it was reported that an earlier upsurge of conflict in North Kivu resulted in serious atrocities and war crimes upon the population by both the Government forces and rebels.⁷⁸ As a result, more than 1.4 million civilians were internally displaced, with an estimated 30,000 fleeing into
80
Uganda. " CNDP rebels were alleged to have further destroyed internally displaced people's camps, in addition to forcing them to leave, thereby multiplying their catastrophe.⁷⁹ The mass atrocities included killings, sexual violence and rapes, abductions, use of child soldiers, and displacement of approximately a quarter of the local population."⁸⁰ Between 14 and 17 December 2009, the Lord's Resistance Army (LRA), a Ugandan rebel group based in Eastern Congo, killed at least 321 civilians, and abducted over 250 others, who included about 80 children, after horrible attacks in the Haut Uele District.⁸¹ UN peacekeeping force only learnt of the attacks at the end of January 2010, and although it could not forestall the attacks due to its limited intelligence and overstretched resources, it undertook no immediate actions to investigate the LRA attack.⁸² As of 2008, it was estimated that between 3,000 and 4,000 children were engaged in the war as child soldiers.'⁸³

Despite the serious mass atrocities that the Congolese population has endured, there is a sense in which the Congo conflict has unfortunately not gained proportionate attention and response from the international community. It has been observed that as the Congolese conflict degenerated into a 'confused postconflict

United Nations Human Rights (n 20) paragraph 481.

⁷⁸ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (n 33) paragraph 180.

⁷⁹ Amnesty International (n 22).

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Human Rights Watch, *Trail of Death: LRA Atrocities in North Eastern Congo* (Human Rights Watch, New York 2010)3.

⁸⁴ Ibid 4.

⁸⁵ Amnesty International (n 22).

civil violence. coverage practically disappeared.⁸⁶ For instance, it has been noted that even the December 2009 LRA attack in Haut Uele District made no headlines in spite of the high death toll of civilians." The eruption of the Darfur conflict had a disastrous impact on the coverage of the Congo conflict by the media," as more attention focused on the new conflict.

In chapter three, we examined the contradictions and problems of the peace enforcement approach, based on the fact that there is still concern for state consent and practical military action for civilian protection is often limited and restricted." Practically, in such a context, there is often no robust enforcement action for the protection of civilians. It has been pointed out that such multipurpose coercive deployments are still described as peacekeeping rather than peace enforcement because, "unlike the latter, where it is known from the outset that the primary role will be fighting - they are embarked upon with a reasonable expectation that force may not be needed at all."⁹⁰ In the case of MONUC, it has been pointed out that it epitomizes the predicaments of operations that apply military force in a manner that is in between "peacekeeping and warring."⁹¹

5.2.5 WHETHER UN PEACEKEEPING RESTRAINED AN AU ROBUST INTERVENTION

With regard to international peace and security matters, the UN Security Council has only primary responsibility under Article 24(1) of the UN Charter, and, therefore, the Council mandate is not absolute. In addition, the Security Council can fail in discharging its primary responsibility, necessitating alternative solutions to a security problem, for instance, through the UN General Assembly. There are three possible alternatives that the AU could have resorted to if it was keen on effective

⁸⁶ Gerard Prunier. *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press, Oxford 2009) 353.

⁸⁷ Human Rights Watch (n 83) 3.

⁸⁸ Gerard Prunier (n 86) 353.

Rosalyn Higgins credibly points out that since the protection of civilians is often mixed with the protection of the United Nations personnel, it often turns out that the 'safety of the peacekeepers becomes in effect the sole consideration." Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, Oxford 2009) 287.

⁹⁰ Gareth Evans (n 44) 123.

⁹¹ Cristina Gabriela Badescu (n 44) 83.

resolution of the conflict and protection of civilians. First, at the minimum, it would have directly contributed troops for the UN peacekeeping efforts, thereby addressing the serious problem of shortage of military personnel in a vast region with poor infrastructure. Second, it could have lobbied the Security Council for a more elaborate forceful intervention mandate that would be more effective in halting the endless cycle of violence and protecting civilians, with the intent of partnering with the UN in its implementation. Third, if the Security Council was ineffective in addressing the issue in a manner that reflects the reality on the ground or in a timely manner, the AU could have pushed for a General Assembly emergency session in line with the Uniting for Peace Resolution, to provide the AU with a more appropriate mandate.⁹² The issue of the viability and necessity for alternative authorization of enforcement action by the General Assembly, where the Security Council is rendered ineffective due to political interests of a permanent member, is discussed in chapters two and three. The African Union should have sought to undertake intervention in accordance to Article 4(h) of the Constitutive Act, or pushed for the UN to undertake such an intervention between 2004 and 2005, and in the subsequent period due to intermittent rise in mass atrocities. The conflict consequently assumed the form of an endless cycle of heinous crimes on civilians.

It may be argued that since some African states have been contributing troops under the auspices of the UN peacekeeping,⁴³ a direct participation by the African Union would have led to duplicity and conflict in operations. This thesis opposes such views based on the fact that one of the serious predicaments rendering the UN peacekeepers ineffective is their small size, in comparison to the vast area that they are required to protect. Therefore, the AU's direct participation would have resulted in very useful burden sharing and increase of military personnel. Under the auspices of the AU, the many other African states that are not contributing troops would have been requested to do so, while those already contributing would have been requested to make additions. Operations could be carried out jointly by the AU and UN, or the

⁹² Uniting for Peace Resolution, UNGA Res 377(V)A (3 November 1950).

⁹³ African states contributing military personnel as of April 2011 included: Burkina Faso. Algeria. Benin, Ghana, Kenya, South Africa, Tunisia, Morocco, Mozambique, Niger, Nigeria. Malawi. Mali. Senegal, and Zambia. United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (n 50).

two organizations would have targeted separate violent prone regions of the vast Eastern Congo region. The AU would also have been expected to address the issue of neighbouring states" occasional participation in the Eastern Congo conflict.

5.2.6 LESSONS FROM THE CONGO CONFLICT

The Congolese state itself has failed in the context of sovereignty as responsibility, in terms of good governance, rule of law mechanisms, and protection of human rights. State failure is, however, an expected phenomenon in relation to some states, especially under the responsibility to protect concept, in which situation the responsibility of protection shifts to the international community. The UN and the AU should have filled the vacuum, intervened in a timely and decisive manner, and helped establish institutions that would institutionalize responsible sovereignty within the state. There are some lessons that may be learnt from the Eastern Congo conflict. First, there was failure to endorse and enforce the concept of sovereignty as responsibility by the African Union. It failed to act in accordance with its intervention mandate as stipulated under Article 4(h) of its Constitutive Act. Second, the UN peacekeeping approach failed in effectively protecting civilians from an endless cycle of heinous atrocities. It seems that military deployment requires an achievable mandate that reflects realities on the ground, appropriate rules of engagement and sufficient composition in terms of personnel capable of performing the required tasks.⁹⁴

Third, the lack of direct participation by the African Union in peacekeeping or even a more helpful military approach, despite the Union being the relevant regional organization, in addition to its intervention mandate under Article 4(h) of the Constitutive Act, is instructive. To an extent, it indicates lack of the rule of law standards in AU decision making, for which extreme political considerations and regional states agenda have prevailed. Participation and interests of neighbouring states, which are AU members, has already been discussed. Fourth, the Eastern Congo conflict is evidence that the alleged rule permitting humanitarian intervention, exercisable by any state, is undesirable and may be problematic. Unregulated

⁹⁴ Gareth Evans (n 44) 124.

intervention by states may, as discussed in chapter two, actually aggravate the conflict and erode the international rule of law. The problems associated with Uganda's intervention in Eastern Congo, which the ICJ found as unlawful and to have aggravated mass atrocities, is instructive on the likely risks of unregulated interventions that would not be subject to institutional regulations.⁹⁵ Fifth, consensual interventions, or peace-enforcement mandates that are based on peacekeeping concepts (and require such roles), may not be appropriate in serious, ongoing conflicts. With focus on preventing mass atrocities, and using civilian protection determinants, there may be need to establish a ceasefire.

5.3 THE CONFLICT IN THE DARFUR REGION OF SUDAN

5.3.1 THE DARFUR REGION

Sudan was formerly the largest state in Africa, its former size approximately the same as that of continental United States east of the Mississippi River.⁹⁶ This was before the separation of South Sudan from Sudan on 9 July 2011, after the January 2011 referendum." The Darfur region is approximated to be equal in size to either France or Texas in the United States, but the comparisons fail to capture the real image of the region as the later two have well developed infrastructure.⁹⁸ Located in western Sudan, Darfur is approximated to measure 250.000 square kilometers, and was in 2005 estimated to have a population of about six million people." As of 2006.

¹⁵ Uganda's intervention in the Congo was found to be unlawful. See. *Armed Activities on the Territory of the Congo* (n 28) paragraph 147-165. The Ugandan occupying forces were also found to have committed egregious violations of human rights and international humanitarian law. Ibid paragraph 207.

United States Department of State, 'Background Note: Sudan' (8 April 2011) <<http://www.state.gov/r/pa/ei/bgn/5424.htm>> accessed 9 June 2011. As of April 2011 (the time of this citation), although South Sudan had already voted for separation in a referendum, it was yet to officially separate from the North to form an independent state. South Sudan was therefore, at the time, deemed to be part of Sudan.

⁹⁷ See, Government of the Republic of South Sudan. 'History of Southern Sudan' <<http://www.goss.org/>> accessed 3 January 2012.

⁹⁸ *New York Times*, 'Obstacles Test African Force in Grim Darfur' (17 May 2006) <http://query.nytimes.com/gst/fullpage.html?res=9900E7DF123EF934A25756C0A9609C8B63&page_wanted=2> accessed 9 June 2011. See also, Human Rights Watch. 'Darfur in Flames: Atrocities in Western Sudan' (April 2004) <http://www.hrw.org/reports/2004_sudan0404/> accessed 9 June 2011. 6.

⁹⁹ International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) <http://www.un.org/news/dhsudan/com_inq_darfur.pdf> accessed 22 November 2009. paragraph 51.

Darfur was a huge and forbidding region that had only a single major paved road traversing the expansive area.' "

5.3.2 THE ORIGIN OF THE CONFLICT AND FACTORS CONTRIBUTING TO ITS CONTINUANCE

By July 2010, the UN estimated that 300.000 people had been killed and a further 2.7 displaced by the previous seven years of conflict in Darfur, with both the Government of Sudan and rebels alleged to have participated in the commission of atrocities." ¹ Although the root causes of the conflict were diverse and complex, some of the outstanding ones were ethnic conflicts relating to scarce resources due to desertification, and others related to governance problems. " The major rebel movements involved in the conflict, Justice and Equality Movement (JEM) and Sudan Liberation Movement/Army (SLM/A), began to organize themselves between 2001 and 2002 against the Sudanese Government.¹⁰³ Both rebel movements largely accused the Government of economic, social and political marginalization of the Darfur region.¹⁰⁴ Actual attacks by the rebel movements, targeting Government installations, such as police posts, began in early 2003.¹⁰⁵ The Sudanese Government responded by hiring mostly Arab nomadic communities to attack the rebels." This predominantly Arabic agents used by the Government came to be commonly referred to as the *Janjaweed*.⁶⁰

First, the Darfur conflict has been sustained by ethnicity and governance factors. The ethnic composition of the Darfur population is

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¹⁰⁰ *New York Times* (n 98).

¹⁰¹ United Nations News Centre. 'Darfur: UN-African Union Peacekeeping Force Extended as Tensions Rise' (30 July 2010) <<http://www.un.org/apps/news/story.asp?NewsID=35493&Cr=Darfur&Cr1=>> accessed 7 June 2011.

" International Commission of Inquiry on Darfur (n 99) paragraph 61.

"" Ibid paragraph 62.

¹⁰⁴ Ibid.

¹⁵ Ibid paragraph 63.

⁶ Ibid paragraph 68. For instance, an April 2003 attack at El Fasher Government Airbase resulted in army recruitments for retaliation, with the Government also heavily mobilizing militia groups, particularly from the Arabs. Report of the African Union High-Level Panel on Darfur (Abuja 29 October 2009) PSC/AHG/2(CCVII) 21.

¹ International Commission of Inquiry on Darfur (n 99) paragraph 69.

Africans and people of Arabic descent." " When the rebels commenced their attack and with the Government having limited resources to respond, it turned to some of the communities to execute attacks in retaliation, by exploiting existing ethnic tensions."¹⁴ The tension between the African communities and the Arabs (alleged to be favoured by the Government) has historically been in existence due to previous Government's policy of arming Arab militia in response to insurgencies by rebels in the Southern region." " The Darfur crisis is largely a manifestation of unequal distribution of power and wealth in Sudan."¹¹

Second, scramble for scarce land and water resources have exacerbated the conflict between the African farming communities and the Arabic herdsmen. African ethnic communities are generally sedentary agriculturalists while Arabs are largely pastoralists. " Other factors, such as climatic changes and environmental degradation, in addition to population growth, have aggravated animosity and conflict arising from issues related to land use."⁴

5.3.3 THE AU'S INITIAL MEDIATION EFFORTS

The African Union is credited with having undertaken the first effort to resolve the conflict and protect civilians by convening ceasefire talks and peace negotiations, dispatching peacekeepers, and demanding accountability.¹¹ One of the earliest efforts to find a peaceful political settlement to end the Darfur conflict was through the N'djamena Ceasefire Agreement of April 2004, which was the initiative of the President of Chad, Idriss Deby, with the assistance of the Chairperson of the African Union Commission.¹¹⁶ There have been subsequent mediation efforts under

¹⁰⁸ Human Rights Watch (n 98) 6.

¹⁰⁹ International Commission of Inquiry on Darfur (n 99) paragraph 67.

¹¹⁰ Jackson Nyamuya Maogoto and Kithure Kindiki, 'A People Betrayed-The Darfur Crisis and International Law: Rethinking Westphalian Sovereignty in the 21st Century' (2007) 19(2) *Bond Review* 102, 104.

¹¹¹ Report of the African Union High-Level Panel on Darfur (n 106) xiii.

¹¹² Jackson Nyamuya Maogoto and Kithure Kindiki (n 110) 104.

¹¹³ Human Rights Watch (n 98) 6.

¹¹⁴ Report of the African Union High-Level Panel on Darfur (n 106) xiv.

¹¹⁵ *Ibid* 4.

¹¹⁶ See, Humanitarian Ceasefire Agreement on the Conflict in Darfur (N'djamena 8 April 2004) <ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=14149> accessed 20 June 2007. Negotiations by President Deby of Chad earlier, on 3 September 2003, resulted in the conclusion of the

the auspices of the African Union.¹⁹ For instance, in November 2004, both the Government and the rebel movements (JEM and SLM/A) signed two Protocols in Abuja, whose objectives were the improvement of security and alleviation of the humanitarian catastrophes in the Darfur region. However, despite various subsequent negotiations, a solution and an end to the conflict were not forthcoming.²⁰

5.3.4 EXISTENCE OF GRAVE CIRCUMSTANCES: AU'S FORCEFUL INTERVENTION THRESHOLD

-Article 4(h) of the Constitutive Act grants the African Union a forceful intervention mandate within a member state in order to stop or pre-empt grave circumstances, which are identified as genocide, crimes against humanity or war crimes. In addition, Article 53(1) of the UN Charter permits regional organizations to undertake forceful intervention provided they have the Security Council authorization. This section examines the existence of 'grave circumstances' as defined in the Constitutive Act, as a basis for demonstrating that a forceful intervention for humanitarian purposes was necessary, either by the African Union on its own, or jointly with the UN. It also forms the basis for demonstrating that there has been no peace to keep within Darfur and, therefore, the peacekeeping and consensual intervention approach by both the AU and UN was not appropriate to ensure long term protection of civilians and cessation of the conflict.

In 2009, the African Union High-Level Panel on Darfur (AUHLP) reported that terrible mass atrocities had been committed in Darfur since the conflict began, including killings, rapes, torture, and displacements.²¹ In 2005, the International Commission of Inquiry on Darfur (ICID) had established that both the Government

temporary Ceasefire Agreement in Abeche. African Union, 'Report of the Chairperson of the Commission on the Situation in the Sudan' (Addis Ababa 13 April 2004) PSC/PR/2(V) paragraph 5.

International Commission of Inquiry on Darfur (n 99) paragraph 70.

⁵ Ibid. See. African Union, 'Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in Accordance with the N'djamena Agreement' (Abuja 9 November 2004) <<http://www.issafrika.org/AF/profiles/sudan/darfur/secprotnov04.pdf>> accessed 20 June 2011.

¹⁹ International Commission of Inquiry on Darfur (n 99) paragraph 70.

²⁰ Report of the African Union High-Level Panel on Darfur (n 106) 25.

and rebels were committing egregious breaches of human rights and international humanitarian law upon Darfur civilians." The Government had resorted to the recruitment of the *Janjaweed*, an Arab militia group, who organized and executed attacks on civilians on horsebacks or camels, with various types of automatic

¹²²

weapons. "The Government was also accused of using airstrikes to indiscriminately attack villages, although most attacks were from the ground, executed by both the military and the *Janjaweed*.¹²³

ICID received hundreds of reports concerning killing of civilians, sexual violence and rape, torture, abduction, destruction of villages and looting of property."⁴ The rebels were also accused of having executed indiscriminate attacks that resulted in the death of civilians, killing of imprisoned and wounded soldiers, attacks on protected buildings, such as hospitals, and abduction of both civilians and humanitarian workers.¹²⁵ ICID, however, clarified that mass atrocities committed by the Government and the *Janjaweed* far exceeded those attributable to the rebels. "ICID noted that the various violations of human rights and humanitarian law constituted 'large-scale war crimes.'²

ICID also observed that although the Government of Sudan could be held responsible for committing crimes against humanity, there was no evidence to indicate that it had implemented a policy of genocide in the region.¹²⁶ In addition, it observed that widespread and systematic sexual violence and rape perpetrated by the *Janjaweed* and Government troops amounted to crimes against humanity. "In 2004, the AU had also refuted that genocide was being committed in Darfur, although it acknowledged the gravity and seriousness of the humanitarian catastrophes. However, one of the shortcomings of the AU was failure to formally clarify whether

International Commission of Inquiry on Darfur (n 99) paragraph 185.

¹²² Ibid paragraphs 102-103.

¹²³ Ibid paragraph 186.

¹²⁴ Ibid.

¹²⁵ Ibid paragraph 190.

¹²⁶ Ibid.

¹²⁷ Ibid paragraph 267.

¹²⁸ Ibid paragraph 519.

¹²⁹ Ibid paragraph 634.

¹³⁰ African Union, 'Decision on Darfur' (Addis Ababa 6-8 July 2004) Assembly AU/Dec.54 (UII paragraph 2.

there was occurrence of crimes against humanity and war crimes, which would be expected to precede a decision on whether to intervene in accordance with Article 4(h) of the Constitutive Act.

The above analysis indicates that, on the minimum, crimes against humanity and war crimes have been committed against civilians in Darfur, and that forceful intervention was necessary to protect civilians and to stop the continuing cycle of mass atrocities. In the case of the African Union, it seems that the Union failed to implement its mandate under Article 4(h) of the Constitutive Act, which envisages forceful intervention for human rights protection, in deserving situations.

5.3.5 DEFICIENCIES IN THE AU AND UN PEACEKEEPING RESPONSES

Peacekeeping and consensual intervention is not necessarily a wrong approach, and it should be given priority over forceful intervention. However, it is clearly inappropriate where ceasefire agreements are not respected, horrendous mass atrocities continue, and the conflict turns into an endless cycle of humanitarian catastrophe. The Darfur conflict exemplifies the failures of peacekeeping and consensual intervention. The African Union established a Cease-Fire Commission in EI Fashir on 9 June 2004, followed by deployment of AU military observers, and the establishment of a protection force.¹³¹ The African Mission in Sudan (AMIS) was established by the AU in order to supervise conformity with ceasefire agreements, especially the N'djamena Ceasefire Agreement.¹³² However, AMIS had serious problems in terms of logistics, mandate and size from the time of its inception.¹³³ AMIS intervention in Sudan was consensual, and of a peacekeeping nature. It was pursuant to a request for intervention by Sudan to the AU, in a manner consistent with Article 4(j) of the Constitutive Act.¹³⁴ The clause permits member states to request AU's intervention in order to restore peace and security.

¹³¹ Ibid paragraph 6-8.

¹³² Nsongurua J Udombana (n 1) 1187.

¹³³ Report of the African Union High-Level Panel on Darfur (n 106) 41.

¹³⁴ Ademola Abass. 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia' (2007) *Netherlands International Law Review* 415. 422. The establishment of AMIS was agreed upon by various parties to the conflict, that included the Government of Sudan, and the AU had been involved in the negotiation and conclusion of various ceasefire agreements. See, for instance. African Union. Press Release' (Abuja 21 December 2004) < <http://www.africa-union.org/DARFUR>

The United Nations Mission in Sudan (UNMIS) was established by the 15 Security Council Resolution 1590 in March 2005, in order to monitor the implementation of the January 2005 Comprehensive Peace Agreement and other peace initiatives, working with and supporting AMIS.¹³⁵ Resolution 1590 cited Chapter VII of the UN Charter in authorizing UNMIS 'to take the necessary action in the areas of deployment... to protect civilians under imminent threat of physical violence', amongst other responsibilities.¹³⁶ In the months that followed, the United Nations was, however, unable to deploy UNMIS due to concerted opposition by the Sudanese Government on a peacekeeping mission undertaken solely by the UN. However, gross violations of human rights and international humanitarian law were still being committed against civilians. This defeated the rationale of granting peacekeepers Chapter VII of the UN Charter powers, which is conceptually non-consensual and of an enforcement action nature, and then requesting the consent of the territorial state. As an alternative, the UN responded by phased strengthening of AMIS, while a transfer of protection authority to a joint African Union-United Nations peacekeeping mission was being worked out.¹³⁸

In the debate following the adoption of Resolution 1593, which referred the Darfur situation to the International Criminal Court, the Sudanese representative protested, stating that the Security Council had "once again ridden roughshod over the African position."¹³⁹ The Sudanese representative also stressed that the Resolution would 'weaken the prospects for settlement and further complicate an already complex situation', indicating that the Sudanese Government was likely to react negatively within Darfur.¹⁴⁰ Abass argues that at this point, the UN had two options, either to resort to a robust forceful intervention under a Chapter VII of the UN

/Press%20release%20closing%20Peace%20Talks%2012%2004.pdf> accessed 12 December 2009.

¹³⁵ UNSC Res 1590 (24 March 2005) UN Doc S/RES/1590.

¹³⁶ Ibid.

¹³⁷ United Nations Mission in the Sudan. UNMIS Background' (June 2011) <<http://www.un.org/en/peacekeeping/missions/unmis/background.shtml>> accessed 21 June 2011

¹³⁸ Ibid.

¹³⁹ UNSC Verbatim Record (31 March 2005) UN Doc S/PV/5158. For the Security Council Resolution, see, UNSC Res 1593(31 March 2005) UN Doc S/RES/1593.

¹⁴⁰ UNSC Verbatim Record (n 139).

