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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

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Abstract

This article examines the basis for humanitarian intervention (HI) in the United Nations Charter, the African Union (AU) Charter and in a number of African sub-regional institutions. It traces the historical development of HI and argues that, while the right to HI emerged more than 100 years ago, that right also emerges from the Genocide Convention. The article argues that this treaty connects HI to the developing norm of the responsibility to protect (R2P) and examines the extent to which R2P is garnering wider support around the world. It focuses on the UN, and the various AU and sub-regional institutions and instruments that sanction HI. It assesses whether intervention can be authorized even in the absence of a UN Security Council mandate and examines the principles, application and inter-relationship of R2P and HI in the African context. It traces the use of these norms in Africa, including in the various sub-regional structures, and evaluates the AU's political will and capability to deal with conflict and human rights abuse.

INTRODUCTION

It is no secret that peace and security have eluded many people in Africa. While the number of conflicts around the world is assessed to have declined 40 per cent between 1992 and 2005[1] and the number of states in Africa with ongoing conflict has decreased, a number of African states are still beset by genocide, crimes against humanity, killings, torture, and other civil and political rights violations. In 2007 Freedom House found that, of the 20 countries in world with the worst protection of civil and political rights, eight are in Africa (Côte d'Ivoire, Equatorial Guinea, Eritrea, Libya, Somalia, Sudan, Swaziland

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1 *Human Security Report 2005: War and Peace in the 21st Century* (2005, Oxford University Press) at 22.

and Zimbabwe). It also determined that, of the 45 countries classified as "not free" in the world, 18 are in Africa.[2] Thus, 18 out of the 53 or so countries in Africa are seen to be "not free".[3]

Worldwide it is estimated that 170 million people have been killed as a result of 250 conflicts that have occurred since World War II.[4] While the level of civilian casualties was only about 5 per cent in World War I, in the 1990s civilian casualties accounted for about 90 per cent of the total.[5]

In the 1990s, 160 million Africans lived in countries consumed by civil war; three million of them were killed in the course of such conflicts.[6] Intra-state conflict of this kind comprised 79 of the 82 conflicts on the continent during that period.[7] Of the 32 intra- and inter-state armed conflicts that have occurred worldwide since 2004, nearly half took place in Africa.[8] Children are often used as soldiers in these conflicts and it is estimated that 300,000 child soldiers are involved in 21 ongoing or recent armed conflicts around the world.[9] It has also been estimated that 2 million children died and 6 million children were wounded as a result of conflict in the years between 1994 and 2004.[10]

The UN High Commissioner for Refugees (UNHCR) states that there are about 37 million displaced people around the world as a result of conflict. Many of these people are in Africa, the largest numbers coming from the Democratic Republic of Congo (DRC), Sudan and Somalia. 25 million of the 37 million are internally displaced people.[11]

In the 45 years to 2001, 80 successful and 108 unsuccessful coups took place in Africa, nearly half of them in West Africa.[12] The fact that 50 of these coups, 13 of which were successful, took place in the final decade of the 20th

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2 "Freedom in the world 2007", available at: <http://www.freedomhouse.org/template.cfm?page=15> (last accessed 13 April 2008).

3 The other categories classified by Freedom House are "free" (91 countries) and "partly free" (58 countries).

4 MC Bassiouni "The normative framework of international humanitarian law: Overlaps, gaps, and ambiguities" (1998) 8/2 *Transnational Law and Contemporary Problems* 199 at 203.

5 S Chesterman *Civilians in War* (2001, Lynne Rienner) at 2.

6 S Kibble "Conflict, peace and development: Rights and human security in Africa" (27 February 2003) *Pambazuka News*, available at: <http://www.pambazuka.org/en/category/features/13660> (last accessed 14 April 2008).

7 Ibid.

8 Project Ploughshares *Project Ploughshares R2P: East, West, and Southern African Perspectives on Preventing and Responding to Crises* (2005, Project Ploughshares) at 2.

9 A Sheppard "Child soldiers: Is the optional protocol evidence of an emerging 'straight-18' consensus?" (2000) 12 *The International Journal of Children's Rights* 37 at 70.

10 A Davison "Child soldiers: No longer a minor incident" (2004) 12 *Willamette Journal of International Law and Dispute Resolution* 124 at 144.

11 UN High Commissioner for Refugees *2006 Global Trends: Refugees, Asylum Seekers, Internally Displaced People and Stateless Persons*, available at: <http://www.unhcr.org/statistics.html> (last accessed 15 October 2007).

12 P McGowan "African military coups d'état, 1956–2001: Frequency, trends and distribution" (2003) 41/3 *Journal of Modern African Studies* 339 at 370.

century[13] indicates that forced regime change is on the rise. Even in relatively peaceful states, many Africans endure abject poverty and lack access to food and basic necessities such as potable water.

To deal with conflict, a number of steps have been taken by a variety of actors including the placing of peacekeepers on the ground. While in 2002 there were 31,000 peacekeepers on the ground in Africa (from the UN and African Union (AU)), by 2007 the number was more than 60,000.[14]

While, historically, principles of non-intervention and sovereignty have been thought to preclude the action of one state within another under such conditions, these concepts are yielding to two "new" doctrines: humanitarian intervention (HI) and the "responsibility to protect" (R2P). Yet, as this article will show, the recent attention to R2P belies the principle's 19th century roots and substantive connections to human rights instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[15] and the African Charter on Human and Peoples' Rights.[16] While some criticize R2P as eroding the equality between states and particularly the sovereignty of weaker ones, the doctrine continues to gain support and prominence in debates on the protection of individuals against shocking human rights abuses.[17]

This article examines the basis for HI in the UN Charter,[18] the AU Charter[19] and a number of African sub-regional institutions. It is not, however, meant to discount the other bases upon which HI may be available. Certainly, the right to HI emerging from the Genocide Convention (the duty to prevent and punish) is an important basis for it and connects it to the developing norm of the R2P. On a number of occasions, the UN Security Council has noted that there are obligations on states to prevent and punish genocide.[20] R2P is implicit in these resolutions. More recently, UN Security Council resolutions have specifically incorporated R2P.

The article also examines the extent to which R2P is garnering wider support. It focuses on the UN, and the various AU and sub-regional instruments that sanction HI, and assesses whether intervention can be authorized even

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13 Id at 348.

14 UN Department of Peacekeeping Operations *Background Note*, available at: <http://www.un.org/Depts/dpko/dpko/bnote.htm> (last accessed 14 April 2008).

15 Available at: <http://www.unhchr.ch/html/menu3/b/p_genoci.htm> (last accessed 14 April 2008).

16 Available at: <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last accessed 14 April 2008).

17 L Holzgrefe and R Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003, Cambridge University Press).

18 Available at: <http://www.un.org/aboutun/charter/> (last accessed 14 April 2008).

19 Available at: <http://www.au2002.gov.za/docs/key_oau/au_act.htm> (last accessed 14 April 2008).

20 See for example UN Security Council Resolution 1325 on Women, Peace and Security (31 October 2000), available at: <http://www.peacewomen.org/un/sc/1325.html> (last accessed 14 April 2008).

in the absence of a UN Security Council mandate. The article also examines the principles, application and interrelationship of R2P and HI in the African context. This analysis is crucial because the AU's political will and capability to deal with conflict and human rights abuse on the continent is doubted by some, even though in July 2005 the AU Assembly at Sirte, Libya set a goal for achieving a conflict-free Africa by 2010.[21] At the moment, the success of this ambitious mandate seems remote. While many efforts are underway by a range of actors in Africa, the political will, resources and funding are necessary requirements if the AU and the various African sub-regional institutions are to fulfil their HI and R2P mandates.

SOVEREIGNTY: THE BACKDROP TO THE R2P AND HI DEBATE

Traditional notions of state sovereignty cabin the domestic affairs of a state within the purview of that state, regardless of its misconduct, no matter how atrocious, towards its people. Yet sovereignty has undergone drastic changes on the international stage. For centuries, states have meddled in each other's affairs. In the 19th century, for example, the international community regarded piracy, the slave trade and certain instances of minority group rights violations as open to international scrutiny notwithstanding sovereignty. British anti-slave patrols on the high seas were some of the earliest attempts at HI. In 1827, Great Britain, France and Russia intervened in Greece to ameliorate the oppression of Greek Christians by the Ottoman Empire. According to the London Treaty,[22] which authorized the intervention, "sentiments of humanity" motivated the active states. Abuse by the Ottoman Empire fuelled several other 19th century interventions, including France's invasion of Syria in 1860 and Russia's incursion into the former Yugoslavia in 1877, the latter being authorized by a number of European states.[23]

While the principle of state sovereignty has not been discarded entirely, it has been eroded in recent years. While the classic international legal principle of sovereignty is static, national sovereignty in practice fluctuates with shifting state obligations. For instance, states limit their sovereignty by ratifying international treaties and joining international organizations. Thus, national sovereignty is an ever-evolving concept as opposed to having the fossilized status it was once thought to have. Nevertheless, some states only begrudgingly part with elements of their sovereignty. For example, the United States of America often resists ceding sovereignty and advances unlimited sovereignty

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21 G Mugumya "Peace, security and the responsibility to protect: Policy options for the AU's Peace and Security Council" (keynote speech at an Institute for Public Policy Research/Institute for Security Studies meeting on "Protecting civilians in African crises: Is military force the only effective response?", London, 14 September 2006).

22 The London Treaty for the Pacification of Greece (1827), available at: <http://www.arts.yorku.ca/hist/tgallant/documents/1827treatyoflondon.pdf> (last accessed 14 April 2008).

