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# **THE AFRICAN UNION'S IMPLEMENTATION OF THE RESPONSIBILITY TO PROTECT**

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## DECLARATION

I, **Adewale Benjamin Samuel Showers** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LL.M Degree in International Law.

Signed.....

Date.....

Supervisor: Dr. Gus Waschefort

Signature .....

Date.....

## **DEDICATION**

This work is dedicated to Prof. Enid Rosamond Ayodele Forde and Mrs Georgiana Corbola King. May light perpetual continue to shine on you and may your souls continue to rest in perfect peace.

## **Acknowledgement**

I will like to thank God Almighty for health and strength throughout this tedious journey.

I am thankful to my Parents for their tireless support morally and financially all these years. I would also like to express gratitude to Ms. Fumilayo Showers and Dr. Martha Forde for their indefatigable efforts in facilitating the completion of this study.

I am most indebted to my supervisor Mr Gus Waschefort for the intellectual direction and discipline he has given not only during the course of this research but throughout the coursework. I am truly grateful.

Finally, many thanks to my friends in the LLM (International law and Multi Disciplinary Law programmes) 2010 & 2011 Classes for the happy and unique time we spent together. I will take back with me a lot of happy memories.

God bless you all.

## **ABBREVIATIONS**

ACHPR	African Court of Justice and Human Rights
AMIB	African Union Mission in Burundi
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
APRM	Africa Peer Review Mechanism
APSA	Africa Peace and Security Architecture
ASF	African Standby Force
AU	African Union
CAR	Central Africa Republic
CEWARN	Conflict Early Warning and Response Mechanism
CEWS	Continental Early Warning System
CNDD	<i>Conseil National pour la Defense de la Democratie (National Council for the Defence of Democracy)</i>
CNDD-FDD	<i>Conseil National pour la Defense de la Democratie: Forces pour la Defense de la Democratie (Forces for the Defence of Democracy)</i>
EAC	East African Community
ECOWARN	Economic Community of West African States Early Warning and Response Network
ECOWAS	Economic Community of West African States
EU	European Union
HQs	Brigade Head Quarters



ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
NATO	North Atlantic Treaty Organisation
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
MAP	Millennium Partnership for the African Recovery Programme
MSC	Military Staff Committee
OAU	Organisation of African Unity
ONUB	United Nations Operation in Burundi
PLANELM	Planning Element
POW	Panel of the Wise
PSC	Peace and Security Council
RECs	Regional Economic Communities
RMs	Regional Mechanisms
R2P	Responsibility to Protect
SADC	Southern African Development Community
UN	United Nations
UNAMID	United Nations African Mission in Darfur
UNSC	United Nations Security Council

## Introduction

### 1.1 Background

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) published a report entitled “*The Responsibility to protect*” (‘R2P’).<sup>1</sup> According to this report,

The core tenet of the R2P is that sovereignty entails responsibility. That is, each state has a responsibility to protect its citizens; if a state is unable or unwilling to carry out that function, the state abrogates its sovereignty, at which point both the right and the responsibility to remedy the situation falls to the international community.<sup>2</sup>

R2P takes a comprehensive approach to humanitarian crises, framing intervention as a continuum from diplomatic and economic sanctions through to military intervention as last resort.<sup>3</sup> R2P involves three specific responsibilities:

- i) Responsibility to prevent (to tackle the causes of conflict and other man-made crises).
- ii) Responsibility to react (to take appropriate action where there are compelling circumstances, including coercive steps such as sanctions or even military interventions as last resort).
- iii) Responsibility to rebuild (after an intervention, to provide assistance in dealing with the causes of the conflict, and to assist in reconstruction and reconciliation).<sup>4</sup>

The R2P concept has been widely accepted since 2005, the Secretary-General of the United Nations embraced the R2P norm in his report: ‘In Larger Freedom, Towards

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<sup>1</sup> International commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Dec 2001) [www.iciss.ca/pdf/commission-Report.pdf](http://www.iciss.ca/pdf/commission-Report.pdf) (ICISS Report).

<sup>2</sup> J. M. Rebecca, ‘The Responsibility to Protect: From Documents to Doctrine But What of Implementation?’ (2006) 19 Harvard Human Rights Law Journal at pg 289.

<sup>3</sup> ICISS Report (n1 above) synopsis XI.

<sup>4</sup> ICISS Report (n1 above) synopsis XI.

Development, Security and Human Rights For all.’ These documents called on the international community to adopt “R2P” as a basis for collective action against mass atrocity crimes.<sup>5</sup> Also in that same year, member states of the United Nations affirmed this norm in paragraphs 138 and 139 of the 2005 World Outcome Document.<sup>6</sup>

After the 1994 genocide in Rwanda, many Heads of State and Government in Africa resolved never to allow lack of political will to prevent the protection of civilians from mass atrocity crimes.<sup>7</sup> Since 1994, African regional organizations have sought to incorporate preventive and reactive measures to mass atrocity crimes. African states therefore decided to switch from the ‘non-interference’ approach of the Organization of African Unity (OAU) to the ‘non-indifference’ approach of the African union (AU).<sup>8</sup> While the 2005 World Summit Outcome Document was a historic step, by 2000, African States had already enshrined principles echoing R2P into law. The Constitutive Act which is the founding document of the AU has enshrined in article 4(h); “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave and systematic circumstances; namely war crimes, genocide and crimes against humanity”.<sup>9</sup> They further endorsed R2P in a report known as the Ezulwini Consensus.<sup>10</sup>

## **1.2 Problem Statement**

This research will look at the implementation of R2P by the AU. The AU consistent with its Constitutive Act and its 2002 Protocol on the Establishment of the Peace and Security Council has taken concrete steps for the establishment of a comprehensive continental architecture for the maintenance of peace and security, as one of the

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<sup>5</sup> G. Puley, ‘The Responsibility to Protect: East, West and Southern African Perspectives on Preventing and Responding to Humanitarian Crisis’, Ploughshares Working paper 05-5 pg 7, <http://www.responsibilitytoprotect.org/files/ploughshares.pdf>, last accessed on 15/3/2011.

<sup>6</sup> United Nations 2005 World Summit Outcome, UN Doc A/RES/601, October 24, 2005, [www.un.org/summit2005/documents.html](http://www.un.org/summit2005/documents.html), last accessed on 7/9/2011.

<sup>7</sup> ‘Africa and the coalition on the responsibility to protect’ <http://www.responsibilitytoprotect.org/index.php/africa>, last accessed 5/5/2011.

<sup>8</sup> n7 above.

<sup>9</sup> n7 above, see also article 4(h) of the AU Constitutive Act 2000.

<sup>10</sup> The Common Position on the Proposed Reform to the United Nations: ‘The Ezulwini Consensus’ Ext/Ex.CL/2 (VII).

prerequisites for development and integration on the continent.<sup>11</sup> This continental peace and security architecture (APSA) includes the Peace and Security Council, the Continental Early Warning System, the Panel of the Wise, a Peace Fund and the African Stand-by Force. It is also set up to bring sustained development and is also working hand in hand with the New Partnership for Africa's Development (NEPAD). These organs are in line with the principles of prevention, reaction and rebuilding which are elements of R2P.