Charter mandate, or to soften up and pacify Sudan, while mass atrocities escalated¹⁴¹ He regrets that the Security Council decided to soften up and pacify Sudan, under the facade of requiring the territorial state's consent before troops could be stationed in Darfur.¹⁴² Resolution 1706 of 2006, while calling for deployment of UNMIS in Darfur, seemed to contradict the Chapter VII of the UN Charter basis of its adoption when it also requested the *consent* of the Sudanese Government for the deployment of troops.¹⁴³ It should be noted that Resolution 1706 had cited Chapter VII of the UN Charter while authorizing UNMIS to 'use all necessary means... to protect civilians under threat of physical violence' in addition to other tasks.¹⁴⁴

As the Sudanese Government sustained its opposition to a sole UN Mission that had Chapter VII of the UN Charter mandate, and the United Nations became more reluctant to impose such a mission, a hybrid AU and UN force was conceived as the acceptable compromise.¹⁴⁵ Resolution 1769 of 2007 commended the consent of Sudan Government for the deployment of a hybrid AU-UN force in Darfur.¹⁴⁶ The Resolution formally established UNAMID, an African Union and United Nations hybrid operation which was envisaged to constitute up to 19,555 military personnel.¹⁴⁷ Resolution 1769 also cited Chapter VII of the UN Charter while authorizing UNAMID 'to take the necessary action...[to] protect civilians.'¹⁴⁸ The Resolution's statement that UNAMID would operate under a unified 'command and control... in accordance with basic principles of peacekeeping' seemed to contradict the enforcement mandate of the Mission. Abass astutely observes that one of the limitations of UNAMID, from its inception, was that consensual interventions, evident in the manner UNAMID had been formed, could "not go hand-in-hand with enforcement actions, or other forms of Chapter VII operations."¹⁴⁹ As of 30 April

¹⁴¹ Ademola Abass (n 134) 429-430.

¹⁴² Ibid 430.

¹⁴³ UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706.

¹⁴⁴ Ibid.

Report of the African Union High-Level Panel on Darfur (n 106) 41.

¹⁴⁵ UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ademola Abass (n 134) 434.

201 1. UNAMID comprised of 23,129 military personnel, in addition to 2,823 civilian personnel, 1,144 international civilian staff and 468 UN volunteers.'

From the forgoing analysis, it is clear that despite the Chapter VII of the ¹ Charter mandate, deployments were based on the consent of the Government of Sudan, and that the various interventions by both the AU and UN were basically of a peacekeeping nature, including through UNAMID. However, despite the consensus; intervention and peacekeeping approach, there clearly was no peace to keep in Darfur. Consequently, peacekeeping failed to end the cycle of conflict, and protect civilians from heinous mass atrocities. Both AMIS and UNAMID have been incapable of protecting civilians from attacks by the *Janjaweed* militia and other rebel groups, and bombardments by the Government.¹⁵⁰ As recently as May 2011 the Government of Sudan was still hindering and obstructing the operations of UNAMID.¹⁵²

5.3.6 WHETHER ROBUST FORCEFUL INTERVENTION WAS NECESSARY

There are opposing views on whether a forceful intervention in Darfur, either by the AU or UN, or jointly by the two organizations, was necessary and viable. Abass, basing his arguments on the Darfur conflict, argues that the Security Council should at times cease from the unhelpful practice of "begging" the consent of the territorial state as if Chapter VII of the UN Charter did not exist."¹⁵¹ Alleging that the Sudanese Government and militia under its control had committed heinous international crimes, Udombana argues that a forceful intervention for humanitarian purposes was justified and necessary.¹⁵⁴ He opines that the continued international community's neutrality was assisting the killers rather than protecting the civilian

¹⁵⁰ African Union/United Nations Hybrid Operation in Darfur, 'UNAMID Facts and Figures' (June 2011) <http://www.un.org/en/peacekeeping/missions/unamid_facts.shtml> accessed 21 June 2011

¹⁵¹ Gareth Evans (n 44) 124.

¹⁵² For instance, it was reported that after airstrikes in Esheraya and Labado areas of South Darfur May 2011, the Government forces blocked efforts by UNAMID to visit civilians in the *afkacc* regions. African Union-United Nations Mission in Darfur, 'Briefings and Statements: 17 May I • Peacekeepers Denied Access to Air Strike Locations' (June 2011) <<http://unamid.unmissions.org/Default.aspx?tabid=900&ctl=Details&mid=1073&ItemID=13628>> accessed 21 June 2011.

¹⁵³ Ademola Abass (n 134) 440.

¹⁵⁴ Nsongurua J Udombana (n 1) 1151.

victims.' Kindiki argues that it was necessary for the international community to acknowledge that there was 'no peace to keep in Darfur" and it was therefore necessary to implement other alternatives in order to achieve security and the rule of law in the region. Kalu observes that the existence of peace on the ground should precede the deployment of peacekeeping forces. He points out that deployment of forces with the mandate and support that provides them with the capacity to end the violence should have preceded negotiations for peace and peace keeping.

There have been credible calls for the AU and the international community to implement the responsibility to protect concept in Darfur. Gray observes that the humanitarian catastrophe in Darfur, despite the 2005 World Summit affirmation of the responsibility to protect concept, was an indication that it may not guarantee intervention."¹⁵¹ She correctly argues that there was no excuse by the Security Council for its failure to implement forceful intervention for humanitarian purposes, and regrets that 'the AU was not willing to intervene in the absence of consent by the government of Sudan.'¹⁵² An examination of views of other eminent African personalities, not necessarily scholars, also indicates some support for forceful intervention for humanitarian purposes. In 2007, South Africa's Archbishop Desmond Tutu regretted that various parties to the conflict, including the Government of Sudan, were responding to the African Union peace monitors with disdain."¹⁵³ He pointed out that ceasefire agreements to stop the mass atrocities were not being

¹⁵⁵ Ibid.

¹⁵⁴ Kithure Kindiki. 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives' (2007) 131 *Institute of Security Studies Monograph Series* 59.

¹⁵⁵ Kelechi A Kalu. 'Resolving African Crises: Leadership Role for African States and the African Union in Darfur' (2009) 9(1) *African Journal of Conflict Resolution* 9, 29.

¹⁵⁶ Ibid.

Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press, Oxford 2008) 55. See. World Summit Outcome Document, UN Doc A/RES/60/1 (24 October 2005) paragraphs 138-139.

Christine Gray (n 159) 55.

Desmond Tutu. 'Statement from Archbishop Desmond Tutu on Darfur' *Pambazuka* (27 January 2007) <http://www.pambazuka.org/aumonitor/images/uploads/Desmond_Tutu_English_version.pdf> accessed on 5 May 2011. Desmond Tutu is a 1984 Nobel Peace Laureate. See. Official Website of the Nobel Prize. 'The Nobel Peace Prize 1984: Desmond Tutu' <http://nobelprize.org/nobel_prizes/peace_laureates/1984/tutu-lecture.html> accessed 27 June 2011.

upheld. He therefore observed that what was required was 'an immediate cease-fire', a strengthened force with UN troops and a robust mandate to protect the innocent

On the other hand, arguments against forceful intervention in Darfur have been advanced, on the basis that it would have complicated and escalated the violence and that it was difficult to implement. Thakur argues that based on the roots of the Darfur crisis, a Western intervention could easily be fashioned as an attack on Muslims and Arabs, and that fact, in addition to the huge size of Sudan, indicate the possibilities of a unilateral intervention being unsuccessful.¹⁶⁴ However, the concerns raised by Thakur could be addressed through a multilateral United Nations intervention that would also involve the African Union. It was essentially an issue of granting UNAMID the appropriate mandate, resources and composition to end the conflict and protect civilians. Although Darfur is an expansive region, with harsh environment and underdeveloped infrastructure, combined efforts by the AU and UN could have helped address the challenges with more effectiveness. It has been argued that some of the Darfur features could have been advantageous. Williams and Bellamy opine that on the basis of the geographic features of Darfur, the sparse population and the simplistic nature of the militia engaged in the conflict, chances for an effective intervention were high.¹⁶⁵

It has been observed that most civil conflicts are easy to address since they are often executed by poorly organized groupings.¹⁶⁶ A robust joint AU and UN forceful intervention deployment would have addressed the problematic issues of legality and legitimacy, which often fuels local and regional resistance (especially if the intervention appears unjustified and is executed outside the UN framework). It has also been observed that brutal regimes, which execute mass atrocities, can be

¹⁶⁷ Desmond Tutu (n 161).

¹⁶⁸ Ibid.

¹⁶⁹ Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to Responsibility to Protect* (Cambridge University Press, Cambridge 2006) 282.

¹⁷⁰ Paul D Williams and Alex J Bellamy, 'The Responsibility to Protect and the Crisis in Darfur' (2005) 36(1) *Security Dialogue* 27.44.

¹⁷¹ John Mueller, 'Ordering the New World' in Michael Bothe, Mary Ellen O'Connell and Natal Ronzitti (eds), *Redefining Sovereignty: The Use of Force After the Cold War* (Transnational Publishers, New York 2005) 65, 70.

compromised through a well organized intervention with relative ease." This is due to the fact that proper 'organization, discipline, coherent tactics ... [and] ideological commitment' are often absent within brutal regimes and rebel organizations."⁵ The Government of Sudan cannot be said to be effective and efficient in the management of its affairs, and the weaknesses in its armed forces could be the prime reason it turned to the *Janjaweed* militia in order to counter the rebellion.

Hehir has observed that the "Somalia syndrome"⁶ could also have affected the external response to Darfur, due to the perception that interventions in Africa are prone to failure due to deep ethnic animosities and the prevalence of hostility towards external intervention within the region.¹ " However, these are some of the concerns that the AU should have helped resolve, through burden sharing with the UN in the forceful intervention. African states, through the AU, could have contributed the majority of the troops, especially in the more sensitive areas of Darfur. In addition to creating more regional and local legitimacy and acceptability for the intervention, it is likely that African troops would have a better adaptability under such terrain and geographical conditions. It is instructive to note that the African Union has deployed African peacekeepers in Somalia' ' without the occurrence of an incident similar to that of October 1993 involving the catastrophic killing and *public display* of the dead US soldiers.¹⁷²

The African Union High-Level Panel on Darfur was of the view that the conflict in Darfur was essentially political.¹ ' The Panel was, therefore, of the opinion that a military intervention was not desirable and could not be possible, and that the

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

The 'Somalia syndrome' is often used in reference to the international community's disinterest in intervening for humanitarian purposes, especially in Africa, due to the catastrophic attacks on United States peace enforcers in Mogadishu, Somalia in October 1993. In the catastrophic operation, despite the apprehension of 24 rebels, 18 United States troops were killed. 75 wounded and two helicopters shot down. See. United Nations. 'Somalia - UNOSOM II: Background' <<http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html#three>> accessed 8 June 2010.

Aidan Hehir. *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, Hampshire 2010) 250.

¹ See, African Union Mission in Somalia, 'Military Component' (2008) < http://www.african-union.org/root/au/auc/departments/psc/amisom/AMISOM_MILITARY_COMPONENT.htm> accessed 27 June 2011.

² For the catastrophic October 1993 peace enforcement by US soldiers, see. United Nations (n 169).

³ Report of the African Union High-Level Panel on Darfur (n 106) 77.

solution required to solve the conflict was a political agreement.¹⁴ Deng has argued that since there were Sudanese citizens who were prepared to oppose an intervening force, a military action would have complicated the issue.¹⁵ He argues that Darfur issues should have been examined in the context of other regional conflicts, which have a common theme that indicates governance problems such as marginalization.¹⁶ He argues that the same principles that were used to resolve the earlier Southern and Northern Sudan conflict could have been applicable to Darfur. He is of the view that efforts toward a political settlement, similar to the approach in other Sudan conflicts, would have been more helpful, rather than raising the issue of international crimes and then doing nothing about it.¹⁷ With regard to Deng's and AUHLPD's views on the inappropriateness of a forceful intervention, we have already discussed the opportunities that existed for a combined AU and UN force, which had the appropriate mandate, resources and composition. It was likely that such a force would be successful in protecting civilians and ending the continuous cycle of violence.

On the second argument by Deng that a political settlement was necessary, in the context of the manner in which other conflicts had been resolved (such as the Northern and Southern Sudan war), it is important to accept the apparent fact that there have been numerous attempts to achieve a ceasefire and political settlement. To an extent, continuous attacks against civilians seem to have been exploited by both the Government and the rebels as a means of pushing their agenda. The problem has been failure to enforce the ceasefire agreements that were constantly breached.

¹⁷⁴ Ibid.

¹⁷⁵ Francis Deng, "JISB Interview: The Responsibility to Protect." (2010) *Journal of International Law and State Management* 83, 87.

¹⁷⁶ Ibid 88. Since 1983, the Sudanese Government had been in war with the Sudan's People's Liberation Movement/Army (SPLM/A), which represented Southern Sudan. See, United Nations Mission in Sudan, 'The Background to Sudan's Comprehensive Peace Agreement' (June 2011) <<http://unmis.unmission.org/Default.aspx?tabid=515>> accessed 28 June 2011. The war ended through a 2005 political settlement (Comprehensive Peace Agreement) that dealt with, amongst other things, governance matters and the South's right of self-determination (including a referendum by the South on whether it could form its own state) between the Sudanese Government and the South. See, United Nations Mission in Sudan, *ibid*. See also, Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> accessed 28 June 2011.

¹⁷⁷ Francis Deng (n 175)88.

¹⁷⁸ Ibid.

leading to a proliferation of such agreements as mass atrocities continued. Second, the heinous atrocities committed against the Darfur civilians have been of great intensity. Deng's suggestion for a political settlement is important with regard to addressing the root causes and avoiding the recurrence of the conflict on a long term basis. However, Deng fails to state what should be done when parties to the conflict are unwilling to stop attacking civilians and uphold political settlements. The appropriate approach seems to have been to stop the violence, protect civilians from atrocities, then embark on addressing root causes and long term solutions through a political settlement, such as good governance, distribution of resources and institutionalization of the rule of law. The AUHLPD argument that a military solution was not desirable or possible¹ ^u seems to indicate the continuing conceptualization of sovereignty in the Westphalian context, rather than in the perspective of responsibilities, whereby protection of civilians from mass atrocities assumes an overriding concern.

The views by AUHLPD^{1s}" and Deng^{1X1} on the solution being a political settlement, and that a forceful intervention was undesirable, are further rendered less credible by the fact that more ceasefire agreements have been breached, with the conflict assuming the form of an endless cycle of mass atrocities. We have already pointed out some of the early ceasefire agreements between the Government of Sudan and the rebels which were, however, unable to forestall the violence and the accompanying gross violations of human rights and international humanitarian law upon the Darfur civilians. There have been reports of heinous atrocities in recent years. In July 2010, it was reported that 221 civilians were killed in the month of June due to inter-ethnic fighting in Darfur.¹⁸²

^u Report of the African Union High-Level Panel on Darfur (n 106) 77.

^{1,0} Ibid.

Francis Deng (n 175) 87-88.

United Nations News Centre. 'Darfur: Conflict Claimed More Than 200 Lives in June. UN-African Mission Reports' (11 July 2010) <<http://www.un.org/apps/news/story.asp?NewsID=35290&Cr=darfur&Cr1=>> accessed 8 June 2011.

A further agreement was signed by the Government of Sudan and JEM rehc in February 2010.¹⁸³ However, that did not put an end to the conflict and ma atrocities. For instance, a weekend fighting in June 2011 between the rebels and the Sudanese army displaced approximately 1,000 civilians in North Darfiir. who sou^' refuge in a UNAMID site.^m Government airstrikes on 18 May 2011 in some Non Darfiir villages were confirmed by UNAMID. and it was reported that more than ten people were killed.^{1*}" The Government has also been obstructing and hinder:r_ UNAMID protection activities. The Government forces obstructed efforts b> UNAMID to visit civilians in Esheraya and Labado areas of South Darfiir in Ma 2011, where airstrikes had been carried out.¹⁸⁶ In May 2011. it was also reported thai other UN agencies and non-governmental organizations were being denied access to some regions in South Darfiir despite their humanitarian roles, and in spite of some displaced civilians inhabiting the affected areas.^{1x7} The Government cited securir-concerns and military operations as having necessitated the restrictions.^{1^} Decisive and timely forceful intervention was necessary in order to stop the violence, protect civilians, and bring the parties to the conflict to the reality that they had to both accept, and uphold, political settlements and ceasefire agreements. After the stoppage of the conflict and mass atrocities, other significant objectives, such as peacekeeping, accountability for international crimes, institutionalization of the rule of law and good governance could have been pursued.

It would, however, be erroneous to assume that peacekeeping has not been helpful in some ways in alleviating the mass atrocities, protecting civilians and

¹⁸³ United Nations News Centre, 'As Sudan, Darfur Rebels Sign Ceasefire, Ban Calls for Definitive Peace Pact' (23 February 2010) <<http://www.un.org/apps/news/story.asp?NewsID=33873&Cr=Darfur&Cr1=>> accessed 8 June 2011. See also. Andrew Heavens. 'Sudan Signs Ceasefire win Darfur JEM Rebels' *Reuters* (Khartoum 20 February 2010) <<http://www.reuters.com/article/2010-02-20/us-sudan-darfur-idUSTRE61J2DJ20100220>> accessed 20 June 2011.

¹⁸⁴ African Union - United Nations Mission in Darfur, 'Briefings and Statements: 19 June 11 - Clashes Confirmed in Shangil Tobaya' (June 2011) <<http://unamid.unmissions.org/Default.aspx?tabid=9&ctl=Details&mid=1073&ItemID=14121>> accessed 21 June 2011.

¹⁸⁵ African Union - United Nations Mission in Darfiir. 'Briefings and Statements: 22 May 11 - Confirmed Attacks in North Darfur' (June 2011) <<http://unamid.unmissions.org/Default.aspx?tabid=900&ctl=Details&mid=1073&ItemID=13689>> accessed 21 June 2011.

¹⁸⁶ African Union - United Nations Mission in Darfur (n 152).

¹⁸⁷ African Union - United Nations Mission in Darfur. 'Briefings and Statements: 17 May Movement of Aid Groups Restricted in South Darfiir' (June 2011) <<http://unamid.unmissions.org/Default.aspx?tabid=900&ctl=Details&mid=1073&ItemID=13627>> accessed 21 June 2011

¹⁸⁸ Ibid.

reducing the intensity of the conflict. In addition, there are some important lessons and commendable achievements in the Darfur peacekeeping venture, which may be helpful in developing and implementing a more effective regional peace and security mechanism in Africa. Mass atrocities, including deaths, sexual violence, rapes and displacements would definitely have been higher without the efforts of both the AU and the UN, especially through UNAMID and earlier peacekeeping mechanisms. UNAMID has been involved in disarmament campaigns with positive results, such as in June 2011 when at least 1,100 former combatants, who included the Sudanese army officers and rebels, disposed weapons and opted for civilian life.¹⁸⁹ The AU's response to the Darfur conflict indicates a commendable change in regional willingness by African leaders to serve as first-responders to regional conflicts, and the co-operation that has subsequently emerged between the AU and UN will serve as a model for future joint operations.¹⁹⁰

5.3.7 WAS THE UNITED NATIONS INVOLVEMENT A BAR TO AN AU'S ROBUST INTERVENTION?

In addition to the horrendous suffering of civilians in Darfur, the impact of the conflict is within Africa. The conflict has an effect on regional peace and security, and economic prosperity. The Security Council has only primary responsibility for international peace and security under Article 24(1) of the UN Charter, and, therefore, not an absolute mandate. This implies that the AU can request the General Assembly to assume the subsidiary responsibility if the Security Council's response is inappropriate. In a regional conflict situation like Darfur, where decisive forceful intervention is necessary for effective protection of civilians, the AU should lobby the Security Council for an appropriate mandate and composition of the military deployment. Where the Council fails, it would be acceptable for the AU to request and lobby the General Assembly for an emergency session to authorize an

¹⁸⁹ African Union - United Nations Mission in Darfur. 'Briefings and Statements: 07 June 11 - More Than 1,000 South Darfur Ex-combatants Lay Down Arms' (June 2011) <<http://unamid.unmissions.org/Default.aspx?tabid=900&ctl=Details&mid=1073&ItemID=13928>>accessed 21 June 2011.

¹⁹⁰ Jeremy I Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan' in Niels Blokker and Nico Schrijver (eds). *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Martinus Nijhoff Publishers. Leiden 2005)213. 250.

appropriate military intervention in accordance with the Uniting for Resolution ' " The necessity and possibility of a General Assembly author, y alternative has been examined in chapters two and three.

On the contrary, our analysis indicates that the AU was not interesie: advocating or implementing a forceful intervention in Darfur. a practice that apr- r inconsistent with Article 4(h) of the Constitutive Act. This may be attributed : continuing constraints of conceptualization of sovereignty in the Westphalian come despite the intervention mandate. The AU permitted the Government of Sudan to _ - the Union as a shield from more decisive international action. In addition, the permitted the Government of Sudan to continually use sovereignty as a shield tr military intervention, to an extent that any intervention could only be consensu./ ar of a peacekeeping nature.

5.3.8 THE SUDANESE GOVERNMENT USE OF THE AU AS A SHIELD FROM INTERVENTION

The Sudanese Government sought to curtail the resolve of the I N - strenuously emphasizing that the Darfur conflict was principally an African ra,r, and that the AU was giving it the appropriate response. For instance, durir,- Security Council debate that followed the adoption of Resolution 1556 of 2(MU Sudanese representative objected to its adoption, noting that even contrary to • findings of an African Union Summit, the US Congress had resolved that gem . and ethnic cleansing was occurring in Darfur. He argued that the adoption of Resolution amounted to expropriation of the Darfur matter 'from the African 1 revealing an attitude of contempt for the African continent's capabilities ,,: potential.¹⁹³ In addition, when Resolution 1564 of 2004 was adopted, the Sudan, representative protested that the AU's efforts had been undermined, and tha: Union's negotiations had been 'torpedoed' by its adoption.¹⁹⁴ Further, follow ;n,

¹⁹¹ Uniting for Peace Resolution (n 92).

¹⁹² UNSC Verbatim Record (30 July 2004) UN Doc S/PV/5015.

¹⁹³ Ibid.

¹⁹⁴ UNSC Verbatim Record (18 September 2004) UN Doc S/PV/5040. In Resolution 1564 of : - Security Council cited Chapter VII powers of the UN Charter while condemning the Governmen failure to comply with the previous Resolution 1556 of 2004, and its continued breach et

adoption of Resolution 1593 of 2005. the Sudanese representative protested that the Security Council had "once again ridden roughshod over the African position."¹⁰ He complained that AU initiatives were not given the preference that they deserved, or even considered, despite the Union having performed significant roles. ¹ "

In chapter four, we discussed the manner in which the pooled sovereignty system of the African Union could be exploited in order to avoid external (non-African) intervention within the African region. It seems that Sudan was, to some extent, successful in employing the AU as a shield from decisive forceful intervention by the UN. As already discussed in this chapter, the UN eventually began to focus on the consent of the Government of Sudan for the intervention. In addition, as also pointed out, the joint AU-UN consensual intervention was a compromise with the Government of Sudan, which had ferociously opposed an intended UN enforcement action.¹⁹⁷

5.3.9 LESSONS FROM THE DARFUR CONFLICT

Despite the failure by both the AU and UN to stop gross human rights violations, and end the continuing cycle of the conflict, there are still some commendable outcomes of the peacekeeping initiative. We have already pointed out that without the peacekeeping operation, violations of human rights and international humanitarian law would have been a notch higher. We have also noted that UNAMID has been involved in disarmament campaigns, with positive results in some circumstances, such as in June 2011 when an approximated 1,100 former combatants resolved to stop their participation in the conflict and gave up arms.¹⁵ In addition, UNAMID pioneered AU-UN joint operations, from which some benefits of burden

ceasefire agreements, especially through airstrikes on Darfur villages. The Security Council also requested the Secretary General of the UN to establish a commission of inquiry that would investigate the nature of the horrendous mass atrocities committed in Darfur. See, UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564.

^{1,5} UNSC Verbatim Record (n 139). Resolution 1593 referred the Darfur issue to the ICC. See. UNSC Res 1593 (n 139).

¹⁹⁶ UNSC Verbatim Record (n 139).

See, Report of the African Union High-Level Panel on Darfur (n 106) 41.

African Union - United Nations Mission in Darfur (n 189).

sharing have accrued.¹⁹⁹ There is no doubt that the partnership between AL and through UNAMID will be an important precedent for future joint operations."'