23 See further R Kolb "Note on humanitarian intervention" (2003) 849 *International Review of the Red Cross* 119.

in the name of self-interest. Yet, even the US has for many years yielded some degree of sovereign independence by joining international organizations and ratifying international and regional instruments.

The importance of sovereignty in Africa has recently come into doubt. "[I]n the case of many African states, without effective control over the entirety of their territories and with their legitimacy challenged among significant elements of their populations, sovereignty is more legal fiction than practical reality".[24] Certainly, African states' membership of the AU has diminished their sovereignty given that, by joining, they have tacitly accepted the curtailment of certain rights. The AU has chosen to de-emphasize the importance of sovereignty by casting it as "conditional and defined in terms of a state's capacity and willingness to protect its citizens".[25]

HUMANITARIAN INTERVENTION: PERMISSIBLE INCURSIONS INTO SOVEREIGNTY

The concept of HI and its legitimacy under international law have long been debated. HI has been described as "the protection by a state or a group of states of fundamental human rights, in particular the right of life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon authorization by the relevant organs of the UN nor upon invitation by the legitimate government of the target state".[26] Thus, the absence of the consent of the state in which the intervention occurs is a crucial element. HI differs from humanitarian aid in that the former may incorporate the threat or use of force in the process of responding to complex humanitarian emergencies. There are times, however, when the two doctrines may overlap.

The right to exercise HI can be found in treaty law, including the Genocide Convention, international customary law and the UN Charter, although provisions are found also in other instruments, including the Charter of the AU.[27]

The UN Charter is often seen to be the most important instrument in determining whether HI is permitted in international law. Some believe that HI is only permitted if pursued within the processes established in the UN Charter. The UN Charter seemingly limits HI by prohibiting the use of force in interstate relations and obliging member states to "refrain in their international relations from the threat or use of force against the territorial integrity or

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24 Project Ploughshares *Project Ploughshares R2P*, above at note 8 at 3.

25 K Powell "The African Union's emerging peace and security regime: Opportunities and challenges for delivering on the responsibility to protect" (2005) 119 *Institute for Security Studies Monograph Series* 1 at 1.

26 D Kritsiotis "Reappraising policy objections to humanitarian intervention" (1998) 19 *Michigan Journal of International Law* 1005 at 1021.

27 See further J Sarkin and M Pietchman "Legitimate humanitarian intervention under international law in the context of the current human rights and humanitarian crisis in Burma/Myanmar" (2003) 33/1 *Hong Kong Law Journal* 371.

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[28] However, Article 39 of the charter authorizes the UN Security Council to determine the existence of a threat "to the peace, breach of the peace, or act of aggression" and to decide which measures are necessary to "restore international peace and security". While the charter does not contain a provision specifically authorizing the use of HI, chapter VII permits the UN Security Council to impose several measures against non-compliant states, such as non-forceful measures under article 41 and air, sea or land action in order to maintain or restore international peace and security pursuant to article 42. One significant area of debate that arose in the wake of the US-led invasion of Iraq continues unresolved: does the use of force require a direct resolution from the UN Security Council sanctioning such action or is "implied Security Council authorization" sufficient?

The UN General Assembly may recommend measures to maintain international peace and security unless the same matter is being considered by the Security Council.[29] In such a case, the General Assembly must obtain an express request from the Security Council to consider the matter. However, under emergency special sessions, the General Assembly can recommend collective measures to member states when the Security Council has failed to "exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression".[30]

Under the UN Charter, regional organizations have the authority to respond to situations that threaten international peace and security[31] with the authorization of the UN Security Council.[32] Regional structures or other willing partners may intervene in certain absences of Security Council action.[33] Such

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28 UN Charter, art 2(4).

29 Id, art 11.

30 Report of the International Commission on Intervention and State Sovereignty at para 6.30, available at: <http://www.iciss.ca/report-en.asp> (last accessed 14 April 2008).

31 UN Charter, art 52.

32 Id, art 53.

33 There have also been a few cases of single country interventions into a neighbouring state. For example, Tanzania intervened in Uganda and overthrew Idi Amin in the late 1970s. Although Kenya, Nigeria, Libya and Sudan objected to this, the international community response was generally muted, even though intervention by Vietnam in Cambodia at around the same time drew much reaction. The intervention was accepted by many as Tanzania acting in self-defence and was not even discussed by the UN Security Council or General Assembly. It was however discussed by the Organization of African Unity on a number of occasions. See SD Murphy *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996, University of Pennsylvania Press) at 106; NJ Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000, Oxford University Press) at 122. A more recent example is that of France intervening in the DRC in 2003. However, that intervention had UN and European Union authorization and played a limited role, while the UN organized its own force. See VK Holt and MK Shanahan *African Capacity-Building for Peace Operations: UN Collaboration with the African Union and ECOWAS* (2005, Stimson Center) at 50.

intervention has occurred in numerous cases, including several within Africa. Some of these are discussed below.

In 1990, the Economic Community of West African States (ECOWAS) intervened in Liberia, also beyond the UN framework. Rather than condemning this action as a dangerous precedent, the UN praised ECOWAS's intervention in Security Council resolution 788.[34] In 1998, ECOWAS's unauthorized intervention in Sierra Leone was similarly praised. These and other ECOWAS interventions will be examined below. Ben Kioko, AU legal counsel, has commented on the UN's position toward ECOWAS interventions: "It would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at the time."[35]

Despite ECOWAS's precedents for collective action, the AU seemingly continues to defer to the UN Security Council as the primary caretaker of international peace and security.[36] However, this may not always be the case and issues of disagreement and circumstances where there is competition or competing objectives may arise in the future. This can be seen in the fact that, at its 7th extraordinary session in March 2005, the AU's Executive Council noted[37] that force should not be exercised beyond article 51 of the UN Charter and article 4(h) of the AU Constitutive Act.[38] The council also agreed that intervention by regional organizations should only take place with UN Security Council approval. However, the council also found that, "[s]ince the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard".[39]

Thus, in times of urgency, the AU is prepared first to sanction action and then to seek subsequent approval. However, the provision also seems to go beyond urgency and seems to indicate by using "proper appreciation" that there may be a disagreement when HI should be used by the various institutions and in that case the AU might decide to intervene regardless. It may

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34 J 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 at 261.

35 Id at 263.

36 Protocol Relating to the Establishment of the Peace and Security Council of the AU, adopted by the 1st ordinary session of the AU Assembly, Durban, 9 July 2002.

37 "The common African position on the proposed reform of the UN: 'The Ezulwini Consensus'" (7th extraordinary session of the AU Executive Council, Addis Ababa, Ethiopia, 7–8 March 2005).

38 Available at: <http://www.au2002.gov.za/docs/key_oau/au_act.htm> (last accessed 14 April 2008).

39 "The common African position", above at note 37 at 6.

even be that the AU accepts that there are processes which permit HI outside the process envisaged by the UN Charter as noted above. Thus, it may be that the AU determines that authorization for HI in international law exists in customary international law, or in treaty law such as that which can be found in the Genocide Convention. According to the AU's document on the subject, the Ezulwini Consensus,[40] it is accepted that retrospective authorization by the UN may occur. The document provides that, where this occurs, the UN should assume financial responsibility for the action undertaken. In the absence of subsequent UN authorization, the AU shoulders the financial burden of the mission. This suggests that the AU may at times go it alone without UN authorization, and may or may not subsequently have the HI ratified. The fact that no prior UN authorization is provided for, and that subsequent ratification may not be given, or requested, makes it clear that the AU sees the right, or possibility, for HI outside the UN Charter.

HUMANITARIAN INTERVENTION REDUX: THE RESPONSIBILITY TO PROTECT

Origins and evolution

The responsibility to protect (R2P) is believed to have first appeared in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), a body comprising representatives from both the political north and south.[41] However, some believe that the concept originated from former UN Secretary General Kofi Annan's 1999 charge that the world must formulate a response to gross human rights violations.[42] The theoretical basis of R2P stems from the scholarship of Francis Deng, former Sudanese minister of state for foreign affairs, former Sudanese ambassador to the United States, Canada and Scandinavia, and the Secretary General's special representative on internally displaced persons between 1992 and 2004. In 1995 Deng proposed the idea of "sovereignty as responsibility".[43] In May 2007, UN Secretary General Ban Ki-moon appointed Deng UN special adviser for the prevention of genocide and mass atrocities. This article will return to this later in this section.

The link between the responsibility of a state, as far as human rights are concerned, and notions of sovereignty, in the African context, can be seen in the

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40 Above at note 37.

41 International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Research, Bibliography and Background* (2001, International Development Research Council).

42 K Annan "Balance state sovereignty with individual sovereignty!" (speech at the UN General Assembly on 20 September 1999). See also K Annan "Two concepts of sovereignty" (1999) 18 *The Economist* 49.

43 FM Deng "Frontiers of sovereignty" (1995) 8/2 *Leiden Journal of International Law* 249. See also S Kimaro, T Lyons, D Rothchild and IW Zartman *Sovereignty as Responsibility: Conflict Management in Africa* (1996, Brookings Institution Press).

1998 statement of then Organization of African Unity (OAU) Secretary General Salim Ahmed Salim who noted: "We should talk about the need for accountability of governments and of their national and international responsibilities. In the process, we shall be redefining sovereignty".[44] At the OAU summit in 1998 in Ouagadougou, Burkina Faso, President Nelson Mandela of South Africa stated: "Africa has a right and a duty to intervene to root out tyranny … we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right and duty to intervene when behind those sovereign boundaries, people are being slaughtered to protect tyranny".[45]

The R2P, however, finds its roots much earlier and its origins can be found elsewhere, including in the 1948 Genocide Convention. That instrument imposes upon states a duty to "prevent and punish",[46] which can be interpreted as a mode of R2P because it obligates states to protect possible genocide victims and to punish genocidal perpetrators. Article 8 of the convention also empowers states to call upon the UN to take appropriate action under the UN Charter in situations of impending genocide. Given that the prohibition of genocide, war crimes and crimes against humanity qualify as *jus cogens* [peremptory norms], it follows that R2P can and should be invoked in their prevention. However, R2P critics maintain that state sovereignty also enjoys *jus cogens* status and that the two rights must be balanced. Regardless of the validity of technical legal arguments, sovereignty is increasingly ceding moral ground to the rights and needs of groups and individuals within states, particularly in cases where gross human rights violations are being committed.