This study will look at the predecessor of the AU, the Organisation of African Unity (OAU) and its policies and structure towards protecting Africans when faced with mass atrocity crimes. This research will define 'The R2P' doctrine. My definition will take into consideration R2P's relationship with state sovereignty and why states are now moving away from the sacrosanct doctrine of state sovereignty to that of sovereignty as a responsibility. This will be done by looking at the documents giving legal effect to the doctrine and the institutional mechanisms in the international sphere and by regional bodies dealing with this doctrine. In the African context, the study will examine the Constitutive Act<sup>12</sup> and the Protocol on Amendments to this Act in 2003<sup>13</sup> which broadens Article 4(h) of the Constitutive Act to involve the right of intervention to prevent a "serious threat to legitimate order".<sup>14</sup>

The research will also examine the approach by the AU in dealing with crisis situations such as the situations in Burundi, Sudan, Kenya and currently the crisis in Libya. In particular, it will look at (a) the AU's response in preventing a further breakdown of order in these situations; (b) In cases where it was not able to prevent a breakdown of order, it will consider the timeliness of the AU's reaction. Additionally, this study will look at the challenges and problems faced by the AU in these crises situations such as the lack of

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<sup>11</sup> 'Africa and the coalition on the responsibility to protect' <http://www.responsibilitytoprotect.org/index.php/africa>, last accessed 5/5/2011.

<sup>12</sup> AU Constitutive Act entered into force 26 May 2001.

<sup>13</sup> Protocol on the Amendment to the Constitutive Act, adopted in July 2003, (not yet in force, at the time of writing only 25 countries have ratified this protocol which needs a two-third majority for it to come into force).

<sup>14</sup> E. Baimu and K. Sturman, 'Amendment to the African Union's Right to Intervene: A shift from human security to regime security?' (2003) 12 No 2, African Security Review.

political will of Governments when confronted with having to implement their R2P obligations.

### **1.3 Research Questions**

The main issue this research aims to tackle is: how is the AU implementing its R2P obligations? In tackling this issue, the study will examine the documents giving authority to the Union to implement this doctrine such as the Constitutive Act 2000, its Protocol of 2002, the proposed Amendment of 2003 and the Ezulwini Consensus. The research will also consider the structural mechanisms setup to implement this responsibility. This research will look at the effectiveness of these institutions in implementing the R2P. “It is one thing to develop a concept of this kind but quite another to get any policy maker to take any notice of it.”<sup>15</sup>

The following sub-questions will be answered in order to give more clarity:

- 1) Since the inception of the doctrine in 2002 what has been the AU’s challenges in implementing the R2P?
- 2) Is the amendment of the Constitutive Act in line with the R2P doctrine?

### **1.4 Literature Review**

It must be acknowledged that although the concept of R2P is fairly new in International Law, there is a large amount of literature on this concept. Of great importance is the book written by Gareth Evans, “*The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*”. It is of importance because the author was the co-chair of the ICISS the body responsible for initiating the doctrine. Therefore “this book draws invaluable insight from the author’s expertise on R2P”.<sup>16</sup> This book sets out the nature of R2P, when R2P can be invoked. It gives an in depth analysis on the legality of military intervention. It lays emphasis on the fact that military intervention envisaged by R2P concept is a means of last resort. It categorically points out that intrusive measures

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<sup>15</sup> G. Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’, (2006) 24 No 3 Wisconsin International Law Journal pg 712.

<sup>16</sup> Book review by G. Maina, Journal of Peace, Conflict and Development, Issue 13, February 2009, available at [www.peacestudiesjournal.org.uk](http://www.peacestudiesjournal.org.uk), last accessed 5/5/2011.

such as roundtable peace talks or negotiations should be used failing which more coercive measures may be employed such as sanctions. Furthermore, this research will draw inspiration from the book written by Dan Kuwali entitled “The Responsibility to Protect: Implementation of Article 4(h) Intervention”.<sup>17</sup> The book explores the scope and limits of article 4(h) of the AU Constitutive Act. It further links article 4(h) to the R2P doctrine. It deals extensively with the issue of the legality of article 4(h) of the AU Constitutive Act and military interventions sanctioned by the AU without the United Nations Security Council endorsement. It brings out the advantages of using persuasive measures to implement R2P such as prosecuting perpetrators of mass atrocity crimes. The prosecution of persons accused of perpetrating mass atrocity crimes forms part of the re-active pillar enshrined in the ICISS’s Report.

This research will follow that of Sabelo Gumedze.<sup>18</sup> This article directly links the R2P concept by the AU with the protection and promotion of human rights in the region. It pays particular attention to article 4(h) of the Constitutive Act of the AU and gives an understanding on how this article gives effect to R2P. It looks at the various Human Rights Institutions set up by the African Union and points out how these institutions by promoting human rights can help the AU in implementing its R2P obligations. Like Kuwali, Gumedze also made an in depth analysis on article 4(h) showing the link between this article in the AU’s Constitutive Act and the R2P doctrine. It gives an understanding of R2P in the African continent. It looks at African leaders and their stance towards R2P. It analyses the success of the various missions on the African Continent in which R2P has been invoked. It also looks at the failures or short-comings in these missions and analyses the challenges faced by the Union.

There is the North-South Institute Roundtable Report on the “Delivering on the Responsibility to Protect in Africa”,<sup>19</sup> and the Nordic Africa Institute’s Policy Notes entitled “The African Union and the Challenges of Implementing the ‘Responsibility to

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<sup>17</sup> D. kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2011).

<sup>18</sup> S. Gumedze’s, ‘The African Union and the Responsibility to Protect’, (2010) 10 AHR LJ pg 135.

<sup>19</sup> K. Powell and S. Baranyi, *Delivering on the Responsibility to Protect in Africa, AN NSI POLICY BRIEF (THE NORTH-SOUTH INSTITUTE) Roundtable Report*, 2005.

Protect”<sup>20</sup> These documents will be very instrumental during the course of the research as they highlight challenges faced by the AU in its quest to protect people in Africa against mass atrocity crimes. These reports took into consideration circumstances in Africa where R2P was invoked as the basis for intervention. They also took in account certain situations in which the doctrine of R2P could have been raised as a basis for intervention in areas of conflict. These reports also looked at the successes recorded by the AU in invoking this doctrine, it also looked at the failures of the Union in implementing R2P. Lastly, it gave a very detailed analysis on the challenges faced by the AU in implementing its R2P obligations and it made several recommendations on how the Union may fulfil its R2P obligations.

Lastly and most importantly, my research will be based on the African Peace and Security Architecture (APSA) 2010 Assessment Study which was conducted by the AU.<sup>21</sup> The study was undertaken by the Union to show the progress and achievements of the institutions set up by the Union in implementing its peace and security policies. It also brings out the challenges faced by the AU in successfully implementing its goal.

### **1.5 Research Methodology**

The methodology adopted in this study will be analytical and comparative. The analytical approach will be based on the documents dealing with R2P such as the Report of the International Commission on Intervention and State Sovereignty, the Constitutive Act of the African Union, the Ezulwini Consensus, the Wilton Park report, the UN Charter and other similar documents. In the comparative study I will be looking at how the R2P doctrine is being implemented by other regional bodies and/or the international community at large (particularly the United Nations (UN)) and how the AU can benefit from best practices which have been developed. The study will look at the challenges faced by the other international and regional actors in implementing the R2P doctrine and how they go about tackling these challenges.

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<sup>20</sup> Nordic Africa Institute's Policy Notes, *The African Union and the Challenges of Implementing the Responsibility to Protect* 2009.

<sup>21</sup> *African Peace and Security Architecture (APSA) 2010 Assessment Study*, available at [http://www.operationspaix.net/.../UA\\_African\\_Peace\\_and\\_Security\\_architecture\\_2010\\_.pdf](http://www.operationspaix.net/.../UA_African_Peace_and_Security_architecture_2010_.pdf), last accessed 15/9/2011.

A focus on library research will be applied. This will take the form of reading literatures written by scholars such as articles and books, assessing internet information. As a result of lack of finances and time constraint, it will be impossible for me to undertake any field work and even meet personally with professionals in this area, to get their opinions on this doctrine.

### Primary Source of Information

My primary source of information will be the Constitutive Act of the African Union, its 2003 Protocol, the Amendment to the Constitutive Act and the UN Charter. This study will also look at the Report of the International Commission on Intervention and State Sovereignty, the African Peace and Security Architecture 2010 Assessment study and the 2005 World Summit Outcome Document.