There have, however, been some fundamental failures by both the AU and UN in offering effective protection to civilians in Darfur. Darfur has exemplified the failure of both the AU and UN to implement the concept of responsibility to protect. Gray regrets that the adoption of the responsibility to protect concept in the 2005 World Summit failed to ensure action in Darfur.²⁰⁰ The AU lacked the desire of intervening without the consent of the Sudanese Government, while the Security Council failed to impose forceful intervention for humanitarian purposes.²⁰¹ The AU conduct and response to the Darfur conflict indicate a continuing attachment to the Westphalian notions of sovereignty and failure to effectively institutionalize the concept of sovereignty as responsibility, despite the intervention framework. With regard to peacekeeping, the Darfur conflict is further evidence that such action can only be successful where there is peace to keep. In addition, the conflict demonstrates the inefficiencies of military deployments that are based on multiple concepts, namely; peacekeeping, consensual intervention and Chapter VII of the UN Charter powers. They are likely to end up as essentially peacekeeping undertakings, even where such an approach is not appropriate.

5.4 THE 2011 LIBYAN CONFLICT AND AU'S OPPOSITION TO MILITARY INTERVENTION

5.4.1 THE ORIGIN AND NATURE OF THE LIBYAN CONFLICT

The 2011 Libyan crisis gained momentum between 15 and 16 February 2011 after hundreds of protesters, demonstrating against the arrest of a government official, clashed with police in the eastern city of Benghazi.²⁰² Unemployment and discontent with President Muammar Gaddafi's Government were some of the factors that

¹⁹⁹ Report of the African Union High-Level Panel on Darfur (n 106) 43.

²⁰⁰ Jeremy I Levitt (n 190)250.

²⁰¹ Christine Gray (n 159) 55. For the 2005 World Summit, see, World Summit Outcome Document (n 159) paragraphs 138-139.

²⁰² Christine Gray (n 159) 55.

²⁰³ *British Broadcasting Corporation*, 'Libya Protests: Second City Benghazi Hit by Violence' (February 2011) <<http://www.bbc.co.uk/news/world-africa-12477275>> accessed 25 June 2011

instigated the protests. ¹ The protests were also inspired by the 'success' of similar demonstrations in neighbouring Tunisia and Egypt that had forced regime changes ¹¹ As the protests escalated, the Libyan Government resorted to the use of helicopter gunships, snipers and armed militia to indiscriminately target demonstrators and civilians."⁶

5.4.2 GRAVE CIRCUMSTANCES' IN THE CONTEXT OF THE AU'S INTERVENTION MANDATE

As we have already observed, forceful intervention under the AU may be considered where grave circumstances (genocide, crimes against humanity or war crimes) exist, in accordance with Article 4(h) of the Constitutive Act. In this section, we examine the various factors that indicated the commission of crimes against humanity, and the necessity of action to pre-empt the continued perpetration of such crimes. On 26 February 2011, the Security Council regretted the 'gross and systematic violation of human rights' that included indiscriminate attacks on peaceful protestors, and, therefore, referred the Libyan issue to the ICC. ¹² Despite opposing any form of military intervention, the AU had, on 10 March 2011, condemned the 'indiscriminate use of force and lethal weapons' by various parties to the conflict, which had resulted in deaths.²⁰⁸ On 17 March 2011, the Security Council further condemned the continuing horrendous and systematic human rights violations which included killings, torture and disappearances, and noted that the actions could amount to crimes against humanity.²⁰⁴ At around the same time, Gaddafi warned that his

¹⁴ *Cable News Network*, 'Libya: A Timeline of the Unrest' (21 February 2011)

<http://articles.cnn.com/2011-02-21/world/libya.protests.timeline_1_anti-government-protesters-anti-government-demonstrations-pro-government?_s=PM:WORLD> accessed 25 June 2011.

Nick Meo, 'Libya Protests: 140 'Massacred' as Gaddafi Sends in Snipers to Crush Dissent' *Telegraph* (Cairo 20 February 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html>> accessed 25 June 2011.

²⁰⁶ *Ibid.*

³⁰⁷ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

⁸ African Union. 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 5-6.

¹⁰⁹ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

soldiers would immediately attack and retake Benghazi (then under rebel's control) and that there would be no mercy for those opposing his leadership

5.4.3 THE AU NON-INTERVENTION STANCE IN CONTRAST TO THE UN APPROACH

On 10 March 2011, the African Union issued a statement opposing "any foreign military intervention, whatever its form" in Libya, and reaffirmed the State territorial integrity.²⁰ As an alternative, the AU established the African Union High Level Committee on Libya in order to negotiate a political settlement, which would also correspond with the UN and other relevant regional organizations.²¹ However on 12 March 2011, the Arab League, of which Libya is a member, requested the UN to authorize the imposition of a no-fly zone in order to protect civilians.²² NATO had already commenced aerial surveillance as its various member states discussed the possibilities of instituting a no-fly zone.²³ In Resolution 1973 of 2011, the Security Council cited Chapter VII of the UN Charter while authorizing member states, either individually or through regional arrangements, "to take all necessary measures" to protect civilians in Libya.²⁴ The Security Council, however, proscribed any deployment of an occupation force in the territory.²⁵ The Council also authorized a no-fly zone and requested member states, either individually or through regional arrangements, to ensure its enforcement.²⁶ France, United Kingdom and United States responded almost immediately by attacking Gaddafi forces as they enforced the no-fly zone.²⁷

²⁰ *Guardian*, 'Gaddafi Threatens Retaliation in Mediterranean as UN Passes Resolution' (18 March 2011) <<http://www.guardian.co.uk/world/2011/mar/17/gaddafi-retaliation-mediterranean-libya-no-fly-zone>> accessed 10 June 2011.

African Union (n 208) paragraph 6.

²¹ *Ibid* paragraph 8.

²² UNSC Res 1973 (n 209); *Reuters*, 'Arab League Calls for Libya No-Fly Zone-STATE TV' (Cairo 12 March 2011) <<http://uk.reuters.com/article/2011/03/12/libya-arabs-council-idUKLDE72BODV.20110312>> accessed 10 June 2011.

²³ Julian Borger, 'NATO Weighs Libya No-Fly Zone Options' *Guardian* (8 March 2011) <<http://www.guardian.co.uk/world/2011/mar/08/nato-libya-no-fly-zone-options>> accessed 10 June 2011.

²⁴ UNSC Res 1973 (n 209).

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *British Broadcasting Corporation*, 'Libya: US, UK and France Attack Gaddafi Force' (20 March 2011) <<http://www.bbc.co.uk/news/world-africa-12796972>> accessed 27 March 2011.

5.4.4 LESSONS LEARNT FROM THE LIBYAN CONFLICT

First, the UN response to the Libyan conflict began as a robust enforcement action under Chapter VII of the UN Charter, and not as an evolution from peacekeeping to contradictory peace enforcement like in the cases of Eastern Congo and Darfur. It was implemented as a robust enforcement mechanism through the imposition of a no-fly zone, including destruction of command centers and facilities from which aerial attacks could be activated. Second, such an intervention was appropriate and necessary. The violence in Libya had already commenced, on a large scale, when the Security Council authorized intervention. What the intervention did was to stop direct aerial attacks that indiscriminately targeted civilians by the Libyan Government. Based on the nature of the conflict by the time of the Security Council authorization, the vast areas that were already under rebel control and the support they had, it is apparent that the conflict, with or without intervention, would take some time to end. It is more convincing to argue that NATO prevented a greater humanitarian crisis and attacks on civilians, by having largely eliminated the Libyan Government's capacity to wage war on its people.

Third, the Libyan case clearly exemplified the AU's continued conceptualization of sovereignty in the Westphalian context, and the failure to institutionalize the concept of sovereignty as responsibility. While the UN and the Arab League focused on the imposition of a no-fly zone and civilians' protection, the AU was opposing any form of military intervention, despite the continuing mass atrocities.² It supports the view that the African Union's pooled sovereignty framework had, among other purposes, the objective of opposing and regulating military interventions from outside the African region.

Fourth, some international political factors facilitated a robust and timely forceful intervention in Libya. The poor reputation of the Gaddafi regime within the international community permitted some elements of regional consensus (within the Arab region), in addition to the certainty of serious threats to the civilian

² For the AU opposition to any form of military intervention, see, African Union (n 208) paragraph 6.

population.²²⁰ The request for intervention by the League of Arab States facilitated the speedy authorization of the intervention by the Security Council.²²¹ In a sense, the request for intervention by the Arab League changed the dynamics within the Security Council, through a degeneration of opposition for the intervention pushed skeptical permanent members to abstain (rather than veto) and persuaded African member states to vote in favour of intervention.²²² Welsh points out that the choice of China and Russia to abstain rather than veto Resolution 1973, which authorized the intervention, resulted from the request for action by the Arab League; and the fact that the three African states that were non-permanent members of the Security Council were willing to endorse the intervention.²²³ Based on the fact that the Arab League had earlier issued a communique rejecting any form of military intervention, the affirmative votes of South Africa, Nigeria and Gabon at the Security Council were not of significance.²²⁴ Western states, and specifically NATO, were not willing to intervene without Security Council authorization.²²⁵ NATO had expressed its intention to intervene in Libya only if there was a proper legal basis, significant regional support and a clear necessity for such action.²²⁶

Fifth, despite the success in the authorization of the Libyan intervention, the Syrian conflict illustrates that the Security Council may be reluctant to endorse a request by a regional organization due to strategic interests of some of the permanent members. The Arab League had requested the Security Council to endorse a draft resolution on Syria that was to be submitted by Morocco, which was premised on the League's action plan.²²⁷ China and Russia vetoed the draft resolution, which was to condemn gross and systematic human rights violations and use of force against

²²⁰ Alex J Bellamy and Paul D Williams, 'The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect' (2011) 87(4) *International Affairs* 825, 825.

²²¹ *Ibid* 843.

²²² *Ibid* 846.

²²³ Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back in?' (2011) 25(3) *Ethics and International Affairs* 255, 257-258.

²²⁴ *Ibid* 258.

²²⁵ *Ibid* 257.

²²⁶ *Straits Times*, 'NATO Chief Urges Quick UN Deal on Libya' (Brussels 17 March 2011) <http://www.straitstimes.com/BreakingNews/World/Story/STIStory_646287.html> accessed 10 November 2011.

²²⁷ United Nations News Centre, 'Security Council Debates Situation in Syria' (31 January 2011) <<http://www.un.org/apps/news/story.asp?NewsID=41090&Cr=Syria&Cr1=>> accessed 10 March 2011.

civilians by the Syrian authorities, and demand an immediate cessation of such actions."* The draft resolution was also to demand an inclusive political settlement of the crisis, and endorse the efforts of the Arab League in pushing for the transition of the Syrian state into 'a democratic, plural political system" that would not discriminate any sections of the population." After the draft resolution was vetoed at the Security Council, the General Assembly overwhelmingly adopted a similar resolution that had the backing of the Arab League, and which condemned the violence against civilians by the Syrian authorities." The General Assembly also supported efforts by the Arab League to facilitate an inclusive political transition in Syria.²³¹ The Syrian case has indicated that the General Assembly can overwhelmingly pass resolutions seeking solutions for gross human rights violations within a state where the Security Council fails, especially if the relevant regional organization supports such action.

Despite the concerns on failure to intervene in other conflict situations such as in Syria, the Libyan intervention was appropriate in comparison to no action at all, "since saving some lives is better than saving none."²³² As the former UN Secretary General, Kofi Annan, stated, "[t]he fact that we cannot protect people everywhere is no reason for doing nothing when we can."²³³ The failures of the Security Council, and the United Nations in general, with regard to the Syrian conflict, should also not be an excuse to desist from continuing to seek legal and policy solutions and alternatives that may improve timely and decisive intervention for the protection of civilians in deserving situations.

^m For the draft resolution, see, UNSC. UN Doc S/2012/77 (4 February 2012). Pakistan, Germany, France, Azerbaijan, Guatemala, India, UK, Togo, Morocco, Portugal, South Africa, USA and Colombia voted in favour of the draft resolution, while China and Russia voted against. UNSC Verbatim Record (4 February 2012) UN Doc S/PV6711.

²²⁹ UNSC (n 228).

⁰ United Nations General Assembly Department of Public Information. 'General Assembly Adopts Resolution Strongly Condemning 'Widespread and Systematic' Human Rights Violations by Syrian Authorities" (16 February 2012) <<http://www.un.org/News/Press/docs/2012/gall207.doc.htm>> accessed 10 March 2011. The Resolution was overwhelmingly supported by 137 states, while 12 states voted against, in addition to 17 abstentions. Ibid, ibid.

" James Pattison. 'The Ethics of Humanitarian Intervention in Libya' (2011) 25(3) *Ethics and International Affairs* 271, 277.

' Report of the Secretary-General: We the Peoples: The Role of the United Nations in the Twenty-First Century, UN Doc A/54/2000 (27 March 2000) paragraph 219.

Finally, the Libyan intervention has, in a sense, exemplified a case of the international community beginning to examine and respond to situations that require forceful intervention in the context of the concept of responsibility to protect. It has convincingly been argued that the responsibility to protect concept has played an important role in shaping the world's response to actual and threatened atrocities in Libya.²⁴ While authorizing the enforcement of no-fly zones and measures to protect civilians, Resolution 1973 reaffirmed 'the responsibility of the Libyan authorities to protect the Libyan population'.²⁵ According to the UN Secretary General, Resolution 1973 was a clear demonstration of the commitment of the international community to implement its 'responsibility to protect' populations from mass atrocities perpetrated by the state.²⁶ According to Orford, when the Security Council adopted Resolution 1973 by specifically reaffirming the responsibility of the Libyan Government to provide protection to the Libyans, and then proceeded to authorize member states to intervene in order to provide protection, the perception that the responsibility to protect had limited legal value was being refuted.²³ Before the UN authorized the intervention, the Special Advisers to the UN Secretary General on the Prevention of Genocide, and the Responsibility to Protect, had warned the Libyan Government that the 2005 World Summit had pledged protection of populations from atrocities such as crimes against humanity and war crimes.^{2,x}

²³⁴ Alex J Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' 25(3) *Ethics and International Affairs* 263, 263.

²³⁵ UNSC Res 1973 (n 209).

²³⁶ United Nations Secretary General, 'Secretary-General Says Security Council Action Affirms International Community's Determination to Protect Civilians from Own Government Violence' (18 March 2011) <<http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm>> accessed 29 March 2011.

²³⁷ Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 *Global Responsibility to Protect* 400, 403. See, UNSC Res 1973 (n 209).

²³⁸ United Nations Press Release, 'UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck Situation in Libya' (New York 22 February 2011) <<http://www.un.org/en/press/docs/2011/110211.orf.deng.luck.sit Libya.htm>> accessed 19 November 2011.

5.5 CONCLUSION

Most of the significant lessons arising from each of the conflicts have already been examined individually, and this conclusion highlights only the core themes established in the chapter. First, in the case of Darfur and Eastern Congo, there were some commendable humanitarian functions by the peacekeeping forces, and mass atrocities would certainly have been greater without the peacekeeping efforts. However, the peacekeeping initiatives failed to effectively protect civilians, and were not based on the appropriate mandate and intervention concepts. It would have been appropriate to separate peacekeeping from enforcement action to avoid the contradictory "peace-enforcement." These contradictions are unhelpful, as the deployed troops have conflicting operation principles, between warfighting and peacekeeping.^{2 y} There was no peace to keep in both Eastern Congo and Darfur. In its place, robust enforcement action to establish peace and ceasefire was necessary. Other essential responses to keep the peace and address the root causes, in order to avoid future conflicts, could have followed.

As Evans points out. in those conflicts, the predicament was the "age-old one that there is not a great deal a peacekeeping mission can do" in situations where there is clearly no peace to keep.²⁴" Evans opines that the appropriate reaction to such conflicts require a robust military reaction that includes a push for a political settlement that will address the root causes of the conflict " The deployment of a well mandated and adequately constituted military force is capable of protecting civilians. Equally important, such a force will pass a clear message to the parties to the conflict that there will be no political gains, or agenda, which will be achieved through attacks on civilians. With regard to the 1999 intervention in Kosovo, for instance, Reisman observes that some of the various strategies that had previously failed, some of which were political in nature, finally became implementable after the forceful intervention. ⁴

^o See. Cristina Gabriela Badescu (n 44) 83.

³⁴⁰ Gareth Evans (n 44)124.
¹⁴¹ *Ibid*

^{ij}: W Michael Reisman 'Kosovo's Antinomies' (1999) 93(4) *American Journal of International Law* **860, 860.**

Second, the three cases have demonstrated that despite the AU's ? intervention mandate, it has not been implemented even in deserving situations* effect of failure to institutionalize the concept of sovereignty as responsibility; been demonstrated, including adoption of policies that have sought to d. intervention even from the UN. as was the case of Libya. The African Union resp. to the Libyan conflict demonstrated that the AU's pooled sovereignty framework*; . be used to oppose external military intervention. The Libyan case also demonstrates:ri! that the UN may disregard the AU and proceed to authorize forceful intervention where it deems it as necessary, despite an AU's contrary position.

Third, this thesis acknowledges that in some situations, a military intervention can lead to undesirable outcomes.⁴³ However, in light of the approach proposed here through a regional approach by the AU, and preferably in partnership with the UN,⁴⁴ it is unlikely that a robust intervention would have made the situation worse in both Darfur and Eastern Congo. In any case, the grave situation in Darfur and Eastern Congo resulted from the failure to decisively enforce earlier political settlement agreements, in addition to a legal and policy approach that largely focused on peacekeeping rather than the stoppage and pre-emption of attacks on civilians. In the case of Libya, the no-fly zones were effective in protecting civilians, who would have suffered more without an intervention of that nature. Therefore, although forceful intervention is not a panacea, and its use is not a cause for celebration, it is a very significant option in situations where mass atrocities are taking place." As Ann observes, despite forceful intervention being the last alternative, "in the face of mass murder it is an option that cannot be relinquished."⁴⁵

²⁴³ Cristina Gabriela Badescu (n 44) 77.

²⁴⁴ Thomas G Weiss, 'RtoP Alive and Well after Libya' (2011) 25(3) *Ethics and International Law*: 287,290.

²⁴⁵ Report of the Secretary-General: We the Peoples; The Role of the United Nations in the 21st Century (n 233) paragraph 219.

CHAPTER SIX

RESOLVING THE AFRICAN UNION'S INTERVENTION PREDICAMENTS: TOWARDS A ROBUST REGIONAL RESPONSE TO MASS ATROCITIES

From a normative standpoint, the needed response to the dilemmas of sovereignty is to reaffirm the responsibility of sovereignty and accountability to the domestic and external constituencies as interconnected principles of the international order¹

6.1 INTRODUCTION

The above statement by Francis Deng, an African of Sudanese nationality (and the then Representative of the UN Secretary-General on Internally Displaced Persons) expresses the significance of the concept of sovereignty as responsibility in resolving the legal and political dilemmas of intervention for human rights purposes. Few years *before* the emergence of the 'responsibility to protect' concept and the formation of the AU, Deng and his co-authors advanced the pertinent views that institutionalization of responsible sovereignty concepts would be helpful in resolving the dilemmas of intervention and human rights protection in Africa.² This thesis is based on the view that Deng's ideas are still relevant to Africa in the post African Union context, and require re-examination and application to the AU's case. This is due to the fact that the Union has serious predicaments in implementing its forceful intervention mandate. This thesis has demonstrated that despite the forceful intervention mandate within the AU, the failure to effectively institutionalize the concept of responsible sovereignty has contributed to the continued legal and political dilemmas of its implementation.

Francis M Deng, 'Sovereignty, Responsibility and Accountability: A Framework of Protection, Assistance and Development for the Internally Displaced' (Brookings Institution-Refugee Policy Group Project 1995) <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1448> accessed on 14 June 2011, 35. Deng was at the time the Representative of the UN Secretary-General on Internally Displaced Persons, as noted in the cover of the cited article.

¹ Deng and his collaborating authors postulated the perception that a 'sovereign state's responsibility and accountability' to the national population and the international community require affirmation 'as interconnected principles of the national and international order.' Francis Mading Deng and others. *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, Washington DC 1996) xvii.

This chapter, therefore, focuses on the question of whether institutional concepts of sovereignty as responsibility can contribute to the elimination of legal and political dilemmas of intervention. On that aspect, the chapter examines various reforms that would be necessary within the AU's legal, policy, and institutional framework. Legal and contextual factors that may contribute to the acceptability of responsible sovereignty and progressive human rights principles within the AU, and the generation of political will, are highlighted on the necessity for the international rule of law, and the fact that the AU does not operate in a vacuum (since the UN has primary, but not exclusive, responsibility for peace and security in the region), the chapter also explores whether an intervention requires to be implemented within the UN system. The chapter therefore explores whether there is opportunity for robust implementation of the AU's intervention mandate within the UN system.

6.2 THE NECESSARY LEGAL AND POLICY REFORMS WITHIN THE AU SYSTEM

It is necessary to reform the structures and operations of an organization if its original design is an impediment to the achievement of certain important objectives and values.³ such as the protection of civilians from mass atrocities in the case of the AU. This part focuses on the desired reforms within the AU system, and is followed by a section which examines the various factors that can contribute to the achievement and acceptance of such reforms within the system.

6.2.1 A COHERENT FRAMEWORK OF SOVEREIGNTY AS RESPONSIBILITY

In chapter four, we discussed the manner in which the dilemma between sovereignty and intervention is maintained within the AU legal and institutional framework. The legal and political dilemma of forceful intervention is maintained within the AU treaties by protecting both the values of sovereignty and non-interference with those of intervention for humanity, without any guidance on

¹ Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art of the State' in Joel Trachtman (ed). *International Law and Politics* (Ashgate Publishing Hampshire 2008) 3, 6.

conflict between the two can be resolved.⁴ Subsequent practice has also indicated continuing constraints of a Westphalian notion of sovereignty, with any form of military intervention undertaken only after the consent of the government of the territorial state. More explicitly, in the recent Libyan case, the AU openly opposed any form of military intervention. In a sense, the AU has been incapable of implementing the forceful intervention mandate under Article 4(h) of the Constitutive Act, even in situations that deserved such a response in order to protect populations from crimes against humanity and war crimes.

The development of a coherent framework within the AU which conceptualizes sovereignty as responsibility, by both the territorial state and the international community, may be helpful in generating consensus for action. Conceptualization of sovereignty and intervention for humanitarian purposes as complementary and interdependent norms, dependent on each other, would be helpful in the eradication of sovereignty as a convenient legal and political excuse by both the territorial state and the AU. Forcible intervention for humanitarian purposes and sovereignty protection may not be contradictory, since enforcement action may have the positive effect of setting free 'people's sovereignty' from tyrannical regimes.⁶ Falk observes that there lacks any 'intrinsic or conceptual reason why effective

⁴ See, Kithure Kindiki. 'The African Peace and Security Council and the Charter of the United Nations' (2005) 1(1) *Law Society of Kenya Journal* 77, 91. While Article 4(h) of the Constitutive Act endorses forceful intervention for human rights purposes, Article 4(g) of the same Act affirms the principle of non-interference. Constitutive Act of the African Union (adopted 11 July 2000, entry into force 26 May 2001) 2158 UNTS 3. Article 4(0) of the AU Peace and Security Protocol re-affirms the principle of non-interference, and Article 4(e) of the Protocol provides that the AU Peace and Security Council shall be guided by the principles of respect for the territorial integrity and sovereignty of state parties. These non-intervention provisions have the effect of neutralizing the right of intervention for human rights purposes that is endorsed in Article 4(j) of the Protocol. See. Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002) *Reprinted in* (2002) 10 *African Yearbook of International Law* 663, 663-694. Even the 2005 Ezulwini Consensus, which stressed the responsibility of states to protect their populations, still emphasized that such an obligation should not be used as a basis for undermining 'the sovereignty, independence and territorial integrity of states.' African Union. 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (Addis Ababa 7-8 March 2005) Ext/EX.CL/2 (VII) part B(i).

See. African Union, 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 6.