The origins of the responsibility to protect can also be detected in the Martens clause, contained in the Hague Conventions of 1899 (II) and 1907 (IV),[47] which codified the legal principles of "laws of humanity, and the requirements of the public conscience". It provides additional legal protection to individuals and groups during war and peace. The Martens clause is a bedrock of positive international human rights law. Even though positive principles date back thousands of years to the origins of natural law, the clause has shaped the course of customary international humanitarian and human rights law. For instance, the clause's unanimous adoption at the Hague conferences and acceptance by various international courts reflect international consensus with regard to non-treaty humanitarian law. Notwithstanding its wide-ranging interpretations, the extent of the definition, scope and role of the Martens clause has been widely debated. Many regard the clause as the

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44 C Landsberg "The fifth wave of panAfricanism" in A Adebajo and IOD Rashid *West Africa's Security Challenges: Building Peace in a Troubled Region* (2004, Lynne Riener) 117 at 124.

45 *Africa's Responsibility To Protect* (2007, Cape Town Centre for Conflict Resolution) at 15.

46 Genocide Convention, above at note 15, art 1.

47 Preamble: Laws and Customs of War on Land, Hague Convention II (1899); Preamble: Laws and Customs of War on Land, Hague Convention IV (1907). Available at: <http://avalon.law.yale.edu/subject_menus/lawwar.asp> (last accessed 14 April 2008).

official basis, in codified international law, for protection against "crimes against humanity". Its rhetoric on the "laws of humanity" and "requirements of the public conscience" forms the backdrop for modern states' duties and responsibilities. The latter argument supports the contention that R2P originated over a century ago.[48]

According to the ICISS report, "the debate about intervention for human protection purposes should focus not on 'the right to intervene' but on 'the responsibility to protect'".[49] The report argued that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states".[50] The report also frames R2P as: "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".[51] The report notes that the R2P can in some cases lead to HI. However, various criteria must be met: just cause, the right intention and proportional means are required; it must be the last resort; there must be reasonable prospects of success; and the authority to exercise HI must be obtained (ie from the UN Security Council).[52] As will be noted throughout this article, the HI issue that is probably the most debated in Africa, and elsewhere, is whether the AU or the various sub-regional institutions in practice need to seek prior UN Security Council approval for HI to occur. In this context, and as a result of NATO's intervention in Kosovo and the US invasion of Iraq, many believe that UN primacy to determine when intervention occurs is on the decline. Already, the UN is not the only institution determining when action ought to be taken to address a range of issues in Africa.[53]

There are three primary principles embodied in R2P:

- responsibility to prevent (to tackle the causes of conflict and other human-created crises);
- responsibility to react (to take appropriate action where there are compelling circumstances, including coercive steps such as sanctions or even

48 J Sarkin "The historical origins, convergence and interrelationship of international human rights law, international humanitarian law, international criminal law and international law: Their application from at least the nineteenth century" (2007) 1/1 *Human Rights and International Legal Discourse* 125 at 137.

49 ICISS *The Responsibility to Protect*, above at note 41 at para 2.29.

50 Id at para 10.

51 Id at para 13.

52 R Hamilton "The responsibility to protect: From document to doctrine – but what of implementation?" (2006) 19 *Harvard Human Rights Law Journal* 289 at 289.

53 See further WP Sidhu "Regionalisation of peace operations" in EB Eide (ed) *Effective Multilateralism: Europe, Regional Security and a Revitalised UN* (2006, Foreign Policy Centre) 32.

military intervention as a last resort where there are reasonable prospects of success, taking due regard of the issue of proportionality); and

- responsibility to rebuild (after an intervention, to provide assistance in dealing with the causes of the conflict, and to assist in reconstruction, reconciliation, and so forth).[54]

It is clear that prevention, addressing conflict where it occurs (including punishment) and taking steps after the close of the conflict must be part of the responsibility to protect. There are many facets to these issues and various component parts of what constitutes R2P. At one level, there has been a great deal of compliance with the responsibilities to prevent and react to conflict recently in Africa. Regional organizations and governments have taken many steps to mediate or otherwise address conflict situations across the continent. However, there are many cases where meditation or other prescriptive action has failed, or the state concerned refuses to permit outside involvement. In these cases, R2P is not met if the violations continue. In the absence of specific action, such as for example sanctions or, in severe cases, HI, the duties envisaged in R2P are violated. This is clear when the violations continue for some time. Similarly, the responsibility to rebuild must at times also mean taking precise measures to address the violations and punish those responsible. It can involve punishing leading offenders found on the territory of other states, as well as other courses of action, such as assisting victims in a variety of ways. States that harbour former leaders, or assist those individuals in hiding their ill-gotten gains from the countries in concern, are in violation of R2P. Action should be taken against these states. The onus to prevent and react should also be placed on those states that have important relationships with violator states. These states, for example China with respect to Sudan, Zimbabwe and others, have significant economic and military relationships. They are in influential positions to affect the conduct of these rogue states. Where these states fail to use their influence they are also failing their obligations.

Instilling and installing democracy, human rights promotion and protection, good governance, the rule of law and anti-corruption strategies, as well as allied issues, are also components of R2P. The onus is on states to ensure that these principles are incorporated, not in name only. Independent, fearless institutions (including the media) deserve support and assistance, including institutions that play watchdog roles. These bodies should be independent through legal status, independent in composition and independent in operation. They ought to be credible and impartial institutions that, without fear or favour, carry out their mandates effectively. The responsibilities to prevent and react must also deal with the causes of the conflict and why human rights violations occurred. While R2P is often allied with civil and political rights, it must also be as applicable to socio-economic rights. Part of the reason

54 Id at xi.

for this is that no real or sustainable distinction can be drawn that distinguishes these rights anymore. Thus, for example, the legacy of colonialism, which still haunts many parts of the continent, has both civil and political, as well as socio-economic, rights implications. They must all be addressed, especially by states that were colonial powers. Development and poverty alleviation must also form part of the responsibility to prevent, as well as the responsibility to react and rebuild. Access to a range of socio-economic rights, including healthcare, clean water and education (inclusive of human rights education) must also be a priority. Long term reconciliation efforts, especially in deeply divided societies, are fundamental to ensuring a peaceful and stable society.[55] It is, however, not only the role of the state that is crucial in this regard. A range of actors can play a part. However, all the steps necessary to achieve the various goals depend on the political will to achieve them, which is not always present.

It is abundantly clear in the ICISS report that "[m]ilitary intervention for human protection purposes must be regarded as an exceptional and extraordinary measure".[56] Military action should therefore be authorized as a last resort to halt or avert "large-scale loss of life, actual or apprehended with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large-scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape".[57] But, there is great reluctance to resort to HI even though there are a number of situations that warrant its use.

Despite the widespread acceptance of the principles inherent in R2P, international institutions have been slower to embrace the concept. For example, the use of force as a human rights tool was rejected by the International Court of Justice in its 1986 *Nicaragua v United States* decision.[58] Written at the height of the Cold War, the decision upheld as inviolable the principle of non-interference. However, the judgment did not necessitate an examination of the use of force vis-à-vis severe human rights violations such as genocide. The decision is therefore of narrow application, particularly in light of the dramatic developments in international law in the past two decades. In addition, the court held that humanitarian assistance is permissible in cases where it is "limited to the purposes hallowed in practice, namely to prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need".[59] Some observers argue, not without controversy, that this exception affirms

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55 See E Daly and J Sarkin *Reconciliation in Divided Societies: Finding Common Ground* (2007, University of Pennsylvania Press).

56 ICISS *The Responsibility to Protect*, above at note 41 at para 4.18.

57 Id at para 4.19.

58 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* 1986 ICJ (27 June).

59 Id at paras 267–68.

that a right to HI in customary international law exists outside the UN Charter and without UN Security Council authorization. Others contend that, without conforming state practice, this theory lacks a basis in international custom.

Supporters of R2P argue that, rather than erode states' rights, R2P in fact promotes sovereignty because it acknowledges powerful states as best positioned to protect their own citizens.[60] Yet R2P is a needs-based responsibility rather than a state right. This characterization resembles states' "duties" which are embodied in the African Charter on Human and Peoples' Rights. In addition, R2P mirrors the charter's recognition of peoples' rights. The doctrine is also particularly pertinent to the body of international humanitarian law. As mentioned above, piracy, slave trading and persecution of minorities were proscribed by the international community as early as the mid-19th century.

The rise of R2P

Regardless of the debates regarding its origin, R2P is receiving increasing support, although from others, including some states in the global south, there has recently been a push back. In 2004 a high-level UN panel published a report which promoted the notion of R2P by discussing notions such as that of "collective security" and "collectively endorsed military action".[61] The panel noted:

> "There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community – with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies."[62] (Emphasis original)

The panel specifically endorsed R2P stating: "We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent".[63]

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60 Powell "The African Union's emerging peace and security regime", above at note 25 at 7.

61 *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change* (2005, United Nations).

62 Id at para 201.

63 Id at para 203.

Thus, there was acceptance by the panel that HI could only occur within the context of the UN Charter, but not from customary international law or from treaty law, such the Genocide Convention.