### Secondary sources of information include:

Textbooks on R2P such as *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* by Gareth Evans and *The African Union: Pan-Africanism, Peacebuilding and Development* by Timothy Murithi. I will also look at journal articles and relevant information from the internet such as communiqués from organisations such as the AU on situations that they are actively seized of. Furthermore, I will be analysing reports from international organisations and regional organisations dealing with R2P.

## **1.6 Proposed Structure of Dissertation (overview of chapters)**

Chapter Two: This chapter looks at the concept of R2P both in the international sphere and also within the African context. That is what it is and what it is not. For instance looking at the Protocol on the Amendment to the Constitutive Act does the expansion of article 4(h) form part of the R2P doctrine? It starts off with a brief historical background as to the sacrosanct nature of sovereignty in the continent and goes on to describe the radical shift from sovereignty as an absolute right to sovereignty as a responsibility (conditional). This chapter will also look at the shift of African leaders' attitude after the Rwandan Genocide from non-intervention to non-indifference. Furthermore, the policies



of the Organisation of African Unity (OAU) will be analysed and reasons for its failure will be explored as well. Lastly, this chapter will look at the conception of the R2P doctrine and how the AU has incorporated this doctrine in its lists of functions. In addition the proposed amendment to the Constitutive Act will be analysed to see if it fits into the R2P doctrine.

Chapter Three: this chapter will take a more detailed look at R2P and how the AU is implementing its obligation. Firstly, it will look at the Protocol relating to the Establishment of the Peace and Security Council, this is very important because the PSC is said to be the most visible component of the African Peace and Security Architecture; it serves as the standing decision-making organ for the prevention, management and resolution of conflicts.<sup>22</sup>

This section of the dissertation will analyse the function of this organ of the AU together with other institutions established by the PSC (such as the Situation Room for the Continental Early Warning System), the Panel of the Wise and the African Stand-by Force in accordance with the powers vested in it by the Protocol creating it. The effectiveness of these institutions will be analysed based on several situations in Africa which the AU was actively seized of and which they invoked R2P as the basis for their involvement.

It is very important to note that some of these crises are still on-going such as the Libyan Crisis, Sudan (although the AU mission has been converted to a hybrid mission with the UN's involvement as well 'UNAMID') as these crisis are currently on-going I am able to point out the achievements and pinpoint the challenges as they happen. It will assess the reaction of the AU towards these crises, for instance was their intervention in these situations timely and decisive because timely and decisive intervention in these conflicts can save lives.

Finally, it will assess the Union's performance in situations that it did intervene in. It will look at the role played by the various institutions under its mandate during these

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<sup>22</sup> See Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

interventions to see how effective they are in helping the Union undertake its obligation to protect African people against mass atrocity crimes.

Chapter Four: In the preceding chapter an assessment was done showing the institutions created by the AU in order to undertake its responsibility to protect civilians against mass atrocity crimes. This chapter will measure the challenges facing the AU in its quest to undertake its obligation. It will look at the hindrances the Union faced in the course of intervening in some of the conflict situations. This part of the dissertation will look at reasons for the failure of the Union to prevent these conflicts from escalating in the first place as one of its objectives is the early detection of conflicts in the continent and the prevention of such situations.<sup>23</sup>

One of the organs setup by the PSC is the Continental Early Warning System to anticipate and prevent conflicts in the continent. If situations escalate into full-blown conflicts then the system must be failing so this section will look at the reasons for such failure.

Furthermore, the AU has been faced by many problems in its peacekeeping missions such as deploying its troops in conflict areas (Burundi) in the continent, an in-depth analysis will be given for such problems. In the event that they are successful in deploying their troops they still face huge difficulties in protecting civilians in these crises situations. In certain situation the conditions were so deplorable that even the peacekeepers were subject to attacks from warring factions. Mention will also be made of the emerging trend of having joint missions (AU-UN peacekeeping missions in Africa).

An evaluation will also be made of the relationship between the AU as a regional body trying to undertake its obligation to protect people on the African continent and the UN as the body with primary responsibility for the maintenance of peace and security in the world.<sup>24</sup> For instance this analysis will use the Libya situation to assess this relationship between these two organisations. Firstly, it will look at the UNSC resolution and how it is

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<sup>23</sup> See Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

<sup>24</sup> See article 39 of the UN Charter.

being implemented by NATO on behalf of the UNSC and the approach taken by the AU in managing this conflict and how the different approaches by these organisations is causing a strain in the relationship between both these organisations.

Lastly, this section will also look at the relationship between the ICC which is a permanent criminal court set-up to hold individuals accountable for perpetrating mass atrocity crimes. This is one measure deemed necessary in deterring people from the commission of these crimes. However, with the indictment of key figures in the African political arena there seemed to have been a strain in the relationship between the ICC and the AU. I will take the time to evaluate this strain in the relationship and how it is affecting the Union in undertaking its R2P obligation.

Finally conclusions and recommendations will be made at the end of the study.

### **1.7 Significance of Research**

As shown above, the some African countries in the African Continent are riddled with bloody conflicts that are claiming lives every day and tormenting the daily lives of Africans. The AU is playing its part in helping to protect African people who helplessly find themselves in such situations. This study will critically analyse the institutions set up by the AU to prevent these crises situations and to protect these people during such crises. This study will be helpful in the African continent because it will unveil some of the complex issues around intervention in conflict situations and how to effectively protect civilians in these situations.

### **1.8 Limitation and Scope**

This research will focus on the R2P concept since its inception in 2001 and its adoption by the AU in the Constitutive Act in 2002. The study will focus on the AU but some references will be made to other regional and international bodies when analysing the issue of implementation.

## **1.8 Conclusion to the Research Proposal**

Building strong institutions to prevent mass atrocity crimes should be a priority in the world especially in Africa. Since its inception in 2002, the AU has served as a mediator among conflicting parties and furthermore, it has sent peacekeeping troops to protect Africans in conflict zones. It was very instrumental in the negotiations leading to the successful referendum for Southern Sudan. However, there is much to be done. I hope this research will go a long way in suggesting how its performance could be improved to improve its performance.

## CHAPTER TWO

### CHAPTER TWO: RESPONSIBILITY TO PROTECT, MANDATE OF THE AFRICAN UNION

#### 2.1 Origin and Historical Background

“Sovereignty as responsibility’ and ‘the responsibility to protect’ are concepts often framed as radical departures from the ‘traditional’ conception of sovereignty”.<sup>25</sup> The principle of sovereignty has its origins in the 1648 Treaty of Westphalia which had enshrined in it a concept that ‘intervention and interference in the affairs of another state was the greatest threat to international peace and security’.<sup>26</sup> According to the Westphalian rule, sovereignty is divided into two; the first is non-interference which implies equality of states at the international level and that states should refrain from intervening in the internal affairs of other states.

Secondly, there is the internal aspect which gives each state the capacity or right to determine its own political system and authority.<sup>27</sup> This concept is also enshrined in some international documents such as the UN Charter in article 2(7)<sup>28</sup> the Organization of African States (OAU) where both the principle of sovereign equality (article 3(1) and that of non-intervention (articles 3(2) and 3(3)) were mentioned,<sup>29</sup> however, it must be noted that the Charter of the OAU has been repealed by the African Union Constitutive Act 2000 and the African Union Constitutive Act (AU Constitutive Act) in article 4(g).<sup>30</sup>

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<sup>25</sup> L. Glannville, ‘The antecedents of sovereignty as responsibility’, (2010) *European Journal of International Relations* XX(X) 1-23 found <http://ejt.sagepub.com/content/early/2010/05/17/1354066109346889> last accessed 24/4/2011.

<sup>26</sup> Glannville (n25 above), at pg 3.

<sup>27</sup> Glannville (n25 above), at pg 3.