⁶ Michael Pugh "Peace Enforcement' in Thomas G Weiss and Sam Daws (eds). *The Oxford Handbook on the United Nations* (Oxford University Press, Oxford 2007) 378.

procedures for responsibility and accountability should not be reconciled with a coherent, reconstructed conception of sovereignty.⁷

Formal amendments to the relevant AU treaties, such as the Constitutive Act and the AU Peace and Security Protocol, may be more problematic. What would be easier, and also significant, would be a practice of comprehensive resolutions and declarations by the AU that continually conceptualize, and interpret sovereignty as responsibility by both the state and the international community to protect populations within a state. Such comprehensive resolutions and declarations would have an implication on the interpretation of sovereignty as provided for in the core AU treaties, leading to its interpretation in a more responsible manner. The UN, through the General Assembly, has shown commendable efforts towards such concepts of sovereignty through its resolutions on the responsibility to protect concept. In addition, an Adviser to the UN Secretary General on responsibility to protect has been appointed."

Despite Africa's susceptibility to conflicts and mass atrocities, there have been no similar efforts within the AU to promote the development and implementation of coherent concepts of sovereignty as responsibility at a regional level in the post AU context. Even in the very few instances that the AU has formally endorsed the responsibility to protect concept, it has also emphasized that it should not be used as an excuse to "undermine the sovereignty, independence and territorial

Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge New York 2000) 69.

⁸ See, High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc A/59/565 (2 December 2004) paragraph 203; World Summit Outcome Document. UN Doc A/RES/60/1 (24 October 2005) paragraphs 138 and 139; United Nations News Centre, 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009) <<http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+protect&Cr1=>> accessed 22 September 2009; There has been annual informal thematic debates on the responsibility to protect within the General Assembly, with the most recent having taken place in 2011. See, United Nations General Assembly Department of Public Information. "'For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers no Relief', Secretary-General Cautions in General Assembly Debate' (12 July 2011) <http://www.un.org/News/Press/docs/2011_ga11112.doc.htm> accessed on 1 August 2011.

⁹ See, United Nations News Centre, 'Interview with Edward Luck, Special Advisor to the Secretary-General' (1 August 2011) <<http://www.un.org/apps/news/newsmakers.asp?NewsID=38>> accessed 2 August 2011.

integrity of states.¹¹" Sovereignty has, therefore, remained as an effective legal and political justification for non-intervention in Africa. At a regional level, a formal office of an AU policy adviser on responsibility to protect would be advisable and helpful in monitoring regional situations, and promoting implementation of the concept. African regional and sub-regional courts could also contribute to the development of a coherent framework of responsible sovereignty by interpreting cases before them in a manner that reconciles sovereignty with effective human rights protection.

6.2.2 ELIMINATING THE CONVENIENCE OF THE PRINCIPLE OF SOVEREIGNTY AS A JUSTIFICATION FOR NON-INTERVENTION

From a legal perspective, it is possible and acceptable to conceptualize sovereignty 'in a manner that accommodates claims of responsibility and accountability.'" However, Falk notes that even if it is possible to conceptualize sovereignty in such a manner, it may not translate into political accommodation of such concepts due to geopolitical realities and interests." Often, it is not the lack of resources that is the major cause of failure to intervene, but state interests that express themselves in the form of lack of political will, and the ease with which the concept of sovereignty can be used as a justification for inaction. Excuse for non-intervention is often justified on the basis of sovereignty,¹³ and frequently phrased as an obligation to respect the territorial integrity of the state in which humanitarian catastrophes are taking place.

Falk regrets the formation of a "misleading impression... especially in Africa, that sovereignty is a status, once and for all, and not a process, evolving to incorporate responsibilities of states as well as rights."¹⁴ Deng highlights the contradictory patterns of behaviour between states, some aimed at evolution towards responsible sovereignty, while others, especially from vulnerable states, are

¹⁰ African Union (n 4) para B(i).

¹¹ Richard Falk (n 7) 70-71.

¹³ Ibid 71.

¹³ Ibid 78. See also, Anthony Carty, 'Sovereignty in International Law: A Concept of Eternal Return' in Laura Brace and John Hoffman (eds). *Reclaiming Sovereignty* (Pinter, London 1997) 101, 115-116.

¹⁴ Richard Falk (n 7) 84.

strenuously aimed at affirming the traditional concepts of sovereignty. There often the "reactive assertion of sovereignty as a defensive mechanism by government whose domestic performance renders them vulnerable to international scrutiny the case of Africa, the inclusion of the forceful intervention mandate under Art - 4(h) of the Constitutive Act has not been successful in resolving such a practice, rv at the state and AU level. However, as Deng observes, there is a paradox of usiiu sovereignty as an excuse from intervention where, on the face of it, internaltona community help is needed to alleviate domestic catastrophes, which are evidence n: the failures of national sovereignty.' Such a situation also supports the idea that the protection of people within a state, and their welfare, cannot be a matter that exclusively dependent on the territorial slate, but is also an issue of the intemationa community.¹⁵

Successful intervention for human rights cannot only be undertaken by rich and globally powerful states. The 1979 Tanzania's intervention in Uganda and the 1978 Vietnam's actions in Cambodia (when, in both cases, actions motivated by self defence had the impact of stopping gross violations of human rights) are evidence the fact that even ordinary neighbouring states may have the capacity to intervene successfully. African states, especially when operating through the AU. have the resources to intervene (if effectively pooled and managed), and any burden shan- with the UN or other non-African states would significantly enhance the AL capacity.

In chapter four, we discussed various indicators of the failure to institutionalize the concept of responsible sovereignty within the AU framew ork r. addition to inconsistencies with the emerging norm of responsibility to protect. Th - is despite the AU intervention mandate under Article 4(h) of the Constitutive V: African states do, and may continue to, conveniently exploit sovereignty principk

¹⁵ Francis M Deng (n 1) 5-6. He observes that while there has been practice of the internal:t. community responding to humanitarian catastrophes in the post Cold War period, in a manner impinged on the traditional notions of sovereignty, there has also been evidence of efforts air-c reaffirming the traditional concepts of sovereignty from vulnerable states. Ibid.

¹⁶ Ibid 13.

¹⁷ Ibid 50.

¹⁸ Ibid.

which are protected both under international law and the African Union framework, in order to prevent forceful interventions. However, a change from such an approach can be precipitated by the realities of the costs and implications of the conflicts and mass atrocities within the region to both the African states and the AU. Some of the approaches and processes that may be helpful in the institutionalization of the concept of sovereignty as responsibility, including some of the realities that the AU requires to take into account, are examined later in this chapter.

It is necessary to eliminate the ease with which AU member states may cite the concept of sovereignty as a legally and politically convenient method of avoiding intervention. The concept of sovereignty as responsibility implies that sovereignty essentially implies the duty to ensure effective protection of populations from atrocities. Conceptualized in that sense, a state that is unable to protect its population from horrendous atrocities, or which is the author of the catastrophes, cannot be deemed to be performing its sovereign functions. Koskenniemi highlights some of the opportunities that have emerged in the post Cold War period, like the flexible postulation of some concepts of formal international law such as sovereignty.¹⁴ In such a context, if sovereignty has the objective of achieving the security of populations of a state, then it should not provide the justification for actions that undermine such security." The concept of sovereignty should therefore not be an impediment for interventions where thousands of lives are threatened."¹

If the concept of responsible sovereignty is effectively institutionalized within the AU processes, an African state that is unable or unwilling to protect its population would not find convenience in advancing the concept of sovereignty as a shield either from the AU or the UN action. There would also be greater consciousness of the necessity of action, including through forceful intervention if necessary, in order to stop or pre-empt genocide, crimes against humanity, and war crimes. Such an approach would significantly promote the implementation of Article 4(h) of the Constitutive Act.

" Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15(3) *European Journal of International Relations* 395, 405.

²⁰ Ibid.

²¹ Ibid.

6.2.3 ADDRESSING INCONSISTENCIES WITH THE RESPONSIBILITY TO PROTECT CONCEPT

This section discusses the manner in which inconsistencies between the V legal framework and the emerging norm of responsibility to protect can be address Chapter four examined the inconsistencies between the emerging norm and the AI framework, while chapter three analyzed the development of the emerging norm through the General Assembly, and instances of its endorsement by the Secur:: Council. Chapter three also examined the parameters and conceptual framework the emerging norm, and addressed some of the obstacles, criticisms and opportunr ^ in the theory and practice of the responsibility to protect. The responsibility to pr .. concept provides an innovative way of establishing synergy between the principle sovereignty and the value of intervention for humanitarian purposes, converting ther into complementary concepts. The 2001 ICISS Report exemplifies one of the " ~ - convincing rejection of the argument that human rights and sovereignty are essentially irreconcilable concepts."²² Despite this commendable approach, the AI framework, as is currently structured, and on account of various inconsistencies. hi - the veiled effect of slowing this evolution within the African region.

The responsibility to protect concept is itself grounded on the theory of sovereignty as responsibility. Orford has argued that the responsibility to protect reaffirms the idea that the capacity to offer protection from catastrophes is the ba<> of the territorial state's authority to govern, or the international commu- t\ authority to intervene." Therefore, the central concern of the responsibility to protect concept is the establishment of a coherent basis for both the legal acceptability ar :: political legitimacy of intervention for humanity.

Slaughter has identified two issues that would enhance human security u the United Nations, which are incidental to improving the African Union's cap . to intervene for humanity. They are also principally the concepts under whtcf

²² Cristina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect and Human Rights* (Routledge, London 2011) 46.

²³ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge Univer> : Cambridge 2011) 109.

emerging norm of responsibility to protect is framed. First, Slaughter identifies the need to move to a responsibility based conception of sovereignty from a rights based one.^J The responsibility to protect concept conceptualizes sovereignty and intervention as "responsibility" to provide protection from catastrophes, rather than a "right."^K In chapter four, we pointed out the manner in which a "rights" based approach to sovereignty and intervention, rather than one that is based on the concept of "duties," is unhelpful in generating political will and support for intervention within the AU system.

Therefore, besides conceptualizing sovereignty as protection of state population from gross humanitarian catastrophes, the AU legal framework and practice should also focus on a responsibility based approach to intervention, rather than a 'rights' based one.^L Resolutions and declarations by the AU that comprehensively endorse the emerging norm, and clearly conceptualize sovereignty as a duty to offer effective protection, may address the inconsistencies within the framework. Based on the flexibility of soft laws (there is lesser formalization of declarations and resolutions than in the case of explicit legislation), they often provide a superior avenue for institutional modification.^M In addition, a formal amendment to Article 4(h) of the Constitutive Act and the relevant African Union treaties, involving an alteration of the conceptualization of the AU's mandate from a "right" of intervention, to "responsibility" to intervene, is necessary.

The second argument by Slaughter is that it is necessary to diminish the UN's commitment to state security by shifting it "to one that locates the value of states in

Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99(3) *American Journal of International Law* 619, 631.

High-Level Panel on Threats, Challenges and Change (n 8) paragraph 201; World Summit Outcome Document (n 8) paragraph 139. According to the 2001 ICISS Report, a rights approach hinders intervention for human rights purposes by focusing on the interests of the interveners, rather than on the severe needs of the population at risk of the mass atrocities. See, International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (December 2001) <<http://idbnc.idrc.ca/dspace/bitstream/10625/18432/6/116998.pdf>> accessed 21 November 2011 paragraph 2.28.

Intervention under the African Union's legal and institutional framework is deemed to be a 'right.' See, Article 4(h) of the Constitutive Act, and Article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 4).

Barbara Koremenos, Charles Lipson and Duncan Snidal. 'The Rational Design of International Institutions' in Joel Trachtman (ed), *International Law and Politics* (Ashgate Publishing Limited, Hampshire 2008) 439, 472.

their ability to guarantee human security". This essentially implies a shift from Westphalian and traditional conceptualization of sovereignty, into a responsibility-oriented one. Within the UN, as the debate on the responsibility to protect progresses, it can be argued that there is evolution towards a greater focus on human security. The responsibility to protect concept is essentially a progressive way of developing international law from a state-centred regime, into a system that is fundamentally concerned with the state of individuals within states, including their security and protection. There is, however, inconsistency with the formal notions of the responsibility to protect concept and the subsequent practice of the AU. An issue that was discussed in chapter four. Comprehensive, clear and consistent endorsements of sovereignty as responsibility within the AU processes, particularly in its resolutions and declarations, are likely to diminish the current practice of extreme concern over state security, and traditional concepts of sovereignty.

6.2.4 AN INSTITUTIONAL POLICY OF PROGRESSIVE HUMAN RIGHTS PROTECTION PRACTICES

The effect of the progressive evolution of international human rights law, international humanitarian law and international criminal law is essentially that the protection of individuals within states is increasingly becoming a basic concern of the international community. All the three branches of international law are, in the end, concerned with the protection of individuals within states. It is important that the AU develops a policy of supporting and implementing progressive human rights protection practices and developments within the international society, and avoids retrogressive engagements that compromise the protection of populations within the African region. The progression of international human rights law has a direct effect of strengthening the responsibility to protect framework.

²⁸ Anne-Marie Slaughter (n 24) 631.

²⁹ The ICISS Report pointed out that the responsibility to protect concept helps to shift the discussion where it belongs - on the requirements of those who need or seek assistance " International Commission on Intervention and State Sovereignty (n 25) paragraph 2.33.

³⁰ Emma McClean. 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123, 143.

During the 1990s, the UN Security Council extended its definition of threats and breaches of international peace and security to include widespread human rights violations, and authorized enforcement action on that account. ' Such developments implied greater development for human rights into being one of the central concerns of the international society in the post Cold War period.³³ It has led to observation that obligations to respect human rights have continuously and progressively implied the duty to take action to enforce their respect. The evolution of individual criminal liability for egregious human rights breaches was a significant development in the 1990s, including the subsequent adoption of the Rome Statute establishing the ICC."

An appraisal of the AU actual practice in regional conflict situations indicates that it lags behind even the UN, although it seems that one of the objectives of the AU system was to address the regional inadequacies of the UN system. To date, the AU is yet to formally reach a finding of any gross human rights violations within a state as necessitating *forceful* intervention for their stoppage or pre-emption, in accordance with Article 4(h) of the Constitutive Act, even for deserving situations. An assessment carried out under the auspices of the UN found that crimes against humanity and war crimes (and possibly genocide) had been committed in the Eastern Congo conflict.³⁵ Another assessment in Darfur under the UN system was of the view that war crimes and crimes against humanity had been committed during the Darfur conflict.³⁶

Secondly, the AU has been opposed to judicial interventions by the ICC where prosecutions have been instigated by the Court's Prosecutor or the Security

Cristina Gabriela Badescu (n 22) 33.

" Ibid.

» Ibid.

^M Ibid 34.

¹⁵ United Nations Human Rights, 'Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010) <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf> accessed 6 June 2011.

" International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) <http://www.un.org/news/dh_sudan/com_inq_darfur.pdf> accessed 22 November 2009.

Council (and not through a reference to the Court by the subject state). Some apprehensions by the AU are genuine and well founded, such as concerns with the manner in which the ICC prosecutions seem to be manipulated by internal political and non-legal considerations.⁵ However, there is necessity for caution the way the AU addresses the issue. It should be addressed in a manner that does not leave lacunae for accountability and responsibility within the African region. Ensuring accountability for international crimes cements and institutionalizes the concept of sovereignty as responsibility. Therefore, the AU could effectively address its concerns against the ICC by ensuring that there are effective state and regional processes for prosecution and punishment of perpetrators of international crimes. In such a way, the ICC process would not be activated, while the concept of sovereignty as responsibility would be further cemented within the region."

⁵ Aversion to ICC approach has particularly arisen in relation to the conflict in Darfur. African Union High-Level Panel Report on the conflict stating that the "issue of justice for Darfur became acutely polarising after the International Criminal Court issued an arrest warrant for President Omar Al-Bashir in March 2009." Report of the African Union High-Level Panel on Darfur. Abu Dhabi (2 - October 2009) PSC/AHG/2(CCVII) xvi. In July 2010, the African Union reaffirmed its disapproval of the Security Council over its failure to defer proceedings against President Bashir at the ICC despite an earlier request, while making the appeal once more. Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270(XIV) on the Security Council Ministerial Meeting on the Rome Statute of the International Criminal Court (Kampala 2" July 2010) Doc Assembly/AU/10(XV) paragraph 4. In addition, AU member states resolved not to cooperate with the Court in arresting and handing over President Bashir. Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270(XIV) on the Security Council Ministerial Meeting on the Rome Statute of the International Criminal Court, *ibid* paragraph 5.

⁵ As of August 2011, the situations and cases listed as proceeding within the ICC, all of which were from the African continent, concerned Uganda, Democratic Republic of the Congo, Central African Republic, Sudan, Kenya and Libya. International Criminal Court, 'Situations and Cases' <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> accessed 2 August 2011. It has been observed that questions have been raised concerning what seems to be selectiveness and bias on the part of the ICC, by focusing on prosecuting African situations only, in addition to its incapacity to act against powerful states such as the United States. Janine Natalya Clark, 'Peace, Justice and the International Criminal Court' (2011) 9 *Journal of International Criminal Justice* 521, 524. It has also been questioned why powerful states such as Russia, China and the US are not parties to the Rome Statute that establishes the ICC. Janine Natalya Clark, *ibid*. Despite the fact that the US, Russia and China are non-members of the ICC, they can, by virtue of their permanent membership in the Security Council, vote to refer a state to the ICC, or veto such actions. For reference of a situation to the ICC by the Security Council, see Article 13(b) of the Rome Statute of the International Criminal Court (17 July 1998, entry into force 1 July 2002) 2187 UNTS 90.

³⁹ The ICC operates on the principle of complementarity, whereby a state has the primary responsibility of prosecuting a crime, and the secondary role of the ICC is brought into action in certain circumstances. Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 351. See also, Articles 1, 15, 17, 18 and 19 of the Rome Statute of the International Criminal Court (n 38). In addition, the AU can mandate an African regional court to try international crimes provided that the principle of complementarity is preserved, from the state and regional level of the ICC.

The emerging norm of responsibility to protect exemplifies the evolving obligation to intervene in order to prevent the occurrence of genocide.⁴⁰ In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ argued that the obligation to prevent genocide, by state parties to the Genocide Convention, is both 'normative and compelling.'⁴¹ The Court was of the view that the genocide prevention obligation 'has its own scope, which extends beyond the particular case envisaged in Article VIII' of the Genocide Convention, which entails reporting to the relevant organs of the UN to take action.⁴² The Court clarified that even if the respective UN organs are notified, that does not discharge state parties from 'the obligation to take such action as they can to prevent genocide from occurring.' but with respect for the UN Charter and decisions that the UN may arrive at.⁴³

Orford argues that an interpretation of the Court's statement on the duty to take action to prevent the occurrence of genocide indicates the necessity of action that goes beyond the implementation of criminal jurisdiction and accountability.⁴⁴ According to Orford, it infers action which is consistent with the global 'responsibility to protect populations wherever they are situated.'⁴⁵ In the African Union context, the ICJ reaffirms the responsibility of the AU to take action, including forceful intervention to prevent genocide, but with respect for the collective security system of the UN. This thesis has examined the necessity and possibility of alternative authorization of forceful intervention through an emergency session of the General Assembly where the Security Council is ineffective due to political interests of a permanent member. The ICJ judgment is a further restatement that sovereignty should not be a legal or political shield or excuse for failure to intervene in order to prevent genocide, if such action is endorsed by the UN.

⁴⁰ The threat of genocide is one of the factors that can trigger an intervention under the responsibility to protect concept. See, World Summit Outcome Document (n 8) paragraphs 138-139.

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 paragraph 427.

⁴² Ibid. For the Genocide Convention, see, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entry into force 12 January 1951) 78 UNTS 277.

⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 41) paragraph 427.

⁴⁴ Anne Orford (n 23) 185.

⁴⁵ Ibid.

6.2.5 ADHERENCE TO THE RULE OF LAW STANDARDS

The concept of the rule of law, even within the international sphere premised on the supremacy of the law instead of other factors such as power." politics. There is need for the AU to avoid political convenience, which is counie-productive in the long term (implications of non-intervention are examined in relevant section of this chapter), and to base its actions on the rule of ia-considerations. The law established under the AU system is clear that forcerc-intervention may be undertaken in order to address or pre-empt situations genocide, crimes against humanity or war crimes. However, the African Unior. also a political entity, and this creates some difficulties in adherence to the rule of la* standards in decision making.

Adherence to the legal criteria established under the AU system would re-L - in forceful intervention being undertaken where consensual action and peace!J means are inadequate or inappropriate to protect civilians. The rule of law standard.-, rather than political convenience in the AU s decision making, would leaJ institutionalization of sovereignty as responsibility. If such a concept is effective institutionalized, it would discourage automatic recourse to the principle of sovereignty as a convenient legal and political excuse for non-intervention b> V states, or as a shield from action by the territorial state. The other benefit of institutionalization of the concept of sovereignty as responsibility within the African Union processes is that it would lead to adherence with various rules established under the AU legal framework for human rights protection, especially those thi: prevent the occurrence of genocide, crimes against humanity and war crimes Preventive measures may actually dispense with the need for intervention. b> averting the occurrence of situations of genocide, crimes against humanity or war crimes.

⁴⁶ Hisashi Owada, "The Rule of Law in a Globalising World" in Francis Neate (ed). *The RuU Perspectives from Around the Globe* (LexisNexis, London 2009) 151. 153.

Political will is necessary within the Assembly of the African Union (the organ that has the mandate to authorize intervention).⁴ Some states within the region may seek to protect some interests of the state that is potentially the target of intervention, thereby opposing such action."¹ However, realization of the regional cost and implications of conflicts would be helpful in making various African states wake up to the reality that adherence to the intervention system established under the Constitutive Act is more beneficial, while inaction is highly detrimental. In addition, the AU may not be successful in preventing external (non-African) intervention, unless it undertakes its own appropriate intervention, as the cases of Ivory Coast and Libya demonstrate.

With regard to adherence to the rule of law standards in the African Union's decision making, the European Union is an important reference point for the AU (although the EU does not specifically address intervention on grounds of war crimes, crimes against humanity and genocide). The EU, despite being a regional political organization just like the AU, has preventive mechanisms that are based on the rule of law standards. The EU standards are so effective it would be unthinkable that widespread mass atrocities in the form of genocide and crimes against humanity can occur within a member state, to an extent that forceful intervention would be necessary. Although Europe is still under the post-Westphalian model of sovereignty, states can only be European Union members if they agree to strict conditions that include democracy, the rule of law and human rights protection.⁴⁹ Consequently, besides commitment by the European Union members to observe the common EU standards, states also work collectively to facilitate or enforce compliance by their fellow members. "

⁴ Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-Intervention' (2003) 85(852) *International Review of the Red Cross* 807. 822.

⁴⁹ Ibid 823.

Anne-Marie Slaughter (n 24) 628. Article 6(1) of the Treaty on the European Union stipulates that the 'principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,' which are commonly shared among the member states, are the foundations upon which the Union is formed. Under Article 49, membership to the Union may be granted to any European state which upholds the principles enumerated in Article 6(1) of the Treaty. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community (29 December 2006) Official Journal of the European Union, C 321 E/1.

⁵⁰ Anne-Marie Slaughter (n 24) 628.