R2P as a norm that is applicable in international law is now found in a number of recent UN Security Council resolutions. For example, on 28 April 2006, the Security Council unanimously adopted resolution 1674 on the protection of civilians in armed conflict, which contributed to R2P's broad acceptance and development. In addition, R2P appears in Security Council resolution 1706 on peacekeepers in Darfur and in resolution 1755, which extended the UN mission in southern Sudan.

States further accepted R2P by affirming the principles in paragraphs 138 and 139 of the 2005 World Summit Outcome document,[64] which say that R2P *must* be invoked in the face of severe human rights abuses such as genocide, war crimes, ethnic cleansing and crimes against humanity. UN Secretary General Kofi Annan's *In Larger Freedom* UN report noted: "I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it".[65]

Such is the increase in the popularity of R2P that several states have pressed for its codification and the extension of its effects. Yet, China and Russia's conservative positions have prevented such a development. As a result, the final text of resolution 1706 was weaker than its draft. While annual open UN Security Council debates on R2P ensure its presence on the agenda, the narrow approach of China, Russia and other states means that R2P has a lot of ground to cover. Even though many states support R2P in principle, practical and widespread fears over the creation of dangerous precedents prevent its expansion and codification.

Regardless of such obstacles, increasing enforcement of international human rights and humanitarian law throughout the world has bolstered R2P's acceptance. The past 15 years have seen the establishment of ad hoc tribunals for the former Yugoslavia and Rwanda, hybrid tribunals in Cambodia, Kosovo, Sierra Leone and East Timor, and the International Criminal Court with its mandate to prosecute individuals who have committed genocide, crimes against humanity and war crimes.

In 2005, R2P was additionally bolstered by the Committee on the Elimination of Racial Discrimination's (CERD) decision[66] on a follow-up procedure to its Declaration on the Prevention of Genocide.[67] That decision lists key indicators for assessing the presence and severity of factors that may ignite conflict and genocide in CERD party states and details procedures for responding to information about serious racial discrimination. While both measures

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64 UN General Assembly, 2005 World Summit Outcome: UN doc A/60/L.1 (15 September 2005).

65 *A More Secure World*, above at note 61 at para 135.

66 CERD/C/67/1 14 October 2005.

67 CERD "Declaration on the prevention of genocide", available at: <http://www2.ohchr.org/english/bodies/cerd/docs/declaration_genocide.doc> (last accessed 16 April 2008).

are valuable additions for addressing genocide, the exclusive focus on racial discrimination may impede efforts to identify and address genocidal acts directed at other groups, including religious, political, social, gender or economic groups.

Minority Rights Group International, a non-governmental organization that researches and advocates for ethnic, religious and linguistic minorities as well as indigenous people, has proposed the establishment of a genocide prevention office to address ongoing genocide and operate as an early warning system for genocide around the world.[68] Notwithstanding the value of such an institution, it would probably be limited in role, prominence and clout for lack of status, visibility and authority. Conversely, a treaty body attached to the Genocide Convention would be far more effective. Such a committee's power and mandate could be built upon the successes and failures of other such UN committees. As a UN organ, a treaty committee would ensure that there is a distinct institution devoted exclusively to genocide. A Genocide Convention committee should focus on research, monitoring and advocacy, and work towards reducing genocide by acting immediately and urgently when it does occur. It could also educate states and share preventative measures necessary to ensure the eradication of genocide. While it would be a challenge to amend the Genocide Convention, and many would see an attempt to do so as futile, such a body would undoubtedly facilitate increased awareness of the convention and guide states on relevant international standards and states' duties under the convention. As a full-time institution, such a committee could also lobby for the domestic incorporation of the Genocide Convention and report its recommendations to the UN General Assembly and Security Council. It could also resolve disputes and receive complaints from states and sub-state organizations.

Significant developments in the prevention arena have also strengthened R2P as a viable and available norm in international law and international relations. As noted above, UN Secretary General, Ban Ki-moon has appointed a special adviser for the prevention of genocide (Francis Deng). The post was renamed so that Mr Deng is now Special Representative of the Secretary General. It was also upgraded to a full-time post at the level of Under Secretary General.[69] Additionally, in August 2007, UN Secretary General Ban Ki-Moon proposed creating the position of special adviser on the responsibility to protect.[70] While a part-time position, at the level of Assistant Secretary

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68 I Matheson "First Rwanda, then Darfur, and next? How we can help to end these horrors" (16 October 2006) *Times Online*, available at: <http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article601484.ece> (last accessed 16 April 2008).

69 UN press release: "Secretary General appoints Francis Deng of Sudan as Special Advisor for Prevention of Genocide, Mass Atrocities" (29 May 2007, United Nations Department of Public Information), available at: <http://www.un.org/News/Press/docs/2007/sga1070.doc.htm> (last accessed 16 April 2008).

70 UN News Centre press release: "Preventing mass atrocities 'sacred calling' for UN and the world – Ban Ki-moon" (10 October 2007, UN News Centre), available at: <http://www.un.

General, this post will reinforce the possibility that R2P will become more accepted and realizable. It may be the necessary impetus towards ensuring that the principle becomes acceptable and applicable in more circumstances, including Zimbabwe, Burma and Sudan where gross human rights violations have been occurring for many years. American Edward Luck, a professor at Columbia University in New York who has had a long association with the UN, was appointed to the position in December 2007.[71]

The creation in February 2008 of the Global Centre for the Responsibility to Protect, an initiative of five high profile international non-governmental organizations (the International Crisis Group, Human Rights Watch, Oxfam International, Refugees International and the Institute for Global Policy), is an important development in the growth of the responsibility to protect.[72] The fact that it is supported financially by a whole host of countries and large donors[73] means that it should have a significant impact.

R2P, HI AND THE AU's ROLE IN PREVENTING CONFLICT AND HUMAN RIGHTS ABUSE

History

Before its dissolution in 2001, the OAU played a limited role in solving human rights problems on the continent. The organization's inaction was party attributed to the fear that criticism of other countries would only pave the way for recrimination and accusations of similar violations taking place on the territory of accusing states. Thus, the political will to criticize, let alone take concrete steps to affect, domestic human rights practices was severely limited. The OAU, as an institution largely comprising heads of states that were often responsible for human rights abuses, was reluctant to rely upon HI as a foreign policy tool. The principle of non-interference was thus preserved at the expense of human rights.[74]

Despite its shortcomings, the OAU enjoyed some modest success in responding to continental conflict towards the end of the 20th century. For example, in the late 1990s, the organization mediated conflict in the DRC. It also brokered peace between Ethiopia and Eritrea in 2000. However, the OAU was

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org/apps/news/storyAr.asp?NewsID=24260&Cr=ki-moon&Cr1=> (last accessed 16 April 2008).

71 UN News Centre press release: "Secretary General appoints special adviser to focus on responsibility to protect" (21 February 2008, UN News Centre), available at: <http://www.un.org/apps/news/story.asp?NewsID=25702&Cr=ki-moon&Cr1> (last accessed 16 April 2008).

72 Press release: "Launch of new global centre against mass atrocity crimes" (14 February 2008, The Global Centre for the Responsibility to Protect).

73 Including Australia, Belgium, Canada, the Netherlands, Norway, Rwanda, the UK, the John D and Catherine T MacArthur Foundation, and the Open Society Institute.

74 See further Project Ploughshares *Responsibility to Protect*, above at note 8.

severely criticized for not stopping the genocide in Rwanda, or ending wars in Liberia and Burundi.[75]

At the same time, the OAU embarked upon a number of initiatives to deal with conflict and human rights, initiatives upon which the subsequent AU was able to capitalize. These initiatives included the New Partnership for Africa's Development's (NEPAD)[76] peace and security agenda, the Conference on Stability, Security, Development and Cooperation in Africa, and the Declaration on a Framework for an OAU Response to Unconstitutional Changes in Government (2000).[77] Notwithstanding these achievements, the OAU morphed into the AU partly out of a desire to create an organization that was more capable of decisive and effective action. The AU was born in part out of a belief that the international community, and particularly the UN Security Council, did not sufficiently attend to African needs,[78] and that African solutions were needed for African problems, particularly in cases of violent conflict and human rights abuse.[79]

The AU's creation reflected a normative shift regarding the role that a regional institution should assume in addressing human rights violations on the continent. Under the OAU, the principle of non-interference was prioritized over a duty to protect against widespread and systematic human rights abuses. However, the AU is now attempting to rectify such problems.

An AU approach to HI and R2P

The AU has established several principles guiding its role in questions of peace, security, human rights and HI. The AU Charter and other regional instruments reflect the need to deal with these issues comprehensively and effectively. Whereas the OAU focused on states and heads of state, the AU Constitutive Act begins with a call for the organization to achieve "greater unity and solidarity between the African countries and the peoples of Africa".[80] The act also affirms the sovereign equality and interdependence among AU member states.[81] It espouses the harmonious co-existence of

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75 K Kindiki "The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal" (2003) 3 *African Human Rights Law Journal* 97 at 98.

76 Various processes in the latter part of the 1990s led to NEPAD. Firstly, the OAU adopted the Millennium Africa Recovery Plan (MAP). Later MAP became part of the New African Initiative which became NEPAD.

77 "Declaration on a Framework for an OAU Response to Unconstitutional Changes in Government" (36th ordinary session of heads of state and government of the OAU, Lomé, Togo, 10–12 July 2000) AHG/Decl 5 (XXXVI).

78 See B Kioko "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention" (2003) 85 *International Review of the Red Cross* 821 at 852.

79 See further M Muyangwa and MA Vogt *An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, 1993–2000* (2002, International Peace Academy).