<sup>28</sup> Article 2(7) of the UN Charter.

<sup>29</sup> It has been replaced by the Constitutive Act of the African Union.

<sup>30</sup> n12 article 4(g).

The 1990s saw numerous humanitarian crises around the world.<sup>31</sup> However, it must be noted that there were some humanitarian interventions during this period. Interventions were inconsistently applied by the international community. Some crises saw intervention by the international community such as the Kosovo Crisis whilst others did not; notably the Rwandan Genocide. These crises brought the issue of sovereignty to the forefront of international relations and law. In 1996 Francis Deng *et al* published a book which attacked this sacrosanct principle of international relations since the Treaty of Westphalia in 1648. They argued that “a government that allows its citizens to suffer in a vacuum of responsibility for moral leadership cannot claim sovereignty in an effort to keep the outside world from stepping in to offer protection and assistance.”<sup>32</sup>

They further argued that “when nations do not conduct their internal affairs in ways that meet internationally recognized standards, other nations not only have the right, but also have the duty to intervene.” They propose that those governments that do not fulfil their responsibilities to their people forfeit their sovereignty.<sup>33</sup> Thus the concept of sovereignty as responsibility was born. In its 2001 report the ICISS put the issue of sovereignty as a responsibility at the forefront of their analysis and came up with the principle of ‘R2P’.

“Until colonialism the idea of sovereignty was quite foreign in Africa. It was only after independence in the 1960s that the issue of sovereignty was brought to the limelight in African setting. It became the cornerstone of African international relations.”<sup>34</sup> African leaders after independence held firmly to the external aspects of sovereignty; “that is the issue of non-interference and *uti possidetis juris*.”<sup>35</sup> Crucial as this principle seems in the African continent, the rule has been flouted by many African leaders.

The weakness of many African states after independence meant that domestic sovereignty was a concept only on paper. African leaders held tightly to sovereignty because it allowed them to deny the human rights of some groups or individuals. It

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<sup>31</sup> A. Etzioni, ‘Sovereignty as Responsibility’, (2006) Foreign Policy Research Institute at pg 71.

<sup>32</sup> F. Deng et al. Sovereignty as Responsibility: Conflict Management in Africa, (1996) at 33.

<sup>33</sup> Etzioni (n31 above) at 71.

<sup>34</sup> Glanville (n25 above) at 5.

<sup>35</sup> Glanville (n25 above) at 5.

allowed leaders to rig elections and to mount anti-democratic coups. Whoever was in power was the sovereign and African leaders accepted them even though their rule was tyrannical or illegitimate.<sup>36</sup>

Whilst internal sovereignty has been very weak due to all these shortcomings, there has also been very little respect for external sovereignty. From independence to present date, the African continent has been home to a series of bloody conflicts. In the 1990s, 160 million Africans lived in countries devastated by civil war, and three million of them were killed in the course of such conflicts.<sup>37</sup> From 1956-2001, there had been 80 successful and 108 unsuccessful coups in Africa, nearly half of them in West Africa.<sup>38</sup>

With all these conflicts and turmoil on the continent it would be strange if African countries had stuck strictly to the non-interference doctrine. They have violated this principle on several occasions, for instance, there were interventions in the Democratic Republic of the Congo in the SADC region led by Zimbabwe, Namibia and Angola, and in the ECOWAS Region, in Liberia and Sierra Leone, which was led by ECOMOG. To quote Gandois, “this norm of non-interference seems all the more inapplicable to the African Continent since there exists a greater degree of solidarity across borders with ethnic groups separated by the frontiers decided at independence”.<sup>39</sup>

Thus in the late 1990s, African leaders decided to approach these problems from another perspective, coming up with innovative concepts and mechanisms for pro-democracy and Human rights-based intervention.<sup>40</sup> Salim Ahmed Salim the then OAU Secretary-General issued a call, suggesting that sovereignty should be transcended by building on the African values of kinship, solidarity and the notion that ‘every African is his brother’s keeper.’<sup>41</sup>

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<sup>36</sup> Glannville (n25 above) at 5.

<sup>37</sup> J. Sarkin, ‘The Role of the United Nations, the African Union and Africa’s Sub-Regional Organisations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect’, (2009) *Journal of African Law* vol 53, No 1 pg 1-33.

<sup>38</sup> P. McGowan ‘African Military coups d’etat, 1956-2001: Frequency, trends and distribution’ (2003) 41 No 3 *Journal of Modern African Studies* at 370.

<sup>39</sup> Glannville (n25 above) at 7.

<sup>40</sup> J. Levitt, ‘Pro-Democracy Intervention’ (1996) 24 No 3 *Wisconsin International Law Journal* at 786.

<sup>41</sup> Glannville (n25 above) at 11.

In 1993, there was the declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution.<sup>42</sup> In that declaration the leaders recognized that by establishing such a mechanism there was an opportunity to speedily take action either by preventing, managing and ultimately in resolving conflicts where and when they occurred.<sup>43</sup> They however reiterated their position on the importance of sovereign equality of member states, non-interference in the affairs of states as well as the inviolability of borders inherited from colonialism.<sup>44</sup>

The OAU was established much like the AU as a continental framework to ensure collective security and collective development on the African continent.<sup>45</sup> However, this organisation was incapable to craft a comprehensive security architecture to support the peace and security architecture on the continent.<sup>46</sup> One of the major problems the OAU faced was that it had no effective early warning or early action capacity, nor military capability.<sup>47</sup> A further reason for the incapability of the OAU to address the peace and security situation on the continent was the undeniable commitment to the principles of sovereignty and non-interference and respect for established borders and territorial integrity.

Therefore, a pivotal point in Africa's history was the 1994 genocide in Rwanda. The policy of non-interference played a crucial role in African States' refusal to intervene in this crisis. Rather, leaders in the African continent pleaded to the international community to intervene but nothing was done.<sup>48</sup> This served as a wake-up call to African leaders that the solutions to African problems were in their hands. It became increasingly clear that that the African continent must build and make operational its own effective security and governance architectures.<sup>49</sup> With this ideology in their mind

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<sup>42</sup> Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, adopted in Cairo 1993. (AHG/Decl.3(XXIX)). Available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/3HoG>. Last accessed 5/5/2011.

<sup>43</sup> Paragraph 12 of the Declaration.

<sup>44</sup> Paragraph 14.

<sup>45</sup> Kuwali (n17 above) at 189.

<sup>46</sup> R.I. Rotberg, "African Responses to African Crises: Creating a Military Response", in R.I. Rotberg et al., *Peacekeeping and Peace enforcement in Africa: Methods of Conflict Prevention*, Cambridge, MA: World Peace Foundation; Washington, D.C.: Brookings Institution Press, 2000, at 101.

<sup>47</sup> Rotberg (n46 above) at 101.

<sup>48</sup> Rotberg (n46 above) at 101.

<sup>49</sup> Kuwali (n17 above) at 191.



the AU was created. The AU's creation reflected a normative shift from non-interference to non-indifference. Under the OAU, the principle of non-indifference was prioritized over a duty to protect against widespread and systematic human rights abuses,<sup>50</sup> the AU has adapted and where needed has created, institutions in order to improve its ability to deal with conflicts.<sup>51</sup>

## **2.2 THE NATURE AND SCOPE OF THE RESPONSIBILITY TO PROTECT**

R2P is a shift from the “traditional language of the sovereign-intervention debate.”<sup>52</sup> R2P seeks to shift the attention of the international community from those wanting to intervene and refocuses the international spotlight where it should be: on the duty to protect communities from mass atrocity crimes.<sup>53</sup>

Adopted unanimously by Heads of State and Government in 2005, R2P is an internationally agreed concept for jointly dealing with the egregious crimes namely: war crimes, genocide, crimes against humanity and ethnic cleansing.<sup>54</sup> The concept is based on three-non sequential and equally weighted ‘pillars’.<sup>55</sup>

This concept provides that the state has primary responsibility to protect individuals within its borders, To stretch the argument a little further the ICJ in its ruling in 2005 on the Invasion of Rwanda and Uganda's invasion of The Democratic Republic of Congo held that a wherever a government of a country has effective control of a territory be it their own or outside its borders they still have a responsibility to protect civilians within such territory. Where the state fails in that responsibility either through incapacity or is unwilling, a secondary responsibility falls on the international community.<sup>56</sup> States will be forced to substantiate the claim that they are upholding certain norms and standards

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<sup>50</sup> Sarkin (n37 above) at 17.