There is no 'vetting' in the admission of states to the African Union, unlike the strict one that operates within the European Union. However, it is still possible to institutionalize the rule of law by establishing monitoring and vetting systems (at various decision-making stages) on various aspects that touch on human rights protection: including democratic governance and the rule of law within member states. For instance, the AU Peace and Security Council could be mandated, explicitly, to produce periodic reports (at specific and regular intervals) on states whose situations constitute, or are likely to lead to genocide, crimes against humanity and war crime? Such states would then not be permitted to vote on matters touching on regional security and human rights issues, and should specifically not vote in decisions concerning intervention. Besides deterring governments that may not desire to appear in the AU Peace and Security list, it would also be helpful in reaching consensus while making intervention decisions since the victim states, and potential candidates would not participate in actual voting. The current practice of suspending states where there have been unconstitutional changes of governments from AU membership is unhelpful as it primarily focuses on regime change issues (and therefore, the preservation of the previous regime) rather than on the existence of gross violations of human rights."¹

6.2.6 ADOPTION OF A ROBUST POLICY OF PREVENTION

There should also be a greater focus on preventing the occurrence of humanitarian catastrophes due to the difficulties of undertaking actual intervention—especially military ones. Akhavan regrets that despite the general discussion on preventive mechanisms, there is a pattern of focusing on civil conflicts more seriously only after they have intensified and atrocities become widespread. Basic efforts aimed at preventing the escalation of tensions into full-blown conflicts through

⁵¹ Madagascar was suspended from the AU membership in 2009 after the military deposed the elected President, and handed power to an opposition leader. Chris McGreal, 'African Union Suspends Madagascar over "Coup"', *Guardian* (20 March 2009) <<http://www.guardian.co.uk/world/2009/mar/20/african-union-suspends-madagascar>> accessed 2 August 2011. Certainly, if the criteria for suspension were focused on stopping gross human rights violations, rather than primarily being concerned with unconstitutional change of government, there are some other African states that have never been suspended that would have been candidates.

⁵² Rein Miillerson, *Human Rights Diplomacy* (Routledge, London 1997) 179.

⁵³ Payam Akhavan, 'Preventing Genocide: Measuring Success by What Does not Happen' *21 Criminal Law Forum* 1,4.

mediation and political settlements, a more robust approach by the AU may also include obstruction of operations of media outlets that spread inflammatory propaganda and hate speech. As the 1994 Rwanda genocide and the 2008 post election violence in Kenya indicate, radio stations have at times been used as an effective medium for spreading ethnic hatred and hate speech within the African region, and may significantly contribute to the occurrence of genocide and crimes against humanity.⁵⁴ As the 2000 OAU Report on the 1994 Rwanda Genocide observed, tolerance of hate radio goes well beyond the limits of acceptable free speech.⁵⁵

Akhavan correctly argues that in the case of Rwanda, some "measures as modest as jamming radio broadcasts inciting hatred" by the international community 'could have substantially constrained genocidal violence.'⁵⁶ According to Akhavan, the jamming of *Radio-Television Libre des Mille Collines* (RTLM) could have been both a less problematic and highly efficient mechanism for preventing the escalation of the genocide due to the mostly rural setting of the Rwandese state, which made the radio broadcasts an important source of information.' He states that:

It is astonishing to conceive that a measure as easy, cheap, and quick as jamming RTLM could have had a decisive preventive effect on the Rwandan genocide. Without the vital instrument of radio broadcasts at their disposal in the months leading to the mass-murders of 1994, the *genocidaires* would have had great difficulty in creating the necessary context for extermination of the Tutsi minority.^{57*}

^J In the case of Rwanda. *Radio-Television Libre des Mille Collines* is alleged to have spread inflammatory rhetoric and propaganda against the Tutsi, and therefore contributed to the commission of the genocide. International Panel of Eminent Personalities, 'Rwanda: The Preventable Genocide' (7 July 2000) <http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf> accessed 11 December 2009 paragraphs 1.20-1.21. In a schedule of the alleged perpetrators of the Kenyan post election violence, a 2008 Kenya National Commission on Human Rights Report lists four Kenyan vernacular radio stations (*Kass*, *Inooro*, *Kameme* and *Coro*) that are alleged to have propagated ethnic animosity and contributed to the violence. Kenya National Commission on Human Rights 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence' (15 August 2008) <<http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>> accessed 7 March 2012, 195. Joshua Sang, Head of Operations of the *Kass* Radio Station, is among some Kenyans whose prosecutions were commenced at the International Criminal Court on allegations of perpetration of crimes against humanity during the post election violence. See, International Criminal Court, 'Kenya' <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/situation%20index?lan=en-GB>> accessed 7 March 2012.

^K International Panel of Eminent Personalities (n 54) paragraph 20.76.

Payam Akhavan (n 53) 4.

⁵⁷ Ibid 6.

⁵⁸ Ibid 7.

The AU should adopt a more robust preventive approach that includes, obstruction of media outlets that incite the commission of genocide, crimes against humanity and war crimes. This is due to the fact that media outlets such as radio stations often play a significant organizational role by igniting ethnic animosity and spreading hate propaganda. Conflict preventive strategies that involve actions such as the jamming of propaganda radio stations may prevent the actual escalation of violence into genocide and crimes against humanity situations. Such a robust preventive approach may, therefore, actually eliminate the necessity of implementing the more problematic military intervention.

6.3 FACTORS THAT CAN FACILITATE REFORMS WITHIN THE AU SYSTEM

A practical reflection on some of the effects of failure to implement Article 4(h) of the Constitutive Act may bring the AU to the reality that a different approach, premised on the concept of sovereignty as responsibility is necessary. This section highlights some of the negative consequences of non-intervention for human rights purposes by the AU, where it is the only viable option to protect populations from mass atrocities. It seeks to demonstrate that, for the AU, 'under certain circumstances it is in the interests of business to support human rights',⁵⁹ including through forcible intervention.

Mullerson regrets that an intervention to save thousands or millions of foreign nationals is often a costly, risky and problematic issue which, on that basis, may not be triggered by purely humanitarian reasons alone.⁶⁰ He observes that despite interventions in Bangladesh (1971), Uganda (1979) and Cambodia (1978) having alleviated humanitarian suffering and having been motivated by some humanitarian concerns, there were, however, other paramount security concerns, in the form of self-defence.⁶¹ This section also addresses some of the critical issues, which, if properly highlighted to the AU, may promote the generation of political will to implement the mandate established under Article 4(h) of the Constitutive Act of the

⁵⁹ Rein Mullerson (n 52) 16.

⁶⁰ Ibid 161.

⁶¹ Ibid.

African Union. In addition, some outcomes, such as the continuance of non-African forceful interventions, may necessitate the AU to effectively implement its intervention mandate in deserving situations.

6.3.1 THE COST AND IMPACT OF INTERNAL CONFLICTS TO THE AFRICAN REGION

Conflicts arising from gross human rights violations and other factors can spread across state borders leading to regional wars, in addition to generation of tension between states.⁶⁰ The 1994 Rwanda genocide is instructive on the issue of escalation of internal conflicts into regional ones. In the case of the Rwanda genocide connection to the Eastern Congo war, it has been observed that the conflict was unavoidable due to the entry of armed Hutu militia into the Congo as they escaped from Rwanda. There is, therefore, a direct connection between conflicts within a state and regional stability.⁶⁴

Regional conflicts and mass atrocities are also likely to precipitate state break-up and disintegration through claims of self-determination. Paradoxically, if the avoidance of intervention by the AU is to protect the sanctity of the state, including its borders, state fragmentation resulting from conflicts may lead to the erosion of the sanctity of the original state, including its geographical borders. The cases of Sudan and Somalia point to the manner in which conflicts can lead to state fragmentation." With regard to the demand for the autonomy of Somaliland (a section of Somalia), the notion of political autonomy was generated by the 1988 to 1991 civil conflict,

⁶³ Ibid 22.

International Panel of Eminent Personalities (n 54) paragraph 20.2.

* Weak regimes, which can be found in some African states, are also often characterized by lack of proper legitimacy to govern, and in that context are often the perpetrators of gross violations of human rights, which may explode and destabilize regional security. Rein Miillerson (n 52) 16.

With regard to Sudan, the lengthy war between the North and the South was brought to an end in 2005 through the Comprehensive Peace Agreement that recognized the South's right of self-determination. See. United Nations Mission in Sudan. "The Background to Sudan's Comprehensive Peace Agreement" (June 2011) <<http://unmis.unmissions.org/Default.aspx?tabid=515>> accessed 28 June 2011. See also. Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army <<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> accessed 28 June 2011. South Sudan formally declared its independence from the rest of the Sudan on 9 July 2011. See, Alexander Dziadosz and Jeremy Clarke. "Independent South Sudan "Free at Last"" *Reuters* (Juba 9 July 2011) <<http://www.reuters.com/article/2011/07/09/us-sudan-idUSTRE7672JT20110709>> accessed 2 August 2011.

whose traumatic experiences cut off some of the bonds that tied the Isaaq clan to the rest of the Somalis.⁶⁶ The Somaliland claim for self-determination was, therefore, founded on the past repressions.⁶⁷ The perception that the Southern clans were unconcerned and disinterested while the Northern Isaaq clan revolted against Siyad Barre's military oppression (a former President of Somalia) was a significant factor in the North's decision to separate from the rest of the shattered Somali state.

In addition, conflicts contribute to regional economic and social decline. Two of the major African problems are economic decline and security problems due to internal conflicts. Intervention for humanitarian purposes can be motivated by the existence of security and economic concerns, which may build up on the humanitarian imperatives." In its Preamble, the AU Peace and Security Council acknowledges that armed conflicts have been the most significant factor that has led to both regional socioeconomic decline and suffering of civilians. "

6.3.2 INEFFECTIVENESS OF THE AU IN STOPPING NON- AFRICAN INTERVENTIONS

In chapter four, we discussed the manner in which the intervention mechanism within the African Union system was envisaged to regulate external intervention, by establishing an internal and regional alternative. However, an analysis of subsequent practice indicates failures in effectively implementing the established regional mechanism, even in situations that deserved forceful intervention. As the recent Ivory Coast (military intervention by French troops) and Libya (implementation of no-fly zones and destruction of military installations by NATO) cases indicate, where the AU is ineffective, external intervention will be carried out where it is in the interest of the interveners to do so. In addition, as

⁶⁶ Henry Srebrnik, 'Can Clans Form Nations?: Somaliland in the Making' in Tozun Bahdiel B^-Bartmann and Henry Srebrnik (eds), *De Facto States: The Quest for Sovereignty* (Routledge, Lond 2004) 210, 218.

⁶⁷ Ibid.

⁶⁸ Ibid. It has been observed that Somaliland has commendably been establishing participatory and accountable governance which combines democratic principles with traditional notion-organization, and therefore exemplifies an indigenous modern African mode of governance. IK .

⁶⁹ Rein Miillerson (n 52) 164.

⁷⁰ Protocol Relating to the Establishment of the Peace and Security Council of the African Union .

observed in chapter five in connection to the Libyan case, the African position (such as a military non-intervention stance) may also be irrelevant to external interveners.

In the African context, it seems that fulfilling 'the responsibilities of sovereignty' is 'in effect the best guarantee of sovereignty.'⁷¹ In 1992, Salim Salim, a former Secretary General of the OAU (which preceded the AU) had cautioned that if the Organization was to assume a leading role in the resolution of African conflicts, it had to intervene swiftly. " He further cautioned that if the Organization failed, there was no guarantee that those who decided to intervene would take African interests into consideration.¹³ An intervention by African states is certainly the most effective way of preventing action by non-African states. ¹ Thabo Mbeki, a former President of South Africa, has highlighted the recent interventions in Ivory Coast and Libya while emphasizing that the African Union requires strengthening so that it can effectively resolve regional problems rather than leaving such action to non-African interveners. ⁵

Therefore, in order to achieve the objective of preventing (and regulating) external (non-African) interventions, the AU forceful intervention mechanism has to be implemented effectively. The "pooled sovereignty' framework of the AU can only successfully prevent or regulate external interventions if its internal intervention mechanism is implemented efficiently, or if it is capable of preventing mass atrocities within states by contributing to the institutionalization of responsible sovereignty within its member states.

¹ Francis M Deng. 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 353, 364.

Report of the OAU Secretary-General on Conflicts in Africa: Proposals for an OAU Mechanism for Conflict Prevention and Resolution. CM/1710 (L.VI) (1992) 12-13 *Quoted* in Francis M Deng. 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect" (2010) 2 *Global Responsibility to Protect* 351 364.

" Ibid.

' Helene Gandois. 'Sovereignty as Responsibility, or African Regional Organizations as Norm-Setters' (British International Studies Association Annual Conference, University of Saint Andrews 20 December 2005) <<http://oxford.academia.edu/documents/0001/2131/GandoisBISApaper2005.pdf>> accessed 10 October 2010. 16.

Thabo Mbeki, 'Address by Thabo Mbeki at the Makerere University Institute of Social Research Conference on the Architecture of Post-Cold War Africa - between Internal Reform and External Intervention' *Daily Monitor* (Kampala 19 January 2012) <<http://www.monitor.co.ug/News/National-688334/1310170/-/item/0/-/tuhthmz'/-index.html>> accessed 9 March 2012.

6.3.3 THE POSSIBLE ROLE OF CIVIL SOCIETY ORGANIZATIONS BASED IN AFRICA

The growth of vibrant regional civil societies across the globe is a significant blow to sovereignty centred regionalism.⁶ There are various ways in which civil society organizations and non-governmental organizations (NGOs), especially those based in Africa, can contribute to the institutionalization of sovereignty, responsibility concepts, and enhance elimination of the legal and political dilemmas of intervention. Strategic advocacy and publicity by Africa based NGOs and civil society organizations can contribute to amendments to existing treaties, in addition to enhancing the adoption of resolutions and declarations that include concepts of sovereignty and intervention as a fundamental responsibility for human rights protection. Further, the African Union's institutional fact finding capacity may benefit significantly from civil society organizations. For instance, Human Rights Watch and Amnesty International have proved effective in investigating grassroots level breaches of human rights, while International Committee of the Red Cross has been effective in investigating compliance with international humanitarian law.

There has also been significant influence of non-governmental organizations in international law making processes, especially during the drafting of international conventions.⁸ Besides NGOs actively encouraging states to become parties to treaties, they also subsequently insist on compliance with the obligations and

⁶ Amitav Acharya, 'Regionalism and the Emerging World Order: Sovereignty, Autonomy, Identity', in Shaun Breslin, Christopher W Hughes, Nicola Phillips and Ben Rosamond (eds), *New Regionalism and the Global Political Economy* (Routledge, London 2002) 20, 27.

Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to Responsibility to Protect* (Cambridge University Press, Cambridge 2006) 104.

⁸ Eric Suy, 'New Players in International Relations' in Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth de Vos and John Dugard (eds), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford) 373, 376. Chinkin aptly highlights the direct engagement of NGOs in drafting of treaties. Christine Chinkin, 'The Role of Non-Governmental Organizations in Setting, Monitoring and Implementation of Human Rights' in Joseph J Norton, Mads Andena-Mary Footer (eds), *The Changing World of International Law in the Twenty-First Century: A Tribute to the Late Kenneth R Simmonds* (Kluwer Law International, The Hague 1998) 45, 52. She notes that NGOs provide professional expertise and personal commitment which may lack with government representatives. Christine Chinkin, *ibid.* Besides direct participation during negotiation and drafting, NGOs may also indirectly influence the conclusion of a treaty by providing information, lobbying governments and their officials to take certain positions and preparing draft the treaty text. Christine Chinkin, *ibid.*

accountability.⁴ NGOs' insistence on compliance with international obligations, and the 'naming and shaming' of non-compliant states, significantly promotes the internalization of the norms of international law.^M Ensuring that the AU and the United Nations are well informed (when they are negligent in executing their own indepth investigations) by explicit coverage of a conflict may be helpful in fostering political will. The excuse of failure to appreciate the actual events on the ground has often been used by world leaders, in order to excuse themselves from the blame of inaction during some humanitarian catastrophes such as the one in Rwanda in 1994." In such situations, NGOs can eliminate the excuse of failure to appreciate the magnitude of the atrocities on the ground through 'broadly based, coordinated, and sustained public advocacy on such a scale and of such an intensity that it simply cannot be ignored' by the relevant decision makers.^{S~}

International advocacy groups have often been critical of the responses by the UN and powerful states in situations of widespread and systematic human rights abuses.^v In the case of the AU, what is required is a focused, coherent and consistent advocacy and publicity by NGOs on the costs and implications of the Westphalian concepts of sovereignty and, specifically, the effects of failure to implement Article 4(h) of the Constitutive Act. There are, however, some predicaments in relation to the role of the civil society groups. For instance, the participation of NGOs still faces state based restrictions. NGOs still remain largely dependent on cooperation from states, and they can be barred from formal drafting processes of treaties and resolutions.⁸⁴

While some governments are more inclusive and recognize the positive role of NGOs. others bluntly refuse contact with such organizations, denying NGOs

⁴ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford 2007) 81.

^M Ibid.

⁸¹ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for AU* (Brookings Institution Press, Washington DC 2008) 225.

^v Ibid 226.

["] International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Inter\ventions* (International Council on Human Rights Policy, Versoix 2002) 10.

^M Christine Chinkin (n 78) 55-56.

registration and accreditation.⁸⁵ The effect of state sovereignty in the definition of international law is still strong in a sense that international non-governmental organizations continue to have a limited role.⁸⁶ NGOs participation and independence on international issues is also hampered by travel challenges faced by their delegations including visa requirements.⁸⁷ Greater engagements of NGOs will certainly require more compromise between state sovereignty demands and aspirations of civil society organizations. Where physical participation of NGOs is denied or limited, their positions and views may still be publicized through the media and internet based forums. NGOs can also focus on advocacy through AL' members that are more accommodative and influential like South Africa.

Africa based NGOs can have greater participation in the AU processes in pressing for institutionalization of sovereignty as responsibility concepts. In identifying strategic entry points for advocacy. There already exists a framework for engagement of NGOs within the AU framework, although it is restrictive in nature. The basis for Africa based civil society organizations engagement in AU processes is established under Articles 3(g),⁸⁹ 3(k)⁹⁰ of the Constitutive Act. In addition. Article 22 of the Constitutive Act establishes the African Union Economic, Social and Cultural Council (ECOSOCC). ECOSOCC is envisaged as comprising of various professional and social organizations operating within the state parties, but its role restrictively defined as being advisory. It is the primary institution within the African Union through which civil society organizations based in Africa can participate in AU operations.⁹¹ However, based on ECOSOCC's mandate being only advisory. Its role is rather ambiguous, in the context of its capacity to influence AU's operations and consequently the engagement and influence of Africa based NGOs is

⁸⁵ Ibid 56.

⁸⁶ Ibid 46.

⁸⁷ Ibid 56.

⁸⁸ Ibid 46.

⁸⁹ The Article includes popular participation as one of the objectives of the African Union.

⁹⁰ The clause lists the promotion of 'co-operation in all fields of human activity' as an objective of the African Union.

⁹¹ Africa Governance Monitoring and Advocacy Project, 'Towards a People-Centred African Union: Current Obstacles and New Opportunities' <http://www.soros.org/resources/Articles/publications/publications/people_20070124/a-people-20071101-english.pdf> accessed 28 March 2011.33.

significantly reduced.^{4"} ECOSOCC is not established under an independent treaty like the AU Peace and Security Council (which would provide it with greater autonomy), but rather through statutes adopted by the AU Assembly.

In addition, eligibility rules for civil societies' involvement in ECOSOCC have been opposed on the basis of the restrictive requirement that at least 50 per cent of the funding of civil society organizations seeking ECOSOCC membership should be internal, from within the civil society membership.^{4^} It seems that the requirement has the agenda of excluding some international and foreign civil society organizations, including important organizations that may be opposed to some of the AU operations.^{4^}

There have already been some commendable efforts to address the limitations of engagements with the AU through the restricted ECOSOCC (which may also be an effective forum for pushing for amendment to the clauses on funding requirements). This is through the establishment of an umbrella organization for engagement with the AU by Africa based civil society bodies, which is the Centre for Citizens' Participation in the African Union (CCP-AU).⁹⁶ It is a strategic, focused and robust way of pushing for reforms within the AU, especially on the relationship between

Ibid. For instance, ECOSOCC is incapable of acting in an independent and robust manner while articulating civil society's positions, due to the lack of its own treaty framework with greater participatory functions, and the mere advisory role in the current legal framework. Ibid 6. For the various advisory roles, see Article 7 of Statutes of the Economic, Social and Cultural Council of the African Union <[http://www.africa-union.org/root/AU/AUC/Departments/BCP/CIDO/Meetings february/docs/ECOSOCC STATUTES.pdf](http://www.africa-union.org/root/AU/AUC/Departments/BCP/CIDO/Meetings%20february/docs/ECOSOCC%20STATUTES.pdf)> accessed 29 July 2011.

Africa Governance Monitoring and Advocacy Project (n 91) 33. ECOSOCC statutes required adoption by the AU Assembly for entry into force, while any proposals for their amendments have to be submitted to the Assembly for consideration. See. Articles 19-20 of (he Statutes of the Economic, Social and Cultural Council of the African Union (n 92).

Africa Governance Monitoring and Advocacy Project (n 91) 34. See, Article 6(6) of the ECOSOCC Statute which states that funding for such 'an Organisation shall substantially, at least fifty percent (50%). be derived from contributions of the members of the Organization." Statutes of the Economic, Social and Cultural Council of the African Union (n 92).

' Africa Governance Monitoring and Advocacy Project (n 91) 34. The fact that some of the African organizations have weak financial resources renders the situation problematic as they require funding from donors. Dieter Neubert. Local and Regional Non-State Actors on the Margins of Public Policy in Africa' in Anne Peters, Lucy Koechlin, Till Forster and Gretta Fenner Zinkernagel (eds). *Non-State Actors as Standard Setters* (Cambridge University Press, Cambridge 2009) 35,38.

Established in 2007. the CCP-AU has the objective of co-ordinating and promoting the engagements of various civil society bodies with the African Union. Centre for Citizens' Participation in the African Union, 'Background' <<http://www.ccpau.org/AboutCCPAU/tabid/54/language/en-US/Default.aspx>> accessed 27 March 2011.

civil society organizations and the AU. The CCP-AU may provide a more vibrant mechanism for engaging the Union on critical issues, including institutionalization of sovereignty as responsibility concepts and effective intervention for humanitarian purposes.

CCP-AU also provides an important forum for united and coherent advocacy by Africa based civil society groups in their engagement with the AU, increasing probability of the success of the organizations' agenda. NGOs often lack a coherent and uniform view with regard to conflict situations (where forceful intervention may be necessary), and often there may be lack of a coalition of NGOs that can articulate such matters in a uniform manner.⁴¹ CCP-AU has the potential to address this lacuna in the African region. During regional treaty making and adoption of resolutions it is necessary for NGOs to organize themselves in a co-ordinated version and to provide commonly agreed views in a coherent manner.⁴¹ Robust, coherent and focused advocacy by CCP-AU may significantly contribute to re-orientation of the AU legal and institutional framework into a system that has overriding human rights concerns including forceful intervention for such purposes.

There are various ways in which CCP-AU and Africa based civil societies can contribute to such reforms. Besides actual advocacy for formal reforms within the AU's legal framework, they may supplement the Union's institutional and professional capacity on specific issues. Such matters may include analysis of conflicts at the grassroots level, especially appraising whether the circumstances constitute or are likely to escalate into genocide, crimes against humanity and other crimes. Further, they can push for action and accountability from African leaders. They may also supplement AU funding and resources for research on issues relating to intervention and responses to mass atrocities. In addition, CCP-AU and civil societies can monitor and evaluate efficacy of AU actions, providing feedback which is essential to the AU, African citizenry and the international community.

International Council on Human Rights Policy (n 83) 11.

⁹⁸ Christine Chinkin (n 78) 57.

⁹⁹ Dan Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Martinus Nijhoff Publishers, Leiden 2011) 378.

6.3.4 IMPACT OF THE CONCEPT OF "AFRICAN SOLUTIONS TO AFRICAN PROBLEMS"

Necessity contributed to the emergence of the above 'catch-all' phrase, especially due to the international community (and African states) neglect of Rwanda during the 1994 genocide, just shortly after the 1993 Somalia experience that left the US unwilling to deploy troops in African interventions.¹⁰⁰ Such experiences led African leaders to realize that, in the end, they may have to find their own solutions to conflicts within the region.¹⁰¹ AU's subsequent practice, especially in relation to the conflicts in Eastern Congo, Darfur, Ivory Coast and Libya, indicate that despite the intervention mandate in Article 4(h) of the Constitutive Act, the Union has been incapable and unwilling to address regional mass atrocities problems decisively. In fact, some autocratic governments, in states such as Sudan and Zimbabwe, have misused the concept of African solutions, using it as the justification of their arguments that the rest of the international community has no basis condemning human rights violations.¹⁰² The concept of African solution in the current context seems, to an extent, to have become an 'outdated and obsolete dictum' which is indefensible¹⁰³ if it is not being implemented in a practical sense. There is need to shift from principle to practice, if the concept of African solutions is to transform the human security situation in Africa.