80 AU Constitutive Act, art 3(a).

81 Id, art 4(a).

member states and affirms their rights to live in peace and security.[82] This provision is guaranteed by the act's ban on the use or threat of force among AU states[83] as well as its advancement of *uti possidetis* [the principle of the stability of borders], which cements the independence-era borders of African states.[84] The act also calls for a common defence policy in Africa and the peaceful resolution of African conflicts through means decided upon by the assembly as a method of encouraging peace and security on the continent.[85]

In order to promote human rights, good governance and the rule of law, the Constitutive Act mandates respect for the sanctity of human life, and condemns impunity, political assassination, acts of terrorism, subversive activities[86] and unconstitutional changes of government.[87] This last provision arises from the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government in 2000.[88] The act also states that members should respect democratic principles, human rights, the rule of law, good governance[89] and gender equality,[90] as well as promote social justice to ensure balanced economic development.[91]

To protect human rights, the AU can intervene in the sovereign affairs of other member states in certain circumstances. For example, states may seek AU intervention in order to restore peace and security within their territories.[92] While member states may not unilaterally interfere in the internal affairs of another state,[93] the AU can authorize collective action in or against a member state when the assembly determines that "grave circumstances", such as war crimes, genocide and crimes against humanity, exist.[94] This article 4(h) was amended by the Assembly of Heads of State and Government[95] and now reads: "[T]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council".[96] The amendment was due to come into force 30 days after

82 Id, art 4(i).
83 Id, art 4(f).
84 Id, art 4(b).
85 Id, art 4(e).
86 Id, art 4(o).
87 Id, art 4(p).
88 Id, art 3(5).
89 Id, art 4(m).
90 Id, art 4(l).
91 Id, art 4(n).
92 Id, art 4(j).
93 Id, art 4(g).
94 Id, art 4(h).
95 See E Baimu and K Sturman "Amendment to the African Union's right to intervene: A shift from human security to regime security?" (2003) 12/2 *African Security Review* 37.
96 Adopted by the 1st extraordinary session of the AU Assembly in Addis Ababa, Ethiopia

two-thirds of the AU member states had deposited their instruments of ratification. Even though a majority of states have adopted the amendment, it has yet to come into force.[97]

Despite the amendment's uncertain legal status, the fact remains that AU member states agreed to article 4(h) before its amendment. This evinces their willingness, at least in theory, to respond collectively to grave circumstances. The AU has also affirmed its acceptance of R2P on various other occasions. For example, at the 7th extraordinary session of the AU's Executive Council in March 2005, member states established a common position known as the Ezulwini Consensus,[98] which reiterated the need for UN reform. One area of reform included restructuring the UN Security Council. The Ezulwini Consensus argued that the Security Council's authority to sanction intervention directly, as well as through regional structures, will not be legitimate until it becomes more inclusive, with permanent African members. Additionally, AU member states agreed to principles of collective action in the World Summit Outcome document, which confirms R2P's global protection from genocide, war crimes, ethnic cleansing and crimes against humanity. However, the text reserves collective action to the UN Security Council "on a case-by-case basis".[99]

Other AU institutions have also adopted R2P. For example, in November 2007 the African Commission on Human and Peoples' Rights adopted a resolution on "strengthening the responsibility to protect in Africa". In the resolution, the commission noted that in the "recent past, the international community has not responded quickly enough to situations of genocide, war crimes and crimes against humanity [and is deeply concerned at] the continued slow response to the allegations of genocide and crime against humanity".[100] It commended the UN for establishing the UN/AU force in Darfur, as well as states that contributed troops to the force, while condemning the rebels for their attacks on AU Mission in Sudan troops and others. The commission also called on the UN and AU to enhance peacekeeping forces in Somalia and called on those involved in the conflict in the DRC, Chad and the Central Africa Republic to comply with their human rights obligations.[101] Yet, the commission could go much further with R2P, ensuring that it is a critical part of its work in general. The use of a R2P framework on a consistent basis could dramatically affect its activities, mandate, resolutions and decisions.

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on 3 February 2003 and by the 2nd ordinary session of the AU Assembly in Maputo, Mozambique on 11 July 2003.

97 See Baimu and Sturman "Amendment to the African Union's right", above at note 95 at 37.

98 See note 37 above.

99 World Summit Outcome, above at note 64 at para 139.

100 ACHPR/Res.117 (XXXXII) 07: resolution on strengthening the responsibility to protect in Africa (42nd ordinary session held in Brazzaville, DRC, 15–28 November 2007).

101 Ibid.

A number of key questions regarding AU collective intervention however remain. Under what circumstances would the AU take action by using force to halt violations without the consent of the individual African state concerned? What would the character of those actions be? What is the likelihood that the AU will move from policy to action in its fulfilment of these objectives? If the AU is to live up to the ideals embodied in article 4(h), political will, funds and adequately trained personnel are needed to carry out these missions.

It must be remembered that, before 1988, only 12 African countries had contributed troops to UN peacekeeping missions; that number has since risen to 29.[102] Still, some argue that Africa's sub-regions are not well positioned to support peace operations.[103] For example, Benedikt Franke observed that, as "several regiosceptics have noted, these weaknesses leave African militaries no choice but to return to outdated modes of warfare" where "the combatants use the weaponry of the Korean war, the tactics of the First World War and the medical treatments of the 19th century".[104]

Funding has been an issue for AU interventions. While the European Union African Peace Facility has provided much funding for African peace operations, additional and independent funding is needed. The AU has proposed increasing state contributions to a peace fund from 6 to 10 per cent, the creation of a pan-African travel visa costing US$10 and a peace tax on African residents. The AU also wants states contributing troops to cover their full costs for the first 14 days of deployment.[105]

In light of African countries' limited experience with peacekeeping, they require training and logistical assistance to remedy their capacity and resource deficits in mission planning and execution.[106]

AFRICAN MECHANISMS TO DEAL WITH CONFLICT AND GROSS HUMAN RIGHTS ABUSE

The African Union

In addition to its various instruments affirming the norms of HI and R2P, the AU hosts several institutions that address conflict and human rights abuse. Aside from the AU General Assembly, the Executive Council, the Pan-African Parliament, the chairperson of the African Commission, the Panel of the

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102 E Berman "African regional organisations' peace operations: Developments and challenges" (2002) 11/4 *African Security Review* 33 at 34.

103 See for example R Jackson "The dangers of regionalising international conflict management: The African experience" (2002) 52/1 *Political Science* 41.

104 BF Franke "In defence of regional peace operations in Africa" (26 February 2006) available at: <http://jha.ac/articles/a185.pdf> (last accessed 16 April 2008).

105 S Mbogo "African peacekeeping force development continues despite funding challenges" (2006) *World Politics Watch*, available at: <http://www.worldpoliticsreview.com/Article.aspx?id=429> (last accessed 16 April 2008).

106 E Berman and K Sams *Peacekeeping in Africa: Capabilities and Culpabilities* (2000, UN Institute for Disarmament Research) at 113.

Wise, the Peace and Security Council, the Peace Fund, the African Standby Force and the Military Staff Committee, various sub-regional mechanisms of the Regional Economic Communities are charged with preventing conflict and protecting human rights. The African Peer Review Mechanism,[107] the African Commission on Human and Peoples' Rights, and the now merged African Court of Justice and Human Rights are also mandated with human rights protection.[108]

The AU has also established a Post-Conflict and Reconstruction Framework. It emerged from the African Post-Conflict Reconstruction Policy Framework designed by NEPAD in 2005. Its goal is to "improve timeliness, effectiveness and coordination of activities in post conflict countries and to lay the foundation for social justice and sustainable peace, in line with Africa's vision of renewal and growth".[109] It contains various principles and directs various interventions for peace-building purposes to achieve the goals found in the framework. Another important policy is the Common African Defence and Security Policy.

The most important AU mechanism charged with intervention duties is the Peace and Security Council (PSC). In January 2004, the AU protocol establishing the PSC entered into force and established a "collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa".[110] The PSC heralds a more robust system for the early detection of crisis and conflict. It is also empowered to take steps to prevent such problems.[111] It comprises 15 members of equitable geographic distribution, ten of whom are elected to serve for two years and five of whom are elected for three years. States' capacities and willingness to contribute militarily and financially to the AU as well as to its diplomatic missions in Addis Ababa, Ethiopia are also taken into account in determining membership of the PSC.

The PSC's mandate is broad and must be exercised in conjunction with the chairperson of the AU Commission. The mandate includes implementing a common AU defence policy[112] and ensuring the implementation of international, continental and regional conventions and instruments. It must also harmonize and coordinate regional and continental efforts to combat

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107 African Peer Review Mechanism *APRM Base Document*, available at: <http://www.uneca.org/aprm/Documents/APRM%20Base%20Document.pdf> (last accessed 17 April 2008). 27 states have acceded to this mechanism and five have already been through the process. See further *Overview Paper on The Role of the APRM in Strengthening Governance in Africa: Opportunities and Constraints in Implementation* (2007 UN Office of the Special Adviser on Africa).

108 See further A Lloyd and R Murray "Institutions with responsibility for human rights protection under the African Union" (2004) 48/2 *Journal of African Law* 165.

109 *Report on the Elaboration of a Framework Document on Post-Conflict Reconstruction and Development* (2006, AU Executive Council) at 3.

110 AU Protocol Establishing the Peace and Security Council, art 2.

111 Id, art 2.

112 Id, art 7(h).

international terrorism,[113] promote arms control and disarmament,[114] and promote and maintain peace, security and stability in Africa.[115] The PSC is also charged with promoting and developing a strong "partnership for peace and security" between the AU and the UN and its organs as well as other international organizations,[116] and with developing policies and actions that will ensure the compliance of external initiative in peace and security on the continent with AU objectives and priorities.