<sup>51</sup> S. Djinnit, Foreword, Compendium of Key Documents Relating to Peace and Security in Africa at pg vii.

<sup>52</sup> ICISS (n1 above) at 16.

<sup>53</sup> ICISS (n1 above) at 17.

<sup>54</sup> *CSCAP Study Group on the Responsibility to Protect, February 26-27, 2010 Jakarta, Indonesia, final report.*

<sup>55</sup> CSCAP (n54 above) at 3.

<sup>56</sup> ICISS (n1 above) at 16

of governance *vis-a-vis* their own population when they invoke sovereignty as a defence against external interference.<sup>57</sup>

The final aspect is that the United Nations, Regional Organisations and Third Party States may intervene non-forcibly or forcibly where there is failure on the part of the host state to protect its population.<sup>58</sup> Again the R2P doctrine clearly stipulates that the collective security system shall remain the primary forum for military action and that military action should be used as a means of last resort.<sup>59</sup> Accordingly it is held that, "...no strategy for the fulfilling of R2P would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military actions in extreme cases."<sup>60</sup> Kuwali cites the 1994 genocide in Rwanda as a classic example of the limits of non-violent means in stopping mass atrocity crimes, in that situation the only realistic means of halting the atrocities was military intervention.<sup>61</sup>

### **2.3 THE RESPONSIBILITY TO PROTECT AND THE MANDATE OF THE AFRICAN UNION**

According to the preamble of the Constitutive Act of the African Union 2000, African leaders agreed to promote and protect human and peoples' rights and also reinforce democratic institutions and a human rights culture, and to ensure good governance and the rule of law. In order to achieve such goals the AU developed a security regime with specific mandates closely linked to the R2P framework.<sup>62</sup>

They postulated article 4 which is said to be the fundamental foundation for the AU institutional structure. This article includes, *inter alia*, sovereign equality and interdependence among Member States; prohibition of the use of force or threat of use

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<sup>57</sup> C. Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norms? (2007) 101 No 1 American Journal of International Law at pg 99-120. Available at <http://www.jstor.org/stable/4149826> last accessed: 01/02/2011.

<sup>58</sup> Stahn (n57 above) at 119.

<sup>59</sup> Stahn (n57 above) at 120.

<sup>60</sup> United Nations, *Implementing the Responsibility to Protect*, Report of the Secretary General, UN Doc. A/63/677 (12 January 2009), p.25, para 56. See also paragraph 139 of the World Summit Outcome Document 2005.

<sup>61</sup> Kuwali (n17 above).

<sup>62</sup> K. Powell, 'The African Union's Emerging Peace and Security Regime Opportunities and Challenges for Delivering on the Responsibility to Protect', 2005 Monograph No. 119, available at [www.nsi-ins.ca/english/research/progress/19.asp](http://www.nsi-ins.ca/english/research/progress/19.asp) last accessed on 14/06/2011.

of force; non-interference by any state in the internal affairs of another; peaceful co-existence of states and their right to live in peace and security; respect for democratic principles, human rights, and the rule of law and good governance as well as respect for the sanctity of human life, condemnation and rejection of impunity.<sup>63</sup>

Article 4(h) of the AU Constitutive Act provides the Union with the right to intervene in a Member State pursuant to a decision of the assembly in respect of grave circumstances, namely war crimes, crimes against humanity and genocide.<sup>64</sup> However, this provision has sparked a controversial debate about its legality. The main issue concerning this article is the legality of intervention without the authorisation of the UNSC. The issue then is; whether the UN Charter's prohibition of the use of force in article 2(4) extends to the use of force without authorisation of the Security Council even in exceptional cases such as those envisaged in article 4(h) of the AU Constitutive Act?<sup>65</sup>

To address this issue one should firstly note that the UNSC remains the only body with the mandate to decide on intervention into a sovereign state pursuant to articles 2(4), 2(7), 42 and 53 of the Charter of the United Nations UN Charter.<sup>66</sup> Therefore, under the UN Charter, and the affiliated collective security system of the UN, there is no room for a state or states to use military force on humanitarian grounds unless there is explicit delegation or authorisation from the UNSC.<sup>67</sup> However, the apparent use and abuse of the veto power by the permanent members of the Security Council has made sanctioning humanitarian intervention by the Security Council problematic leading to non-intervention in certain critical situations.<sup>68</sup>

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<sup>63</sup> Kuwali (n17 above) at pg 3.

<sup>64</sup> Article 4(h) of the Constitutive Act

<sup>65</sup> Kuwali (n17 above) at 105.

<sup>66</sup> Kuwali (n17 above) at 342.

<sup>67</sup> Kuwali (n17 above) at 343.

<sup>68</sup> B.D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and world Religions*, University Park, Pennsylvania State university Press, 2002, at 362-363.

It is my view that when such situation occurs or even before that, the AU as a regional organisation is authorised to act in terms of article 52(1) of the UN Charter. Article 53(1) of the UN Charter prohibits regional organisations from taking enforcement action without the authorisation of the UNSC, however, it is my opinion that the AU as a regional organisation taking enforcement action introduces an element of collectivity to the decision to intervene as opposed to a unilateral decision frowned upon in international law.

In this light the 'Ezulwini Consensus' has recommended that where use of force is involved, the AU as a Chapter VIII Regional Arrangement, must seek prior or in urgent cases, after-the-fact authorisation of the Security Council.<sup>69</sup> For now the emerging trend is that of hybrid interventions, such as the AU Mission in Burundi (AMIB) which later became the United Nations Observer Mission in Burundi (ONUB) and the recent conversion of the AU Mission in Sudan (AMIS) to the AU-UN Hybrid Mission in Darfur (UNAMID). Therefore the problematic legality issue of intervention without UNSC authorisation has not been tested as of yet; there has been no unsanctioned intervention.

In fact, as Kuwali says, the resultant hybrid of AU-UN intervention provides an impetus for the AU to seek prior authorisation of the UN Security Council for article 4(h) intervention. Furthermore, articles 6 and 7 of the PSC Protocol stipulates that with regard to the management of intervention, the PSC shall cooperate with the UNSC, which has the primary responsibility in this area and where necessary recourse shall be had to the UN to provide the necessary financial, logistical and military support.<sup>70</sup>

To undertake its R2P obligation the AU established certain institutions to implement its principles and mandates. Of great importance was the establishment of the PSC in December 2003.<sup>71</sup> The PSC serves as "a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in

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<sup>69</sup> n10, para B(i).

<sup>70</sup> Kuwali (n17 above) at 196.

<sup>71</sup> T. Murithi, "The African Union: Pan-Africanism, Peacebuilding and Development", 2005 at 85.

Africa”.<sup>72</sup> The PSC works closely with the Chairperson of the African Commission, who, *inter alia*, oversees a number of key peace and security structures created to contribute to the operational prevention, mediation and management of conflict. These structures include the Continental Early Warning System (CEWS), a Panel of the Wise, a Peace Fund, and an African Standby Force (ASF). There is also the New Partnership for Africa’s Development (NEPAD).