The concept still retains the capacity to ignite homemade solutions to Africa's conflict problems, including implementation of Article 4(h) of the Constitutive Act in deserving situations. In combination with the continued risk of external (non-African) intervention, which may be undertaken without any regard to the AU position, the concept of African solutions can provide the impetus for robust action by the AU in deserving situations.

¹⁰⁰ Chris Fomunyoh, 'African Solutions to African Problems: A Slogan Whose Time has Passed' (9 February 2005) <<http://allafrica.com/stories/200502090005.html>> accessed 28 July 2011.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

6.3.5 INCREASING GLOBAL INTERDEPENDENCE: GREATER LIKELIHOOD OF NON-AFRICAN INTERVENTIONS

African states are often reluctant to request or endorse external intervention as a method of addressing humanitarian catastrophes due to the lingering memories of the colonial period, in addition to their experiences in the geopolitical context of the post colonial era."¹⁴ However, as we have already observed, the only way to avert this predicament is to have an internal intervention system that is effectively implemented. The African continent is part of the global community, and given its relatively weaker political and economic power, will remain more susceptible to the forces of global interdependence. As Mullerson states, the Westphalian concept of the international community is continually being dented by globalization.¹ There is a sense in which international law is evolving from a state-centred system into a regime that is also primarily concerned with protection of individuals within states. Human rights violations will increasingly become a concern for the larger international community, increasing the likelihood of external intervention within Africa by non-African states where the AU fails, and especially if, in a particular situation, it is in the interest of the external (non-African) intervener to do so.

If the AU fails to be an effective participant in this evolution to an individual centred international legal system, including in the context of forceful intervention for humanitarian purposes, there are times that it will find that its divergent views may, after all, be unsuccessful in preventing external intervention within the region. Attempts by the African Union to curb such developments may not be successful where interests of powerful states converge with consensus at the United Nations.

¹⁰⁴ Richard Falk (n 7) 71.

¹⁰⁵ Rein Mullerson, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff Publishers, The Hague 2000) 133.

¹⁰⁶ Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century; General Course on Public International Law' (1999) 281 *Recueil des Cours de l'Académie de Droit International* •• *Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, The Hague 2000) 162. Reisman observes that international law is increasingly focusing on protecting sovereign states, in the context of the 'capacity of a population freely to express and effect choices about the identities and policies of its governors.' W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84(4) *American Journal of International Law* 866. 872.

The recent intervention in Libya by NATO is an illustration.' The AU can only avoid such predicaments by effectively implementing the intervention mandate established under Article 4(h) of the Constitutive Act in deserving situations.

6.4 THE COMPATIBILITY OF THE CONCEPT OF SOVEREIGNTY AS RESPONSIBILITY WITH STATEHOOD

Institutionalization of the concept of sovereignty as responsibility within the AU processes does not imply that African states should lose their statehood. The concept does not portend an end to the model of statehood as the fundamental organizational entity within the international community, and it does not imply loss of territory to intervening states. The concept is based on a framework that places effective protection of populations within a state from avoidable catastrophes as the core responsibility of sovereignty. The concept is compatible with the evolving purposes of the UN system, which include more effective human rights protection. The concept promotes the protection of the sovereignty of the people within a state. As Tomuschat observes, the progressive evolution of the international society 'from a sovereign-centred to a value-oriented or individual-oriented system' has significantly affected the meaning and strictures of the principle of non-intervention.¹⁰⁸

In situations where the concept of responsible sovereignty has been coherently articulated, such as in the responsibility to protect discussions, there have been efforts to maintain intervention within the UN system, an issue that is discussed in chapter three. The UN Charter foresees the necessity of such intervention, by establishing an exception where the Security Council may authorize an intervention within a state. The Security Council has acknowledged that gross human rights violations and humanitarian catastrophes within a state are threats to international peace and security, and has developed a practice of authorizing intervention on that basis.¹⁰⁹

¹ The AU had opposed a military intervention of any form in Libya, and emphasized the territorial integrity of the state. African Union (n 5) paragraph 6. The UN Security Council proceeded to authorize enforcement of no-fly zones and measures to protect civilians from attacks. UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

¹⁰⁸ Christian Tomuschat (n 106) 237.

¹⁰⁹ * For instance, while authorizing enforcement of no-fly zones and measures to protect civilians in Libya, the Security Council noted that the situation within the State was a threat to international peace and security. UNSC Res 1973 (n 107).

Gross violations of human rights and humanitarian law, such as genocide and crimes against humanity, result in the breach of international peace and security due to the flow of refugees, militias and weapons to neighbouring states. In addition, Article 53 of the UN Charter permits regional organizations to undertake enforcement actions for the purposes of maintaining international peace and security.

Sovereignty has important roles within the international system, and becomes a stumbling block against the protection of human rights only in some situations. Such circumstances include when the principle is used as a legal or political shield: from intervention, or justification for inaction, despite horrendous atrocities taking place within a state. Sovereignty and human rights have important complementary values. As Peters observes, the principle of sovereignty provides 'order, security, stability and predictability' within the international system, while promoting the protection of human rights within the territory of a state by monopolizing the legal basis of use of force.¹¹⁰ It is only when sovereignty fails to perform its protection functions, and is misused as a justification for oppression and inaction to alleviate or prevent catastrophes, that the principle becomes a liability to the core values of human rights protection. The concept of responsible sovereignty advocates a theory and practice that transforms sovereignty and intervention for human rights into complementary values.

As the UN Secretary General observes, the concept of responsibility to protect (which is based on the notion of sovereignty as responsibility) 'is about reasserting and reinforcing the sovereign responsibilities of the State.'¹¹¹ According to the UN Secretary General, the concept:

...affirms that a core function of global and regional organizations alike is to permit the full and peaceful expression of sovereignty within the purposes and principles of the Charter and according to the provisions of international law. Sovereignty endows the State with international and domestic responsibilities, including for the protection of populations on its territory.¹¹²

¹¹⁰ Anne Peters, 'Humanity as the A and Q of Sovereignty' (2009) 20(3) *European Journal of International Law* 513, 518.

¹¹¹ Report of the Secretary-General: The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect. UN Doc A/65/877 (27 June 2011) paragraph 10.

¹¹² *Ibid.*

Henkin argues that although the autonomy of states is an important value that requires protection, it certainly should not be conceptualized as 'an iron curtain.''' Sovereignty implies territorial integrity, but it certainly does not immunize the commission of genocide and other systematic gross human rights violations 'from external communal concern, judgment, and intervention.'''¹⁴

6.5 DOES THE UN SYSTEM PROVIDE OPPORTUNITIES FOR A ROBUST IMPLEMENTATION OF THE AU'S INTERVENTION MANDATE?

A comprehensive discussion of issues relating to the implementation of the AU's right of intervention requires that the role of the UN be taken into account. By virtue of Article 24(1) of the United Nations Charter, the UN Security Council has primary (but not exclusive) responsibility for peace and security in Africa. The fact that the Security Council's mandate is not absolute indicates that the AU may have a robust role in regional security issues where the Council is ineffective, but through a mechanism that does not set precedents that may lead to the erosion of the international rule of law. Where the Security Council is ineffective in addressing an African regional conflict due to the political interests of a permanent member, the AU should request the General Assembly to assume the subsidiary responsibility and authorize an appropriate intervention, including forceful intervention in deserving situations. However, the necessity of seeking alternative authorization from the General Assembly would only be in situations where the Security Council fails to provide an appropriate mandate for an intervention within an African Union member state, despite intensive lobbying by the AU.

The major reason for the failure of a robust implementation of the AU's forceful intervention mandate in deserving situations can largely be attributed to the Union's continued concerns with the protection of sovereignty in the traditional Westphalian sense. Consequently, despite the forceful intervention mandate, the AU has adopted a policy of undertaking only negotiations, peacekeeping and consensual interventions, even where they are clearly inappropriate and ineffective.

¹⁴ Louis Henkin, "That "S" Word: Sovereignty, and Globalization, and Human Rights, *Et Cetera'* (2000) 68 *Fordham Law Review* 1,13.

¹⁴ *Ibid* 12.

Peacekeeping and consensual interventions are themselves expressions of traditional concepts of sovereignty since they are premised on the sovereign right of a territorial state to request or consent to intervention. Such an approach is, however, grossly unhelpful where the government of the state is a perpetrator of the atrocity. Therefore, despite the forceful intervention mandate, the AU framework has not effectively institutionalized the concept of sovereignty as responsibility, which has not had enhanced the likelihood of achieving legal and political consensus for intervention.

The African Union has, therefore, not been interested in lobbying the Security Council for a robust mandate to implement its forceful intervention mandate in deserving situations. Further, even if the Security Council failed to grant such a robust mandate after an AU request (which has not been the case so far), the AU could turn to the other reasonable alternative within the UN system, which is authorization by an emergency session of the General Assembly. An analysis of the AU and UN interactions in African conflict situations demonstrates that the AU has, to an extent, been an impediment for robust intervention by the UN in Africa. In chapter five, we pointed out that Sudan stressed the regional role of the AU in order to shield itself from robust intervention by the UN in connection to the Darfur crisis.¹¹⁵ In the case of Libya, the AU explicitly opposed any form of military intervention, and reaffirmed the territorial integrity of the Libyan state, despite systematic attacks on civilians that had characteristics of crimes against humanity. On the contrary, the Arab League, to which Libya is also a member, requested UN authorization of implementation of no-fly zones to protect civilians.

¹¹⁵ For instance, the Sudanese representative to the Security Council strenuously protested that the Security Council had 'once again ridden roughshod over the African position' upon the adoption of Resolution 1593, which referred the Darfur situation to the International Criminal Court. UNSC Verbatim Record (31 March 2005) UN Doc S/PV/5158. See, UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593. Protests by the Government of Sudan against UN enforcement action led to an eventual compromise in the form of a joint AU and UN consensual intervention. Report of the African Union High Level Panel of Experts (n 37) 41.

¹¹⁶ See, African Union (n 5) paragraph 6.

¹¹⁷ See, UNSC Res 1973 (n 107); *Reuters*, 'Arab League Calls for Libya No-Fly Zone - Slats' (Cairo 12 March 2011) <<http://uk.reuters.com/article/2011/03/12/libya-arabs-council-idUKLDI110312>> accessed 10 June 2011.

However, as the Libyan precedent indicates, the UN will still proceed to authorize forceful intervention in the region even if the AU opposes such action, if such intervention is necessary. Therefore, based on those facts, to argue that the UN has been an impediment to a robust implementation of the AU mandate seems incorrect. It is the AU's approach, especially its concerted effort to preserve some traditional concepts of sovereignty that has been the actual impediment to a robust implementation of the AU's intervention mandate. There are opportunities for a robust implementation of the AU intervention mandate within the UN system.

6.5.1 THE INTERNATIONAL RULE OF LAW CONSIDERATIONS: THE ROLE OF THE UN

Governance within the international community benefits immensely from the rules of international law."^s Rules and principles regulating forceful intervention, in addition to the collective security system of the United Nations, are crucial in the maintenance of the international rule of law. In its Preamble, the 1970 Declaration on Principles of International Law acknowledges the significant role of the UN Charter in the promotion of the international rule of law."^t The absence of rules and principles regulating conduct of states would permit powerful states to act without restraints, and failure to observe such regulations amounts to a breach of the rule of law.

A core attribute of the concept of the rule of law, even within the international system, is the supremacy of the law rather than other factors, for instance, arbitrary power.¹²⁰ Supremacy of the law implies that international law applies to international organizations¹²¹ such as the African Union. The second characteristic of the rule of law is equality of all subjects before the law.¹²² The concept of equality before

^s Rein Mullerson (n 105) 136.

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

Hisashi Owada (n 46) 153.

^t Simon Chesterman, 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System' *Final Report and Recommendations from the Austrian Initiative. 2004-2008*, UN Doc A/63/69 (7 May 2008) paragraph 14.

¹²⁰ Hisashi Owada (n 46) 153. Brownlie also observes that the rule of law requires that law be applied equally. Ian Brownlie. *Rule of Law in International Affairs: International Law at the Fiftieth*

international law is provided for in the UN Charter, with Article 2 of the Charter listing the 'sovereign equality' of its member states as being one of its fundamental principles. However, imbalances in state power and the lack of a properly centralized authority like in the domestic context, limits the effective application of the principle of equality before the law in the international context.¹²⁴ The third element of the rule of law is the requirement of soundness in the substantive element of the law. Therefore, legal issues 'should be exercised in accordance with certain standards of justice, both substantial and procedural.'¹²⁶ The rule of law within the international system has the role of 'constraining States from acting in gross violation of fundamental principles of justice and human rights that underpin the contemporary international legal system.'¹²

Absolute rule of law within the international community is certainly unlikely. Therefore, the concern should be a framework that decreases chances of breach of the rule of law, through other considerations such as politics and state interests. The push for the rule of law within the international community is essentially a struggle against political influence (exemplified by the furtherance of subjective interests by states and more likely to cause anarchy within the international community). Koskenniemi correctly points out that, although some political factors cannot be avoided, non-political rules should constrain the escalation of such factors. "Collective action through the UN is more likely to safeguard the international rule of law rather than an approach that can easily be abused by individual states, or *ad hoc* coalitions of states, due to the lack of any institutional checks. Permitting unilateral intervention without any form of institutional checks is highly likely to contribute to international anarchy. The prevention of international anarchy, and the preservation of international stability, including the collective protection of the interests of all

Anniversary of the United Nations (Kluwer Law International, The Hague 1998) 214. Chesterman focuses on consistency in the application of international law as an attribute of equality before the law. • Simon Chesterman (n 121) paragraph 15.

¹²³ Hisashi Owada (n 46) 157.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* 154.

¹²⁶ Ian Brownlie (n 122) 215.

¹²⁷ Hisashi Owada (n 46) 155.

¹²⁸ Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) *European Journal of International Law* 4, 5.

¹²⁹ *Ibid.*

states, requires a long-term framework for the operation of the rule of law rather than a mechanism that would permit the rule of force.^{1 0}

AU's intervention should be implemented within the UN system, and even where the Security Council is ineffective, the most reasonable option would be to seek alternative authorization by the General Assembly. Radical departure from the UN system is to set precedents that may result in greater anarchy and insecurity. In any case, eroding the collective security system of the UN may result in greater abuse of human rights and widespread atrocities as was the case in the period preceding the drafting of the UN Charter, which contributed to the two world wars. It is necessary to ensure that the international rule of law is maintained in issues relating to international peace and security. The alleged rule permitting humanitarian intervention is often advanced as an alternative justification for forceful intervention independent of the collective security system of the UN. However, unregulated discretion to intervene within another state, based on the subjective judgments of the intervening state, or the coalition of states, and without any institutional checks, is highly susceptible to abuse and manipulation in the context of state interests. As pointed out in chapter live. Uganda's intervention in Eastern Congo demonstrates that an unregulated right of humanitarian intervention is undesirable and may actually aggravate the problem. It may have the negative effect of aggravating the conflict, due to subjective and unregulated interests of the intervening state. Intervention by Uganda was found to have been unlawful, and to have escalated the commission of mass atrocities.³¹

Arthur Watts. 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15,25.

^{1,1} For the unlawfulness of Uganda's intervention, see. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 paragraph 147-165. The Ugandan troops were also liable for egregious violations of human rights and international humanitarian law in areas under their occupation. Ibid paragraph 207.

6.5.2 SIGNIFICANT POST COLD WAR INTERVENTIONS IN AFRICA BY NON-AFRICAN STATES: UN AUTHORIZED INTERVENTIONS

The AU may require support, and burden sharing (in terms of technical human resources), with the more endowed, non-African states, for robust interventions for humanitarian purposes to be implemented successfully in deserving situations. It is instructive to note that most African interventions by non-African states for humanitarian purposes) in the post Cold War period have been undertaken without authorization by the UN. This includes individual interventions by France, India, United States, United Kingdom and collective action through NATO. The interventions included in this categorization are those that included elements of peace enforcement (by inclusion of Chapter VII powers by the Security Council while providing authorization, although the consent of the territorial state could also have been sought). In addition, they are interventions in which a non-African state (rather than the UN) was willing to assume leadership of the mission, whether the deployment was successful in stopping or pre-empting mass atrocities or not. It is therefore improbable that powerful states that have the requisite military and technical resources, and which have previously indicated willingness to support robust intervention for humanitarian purposes in the African region, will focus on regional interventions outside the UN system.

It seems the opportunity is for the AU to lobby for increased military support from states such as France, United States, United Kingdom and region, organizations such as NATO and the EU through actions sanctioned by the UN. In the case of the 2011 intervention in Libya, it has been argued that NATO states were not willing to intervene without authorization by the Security Council.¹³³ NATO has declared that it would intervene for the purposes of protecting the Libyan population if there was a proper legal basis, an apparent necessity for such action, and regional support.¹³³ Authorization of an intervention to enforce the no-fly zone-

¹³³ Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into Reality' (2011) 25(3) *Ethics and International Affairs* 255, 257.

¹³³ *Straits Times*, 'NATO Chief Urges Quick UN Deal on Libya' (Brussels 17 March 2011): <http://www.straitstimes.com/BreakingNews/World/Story/STISStory_646287.html> accessed 17 November 2011).

protect civilians by Resolution 1973 of the Security Council provided NATO with the requisite legal validity for the intervention.' " Request for enforcement of the no-fly zone by the Arab League provided NATO with the regional support it was seeking, despite opposition to any form of military intervention (and emphasize on Libya's territorial integrity) by the AU.¹³⁵ The Arab League had requested for the establishment of safe areas to prevent attacks on civilians, and the imposition of a no-fly zone.¹³⁶

The interventions analyzed in this section have already been examined in chapters two, four and five. The unsuccessful 1992 United States led intervention in Somalia was authorized by the United Nations.¹³⁷ In the case of the 1994 Rwanda genocide, France made a *belated* intervention 'to protect civilians from attacks' which was authorized by the United Nations.¹³⁸ The 2000 UK intervention in Sierra Leone saved UNAMSIL from total collapse, facilitated the deployment of additional peacekeepers and prevented Freetown from being taken over by rebels.¹³⁹ Although UK had the objective of protecting British nationals within Sierra Leone.¹⁴⁰ it is also apparent that it had the intention of supporting UNAMSIL operations within the State, which had already been granted Chapter VII of the UN Charter mandate by the Security Council.¹⁴¹ The UK intervention was essentially support for overwhelmed UN peace enforcers. France led the 2003 European Union's *Operation Artemis* in the Ituri region of Eastern Democratic Republic of Congo after authorization by the

¹³⁴ UNSC Res 1973 (n 107).

¹³⁵ For the AU express opposition to the intervention, see, African Union (n 5) paragraph 6.

¹³⁶ UNSC Res 1973 (n 107).

¹³⁷ UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

¹³⁸ On 19 June 1994 the UN Secretary General informed the Security Council of the request by France to be granted an intervention mandate under Chapter VII of the UN Charter in order to intervene in Rwanda to guarantee the protection of displaced persons and civilians at risk within the state. UNSC, 'Letter Dated 19 June 1994 from the Secretary General Addressed to the President of the Security Council' (20 June 1994) LIN Doc S/1994/728. Despite previous ineffectiveness by the Security Council, it authorized the requested French intervention and granted it a Chapter VII of the UN Charter mandate. See, UNSC Res 929 (22 June 1994) UN Doc S/RES/929.

¹³⁹ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Research, Bibliography. Background' (December 2001) <<http://web.idrc.ca/openebooks/963-1/>> accessed 28 November 2011

¹⁴⁰ *Ibid.*

¹⁴¹ In Resolution 1289 the Security Council cited Chapter VII of the UN Charter powers while authorizing UNAMSIL to take the necessary action in order to protect civilians under the threat of violence. UNSC Res 1289 (7 February 2000) UN Doc S/RES/1289.

UN.¹⁴² The 2011 forceful intervention by France in Ivory Coast was after Security Council Resolution 1975.¹⁴³ Prior to the NATO intervention in Libya, Resolution 1973 authorized the enforcement of no-fly zones and implementation of necessary measures to protect civilians.¹⁴⁴

6.5.3 SECURITY COUNCIL INEFFECTIVENESS: THE GENERAL ASSEMBLY ALTERNATIVE

Assuming that the AU system evolves into an effective mechanism that is capable of implementing its forceful intervention mandate in a timely and decisive manner, then it should be acceptable for the Union to seek alternative authorization by the General Assembly where the Security Council is ineffective. The necessity and possibility of the General Assembly resolution has been discussed in chapters two and three. The Security Council can be an impediment to a robust implementation of the AU's forceful intervention mandate, if rendered ineffective in providing authorization due to political interests of a permanent member. Reisman argues that rather than rigid conservatism, there is the necessity of an occasional re-examination of whether our institutional arrangements are effective in achieving the desired societal goals.¹⁴⁵ The Security Council can be an impediment to the achievement of values of human rights protection, especially in relation to timely intervention to stop or pre-empt genocide, crimes against humanity and war crimes. In such situations, the only other reasonable and representative alternative, which balances the necessity of intervention for humanity with the need to preserve the international rule of law, is alternative authorization of the action by the General Assembly.

¹⁴² The short term deployment of Interim Emergency Multinational Force in Bunia. It was authorized by Security Council in Resolution 1484, which included a Chapter VII of the UN Charter mandate to improve the humanitarian condition and stabilize the security situation, in addition to specific protection mandates. UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484. The UN K, resorted to the European Union's assistance in order to contain the escalation of the conflict in the Ituri region, in addition to providing an opportunity for the upgrading of the UN Mission. Gareth A. Jones, 18 (2011) 123.

¹⁴³ The Security Council authorized the United Nations Operation in Cote d'Ivoire (UNOCI) to use all necessary means ... to protect civilians under imminent threat of physical violence', including pre-empting 'the use of heavy weapons against the civilian population'. UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975. The Resolution also specifically requested co-operation with UNOCI and French troops that were supporting the UN Mission in the operation. Ibid. .

¹⁴⁴ UNSC Res 1973 (n 107).

¹⁴⁵ W Michael Reisman. 'Redesigning the United Nations' (1997) 1 *Singapore Journal of International and Comparative Law* 1, 3.

The General Assembly is credited with the progressive evolution of the responsibility to protect concept.¹⁴⁶ The capacity to authorize intervention in accordance with the responsibility to protect concept would be enhanced significantly if the General Assembly reaffirmed its capacity to authorize such action, in a manner similar to that prescribed under the Uniting for Peace Resolution.¹⁴

6.5.4 IS A REGIONAL CUSTOM PERMITTING RETROACTIVE

AUTHORIZATION EMERGING IN AFRICA?

Chapter three discussed some of the forceful intervention clauses in the constitutive instruments of some African sub-regional organizations such as ECOWAS and SADC. The forceful intervention clauses in the constitutive instruments of such organizations could provide the basis for the emergence of an African regional custom permitting subsequent validation (by the UN Security Council) of interventions that lacked prior authorization, and are undertaken by African organizations in extreme situations. However, the development of such a regional customary law would require support from the AU's legal framework, for uniformity of practice and *opinio juris* to exist. The fact that Article 53(1) of the UN Charter does not *explicitly* state the specific time that authorization (by the Security Council) is to be granted to a regional organization for an intervention has led to views that the clause can be interpreted in a flexible manner, and hence be deemed to permit retroactive authorization.¹⁴⁸ Due to interactions between treaty and custom, consistent conclusion of treaties within a certain sphere may result in the crystallization of a custom.¹⁴⁹ Therefore, African regional and sub-regional treaties that uniformly endorse a flexible interpretation of the time of authorization from the Security Council, and are effectively implemented, can give rise to a regional custom

¹⁴⁶ Some of the resolutions adopted within the General Assembly have included endorsement of the responsibility to protect. See, High-Level Panel on Threats, Challenges and Change (n 8) paragraph 203; World Summit Outcome Document (n 8) paragraphs 138 - 139; United Nations News Centre (n 8); The General Assembly has also been conducting annual thematic debates on responsibility to protect, with such recent discussion in July 2011. See, United Nations General Assembly Department of Public Information (n 8).