The PSC must also anticipate and prevent disputes and conflicts, undertake peace-making and peace-building functions, resolve conflicts, and authorize, deploy and set guidelines for peace operations. In addition, it is charged with examining progress made towards democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by member states.[117]

In addition to its many obligations, the PSC is also vested with several methods by which it may respond to non-compliant member states. For example, it may institute sanctions where an unconstitutional change of government takes place in a member state.[118] It may recommend that the AU Assembly authorize an article 4(h) intervention into a member state where "grave circumstances" exist. Upon the approval of the assembly, in the terms of article 4(j) of the AU Constitutive Act, the PSC must approve the "modalities" of the chosen intervention.[119] The PSC is also empowered to examine and take appropriate action when the independence and sovereignty of a member state is threatened by acts of aggression, including those by mercenaries.[120] It is also mandated to support and facilitate humanitarian action in instances of conflict or natural disasters.[121] The AU Assembly may also grant the PSC additional powers to address issues with implications for the maintenance of peace, security and stability on the continent.[122] Situations are referred to the PSC via member states, the chairperson of the AU Commission, the Panel of the Wise, sub-regional structures, the Pan-African Parliament and civil society.

One particularly unique aspect of the PSC's mandate is its obligation to involve civil society in its work.[123] This feature is important because civil society involvement will enable the PSC to disseminate information about its work and thus establish legitimacy and credibility. Thus, the PSC should

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113 Id, art 7(i).
114 Id, art 7(n).
115 Id, art 7(j).
116 Id, art 7(k).
117 Id, art 7(m).
118 Id, art 7(g).
119 Id, art 7(f).
120 Id, art 7(o).
121 Id, art 7(p).
122 Id, art 7(r).
123 Id, art 20.

also build an outreach component to inform and educate the public as well as to empower entitled individuals to interact with it.

The role of the PSC in dealing with conflict and its connection to R2P can be seen in the statement of Saïd Djinnit, Commissioner for Peace and Security of the African Union who stated: "No more, never again. Africans cannot … watch the tragedies developing in the continent and say it is the UN's responsibility or somebody else's responsibility. We have moved from the concept of non-interference to non-indifference. We cannot as Africans remain indifferent to the tragedy of our people".[124] The concluding section of this article will return to this statement.

One of the AU's first interventions occurred in May 2003 when South Africa, Ethiopia and Mozambique deployed troops to Burundi without UN authorization. However, in 2004, the UN Security Council praised the role of the AU contribution, without ratifying the intervention.[125] The Security Council's praise can be seen, at least, as tacit ratification, although questions remain regarding exactly what the UN was praising: the intervention or the AU role thereafter. The fact that nothing was said about the AU's un-authorized actions, in similar fashion to a number of un-authorized ECOWAS interventions, will in future give credence to the idea that prior UN authorization is not absolutely necessary. This article will return to the issue of non-authorization and post-intervention ratification, particularly as regards the situation where neither prior authorization nor post-ratification occurs, and how the AU already has made provision for this.

Another role played by the AU was when it suspended Mauritania's membership in 2005 after President Maaouiya Ould was deposed in a coup.[126] The organization also threatened sanctions and suspended Togo from participating in AU affairs after a 2005 coup in the country.[127] The organization only lifted the suspension after Togo held elections. Unfortunately, the AU Mission to Sudan's failure to bring peace and stability to Darfur has somewhat undermined the organization's credibility as a critical conflict-resolution actor.[128] The mission's shortcomings are considered a reflection of the AU's inability to achieve its regional objectives, and the recent integration of AU and UN forces in Darfur reaffirms the AU's incapacity to fulfil its own mandate.

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124 Quoted in Powell "The African Union's emerging peace and security regime", above at note 25 at 1.

125 Res 1545, S/Res/1545 (2004), 21 May 2004. See VK Holt and MK Shanahan *African Capacity-Building for Peace Operations: UN Collaboration with the African Union and ECOWAS* (2005, Stimson Center) at 49.

126 AU press release: "The chairperson of the Commission of the African Union (AU) expresses his concern over the events in Mauritania" (3 August 2005, African Union).

127 Peace and Security Council press release: PSC/PR/Stat.(XXXVI)-(ii) "Statement" (2005, African Union).

128 See further C Guicherd *The AU in Sudan: Lessons for the African Standby Force* (2007, International Peace Academy).

Nevertheless the AU has been involved in trying to deal with conflict in countries such as Burundi, Central African Republic, Comoros, Côte d'Ivoire, the DRC, Liberia, Sudan and Western Sahara. The pressure that the AU brought to bear on Senegal to prosecute the president of Chad, Hissen Habre, also reflects the positive role that the AU wants to play regarding R2P, although it did take some time for the AU to act.

While the AU has taken action in a number of other circumstances, it is subject to debate, in some instances, whether it was HI or not, based on whether the state where the intervention took place gave its consent to the intervention. Additionally, there is some debate as to whether a peacekeeping operation can always be classified as HI and whether such a mission needs UN authorization. Regardless, it is clear that these interventions, however classified, are covered by R2P.

Intervention into Somalia has a notorious history. US intervention there in the 1990s still bears scars for the US. Despite many attempts to deal with Somalia, peace and stability have remained elusive. In March 2007, the AU sent troops to Somalia after the UN Security Council adopted resolution 1744, which authorized AU deployment.[129] Ongoing consultation and joint planning continues between the organizations.[130] This may be the future methodology of a working relationship between the UN and AU on upcoming processes.

However much more needs to be done to achieve peace and stability in places such Chad, the DRC, Somalia, Ethiopia, the Central African Republic, Sudan, Zimbabwe and elsewhere in Africa, and for the AU principles on HI and R2P to be fully realized.

A useful step taken by the AU is the establishment of field offices that monitor conditions where the AU believes it necessary. These field offices can play many of the functions envisaged within R2P. They increase the visibility of the AU, hopefully with positive results. These offices have been established in Central Africa Republic, Chad, Comoros, Côte d'Ivoire, the DRC, Ethiopia/Eritrea, the Great Lakes, Liberia, Mauritania, Somalia and Western Sahara. Given sufficient resources and staffed with well-trained and skilled individuals, they could have dramatic and positive results on preventing and addressing conflict in those areas.

Sub-regional responses

In addition to the efforts of the AU, conflict prevention has not been confined to the continental level. Sub-regional institutions in east, west, central and southern Africa have made considerable inroads into preventing and managing conflict. They face many difficulties however, including "serious

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129 T 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 at 80.

130 T Murithi "The responsibility to protect, as enshrined in article 4 of the Constitutive Act of the African Union" (2007) 16/3 *African Security Review* 14.

human, financial, technical, administrative and management capacity challenges … additional burdens, [are] difficult working conditions and weak information technology infrastructure and capacity".[131]

Economic Community of West African States (ECOWAS)

ECOWAS, a consortium of 15 west African states, has been active in the region since 1975.[132] As noted earlier, ECOWAS led the way in Africa with regard to HI. It intervened in Liberia in 1990 and Sierra Leone in 1998, without UN authorization. It also intervened in Guinea-Bissau in 1999 and 2001. The question remains, however, as to whether these actions were HI or not. This would be the case if ECOWAS was asked to play the role it did by the state concerned. ECOWAS did, however, threaten Guinea-Bissau with expulsion from the organization in terms of the ECOWAS Protocol on Good Governance and Democracy[133] and the AU Algiers Declaration on Unconstitutional Changes of Government[134] when President Kumba Yala suffered a coup d'état in September 2003.[135]

More recently ECOWAS has played a role in dealing with the conflicts in Côte d'Ivoire and Liberia. In Côte d'Ivoire, ECOWAS intervened in 2002. France later helped in this endeavour. The UN then became involved in peacekeeping in 2003. As with its interventions in Liberia in 1990 and Sierre Leone in 1998, these were not authorized by the UN. However, after they occurred, the UN again welcomed the ECOWAS interventions.[136] In Liberia, the UN authorized ECOWAS to intervene in 2003.[137] This it did with the assistance of the US, while the UN assumed the leadership role some months later.

Thus, on occasion, the UN has authorized HI. At other times, it ratifies the action taken after the event has already occurred. The questions that arise then are: When must prior authorization be obtained from the UN and what happens if such authorization is not obtained? Also, what happens if the UN refuses to sanction such an intervention? ECOWAS seems to have decided that, at times, it will go alone without UN authorization, as has already occurred on a number of occasions. In this regard, the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999) states that it will "inform the

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131 UN Office of the Special Adviser on Africa "The emerging role of the AU and ECOWAS in conflict prevention and peacebuilding" (background paper prepared for expert group meeting, 28 December 2007) at para 56.

132 See <http://www.ecowas.int/> (last accessed 17 April 2008).

133 H Bakhoum "ECOWAS as regional peace broker", available at: <http://www.bmlv.gv.at/pdf_pool/publikationen/sorting_out_the_mess_ecowas_regional_peace_broker_h_bakhoum.pdf> (last accessed 17 April 2008).

134 See <http://www.ecowas.cc/paps.php#ECOMOG> (last accessed 17 April 2008).

135 Bakhoum "ECOWAS as regional peace broker", above at note 133.

136 Res 1464, S/Res/1464 (2003), 4 February 2003. See Holt and Shanahan *African Capacity-Building*, above at note 125.

137 Res 1497, S/Res/1497 (2003), 1 August 2003. See Holt and Shanahan id at 49.

United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism".[138] Thus, ECOWAS foresees future interventions, and that they may be conducted without prior UN authorization or that it would seek subsequent ratification. Article 52 simply envisages ECOWAS informing the UN after the fact that it had undertaken an intervention. No consultation, seeking of authority or request for post-event approval is envisaged by the article. In practice, there may well be consultation. Only in circumstances where no agreement is reached is ECOWAS likely to go it alone.