The AU has further developed several commissions with complementary departments to deliver a wide and durable peace, security and development agenda. A good example is the AU’s Political Affairs Commission and its Political Affairs Department which deal with a variety of issues that fall within a conflict prevention mandate.<sup>73</sup> The APRM is designed to promote structural conflict prevention through good governance. In addition, NEPAD has set out a series of peace and security priorities to respond to different stages of conflict that correspond with the report’s prevention-reaction-rebuilding framework.<sup>74</sup>

Like R2P, the Constitutive Act places emphasis on the great magnitude of the nature of sovereignty; however, it also places a limit on sovereignty.<sup>75</sup> This limitation is based on the notion that sovereignty is conditional and is defined in terms of a state’s willingness and capacity to provide protection to its citizens;<sup>76</sup> failing which the PSC will then make a recommendation to the AU General Assembly to invoke article 4(h) depending on the severity of the situation. Like R2P, the AU stresses that military intervention should be considered as a means of last resort as there are other means available to the Union.<sup>77</sup> Article 4(h) was adopted with the purpose of ending mass atrocity crimes.<sup>78</sup> This article

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<sup>72</sup> J. Levitt, “The Peace and Security Council of the Africa Union: The Knowns and Unknowns”, (2003) *Transnational Law & Contemporary Problems* vol. 13 at 116.

<sup>73</sup> Powell n62 above.

<sup>74</sup> R. Gossen and S. Sharma, ‘Advancing NEPAD through the responsibility to protect’, July 2003 Policy Brief, the Liu Institute for Global Issues.

<sup>75</sup> See articles 4(a), (f), (g) and (h) of the Constitutive Act.

<sup>76</sup> Powell n62 above.

<sup>77</sup> See article 23(2) of the Constitutive Act

<sup>78</sup> D. Kuwali, ‘Protect Responsibly: The African Union’s Implementation of Article 4(h) Intervention’, (2008) *Vol. 11 Yearbook of International Law*, pg 51-108 at pg 52.

is based on protecting civilians from egregious crimes and is therefore justified regardless of consent of the target state.

In 2003, a proposed amendment was made to the Constitutive Act which calls for an expansion of article 4(h). The proposed amendment provides the AU with the right to intervene in a member state pursuant to a decision by the Assembly 'when there is a serious threat to a legitimate order for the purpose of restoring peace and security'.<sup>79</sup> Due to this extension of the mandate of the Union, to allow intervention to restore peace and security on the continent, many scholars are of the opinion that the debate will shift from human protection to regime security.<sup>80</sup>

The AU however has intervened in Comoros in order to restore a legitimate government and peace.<sup>81</sup> The question is how does intervening to restore legitimate order fit in the R2P doctrine? My position is that it does not, because the ICISS report has provided some form of guidelines for military intervention.<sup>82</sup> R2P only makes provision for the three international crimes which have been defined in the Rome Statute and other *ad hoc* tribunals.<sup>83</sup> These are all crimes related to gross violations of human rights law and international humanitarian law and they have been designated in the Rome Statute as the crimes of the 'greatest concerns' to the international community.<sup>84</sup>

On the other hand intervening in the event that there is a serious threat to legitimate order is very blurry. It is also unclear what criteria the African Union will use to determine whether the regime in power in an African state, being considered for intervention, is legitimate.<sup>85</sup> Therefore if the unconstitutional change of government

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<sup>79</sup> Protocol on Amendments to the Constitutive Act of the African Union adopted 11 July 2003, at the time of writing this act has not yet entered into force.

<sup>80</sup> E. Baimu and K. Sturman, 'Amendment to the African Union's Right to Intervene: A shift from human security to regime security?' (2003) 12 No 2 African Security Review. See also M. Vunyingah, 'Unconstitutional changes of Government in Africa: An Assessment of the Relevance of the Constitutive Act of the African Union', Africa Institute of South Africa, Briefing No. 44, March 2011.

<sup>81</sup> E. Svensson, 'The African Union's Operation in the Comoros, MAES and Operation Democracy', 2008.

<sup>82</sup> ICISS (n1 above) at 32.

<sup>83</sup> Baimu, Sturman (n80 above) at pg 6.

<sup>84</sup> See article 2 of the Rome Statute.

<sup>85</sup> Baimu, Sturman (n80 above) at pg 5.

leads, or there is evidence that it might lead, to gross violations of human rights then a military intervention is warranted. However if the evidence available shows that the atrocities being committed have not reached a level of intensity warranting military intervention then in my opinion intrusive methods should be used to settle the crisis.

## **2.4 CONCLUSION**

The sacrosanct nature of sovereignty has been pushed to the back burner, African leaders and policy makers have seen that in order to protect civilians against mass atrocity crimes sovereignty is conditional. The AU became the first regional body to enact R2P concept into law even before the ICISS published its report in 2001. African leaders thought it fit that there has to be an African solution to African problems. They have decided to adopt the nature and scope of R2P as postulated in the Report of the ICISS. Thus the AU has a clear R2P mandate.

The AU is also making its mark in trying to protect its people from the scourge of war. They have posited the right to intervene in countries where there is evidence of such egregious crimes being committed, or when they are about to be committed.<sup>86</sup> They have set up mechanisms and institutions to prevent and manage conflicts in the region. However, in as much as these institutions and mechanisms are in place to prevent and manage conflicts there is still need for political will in implementing these policies. In a nutshell, if properly implemented R2P will save the world from situations such as Rwanda, Srebrenica.

However, a bit of caution should be exercised by the AU in implementing its R2P mandate. The issue of military intervention in order to restore legitimate or constitutionally elected governments in a way is extending its R2P mandate beyond the scope of what was envisaged by the ICISS who are responsible for coining the concept.

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<sup>86</sup> Article 4(h) of the Constitutive Act.

## **CHAPTER THREE: INSTITUTIONS IMPLEMENTING THE RESPONSIBILITY TO PROTECT IN THE AFRICAN UNION**

### **3.1 Introduction**

A major step taken by the AU in its effort to ensure peace, security and stability in the region was the endorsement of the Peace and Security Protocol.<sup>87</sup> The Peace and Security Council (PSC) in turn has also created specific organs to reinforce its monitoring and information-assessing mandate, and in helping the Union take decisive action. These organs include the Continental Early Warning System (CEWS), the Panel of the Wise (Panel), and the African Standby Force (ASF).

### **3.2 The Peace and Security Council**

The PSC was created in 2004 when deadly conflicts and crisis were devastating various parts of the continent.<sup>88</sup> It makes recommendations to the AU Assembly as regards intervention under article 4(h), whilst in relation to article 4(j) it approves the modalities for the intervention following the decision by the Assembly.<sup>89</sup> Although the final decision to intervene rests on the AU Assembly, the PSC is expected to consider the necessity of intervention when a situation so warrants and make appropriate recommendations to the Assembly for possible intervention.<sup>90</sup> Therefore it can be said that the PSC has effectively replaced the OAU's Central Organ for the Mechanism for Conflict Prevention, Management and Resolution.

The PSC has considerable powers, it serves as the standing decision making organ for the prevention, management and resolution of conflicts. Its main objectives are to anticipate conflicts and undertake preventive diplomacy; make peace through use of good offices, mediation, conciliation and enquiry; undertake peace support operations

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<sup>87</sup> J. Levitt, 'The Peace and Security Council of the African Union: the Known Unknowns', 2003, 13 *Transnat'l L. & Contemp. Probs*, 109-137 at pg. 111.

<sup>88</sup> Glanville (n25 above) at 23.

<sup>89</sup> Kuwali (n17 above) at 195.