¹⁴⁷ UNGA Res 377(V)A (3 November 1950).

⁴⁸ See, for instance, Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Urn Publishing, Oxford 2004) 53-55.

¹⁴⁹ Christian Tomuschat (n 106) 347.

permitting retroactive authorization of an intervention carried out in the circumstances.

In chapter three, we observed that in the African region, the ECOWAS framework flexible approach to the issue of authorization by the Security Council: contradicted by the SADC legal framework which specifically provides that enforcement action can only be undertaken in accordance with Article 53 of the SADC Charter, and only with Security Council authorization.¹⁵⁰ In addition, since the reformation of the African Union, there seems to be lesser focus on forcible intervention by ECOWAS in its response to regional conflicts. For instance, in the case of the 2010-2011 Ivory Coast post election violence, it seems ECOWAS was not keen on intervening militarily (in contrast to its earlier interventions in the region: such as in Liberia). In chapter four, we examined the legal framework and subsequent practice of the AU. We observed that although the AU's legal framework grants the Union a forceful intervention mandate, it does not expressly require that the AU obtains prior authorization from the Security Council. However, an analysis of the AU's subsequent practice in chapters four and five indicates that the AU has undertaken only consensual and peacekeeping interventions, even in situations that deserved forceful intervention to protect civilians more effectively. Therefore, its forceful intervention mandate is yet to be implemented, let alone be undertaken without prior Security Council authorization. In addition, the AU's express opposition to military intervention in Libya, which has already been examined, negates uniformity of practice and presumptions of *opinio Juris*.

Therefore, an African regional customary law permitting forceful intervention in extreme situations, without prior authorization by the Security Council (before anticipating subsequent authorization or guidance from the Council) has not emerged due to the lack of uniformity of regional practice and *opinio juris*. The AU therefore cannot justify its forceful intervention, without prior Security Council authorization on the existence of such a regional customary law. Despite African regional and

¹⁵⁰ Article 11(3)(d) of the Protocol on Politics, Defence and Security Co-operation (adopted 14 August 2001) <<http://www.sadc.int/index/browse/page/157>> accessed on 20 July 2010.

regional organizations having intervention mandates in their constitutive instruments, permitting regional organizations to take action without prior UN authorization could lead to various forms of regional arrangements being exploited by influential member states for their strategic interests. Unregulated interventions by regional organizations (which are not subject to prior UN institutional check) would be highly susceptible to influence of power politics, and may easily contribute to international anarchy and erosion of the international rule of law. In situations where the Security Council is ineffective in providing timely authorization due to political interests of a permanent member, the most reasonable alternative would be for the AU to seek alternative authorization from an emergency session of the General Assembly.

6.6 CONCLUSION

This chapter discussed the manner in which legal prescriptions could be combined with political and contextual factors to ensure institutionalization of the concept of sovereignty as responsibility within the AU processes, as a way of resolving the dilemmas of forceful intervention. The desired reforms that were suggested include the development of a coherent framework for responsible sovereignty within the AU system and elimination of the convenience with which the principle of sovereignty provides an effective legal and political justification for non-intervention. Addressing the existing inconsistencies between the AU system and the responsibility to protect concept was also found as necessary. Further, an institutional practice of progressive human rights practices within the AU system, and adherence to the rule of law standards, is essential. Besides focusing on political settlements, it is also necessary that the AU adopts a more robust genocide and crimes against humanity prevention approach, for instance, through the obstruction of the mass media that is utilized to spread ethnic animosity and hate propaganda, such as the jamming of hate radio stations.

Some of the discussed factors and emerging global realities that could facilitate reforms in the AU approach include the cost and implications of conflicts, and the fact that the AU system risks becoming irrelevant to the international community on intervention matters concerning the African region. Inevitable global

interdependence indicates that the only way the African Union can be guaranteed; .
an external (non-African) forceful intervention will not be undertaken is by the -
pre-empting the necessity of such action through decisive and timely intervention
was observed that the AU pooled sovereignty system could fail in its or: . -
objective of regulating external interventions in the region. Robust and forceful
advocacy by Africa based civil society organizations could also contribute ' .
desired reforms within the AU system. The concept of African solutions to Africa
problems has the capacity to inspire practical implementation of the inten: -
mandate, especially due to the undesirable costs and implications of non-interventK-
by the AU.

Based on the fact the UN Security Council has primary, but not exclusive
responsibility for international peace and security, this chapter also discussed
context in which the African Union can undertake a robust forceful interventk
where the Security Council is ineffective in its response to a conflict within an AU
member state. The necessity for a more robust role by the AU was balanced with the
need to safeguard the international rule of law. The chapter built on discussions r_
chapters two and three, while linking the necessity and possibility of alternative
authorization by the General Assembly to the issue of the implementation of the
African Union's forceful intervention mandate.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

The purpose of this thesis was to examine mechanisms through which the legal and political dilemmas of the implementation of the African Union's forceful intervention mandate can be addressed. It analyzed the legal, policy and contextual alternatives that can permit a robust implementation of the AU's intervention mandate in deserving situations, while safeguarding the international rule of law. The predicaments and opportunities of forceful intervention within the AU system are systemic in nature. A systemic method of analysis was therefore adopted to address the concerns of this thesis. A systemic method permitted an analysis of the interplay between the African Union and other systems that have an impact on the AU's intervention mandate (such as the UN and international law), and interactions between the norms of state sovereignty and those in favour of intervention for humanitarian purposes. In addition, it allowed an examination of the impact of environmental factors such as international politics and globalization, especially in the context of the historical vulnerability of the African region to external interference. Further, the systemic approach permitted an analysis of the possible role of Africa based civil society organizations in contributing to effective implementation of the AU's intervention mandate, among other factors.

7.2 JUSTIFIABLE BASIS FOR AN AFRICAN UNION INTERVENTION FOR HUMANITARIAN PURPOSES

It is clear that forceful intervention for humanitarian purposes may be undertaken by states or regional organization for humanitarian purposes after authorization by the Security Council, in accordance with its powers under Article 24 and Chapter VII of the UN Charter. Regional organizations such as the AU are specifically mandated to undertake forceful intervention under Article 53(1) of the UN Charter, provided they have Security Council's authorization. The Security

Council has, however, proven to be ineffective at times. It can fail to re-authorization for forceful intervention to a regional organization due to the use veto even in a situation that deserves action, owing to political interest-permanent member. This has contributed to justifications for alternative mer forceful intervention both within and outside the UN system.

With regard to military intervention outside the UN system it has "ex-postulated that an AU forceful intervention may be justified either through the al : rule permitting humanitarian intervention or the principle of consent observations seem to suggest that the AU may intervene outside the UN s\ without legal or political constraints. However, the alleged rule permittir, humanitarian intervention cannot provide an effective and reliable justification for - AU intervention for humanitarian purposes. There lacks sufficient state practice and *opinio juris* to legally permit humanitarian intervention outside the UN Secur.:> system.

The international rule of law considerations and the current lack of conse:>- among states on the issue indicate that such a rule is unlikely to emerge on the shx r term, or that it would be desirable. On the contrary, international consensus is coalescing upon the emerging norm of responsibility to protect, which reaffirms the role of the UN system. There are, however, critical issues that require to be address;. : if the UN system is to be an effective institution in ensuring protection of populations from gross human rights violations, even under the responsibility to protect approach For instance, the necessity of alternative authorization of an intervention by the General Assembly, where the Security Council is ineffective due to the use of the veto, requires affirmation within the responsibility to protect concept. This can be achieved through a General Assembly resolution that reaffirms the option of the Uniting for Peace procedure in the implementation of the responsibility to pmtec: concept.

An AU intervention under Article 4(h) of the Constitutive Act¹ cannot also be justified on the basis of the principle of consent. Intervention under Article 4(h) of the Constitutive Act is premised on a decision of the Assembly of the AU where there is commission of crimes of genocide, crimes against humanity and war crimes, and is not based on the specific request or consent of the territorial state.' Therefore, where military force is used after an Assembly's authorized intervention, it is in the form of enforcement action as envisaged under Article 53 of the UN Charter. If effectively implemented, forceful intervention by the AU would be a significant avenue for protecting civilians since consensual intervention may not be helpful where the government is the perpetrator, or is unwilling to invite or consent to intervention. The basis for consensual interventions and peacekeeping within the AU system is the alternative Article 4(j) of the Constitutive Act. The Article permits a member state to request a military intervention by the AU in order to restore peace and security on specific situations. An AU intervention that adheres to the provisions of Article 4(j) of the Constitutive Act does not require authorization by the Security Council.

7.3 ADDRESSING THE INEFFECTIVENESS OF THE SECURITY COUNCIL AND INADEQUACIES OF 'CONSENSUAL' PEACE ENFORCEMENT

The UN Security Council, the body that should primarily authorize intervention for human rights purposes, has at times been ineffective due to the threat or use of the veto, precipitated by political interests of the five permanent members. In addition, even where peace keepers have been granted Chapter VII of the UN Charter mandate for peace enforcement, they have often been ineffective since they have practically focused on the concepts of traditional peacekeeping, such as consent of the territorial state and limited use of force. On a practical sense, peace enforcement, also referred to as second generation peacekeeping, has remained conceptually linked to the principles of traditional peacekeeping. Such troops, despite Chapter VII of the UN mandate, have often been neutral on the ground, and regularly

¹ Constitutive Act of the African Union (adopted 11 July 2000. entry into force 26 May 2001) 2158 UNTS3.

" For the principle of consent to provide an acceptable justification, it should be provided in connection to specific situations on a case to case basis, and cannot be issued in the form of a blanket authorization for all future interventions. Antonio Cassese, *International Law* (Oxford University Press. Oxford 2001) 318.

lack the 'mandate to stop the aggressor (if one can be identified) or imp
cessation of hostilities.'³ This is exacerbated by the fact that the directive to l-j
for human rights purposes do not include the mandate of ending the conflict." At
regional level, the AU intervention system can be a mechanism for addressing
inadequacies of the UN system, by lobbying for a robust mandate from the Secum
Council where necessary. In addition, if the Security Council is ineffective, th> .
proposes that the AU should seek alternative authorization from the Gerrj
Assembly. Upon authorization, the AU may implement its robust interven: -
mandate solely, or through burden sharing with the UN, other regional organiza^ ns
or willing non-African states.

7.4 THE AU'S SYSTEM CONFORMITY WITH THE UN CHARTER AND INTERNATIONAL LAW

This thesis has established that although the AU's legal system grants th.
Union a forceful intervention mandate, the legal framework does not explicitly bind
the Union to seek authorization from the Security Council before an intervention ;s
undertaken. This has contributed to uncertainty on the implementation mechanism of
the AU's intervention mandate, with various justifications postulated, while there
have also been allegations of the AU's system inconsistency with the UN' Charter
and even international law. Based on the fact that both the concept of humanitarian
intervention and the principle of consent cannot provide an acceptable justification
for intervention under Article 4(h) of the AU Constitutive Act, reference to the 1"\
system cannot be avoided. In addition, as Mullerson observes, rules of international
law contribute immensely to governance within the international community/ Those
rules grant the Security Council primary responsibility for international peace and
security, on behalf of the United Nations. It should, however, be taken into account
that under Article 24 of the UN Charter, the responsibility of the Security Cou tk I i
primary and not absolute, in addition to an obligation that the Council acts in

³ Report of the Secretary General on the Work of the Organization, 'Supplement to an Agendi
Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary
United Nations" UN Doc A/50/60 (3 January 1995) paragraph 19.

⁴ **Ibid.**

⁵ Rein Mullerson, *Ordering Anarchy: International Law in International Society* (Martinus N
Publishers, The Hague 2000) 136.

manner consistent with UN principles and purposes. This thesis has taken into account the role of the UN since it is also concerned with the international rule of law and governance within the international community. In addition, there may be the necessity for burden sharing between the African Union and UN, based on the fact that the AU may require support in terms of technical resources and troops.

The issue is therefore on how inefficiencies within the Security Council may be addressed, especially where it is unable to discharge its primary responsibility of authorizing forceful intervention in a timely manner despite the occurrence of genocide, crimes against humanity and war crimes. Observing that alternatives are necessary within the UN system, and balancing that with the necessity to maintain the international rule of law, this thesis proposes alternative authorization by the General Assembly as the most reasonable solution. This is based on the fact that under Article 24(1) of the UN Charter, the responsibility of the Security Council for international peace and security is primary but not exclusive. Therefore, states, the founders of the UN, can grant the subsidiary responsibility to the General Assembly (which is also probably the most representative organ of the UN) where the Council is ineffective.

This thesis has also examined whether the AU framework is consistent with the UN Charter and international law. In the analysis, it adhered to the guidelines for interpreting treaties as stipulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties,⁶ which are also a reflection of customary international law. Factors taken into account include subsequent practice and agreements between the AU and the UN, and preparatory work for the establishment of the AU, including circumstances under which the Constitutive Act was concluded, especially the factors which could have contributed to the inclusion of the right of intervention. The analysis established that the AU recognizes the UN Charter provisions on peace and security matters, including the primary role of the Security Council in relation to international peace and security.

⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

The ICJ has also clarified that rules of interpreting treaties under Articles 31 and 32 of the 1969 Vienna Convention 'may in many respects be considered as a codification of existing customary international law'. *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53 paragraph 48.

Based on the recognition of the role of the UN system, this thesis finds the failure to expressly state that the AU Assembly is bound to seek prior Security Council authorization does not necessarily mean that the AU framework is inconsistent with that of the UN. In any case, without a contrary express clause precedent by the AU, it is implicit that the AU is bound to act within the UN system. It seems to have been a pragmatic way of permitting flexibility in relation to other necessary and possible authorization alternatives within the UN system and international law, without the inconvenience of internal restrictions within the AU legal framework. Despite the uncertainty on the relationship between the African Union and the United Nations systems, and the envisaged mechanism implementing the Union's intervention mandate, this thesis has established that the AU's legal framework permits flexibility with regard to intervention, without establishing inconsistency with the UN system. With regard to flexibility, the AU's intervention mandate under Article 4(h) of the Constitutive Act can even assume other non-consensual forms, such as judicial prosecutions for international crimes under the principle of universal jurisdiction/

7.5 FAILURE TO INSTITUTIONALIZE THE CONCEPT OF RESPONSIBLE SOVEREIGNTY: THE CAUSE OF INEFFECTIVENESS WITHIN THE AU

This thesis has established that although the necessity for international rule of law restricts the AU's interventions to those authorized within the UN system, there is opportunity for robust implementation of the Union's intervention mandate within the UN framework. The failure to exploit the opportunities for robust implementation of the AU intervention mandate within the UN system may be attributed to legal and political dilemmas arising from the failure to effectively institutionalize the concept of sovereignty as responsibility. Consequently, even where the Security Council found political consensus in order to authorize intervention for humanitarian

⁵ As Kuwali observes, since the grounds for intervention by the African Union under Article 4 of the Constitutive Act are also international crimes, then the intervention mandate can be a judicial prosecution of such crimes by the AU through the concept of universal jurisdiction. Dr Kuwali. *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Maninus Publishers, Leiden 2011) 403-404.

purposes, such as in the case of Libya, the AU has adopted policies that have been aimed at obstructing the UN. The AU's opposition to any form of military-intervention in Libya (including establishment of no-fly zones) while reaffirming the State's territorial integrity, seemed to contradict Article 4(h) of its Constitutive Act."

The concept of sovereignty as responsibility has emerged as the progressive way of addressing the legal and political dilemmas of intervention, as exemplified by the emerging norm of responsibility to protect. The concept of responsible sovereignty is one of the elements signifying the gradual progression of international law from a state centric nature into a regime that is also fundamentally concerned with the status of individuals within states ¹¹ There are, however, certain approaches to human rights protection that require incorporation and reaffirmation within the responsibility to protect framework. Due to the politicization of the Security Council, and considering the lack of global consensus on the necessity of a rule permitting humanitarian intervention, there is the need for alternative authorization of forceful intervention by the General Assembly where the Security Council is ineffective.

Some factors that have been analyzed in this thesis indicate the failure of institutionalization of the concept of sovereignty as responsibility within the AU processes, or undermine its institutionalization by entrenching traditional notions of state sovereignty. First, the tension between the principles of sovereignty and values of intervention for human rights protection are maintained within the AU legal and institutional framework. This conflict has subsequently been interpreted in favour of traditional concepts of sovereignty. It has, therefore, permitted the effective use of sovereignty as a convenient legal and political justification for non-intervention."

" For the AU opposition to any form of intervention, see. African Union, 'Communique of the 265th Meeting of the Peace and Security Council' (Addis Ababa 10 March 2011) PSC/PR/COMM.2 (CCLXV) paragraph 6.

¹⁰ For the evolution of international law into a regime that is also primarily concerned with the status of individuals within a state, see. Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century; General Course on Public International Law' (1999) 281 *Recueil des Cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, The Hague 2001) 162.

¹ As Cany observes, state security concerns and interests can be articulated in a legally acceptable form through the principle of sovereignty, which provides a convenient cloak for such purpose. Anthony Carty, 'Sovereignty in International Law: A Concept of Eternal Return' in Laura Brace and John Hoffman (eds). *Reclaiming Sovereignty* (Pinter, London 1997) 101, 116. Falk also points out that the problems associated with intervention for humanitarian purposes can conveniently be avoided by

Adejo has also correctly observed that the AU is essentially, to an extent, repainting of the OAU with fresh paint but without resolving the necessary in-structures in a manner that permits effective intervention.¹¹ The forceful interver mandate is effectively negated by other non-intervention oriented clauses w :;) :r legal framework.

Other factors that indicate the failure to effectively institutionalize the cone.-' of sovereignty as responsibility are some of the inconsistencies between the A intervention framework and the emerging norm of responsibility to protect. Such inconsistencies may compromise the emerging norm's regional development .. r Africa, including its implementation by the AU. Although the concep. responsibility to protect is not yet a proper legal norm, it has significant legal ar.c political value. The concept can provide a reference point for reforms within the AI system, especially in connection to resolving the continuing dilemmas between traditional notions of sovereignty and the values of intervention for humannariar purposes. The concept of responsibility to protect conceptualizes both state sovereignty and intervention for humanitarian purposes as responsibilities that accn-e both to the territorial state and the international community.¹³ Orford correct ', observes that the concept is a form of law that grants powers and provides jurisdiction¹⁴ to the international community for intervention. In addition, as Evans observes, generation of political will requires energetic and intelligent advancemer: of good arguments, which may encourage acceptability of problematic politick

asserting sovereign rights. Richard Falk. *Human Rights Horizons: The Pursuit of Justice :r _ Globalizing Wor/rf* (Routledge, New York 2000) 78.

¹¹ Armstrong M Adejo, 'From OAU to AU: New Wine in Old Bottles?' (2001) 4(1&2) A fn^n *Journal of International Affairs* 119, 137. Falk aptly highlights the continuing impression, in A fri that sovereignty is a static concept that is not evolving towards the notions of responsibility Rjchj.-: Falk (n 11) 84. Deng also observes that some states that feel vulnerable to intervention are stru^j¹ to protect the traditional concepts of sovereignty, although other states are progressing toward the concept of responsible sovereignty. Francis M Deng. 'Sovereignty, Responsibility and Account A Framework of Protection. Assistance and Development for the Internally Displaced (Br • • Institution-Refugee Policy Group Project 1995) <http: repository.forcedmigration.org show **Te** adata.jsp?pid=fmo: 1448> accessed on 14 June 2011. 5-6. According to the analysis earned out n thesis, Deng's observation with regard to the attempt, by some states, to preserve the trac:: concepts of sovereignty, seems correct in relation to Africa.

ⁿ International Commission on Intervention and State Sovereignty, 'The Responsibility to Proteee: (December 2001) <http://idl-bnc.idrc.ca/dspace^itstream'l0625/18432/6/116998pdf> accessed : November 2011 paragraphs 2.7 - 2.33.

¹⁴ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge Universu> Cambridge 2011)25.

actions. The concept of responsibility to protect is based on such progressive notions, as a way of enhancing the generation of political will for purposes of intervention to protect populations from horrendous atrocities.

There has been credible progress of the responsibility to protect concept within the UN system. The concept was affirmed by the UN General Assembly in both the 2004 High-Level Panel Report¹⁶ and the 2005 World Summit Outcome Document. In September 2009, the General Assembly resolved that states would continue with further discussions on the concept.¹⁷ More recent General Assembly discussions on the responsibility to protect have taken place in 2011.¹⁹ The Security Council has also affirmed the concept in Resolutions 1674 and 1894.²⁰ which is a significant development. Orford correctly observes that on the basis of the General Assembly affirmations, the question now relates to the manner in which the concept should be implemented, and it is no longer questionable whether the concept should be endorsed."

There are specific inconsistencies between the AU framework and the emerging norm, and other factors that may impede implementation of the concept by the Union. These issues were discussed in chapter four. For instance, a Westphalian

¹⁵ Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24(3) *Wisconsin International Law Journal* 703, 721.

¹⁶ High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' UN Doc. A/59/565 (2 December 2004) paragraph 203.

World Summit Outcome Document, UN Doc. A/RES/60/1 (24 October 2005) paragraphs 138 and 139. As Stahn observes, the inclusion of the concept in the Outcome Document was an indication of a broader systemic shift in international law.' that underpinned the continuing acceptance of the notion that human security concerns may limit traditional state sovereignty perceptions. Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99, 100-101.

¹⁸ United Nations News Centre, 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009)

<<http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+protect&CrI=>> accessed 22 September 2009.

The General Assembly has been conducting annual informal discussions on the responsibility to protect concept, such as the July 2011 forum. See, United Nations General Assembly Department of Public Information, "'For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers no Relief', Secretary-General Cautions in General Assembly Debate' (12 July 2011) <<http://www.un.org/News/Press/docs/2011/gal1112.doc.htm>> accessed on 1 August 2011.

The 2005 World Summit Outcome Document provisions on the responsibility to protect concept were endorsed by the Security Council Resolution 1674. UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

³¹ UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894.

²³ Anne Orford (n 14)21.

concept of state sovereignty is still prevalent within the AU system." while < contrary, sovereignty under the responsibility to protect concept is postulai. responsibility for effective human rights protection."⁴ Second, intervention under AU system is unhelpfully conceptualized as a 'right.'" while under the emer. norm it is progressively postulated as a 'responsibility.'" As the ICISS Rep " observed, a 'rights' approach obstructs decisive intervention since, rather than : .. on the requirements of the suffering populations, it is centred on the prerogatives and interests of the intervening states.²

The fact that the AU system is a form of 'pooled sovereignty' that ha- the objective of protecting member states from external (non-African) intervention ha- continued to undermine the institutionalization of the concept of respoa:". sovereignty and effective intervention within Africa, even by the AU. Therefore, as Kalu observes, 'sovereignty remains essential against non-AU threats.' despite tk development of an AU intervention mechanism.^{2<} However, the contradictor, expectations that the AU system would provide an avenue for opposing external (non-African) intervention, while hoping that it would at the same time promote an internal (AU based) intervention, are some of the factors that impede effective operations of the AU intervention mechanism. This is due to the realities of globu interdependence, and the necessity of burden sharing and partnership between the AI" system and the international community due to the necessity for military resources for intervention.

Sovereign equality of states and non-interference in internal matters of member states are some .-" the African Union's principles under Article 4 of the Constitutive Act, but they are articulate j ^ protected without linking them to effective protection of the population within a state r humanitarian catastrophes. A Westphalian construction of sovereignty is also permitted by the A Peace and Security Council Protocol, as it requires the Council to be guided by the principle of respect for territorial integrity and sovereignty of states (Article 4(e) of the Protocol). In addition under Article 4(f) of the Protocol, the Council is to be guided by the principle of non-interference (b> • in the domestic affairs of other member states. Protocol Relating to the Establishment of the Pcj. . Security Council of the African Union (adopted 9 July 2002) *Reprinted in (2002) 10 African Yu'~< - • of International Law* 663, 663-694.