ECOWAS has various institutions and structures to deal with conflict, including the Court of Justice, which was established in 1991 and came into existence in 1993. ECOWAS established it to deal with disputes arising out of the application and the interpretation of the organization's treaty.[139] It may also have jurisdiction where human rights violations allegedly occurred.

ECOWAS also established the Council of Elders to play a part in conflict prevention, for example, by monitoring elections.[140] It will also be involved in questions of intervention as well as post-conflict efforts.

In 2008 ECOWAS established the ECOWAS Network of Electoral Commissions. This was agreed upon at the end of a two day meeting of the Heads of Electoral Management bodies in the region, and is intended to promote independent and impartial electoral management bodies in ECOWAS states.[141]

The ECOWAS Mediation and Security Council, which is composed of representatives of ECOWAS member states, has ultimate authority to decide whether to intervene in a state. The organization may intervene when internal conflict threatens "to trigger a humanitarian disaster" or "poses a serious threat to peace and security in the sub-region".[142] Intervention is also permitted in instances of "serious and massive violations of human rights and the rule of law" and if there is "an overthrow or attempted overthrow of a democratically elected government".[143] Lastly, the Mediation and Security Council may sanction action in any other situation where it deems intervention to be necessary.[144]

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138 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, art 52, available at: <http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf> (last accessed 17 April 2008).

139 See <http://www.court.ecowas.int/> (last accessed 17 April 2008).

140 See for example ECOWAS press release: "ECOWAS electoral observers in Sénégal" (press release no 11/2007, 25 February 2007, Abuja) and ECOWAS press release "ECOWAS observers to be deployed in Nigeria for general elections" (press release no 28/2007, 4 April 2007, Abuja).

141 ECOWAS press release: "Heads of election management bodies establish [sic]" (Press release008/2008, 9 February 2008, Conakry).

142 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999), art 25.

143 Ibid.

144 Ibid.

In addition to the Mediation and Security Council, ECOWAS established a Department of Defence and Security in the Office of the Deputy Executive Secretary Political Affairs, Defence and Security (DES-PADS) pursuant to article 16 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security. The director of the Department of Defence and Security assists the DES-PADS in situations relating to defence and security in west Africa. The department's two principal programme officers in charge of mission planning and management as well as the defence and peacekeeping division are charged with planning and managing ECOWAS peace missions. The entire department is intended to support the reinvigorated ECOWAS Stand-by Force project,[145] which is composed of 6,500 soldiers and headquarters personnel. It also includes a Mission Planning and Management Cell, comprising ten officers from ECOWAS states.

However, limiting the realization of its goals is the fact that ECOWAS processes suffer from severe constraints including under-funding and understaffing. High staff turnover exacerbates this. These issues have a dramatic affect on the capacity of the organization to carry out its mandate. ECOWAS is however attempting to redress these matters.

Inter-Governmental Authority on Development (IGAD)[146]

While east Africa currently lacks a sub-regional intervention structure akin to that of ECOWAS, IGAD has been attempting to develop such an arrangement.[147] It is the successor to the Intergovernmental Authority on Drought and Development created in 1986,[148] and has been playing a role in dealing with conflict.[149] Article 19 of its charter holds that: "member countries shall act collectively to preserve peace, security and stability, which are essential prerequisites for economic development and social progress". In 1993 it created a Standing Committee on Peace to deal with conflict in Sudan. Since 1995, IGAD has housed a conflict early warning and response network to help prevent the intensification of inter-state conflicts and enable the IGAD secretariat to implement conflict-prevention strategies such as fact-finding missions.

IGAD's role in conflict reduction has focused on Sudan and Somalia. IGAD has played a role in bringing peace between north and south Sudan. It has also attempted to play a role in reducing conflict caused by large and bloody cattle raids in the region.[150]

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145 See <http://www.ecowas.int/> (last accessed 17 April 2008).

146 Comprising Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda.

147 See draft Protocol for the Establishment of the Eastern Africa Standby Brigade (2005, IGAD), available at: <http://www.iss.org.za/AF/RegOrg/unity_to_union/pdfs/igad/easbrigfeb04prot.pdf> (last accessed 17 April 2008).

148 See <http://www.africa-union.org/Recs/IGAD_Profile.pdf> (last accessed 17 April 2008).

149 J Young "Weaknesses of IGAD mediation in the Sudan peace process" (28 January 2008) *Sudan Tribune* at 5.

150 "Tackle roots of deadly Africa cattle raids – IGAD" (28 May 2007) *Reuters Alertnet*, available

IGAD also fits into the AU plan for an African standby force, although tensions existed between it, the East African Community (EAC)[151] and the Common Market for Eastern and Southern Africa[152] about which sub-regional body should play this part. They too have been examining the role they can play with regard to conflict.

In a 2004 an IGAD meeting of experts established the East Africa Standby Brigade (EASBRIG).[153] Soon thereafter, the eastern African chiefs of defence staff signed the draft Protocol for the Establishment of the Eastern Africa Standby Brigade and in April 2005 the Policy Framework, Memorandum of Understanding and Budget for the establishment of EASBRIG were adopted.

Southern African Development Community (SADC)[154]

Like other sub-regional blocs, SADC[155] (originally the Southern African Development Coordination Conference),[156] has been developing its ability to prevent and manage conflict. SADC was predated by the Inter-State Defence and Security Committee (ISDSC), established by the frontline states of Mozambique, Tanzania and Zambia in 1975.

SADC has some history in dealing with conflict, although its role is not free from controversy. In August 1998, Angola, Zimbabwe and Namibia intervened in the DRC. The purpose behind this intervention again is controversial. While SADC auspices did not organize it, the sub-regional body retroactively endorsed it.[157] In September 1998, South Africa (with troops from Botswana arriving later) intervened into Lesotho to quell a coup d'état. This intervention was supposedly carried out under the auspices of SADC. Whether SADC could take such action under its charter, whether it had mandated South Africa, Botswana and Zimbabwe to take action, and what specifically South Africa's motivations for intervening in Lesotho were, are all clouded in controversy and conjecture.[158]

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at: <http://www.alertnet.org/thenews/newsdesk/B331348.htm> (last accessed 17 April 2008).

151 Comprising Tanzania, Kenya, Uganda, Burundi and Rwanda.

152 Comprising Angola, Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

153 See <http://www.easbrig.org/about.php> (last accessed 3 December 2007).

154 Comprising Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

155 See <http://www.sadc.int/english/about/profile/index.php> (last accessed 17 April 2008).

156 The Southern African Development Coordination Conference was established in 1980 and was transformed into SADC in 1992.

157 EG Berman and KE Sams "Constructive engagement: Western efforts to develop African peacekeeping" (1998) 33 *ISS Monograph* 1 at 9.

158 See FJ Likoti "The 1998 military intervention in Lesotho: SADC peace mission or resource war?" (2007) 14/2 *International Peacekeeping* 251.

In 1996, SADC established the Organ on Politics, Defence and Security Cooperation (OPDS). OPDS is charged with protecting against instability arising from the breakdown of law and order, intra-state conflict, inter-state conflict and aggression. It is intended to promote political cooperation, develop common foreign policy approaches, promote sub-regional coordination and cooperation, and establish appropriate mechanisms to prevent, contain and resolve inter- and intra-state conflict. OPDS may authorize intervention as a last resort.[159] It is empowered to act where "significant intra-state conflict" exists, such as where "large-scale violence between sections of the population or between a state and sections of the population, including genocide, ethnic-cleansing and gross violation of human rights exists, or where there has been a 'coup or other threat to the legitimate authority of a State' where 'a condition of civil war or insurgency' exists and there is 'a conflict which threatens peace and security in the Region or in the territory of another State Party'".[160]

The Protocol on Politics, Defence and Security Cooperation incorporated ISDSC under the OPDS.[161] The ISDSC oversees developments in the areas of defence, public security and state security. According to the protocol, states may not use or threaten to use force against each other except in cases of self-defence. However, when peaceful means of resolving a conflict have been unsuccessful, the chairperson, upon the advice of the ministerial committee, may recommend that the summit pursue "enforcement action".[162] The summit can only agree to such action as a last resort in accordance with article 53 of the UN Charter and with the authorization of the UN Security Council.[163]

In 2003 SADC adopted a strategic indicative plan for the organ, of which the first objective is to protect people and the region from "instability arising from the breakdown of law and order, intra-state and inter-state conflicts and aggression".[164] The SADC system also allows for a SADC regional brigade, which would be part of the broader African standby force.

Central Africa: the Economic Community of Central African States (ECCAS)

While established in 1983, ECCAS[165] was inactive for a number of years. However, its members entered into a non-aggression pact in 1994. Since a 1999 agreement to promote, maintain and consolidate peace and security in the region, ECCAS has had a Council for Peace and Security in Central Africa. The council comprises the Defence and Security Commission, the Multinational Force of Central Africa and the Early Warning Mechanism of

159 Protocol on Politics, Defence and Security Cooperation (2001), art 2.

160 Id, art 11(2).

161 Id, art 3.

162 Id, art 11(3)(c).

163 Id, art 11(3)(d).

164 Strategic Indicative Plan for the Organ on Politics, Defence, and Security Cooperation, objective 1, available at: <http://www.sadc.int/content/english/key_documents/sipo/sipo_en.pdf> (last accessed 17 April 2008).