<sup>90</sup> Kuwali (n17 above) at 195.



and interventions; engage in peace-building and post-conflict reconstruction; undertake humanitarian action and disaster management.<sup>91</sup>

The PSC has in some respect recorded some achievements. Firstly, the PSC has received more resources than its predecessor the OAU ever did.<sup>92</sup> The Peace and Security Department is also the largest of the eight substantive divisions within the AU Commission.<sup>93</sup> In resource terms, the largest items on the PSC agenda have been the peace operations conducted by the AU in Burundi (2003-4), Sudan (2004-present), the Comoros (2006, 2007, 2008) and Somalia (2007-present).<sup>94</sup> These operations have involved a combined total of approximately 17,350 uniformed personnel (troops, military observers and police).<sup>95</sup>

Sadly though, these operations cannot be judged as evidence of general African support for the PSC. The majority of these peacekeepers came from a handful of African States.<sup>96</sup> Therefore in as much as the AU responded in order to protect innocent civilians against mass atrocity crimes, the PSC failed to elicit significant troop contributions from a large number of its members.<sup>97</sup>

However some positives should be taken out of these peacekeeping operations. The deployment of AMIB represents a critical moment for the development of a continent-wide security architecture in Africa.<sup>98</sup> Sustainable peace in Burundi was essential for controlling the spread of violence in the already volatile Great Lakes region AMIB's presence helped curtail the level of violence in the region. AMIB's performance in Burundi also provided an early indication of the contribution the AU is likely to make in promoting peace and security on the continent, including the protection of civilians against mass atrocity crimes.<sup>99</sup> The mission was said to be a success "there is no doubt

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<sup>91</sup> See article 7 of the PSC Protocol.

<sup>92</sup> P. Williams, 'The Peace and Security Council of the African Union: evaluating an embryonic international institution', (2009) *Journal of Modern African studies*, pg. 614. Available at <http://journals.cambridge.org>; last accessed on 28 July 2011 at 618.

<sup>93</sup> Williams (n92 above) at pg 618.

<sup>94</sup> Williams (n92 above) at pg 618.

<sup>95</sup> Williams (n92 above) at pg 618.

<sup>96</sup> Williams (n92 above) at pg 618.

<sup>97</sup> Williams (n92 above) at pg 618.

<sup>98</sup> Powell (n62 above) at 37.

<sup>99</sup> Powell (n62 above) at 37.

that AMIB's mere presence in Burundi served as some kind of deterrence to the further escalation of violence."<sup>100</sup>

Indeed AMIB did play an important security role in Burundi. It helped stabilize certain parts of the country. The mission helped to protect certain cantonment sites and was even successful in repelling an attack on the part of the CNDD-FDD. It also contributed to creating conditions sufficiently stable for a UN mission, which was finally deployed following the signing of a ceasefire between the CNDD-FDD and the government.<sup>101</sup> The mission's initiatives, and in some instances, departure from conventional neo-liberal approaches was helpful in this regard.

The PSC is also actively engaged with the on-going crisis in the Sudan. The fighting in Darfur which erupted in February 2003 has triggered the worst humanitarian crisis since Rwanda.<sup>102</sup> The conditions in Darfur resemble those envisioned in R2P for prompt action on the part of the international community in situations where a large number of human lives are at risk.<sup>103</sup> According to experts, by September 2004, it had claimed an estimated 30,000 lives, uprooted an estimated 1.2 million people and forced a further estimated 200,000 people to flee across the border into Chad as refugees.<sup>104</sup>

For its part, the AU played a critical political and security role in Darfur where the UNSC would not act decisively. In deploying AMIS and leading the political negotiations, the AU signalled its willingness to promote its peace and security agenda. AMIS helped improve the security situation, albeit with a limited presence and a weak mandate.<sup>105</sup> In 2004, the AU obtained a mandate to monitor the ceasefire and protect civilians in Darfur; this mandate was derived from the Ndjamenan Humanitarian Ceasefire

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<sup>100</sup> 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*, 17:1 *Afr. Security Rev.*, pp. 71-82

<sup>101</sup> Powell (n62 above) at pg 37.

<sup>102</sup> Dr. P. Kagwanja, 'Darfur: An African Union Peace-Keeping Crucible', Paper presented at a conference by the Center for International Political Studies, on: *Keeping Peace in Tough Neighborhood: The Challenges Confronting Peacekeepers in Africa*, at the South African Defence College, John Rissik Avenue Waterkloof, Pretoria, 14, September 2004.

<sup>103</sup> Powell (n62 above) at 50.

<sup>104</sup> Powell (n62 above) at 50.

<sup>105</sup> Powell (n62 above) at 50.

Agreement.<sup>106</sup> This agreement allowed the AU to dispatch ceasefire monitors and subsequently a force to provide protection for those monitors and any civilian in the immediate vicinity of its operations.<sup>107</sup> The AU's presence in Darfur to a limited extent played a vital role in protecting civilians.

However, it has been widely agreed that the mandate of ceasefire monitoring arising from the Ndjamenia agreement was insufficient, and that the additional mandate that enabled AMIS to protect civilians who were at risk when it encountered them during the course of its duties was also inadequate.<sup>108</sup>

Of major importance is the crisis concerning Libya. I would like to analyse the handling of this crisis by the AU as an on-going crisis. This crisis has actually brought to the forefront the challenges of implementing R2P not only by the AU, but by the international community at large, especially the UN.

In February 2011, the unrest sweeping through much of the Arab World erupted in several cities in Libya.<sup>109</sup> Though it began with a relatively organised core of anti-government opponents in Benghazi, its spread to the capital Tripoli was swift and spontaneous.<sup>110</sup> Gaddafi responded with a level of violence unseen in the other uprisings. Several accounts were given by NGOs, that “snipers were shooting peaceful protesters. Artillery and helicopter gunships were used against crowds of demonstrators.” According to Regehr, based on these actions, “a mass atrocity event was unfolding in Libya”.<sup>111</sup>

Deng and Luck, the UN Secretary-General's Adviser on Genocide and the Responsibility to Protect respectively, issued a statement which said in part “we remind national authorities in Libya, as well as in other countries facing large-scale popular protests, that the Heads of State and Government at the 2005 World Summit pledged to

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<sup>106</sup> A. De Waal, ‘Darfur and the Failure of the Responsibility to Protect’, (2007) *The Royal Institute of International Affairs* Vol 6, 83.

<sup>107</sup> Kagwanja (n102 above).

<sup>108</sup> Kagwanja (n102 above).

<sup>109</sup> De Waal (n106 above).

<sup>110</sup> De Waal (n106 above).

<sup>111</sup> E. Regehr, ‘A R2P Intervention in Libya? Available at <http://www.disarmingconflict.ca>, last accessed on the 2/8/2011.

protect populations by preventing acts of genocide, war crimes and crimes against humanity, as well as their incitement...<sup>112</sup>

There were calls for the AU to take a leading role in the continent's affairs in finding a peaceful solution to the Libyan crisis.<sup>113</sup> For many weeks, the AU was silent on the demonstrations by pro-democracy opposition forces in Libya even in the face of the use of disproportionate force by the Gaddafi regime to quell the peaceful protests.<sup>114</sup> They should have been actively involved in the matter as they are responsible to promote peace and security on the continent.<sup>115</sup>

The UN took up the responsibility as the body with the primary duty in maintaining peace and security in the world,<sup>116</sup> and acted based on the third pillar of R2P which stipulates that when states are manifestly failing or unwilling to protect their citizens then the international community should intervene on behalf of these people through the UN<sup>117</sup> and based on their commitment in paragraph 139.<sup>118</sup> They used their Chapter VII powers and passed a resolution referring the situation to the ICC.<sup>119</sup> This resolution firstly expressed grave concern at the situation in Libya and also condemned the violence and use of force against civilians.<sup>120</sup> They also considered that the widespread and systematic attacks taking place in Libya against the civilian population may amount to crimes against humanity. Therefore, they recalled the Libyan authorities' responsibility to protect their population.<sup>121</sup> They also imposed a travel ban, arms

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<sup>112</sup> Statement by the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the situation in Libya, 22 February 2011. [http://www.responsibilitytoprotect.org/UN\\_Secretary-General's\\_Special\\_Advisers\\_on\\_the\\_Prevention\\_of\\_Genocide\\_and\\_the\\_Responsibility\\_to\\_Protect\\_on\\_the\\_situation\\_in\\_Libya](http://www.responsibilitytoprotect.org/UN_Secretary-General's_Special_Advisers_on_the_Prevention_of_Genocide_and_the_Responsibility_to_Protect_on_the_situation_in_Libya). Last accessed on the 2/8/2011.