•^International Commission on Intervention and State Sovereignty (n 13) paragraphs 2.14 - 2.15

²⁵ Article 4(h) of the Constitutive Act of the African Union. See also Article 4(j) of the Prcr.v: Relating to the Establishment of the Peace and Security Council of the African Union (n 23).

²⁶High-Level Panel on Threats, Challenges and Change (n 16) paragraph 201: World Summit Out. " Document (n 17) paragraph 139.

∴ International Commission on Intervention and State Sovereignty (n 13) paragraph 2.28.

³⁸ Kelechi A Kalu, 'Resolving African Crises: Leadership Role for African States and the An... Union in Darfur' (2009) 9(1) *African Journal of Conflict Resolution* 9, 19.

This thesis traces the desire to pool sovereignty and oppose external intervention in Africa to historical experiences and the continuing international political factors. From a historical perspective, the necessity for integration in Africa, as first postulated by the Pan Africanism movement in the colonial period, was primarily concerned with the eradication of colonial domination and exploitation. Based on such circumstances, and borrowing on the Pan Africanism ideals, some of the significant provisions in the 1963 OAU Charter had the objective of bringing colonial domination in the region to an end, and safeguarding the territorial integrity of the newly independent states.²⁹ The formation of the AU system was also influenced by concerns against external interference, particularly the region's susceptibility to external intervention. Maluwa has instructively observed that AU's formation was precipitated by the idea that the most effective way of responding to the predicaments of globalization was through integration into a large regional block.³⁰ Some of the direct consequences of continued globalization and interdependence between states have been the diminishing of traditional notions of sovereignty, and the progressive development of human rights, including justifications for intervention for their protection.³¹

The continued restrictive and traditional interpretation of the concept of sovereignty within the AU system has continued to contribute to the legal and political dilemmas of intervention, despite the Union's intervention mandate. This has

²⁹ Article II of the OAU Charter listed its purposes as including the protection of the sovereignty, territorial integrity and independence of African states, and the elimination of all forms of colonization from the region. Further, according to Article III of the Charter, some of the fundamental principles governing OAU's operations included non-interference in domestic matters of other states, respect for the sovereignty and territorial integrity of other states and dedication to the independence of African states still under colonial domination. See, Charter of the Organization of African Unity (adopted 25 May 1963, entry into force 13 September 1963) 479 UNTS 39.

Tiyanjana Maluwa, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union' (2001) 9 *African Yearbook of International Law* 3, 13. Maluwa served as the AU's first Legal Counsel. See, Pennsylvania State University, 'Tiyanjana Maluwa' <http://sia.psu.edu/facuhy/tiyanjana_maluwa> accessed 7 December 2011.

Mangala has argued that globalization has resulted in the infringing of African states' sovereignty, contributing to concern for a framework upon which African states' impact within the international community can be protected. Jacques Mangala, 'State Sovereignty and the New Globalization in Africa' in George Klay Kieh (ed), *Africa and the New Globalization* (Ashgate Publishing, Hampshire 2008) 97, 114. According to Mangala, the concept of pooling of sovereignty emerged as the most effective mechanism of protecting or enhancing African states' impact and influence within the international community. Ibid.

therefore rendered it problematic and difficult for an internal (AU) implements Article 4(h) of the Constitutive Act, through forceful intervention. There however, been failures of the AU 'pooled system" to prevent external intervent the recent cases of Ivory Coast and Libya indicate.

It should be noted that the pooling of sovereignty (such as in the AU's . does not always portend negative prospects for human rights protection.. intervention for their purposes. The pooling of sovereignty may be a basis for greater regional protection of human rights, including intervention on such grounds, i: the relevant internal systems are structured appropriately. If sovereignty is conceited progressively, as being the responsibility to protect populations from avoidable catastrophes, then protection and intervention for human rights purposes may even re more effective under a pooled sovereignty context. In the case of the AU system, the intervention mechanism has continued to be susceptible to African leaders' politics considerations, rather than adherence to the rule of law standards.

7.6 THE AU'S SUBSEQUENT INTERVENTIONS: CONSENSUAL

INTERVENTION AND TRADITIONAL SOVEREIGNTY CONCERNS

To an extent, the AU has been instrumental in filling the security vacuum within the African region, and has undertaken significant and commendable interventions especially where consensual interventions and peacekeeping have been adequate in ensuring the protection of civilians. In chapter four, this thesis briefly examined some of the AU's subsequent responses to regional conflicts, including military intervention or non-intervention in Burundi, Eastern Congo, Darfur. Soma'ia. Comoros, Ivory Coast and Libya. In addition, in chapter five there was a more extensive analysis of the AU's response to the conflicts in Eastern Congo. Darfur and Libya. The analysis established that various interventions by the AU have either been of a consensual nature, or peacekeeping undertakings. The subsequent intervention therefore do not amount to implementation of the forceful intervention mandate as envisaged under Article 4(h) of the Constitutive Act. While the AU's consensual interventions and peacekeeping in Burundi and Comoros were sufficient to **prevent** mass atrocities and full blown conflicts, there has been a failure of such an appro.."

in Darfur and Somalia. In addition, the case of Eastern Congo seems to amount to burden shifting by the AU to the UN. Further, the AU was reluctant to undertake a forceful military intervention in Ivory Coast, and was expressly opposed to any form of military intervention in Libya.

The general theme arising out of the analysis of the various interventions is that the AU is willing to intervene where the territorial state consents to intervention or requests it, or where the action involves peacekeeping. However, the Union is unwilling to undertake forceful intervention even if circumstances for civilian protection on the ground warrant it, especially in circumstances where consensual intervention and peacekeeping was ineffective or inappropriate. Consequently, there has been an endless cycle of breached peace agreements and mass atrocities in the case of the Eastern Congo and Darfur conflicts. The AU has adopted such a policy despite its forceful intervention mandate under Article 4(h) of the Constitutive Act. This indicates continuing constraints of the Westphalian concept of state sovereignty. A state that requests or consents to intervention, without any duress, is actually expressing some of its sovereignty privileges, even from a rigid, Westphalian perspective.

The AU response to the Libyan conflict clearly indicated that the Union's pooled sovereignty system could be used as a basis for opposing external (non-African) intervention. Earlier, Sudan had successfully cited the role of the AU in order to prevent forceful intervention from the UN in the Darfur conflict." The Libyan intervention has, on the other hand, indicated that the only way the AU can be effective in preventing external intervention in the region is by undertaking its own. Where there is failure to undertake an AU intervention in a deserving case, the

The Sudan's representative to the Security Council protested that the adoption of Resolution 1556 signified an annexation of the Darfur matter 'from the African Union, revealing an attitude of contempt for the African continent's capabilities and potential.' UNSC Verbatim Record (30 July 2004) UN Doc S/PV/5015. Resolution 1556 demanded that the Sudanese Government disarm the *Janjawved* militia, ensures judicial accountability for the militia leaders and their associates and demanded that states stop from selling or supplying weapons to non-governmental entities in Darfur. The eventual joint AU-UN consensual intervention in Darfur was a compromise with the Sudanese Government, after it had strenuously opposed UN enforcement action. Report of the African Union High-Level Panel on Darfur (Abuja 29 October 2009) PSC/AHG/2(CCV11) 41.

international community may disregard the Union's non-intervention position and proceed to intervene.

7.7 RECOMMENDATIONS: RESOLVING THE AU'S INTERVENTION DILEMMAS

In chapter six we discussed various mechanisms through which the intervention dilemmas can be resolved, as a way of developing a robust mechanism for the implementation of forceful intervention mandate as envisaged in Article 4(h) of the Constitutive Act of the AU. The mechanisms that were explored are connected to, or would constitute the elimination of legal and political dilemmas of intervention. They would contribute to, or exemplify, the institutionalization of the concept of sovereignty as responsibility. In addition, such structures would permit the AU to undertake a robust role in regional intervention for human rights purposes, even in the context of its relationship with the UN system. This section provides a synopsis of suggestions postulated in chapter six and other chapters.

7.7.1 ROBUST INTERVENTION WITHIN THE UN SYSTEM

This thesis has established that both the AU and the UN have peace and security roles in Africa. In addition, the alleged rule permitting humanitarian intervention, or the principle of consent, cannot provide acceptable justification for forceful intervention by the AU under Article 4(h) of the Constitutive Act while acting outside the UN system. Further, proposals for addressing the legal and political dilemmas of forceful intervention within the international community should take into consideration the necessity of the international rule of law. This implies that an ideal framework should not promote anarchy and disorder within the international community, or permit unrestrained actions by powerful states. Therefore, taking the international rule of law into account, institutional checks are important. Lack of institutional checks and the adoption of a system that can permit powerful states to act in unrestrained manner may lead to greater anarchy, and could contribute to greater human rights violations.

The ineffectiveness the Security Council due to political and strategic interests of the five permanent members (through the threat or use of the veto) has been one of the fundamental causes of the failure of the UN system in authorizing forceful intervention for humanitarian purposes. From both a legal and political perspective, the question is therefore the manner in which the ineffectiveness of the Security Council may be resolved while at the same time safeguarding the international rule of law.

7.7.1.1 Probable Non-African partner states: preference for UN authorization in post Cold War interventions in Africa

As pointed out in chapter six, it is instructive to note that post Cold War interventions (for humanitarian purposes) in Africa, by resourceful states such as the United States, France and United Kingdom, including through NATO, have been after prior authorization by the Security Council. The interventions put into consideration are those that involved elements of enforcement action, although the consent of the territorial state was in some cases also sought, despite the enforcement action mandate from the UN Security Council. It is apparent that for the AU to effectively implement its forceful intervention mandate, burden sharing with resourceful and intervention oriented states such as France, United States and United Kingdom, or even NATO (which have already indicated some willingness to intervene in the region) may be necessary. Based on the fact that France, UK, US and NATO have indicated keenness to undertake enforcement action after authorization from the UN in relation to African conflicts, it seems that is the likely modality upon which partnership with the AU may be formulated. In situations where the Security Council fails in providing timely authorization in a deserving situation, due to political interest of a permanent member, the most reasonable alternative would be for the AU to seek alternative authorization from an emergency session of the General Assembly.

7.7.1.2 Alternative authorization by the General Assembly

The issue of the necessity and possible alternative authorization of an intervention by the General Assembly was discussed in chapter three. Through Uniting for Peace Resolution, the General Assembly sought to assume a greater role in peace and security matters, including the power to authorize enforcement where the Security Council was unable to discharge its role.³³ In sum, under Article 24 of the UN Charter, the Security Council has only *primary* and not *exclusive* responsibility for international peace and security, and is also required to act in accordance with UN purposes. This implies that states (the founders of the United Nations) retain secondary responsibility, which they can grant to the General Assembly,³⁴ which seems to be the most representative organ of the UN. In addition to some of the legal and political factors which were discussed in chapter three, and which seem to favour alternative authorization by the General Assembly, it is also one of the most effective ways of addressing the inefficiencies of the Security Council while safeguarding the international rule of law. The progressive development of the concept of sovereignty as responsibility may to an extent be attributed to General Assembly's initiatives and resolutions.³⁵ A General Assembly affirmation of its capacity to alternatively authorize forcible intervention under the responsibility to protect concept, where the Security Council is unable to discharge its primary responsibility, would further increase chances of the concept being implemented.

³³ UNGA Res 377(V)A (3 November 1950).

³⁴ Juraj Andrassy, 'Uniting for Peace' (1956) 50(3) *American Journal of International Law*. As Allott observes, the United Nations and member states assume residual responsibility where the Security Council is unable to undertake its duties under the UN Charter. Philip Allott, *The International Rule of Law: Essays in Integrated Constitutional Theory* (Cameron May, London 2007) 407.

³⁵ The General Assembly has endorsed the responsibility to protect concept in its resolutions High-Level Panel on Threats, Challenges and Change (n 16) paragraph 203; World Summit Outcome Document (n 17) paragraphs 138 and 139; United Nations News Centre (n 18); Annual debates on the responsibility to protect concept have also been conducted under the auspices of the General Assembly. The recent such discussion was held in July 2011. See, United Nations General Assembly Department of Public Information (n 19).

7.7.1.3 *Retroactive authorization: lack of the emergence of an African regional custom*

African regional and sub-regional organizations such as the AU, ECOWAS and SADC have been granted forceful intervention mandates (for humanitarian purposes) by their member states. It may appear as if such institutionalization of forceful intervention mandate in the region has led to the emergence of a regional custom permitting enforcement action in extreme circumstances, pending subsequent authorization by the Security Council. However, this thesis has established that a customary law that could permit retroactive authorization of such action has not emerged within the African region, due to lack of uniformity of practice and *opinio juris*. Further, permitting forceful intervention by regional arrangements even without prior authorization by the UN could result in such agencies being misused by powerful states, which could increase chances of anarchy and the breach of the international rule of law.

7.7.2 FROM 'CONSENSUAL' PEACE ENFORCEMENT TO ROBUST ENFORCEMENT ACTION

Based on the analysis of the failures of peacekeeping and 'peace enforcement' in Darfur and Eastern Congo, in addition to other places, this thesis advocates for the separation of peacekeeping from enforcement action in interventions by both the AU and UN. Peacekeeping should only be implemented where there is peace to keep. Where conflict is ongoing, and the parties refuse a political settlement, or fail to honour a peace agreement, robust enforcement action, to create the peace and protect civilians, should be implemented. In that case, consent of the parties to the conflict should not be a conceptual basis for enforcement action. It has credibly been observed that consensual intervention is desirable since there is a chance of bringing the conflict to an end without loss of many lives through a military confrontation.³⁶ However, consensual intervention may not be effective in some situations, and is unlikely to be effective where the government is one of the perpetrators or a

Brian D Leppard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (Pennsylvania State University Press, Pennsylvania 2002) 195.

beneficiary of the continuance of the conflict. Therefore, where it is apparent that consensual intervention is ineffective, or is unlikely to succeed in protecting civilians, the international community should undertake robust enforcement action in a prompt and decisive manner/

7.7.2.1 Where the UN peacekeeping is inadequate: robust role by the AU

Where peacekeeping is ineffective in ensuring the protection of civilians, the best option for the AU would be to undertake a more robust role after seeking authorization from the UN, in order to safeguard the international rule of law. This is also important. Where the Security Council is ineffective in providing appropriate authorization for forceful intervention, the AU should seek alternative authorization from an emergency session of the General Assembly. Second, although some conflict situations in Africa may require emergency action (the 1994 fast paced Rwanda genocide is an example) the cases of Eastern Congo and Darfur conflicts have occurred over a relatively long period. In both situations, the AU failed to lobby the Security Council for a more robust and non-contradictory mandate. In the case of Eastern Congo, the AU was not keen on undertaking a direct military intervention role, whether of a peacekeeping or enforcement action nature. With regard to Darfur, the AU, like the UN, continued to focus on the consent of the Sudanese Government.

The necessity of seeking alternative authorization by the General Assembly for a more robust intervention mandate, in order to effectively implement the AU's mandate under Article 4(h) of the Constitutive Act, would only arise where the Security Council has been ineffective. In the case of the Darfur and Eastern Congo conflicts, there is no evidence that the AU sought a more robust mandate from the Security Council which was denied. Therefore, it seems the AU did not exploit the Security Council option, so that an alternative could even be contemplated. As a result, both the Congo and Darfur conflicts turned into an endless cycle of human atrocities against civilians. Although assuming various forms, and different inter-

Rosalyn Higgins deems it absolutely necessary to differentiate enforcement action from peacekeeping, whereby such peace missions should not comprise enforcement functions. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, Oxford 2009) 288.

(occasionally subsidizing only to subsequently erupt with great intensity) crimes against humanity and war crimes, the basis for forceful intervention under Article 4(h) of the Constitutive Act, continued to be committed. In the recent case of Libya, the AU demonstrated that it could expressly obstruct any form of military intervention to protect civilians,³⁸ despite willingness of action by the UN.

7.7.3 INSTITUTIONALIZING RESPONSIBLE SOVEREIGNTY CONCEPTS WITHIN THE AU: ADDRESSING THE UNION'S INTERVENTION DILEMMAS

An analysis of the Africa Union's subsequent practice indicates that its interventions have either been consensual, or of a peacekeeping nature. The AU has failed to undertake forceful intervention for humanitarian purposes even in deserving situations. In addition, the AU opposed forceful intervention in Libya while asserting the need to respect the territorial integrity of the State,"" despite the widespread mass atrocities that were being committed against the civilian population. This thesis attributes the subsequent practice of the African Union to the failure of effective institutionalization of the concept of responsible sovereignty within the Union processes, despite the forceful intervention mandate under Article 4(h) of the Constitutive Act. This has effectively permitted Westphalian concepts of sovereignty to continue exacerbating the legal and political dilemmas of intervention, in addition to providing an effective justification for non-intervention. The research was therefore also concerned with examining how the concept of sovereignty as responsibility could be institutionalized within the AU processes, and factors that could contribute to such institutionalization. In essence, this thesis sought to determine the manner in which the pooled sovereignty system of the AU could become an effective avenue for human rights protection in the region, including through forceful intervention in deserving situations.

Chapter six examined various mechanisms through which the concept of sovereignty as responsibility could be institutionalized within the AU processes, as a

" The AU opposed any form of military intervention in Libya. African Union (n 9) paragraph 6.

* Ibid.

way of resolving the legal and political dilemmas of forceful intervention, in addition to factors that could contribute to the acceptability of reforms. First, the reforms and approaches to sovereignty and intervention for humanity within the system were analyzed. A coherent framework of sovereignty as responsibility at the AU system (which would conceptualize sovereignty as responsibility by both territorial state and the international community) was postulated as important in generating consensus and political will. This could be achieved through consistent African Union's declarations and resolutions, which could influence the interpretation and perception of the AU's core treaty provisions on sovereignty, non-intervention and intervention for human rights protection purposes.

The UN has made some progress on the evolution of the concept of sovereignty as responsibility through adoption of resolutions.⁴⁰ It would also be helpful to have an AU adviser on responsibility to protect, like the case of the UN.⁴¹ Although the African states are members of the UN, this thesis has demonstrated that there have been concerted efforts by African states to preserve and protect some elements of traditional concepts of sovereignty through the AU regional mechanism. The AU system should not encourage or permit efficient use of the concept of sovereignty as an effective justification for non-intervention. It is also necessary that various inconsistencies between the AU's legal framework and the emerging norm of responsibility to protect, which were discussed in chapter four, be addressed. Such inconsistencies hinder effective implementation of the responsibility to protect concept by the AU. It may be necessary that a formal amendment to Article 4(h) of the Constitutive Act, and similar provisions under the legal framework, be carried out in order to conceptualize intervention as a 'duty' rather than as a "right." In addition, comprehensive AU resolutions and declarations that affirm the responsibility to

⁴⁰ For instance, See, High-Level Panel on Threats, Challenges and Change (n 16) paragraph T; World Summit Outcome Document (n 17) paragraphs 138 and 139; United Nations News Centre (n 18); The General Assembly has also been conducting informal thematic discussions on the responsibility to protect concept on an annual basis, such as the July 2011 meeting. See, I - : Nations General Assembly Department of Public Information (n 19).

⁴¹ For the Adviser to the UN Secretary General, see, United Nations News Centre. "Interview Edward Luck, Special Advisor to the Secretary-General" (1 August 2011) <<http://www.un.org/apps/newsmakers.asp?NewsID=38>> accessed 2 August 2011.

protect concept, and conceptualize sovereignty as responsibility to provide protection, are necessary.

An institutional practice of progressive human rights practices within the AU system has been advocated. As such, the AU policies should have the objective and effect of enhancing the protection of civilians that is afforded by the progressive developments in international human rights law, international humanitarian law and international criminal law. Such progressive developments within the international community, and the AU's role and participation, have a bearing on the implementation of the forceful intervention mandate under Article 4(h) of the Constitutive Act. Adherence to the rule of law in AU decision making, rather than political convenience and state interests, is also necessary. The AU legal system is clear that grave situations such as genocide, crimes against humanity or war crimes may be addressed through forceful intervention. Although the AU is a political entity, the rule of law could be integrated and preserved through institutional checks, and by learning from the operations of other regional arrangements such as the EU, which has been more successful in enhancing the rule of law in its processes. This thesis has also highlighted the necessity of a more robust regional approach to the prevention of the occurrence of genocide and crimes against humanity through the AU system. Such a robust approach should proceed beyond negotiations for a political settlement, to include activities such as the obstruction of mass media which is used to spread hate propaganda and ethnic animosity, for instance, the jamming of hate radio stations.

Some of the factors that could contribute to the acceptability of reforms within the AU system, especially the institutionalization of the concept of sovereignty as responsibility and the addressing of various legal and political dilemmas of intervention, were also analyzed. First is the implication of internal conflicts and humanitarian catastrophes to African states structures, since they precipitate states disintegration and break up through calls for self-determination, as the case of Somaliland and South Sudan illustrate. Other costs and implications of conflicts and humanitarian catastrophes include economic decline due to the influx of refugees to neighbouring states and disruption of regional trade and commerce. In addition, if not

implemented, the AU forceful intervention system may become irrelevant to the international community, as the recent interventions in Ivory Coast and Libya seem to suggest. Interventions by external (non-African) states will be executed when it is in the interest of the interveners to act, despite the AU holding a contrary position. Therefore, if the purpose of pooling sovereignty under the African Union system was to avoid external (non-African) intervention, the most effective way to avoid such action is to effectively implement the AU mandate. External (non-African) intervention is continually becoming more likely due to the ever increasing global interdependence.

It has been pointed out that strategic and focused advocacy by the civil society organizations based in Africa can contribute to significant reforms within the AU system, including on issues relating to forceful intervention for human rights purposes. Advocacy by such non-state actors may contribute to the institutionalization of the concept of sovereignty as responsibility within the AU processes, including implementation of Article 4(h) of the Constitutive Act by the AU in deserving situations. Besides supplementing the AU's fact finding capacity through alternative analysis, strategic lobbying by the African based non-state actors can contribute to the amendment of existing AU treaties, and adoption of resolutions that endorse the concept of sovereignty as responsibility. The concept of African solutions to African problems, despite its current shortcomings, may in future provide the conceptual basis for igniting practical and local solutions by the AU, including forceful intervention. Based on the ineffectiveness of the AU system in stopping external (non-African) interventions, the concept of African solutions may provide the impetus to strengthen the regional role of the AU, through a robust implementation of the Union's forceful intervention mandate in deserving situations.

The concept of sovereignty as responsibility does not postulate an end to the state system, or advocate for the abolition of the principle of non-intervention. It has the objective of facilitating the principles of state sovereignty and non-intervention to effectively achieve one of their core purposes, that of ensuring the security and protection of population within a state. If the principles of state sovereignty and non-intervention have the purpose of preventing interstate conflicts that would lead to

catastrophic suffering of populations within states, then they should not be used as a shield that permits the commission of genocide and crimes against humanity against the same population. In addition, the commission of genocide and crimes against humanity within a state cannot be regarded as being purely a domestic matter of a state as it often involves the flow of refugees, militia groups and weapons across state borders, and is therefore a direct threat to regional peace and security.

This thesis has examined the various ways in which the concept of sovereignty as responsibility could contribute to the elimination of the legal and political dilemmas of intervention within the AU system. In relation to the elimination of the intervention dilemmas, various reforms that would be necessary within the AU system were evaluated, in addition to factors that could facilitate the acceptance of such reforms. The capacity of the African Union to stop, pre-empt or deter the commission of mass atrocities provides a foundation for not only greater human rights protection and institutionalization of the rule of law within Africa, but also improvement in security, in addition to the establishment of a conducive environment for regional economic prosperity.

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