165 See <http://www.ceeac-eccas.org/> (last accessed 3 December 2007).

Central Africa, all of which were issued standing orders in 2002. A 2003 meeting of defence chiefs of staff agreed to establish and maintain a brigade-size peacekeeping force as a component of the African standby force.[166] In 2004 the structure of the planning element's regional headquarters was decided. That same year, states agreed that the ECCAS standby brigade will comprise 2,177 troops. This decision followed the AU's announcement that its force should comprise five regional brigades of 2,000 to 3,000 soldiers, each of which could be deployed within 30 days for normal missions and 90 days for complex ones. An action plan establishing the ECCAS planning element and standby brigade was also adopted.[167]

Other sub-regional structures

There are various other sub-regional institutions within Africa. For instance, in central Africa there is the Central African Economic and Monetary Community. Other groupings are the Arab Maghreb Union and the Mano River Union.[168] A further group that has member states from more than one sub-region is the community of Sahel-Saharan states, established on 4 February 1998 and comprising 23 members.[169] It deploys missions to strengthen peace, security and stability in the region.[170] A possible northern African standby brigade, headquartered in Libya, has been delayed because of regional coordination difficulties.

These regional structures are part and parcel of the African-wide system and will be useful in formulating and instigating HI. The African standby force, expected to come into being in 2010, will similarly consist of regional forces. However, doubts continue to surround the capacity of these institutions to prevent conflict and build peace on the continent, especially given the difficulties experienced by the AU in its past attempts to engage in HI.[171]

CONCLUSION

While non-interference has historically framed questions of human rights protection and promotion since at least the 19th century, the primacy of

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166 See further V Kent and M Malan "The African standby force: Progress and prospects" (2003) 12/3 *African Security Review* 29.

167 AU "Experts' meeting on the relationship between the AU and the regional mechanisms for conflict prevention, management and resolution" (March 2005), available at: <http://www.africa-union.org/root/au/AUC/Departments/PSC/Asf/doc/ASF%20roadmap.doc> (last accessed 17 April 2008).

168 Comprising Guinea, Liberia and Sierra Leone.

169 Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, The Gambia, Ghana, Guinea-Bissau, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia.

170 See <http://www.cen-sad.org/new/index.php?option=com_content&task=view&id=33&Itemid=76> (last accessed 16 April 2008).

171 M Juma and A Mengistu *The Infrastructure of Peace in Africa: Assessing the Peacebuilding Capacity of African Institutions* (2002, International Peace Academy).

sovereignty has been on the decline. In recent years, R2P has risen to unprecedented stature. Yet, attention regarding R2P may be little more than rhetorical; in practice, states remain reluctant to advance the use of HI. Some states support R2P it seems in part because it remains somewhat vague. There still exists a large degree of theoretical ambiguity about what R2P means and when it is applicable. Alex de Waal argues for example that the failure to achieve R2P in Darfur "owes much to the inadequate conceptualization of the R2P".[172] More is needed to clarify what it is, when it is applicable, and when and how it ought to occur in practice. In the absence of benchmarks and standards that can be applied each time a situation arises where R2P may be applicable, debate about its applicability arises. Adopting some rules would help to create standardization around the issues. While this may occur at some point, it may not be in the immediate future, especially without the occurrence of another cataclysmic event, such as the events in former Yugoslavia or in Rwanda in 1994. It was those events that spurred the formation of international criminal tribunals. Thus, R2P's expansion as a relevant and important norm in international law is likely, but at what pace remains unclear. The fact that some of the major powers, including those who wield the UN Security Council veto is also likely to stymie the use of force in places where it should be used. This has already caused the failure to use R2P to its fullest extent in situations such as Burma and Darfur where HI is most warranted. Politics, and the division between the global north and south, continue to remain major obstacles to the more successful use of the principle to prevent and deal with conflict.

One of the most recent displays of international reluctance towards R2P took place in early 2007 when the United States and the United Kingdom submitted a draft resolution on the shocking human rights abuses in Burma to the UN Security Council. The Security Council vote 9:3 in favour of the resolution was defeated by the vetoes of Russia and China. The United States, the United Kingdom, France, Belgium, Italy, Ghana, Peru, Panama and Slovakia all voted for the resolution. The resolution's rejection, while not unexpected, was nonetheless vexing given that the resolution itself contained nothing to which the international community ought to have objected, particularly in light of Burma's failure to meet its international human rights obligations. Indeed, the resolution was mildly worded. There was no reference to consequences for Burmese non-compliance. Nor were there demands for sanctions, peacekeepers or intervention of any sort. Opposing states (China, Russia and South Africa) justified their votes on the grounds that the General Assembly or other UN organs, such as the Human Rights Council, were the proper venues for addressing such matters, not the Security Council. The UN Security Council's equivocation on Burma reflects the reluctance by at least

172 A de Waal "Darfur and the failure of the responsibility to protect" (2007) 83/6 *International Affairs* 1039 at 1054.

some states and some international institutions even to make statements concerning certain countries where gross human rights violations take place.

Later in 2007, after demonstrations on the streets of Burma were violently put down, the UN Human Rights Council (HRC) did unanimously adopt a resolution on Burma. However, an HRC resolution is not binding and no state has to take action, unlike a Security Council resolution that can mandate action and state compliance. Thus, as this example indicates, R2P, which is even less demanding than the principles of HI, is not always capable of realization. Where a matter comes before the Security Council, politics between the permanent members of the council still play a major role in determining whether a resolution even makes it to the floor, never mind the wording of the resolution, what actions, if any, it demands and whether the resolution is adopted.

While the AU has crafted a regime to confront its numerous human rights problems, it will be years before it achieves its goals of delivering security to the millions of Africans engulfed in conflict and daily human rights abuse. Although many African states remain racked by violence and conflict, fewer African countries are plagued by these problems than in the past.[173] In July 2007, Freedom House noted that peace and liberty are advancing in Africa, albeit unevenly.[174] Their report stated: "Sub-Saharan Africa in 2007 presents at the same time some of the most promising examples of new democracies in the world – places where leaders who came to power through fair elections provide real opportunities for their citizens to live in freedom – as well as some of the most disheartening examples of political stagnation, democratic backsliding, and state failure."[175]

The intervention of the international community, including the United Nations special adviser on the prevention of genocide, Francis Deng,[176] in Kenya and the success in finding a solution to the crisis there in February 2008, may give some credence to the notion that principles are realizable in Africa. Already countries such as Nigeria and South Africa, as they vie for a permanent UN Security Council seat, have played an important role in bringing about peace, or reducing conflict, in a range of countries across the continent. Their roles and motives are however not always perceived in the best light. For example, South Africa's role in regard to Zimbabwe is controversial, and its policy of quiet diplomacy has not had much success. Some see South Africa as benefiting, economically and politically, from the problems in Zimbabwe, and thus not really an honest broker. Individual African leaders have also

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173 See further MG Marshall and TR Gurr *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-determination Movements, and Democracy* (2005, Centre for International Development and Conflict Management, University of Maryland) at 39–40.

174 See <http://www.freedomhouse.org/template.cfm?page=70&release=529> (last accessed 17 April 2008).

175 Ibid.

176 UN press release 2008 "Kenya: UN genocide adviser urges end to violence in Kenya, sends staffer there" (28 January 2008, UN News Service), available at <http://www.un.org/apps/news/story.asp?NewsID=25425&Cr=kenya&Cr1> (last accessed 17 April 2008).

played a crucial role in reducing conflict or the potential for conflict. At the behest of the AU, Kofi Annan, Graça Machel and Benjamin M'Kapa have played a positive role in a variety of conflict settings.[177] So have a range of former African leaders, as well as others.

A critical issue is what happens when mediation or other processes are unsuccessful, as is the case with Zimbabwe or Sudan. There, conflict has continued for years with dramatic affects on the civilian population. HI as envisaged in the AU Charter, or other institutions, must at some point become a necessity if peace is not achieved. Already the intervention by the AU into the Comoros in March 2008 indicates a willingness at some level to use HI. However, HI is likely to be used rarely. However, a failure to go beyond the placing of peacekeepers on the ground may, if inadequate results are achieved, tarnish the AU with the same brush used to ridicule the OAU for its inaction and inadequate commitment to solve Africa's many human rights problems. While the AU is involved in many more places than the OAU was, making tough choices and showing the political will to deal with those places where intractable conflict still exists, remains.

While the duty to prevent and react seems clear, without HI and action to punish those responsible for massive human rights violations, on occasion, R2P has minimal value. The advent of universal jurisdiction in more than 100 countries means that prosecutions can take place in states even where there is no direct connection to the crimes committed. Thus, institutions must comply with the responsibilities to react and rebuild, in order for R2P to be meaningful and relevant to those who are suffering the effect of human rights violations.

With adequate political will, resources and training, the efforts of Africa's continental and regional institutions and mechanisms can promote the use of HI and R2P to capitalize upon such positive developments and alleviate the suffering of so many throughout the continent.

It is very dependent on the political will of the range of African actors that can play a part in doing so. While the AU and other sub-regional institutions in Africa have moved from "non-interference to non-indifference", non-indifference can still mean unresponsiveness and inaction. If the people in Africa can look forward to steps being taken to limit gross human rights violations, R2P must also mean, if necessary, HI using force. In cases where the violations are serious, systematic or ongoing, R2P cannot mean non-intervention and non-intrusion. If this is the case, R2P will mean that those in power in states where human rights violations abound will continue to act with impunity. There is less incentive for them to deal with their human rights problems. These states will continue to snub their noses at the international community's concerns, and continue to commit massive human rights violations. In some cases, therefore, R2P must mean immediate and forceful humanitarian intervention. A commitment to R2P must also by implication mean a commitment to HI.

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177 Archbishop D Tutu "Taking the responsibility to protect" (19 February 2008) *International Herald Tribune*.