<sup>113</sup> H. Shejiao, Libyan War: Rising voice of reason, The 4<sup>th</sup> Media, posted 8<sup>th</sup> July 2011.

<sup>114</sup> A. Kamba, The Use of Force in Libya: the AU caught off Guard. Posted on 18/04/2011 available at <http://www.currentanalyst.com/index.php/opeds/154-the-use-of-force-in-libya-the-au-caught-off-guard>, last accessed 20/9/2011.

<sup>115</sup> See article 3(f) of the AU Constitutive Act.

<sup>116</sup> See UN Charter.

<sup>117</sup> M. Notaras and V. Popovski, 'The Responsibility to Protect, United Nations University', available at <http://unu.edu/articles/peace-security-human-rights/responsibility-to-protect-and-the-protection-of-civilians>, last accessed on 20/9/2011.

<sup>118</sup> World Summit Outcome Document (n6 above) para 139.

<sup>119</sup> Resolution 1970, S/RES/1970 (2011), available at [www.cfr.org](http://www.cfr.org). Last accessed on 20/03/2011.

<sup>120</sup> Preamble of Resolution 1970.

<sup>121</sup> Shejiao n113 above.

embargo and asset freeze on certain individuals closely related to the Gaddafi regime.<sup>122</sup>

It however became apparent that Gaddafi was not only ignoring the resolution but also planning a major assault on Benghazi in which ‘no mercy whatsoever’ would be shown to perceived opponents, armed or otherwise.<sup>123</sup> Therefore the UNSC followed up with Resolution 1973,<sup>124</sup> which also invoked R2P. It reasserted a determination to ensure the protection of civilians, and deplored the failure to comply with the first resolution. It called for an immediate ceasefire and a complete end to violent attacks against and abuse of civilians.<sup>125</sup> It also incorporated coercive military action which includes ‘taking all necessary measures’ to protect civilians and civilian populated areas under threat of attack and furthermore, all necessary measures to enforce a no-fly zone.<sup>126</sup>

However, months after the NATO led aerial bombing campaign started; Gaddafi still held on to power and continued to wreak havoc on civilian populations. The no-fly zone and other military measures employed by NATO did not deliver a knockout blow.<sup>127</sup> On the 30<sup>th</sup> of April a NATO military campaign killed Mastoura, Gaddafi’s granddaughter, her brother and two other grandchildren.<sup>128</sup>

This action sparked an international debate about the methods being used to protect civilians in Libya. To quote Evans, “the international military intervention in Libya is not about bombing for democracy or for Gaddafi’s head... Legally, morally or politically and militarily, it has only one justification: protecting Libyans from the murderous harm that Gaddafi inflicted on unarmed protestors, has continued to inflict on those who oppose him in the areas that his forces control, and has promised to inflict on his opponents in

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<sup>122</sup> Shejiao (n113 above) 15-17.

<sup>123</sup> G. Evans, ‘Implementing the Responsibility to Protect: Lessons and Challenges’, Freilich Foundation 2011, Alice Tay Lecture on Law and Human rights. Available at <http://www.gevans.org/speeches/speech437.html>, last accessed 4/8/2011.

<sup>124</sup> United Nations Security Council Resolution 1973, S/RES/1973 (2011), available at [www.cfr.org](http://www.cfr.org). Last accessed on 20/03/2011

<sup>125</sup> Resolution 1973 (n124 above) see preamble.

<sup>126</sup> Resolution 1973 (n124 above).

<sup>127</sup> Resolution 1973 (n124 above).

<sup>128</sup> V. Prasad, The Undoing of Libya, Islam Daily Observing Media, posted 29/06/2011. Available at [www.islamdaily.org/en/world-issues/middle-east/9843.article.html](http://www.islamdaily.org/en/world-issues/middle-east/9843.article.html), last accessed 4/8/2011.

Benghazi and other rebel held territory.”<sup>129</sup> He continued by saying “when that job is done, the military’s job will be done. Regime change is for the Libyan people themselves to be achieved.”<sup>130</sup>

The major question is what has the AU done to resolve the crisis? The PSC adopted a more intrusive and diplomatic approach to the conflict. They created a High-Level *ad hoc* Committee comprising of five Heads of State and Government, as well as the Chairperson of the Commission.<sup>131</sup> The Committee was mandated to i) engage with all parties in Libya and continuously assess the evolution of the situation on the ground, ii) facilitate an inclusive dialogue among the Libyan parties on the appropriate reforms, iii) engage AU’s partners, such as the League of Arab States, the EU and the UN, to facilitate coordination of efforts and seek their support for the early resolution of the crisis.<sup>132</sup>

The *ad hoc* Committee on the 19<sup>th</sup> of March issued a *communiqué* which *inter alia* reaffirmed the AU’s Conviction on the need for an urgent African action revolving around the following elements: i) the immediate cessation of all hostilities, ii) the cooperation of the concerned Libyan authorities to facilitate the diligent delivery of humanitarian assistance to the needy population, iii) the protection of foreign nationals, including African migrant workers living in Libya and iv) the adoption and implementation of political reforms necessary for the elimination of the causes of the current crisis. They also stressed the legitimacy of the aspirations of the Libyan people for democracy, political reform, justice, peace and security ... and the need to ensure that these aspirations are fulfilled in a peaceful and democratic manner.<sup>133</sup>

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<sup>129</sup> G. Evans, The UN Security Council mandate does not call for Gadhafi’s Head, The Daily Star 25<sup>th</sup> March 2011. Available at <http://www.responsibilitytoprotect.org/.../3371-gareth-evans-the-daily-star>, last accessed 4/8/2011.

<sup>130</sup> Evans (n129 above).

<sup>131</sup> Communiqué of the 265<sup>th</sup> Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV).

<sup>132</sup> Prasad (n128 above).

<sup>133</sup> Communiqué of the Meeting of the AU High-Level Ad Hoc committee on Libya. [http://au.int/en/dp/ps/sites/default/files/COMMUNIQUE\\_EN\\_19\\_MARCH\\_2011\\_PSD\\_MEETING\\_AU\\_HIG\\_H\\_LEVEL\\_AD\\_HOC\\_COMMITTEE\\_LIBYA\\_NOUAKCHOTT\\_ISLAMIC\\_REPUBLIC\\_MAURITANIA.pdf](http://au.int/en/dp/ps/sites/default/files/COMMUNIQUE_EN_19_MARCH_2011_PSD_MEETING_AU_HIG_H_LEVEL_AD_HOC_COMMITTEE_LIBYA_NOUAKCHOTT_ISLAMIC_REPUBLIC_MAURITANIA.pdf), last accessed 3/5/2011.

In the meantime the AU Commission and the PSC held several meetings on the crisis in Libya and issued several *communiqués* and press releases on the matter. In fact on the 4<sup>th</sup> of May the AU issued a press release clearly emphasizing its position that “its efforts are driven by the conviction that, ultimately, only a political solution will make it possible to promote, in a sustainable way, the legitimate aspirations of the Libyan people for reform, democracy, good governance and the rule of law.”<sup>134</sup>

The AU also reiterated its commitment to respect of UNSC resolution 1973, as expressed in the PSC *communiqué* of 26<sup>th</sup> April 2011. Furthermore, it echoed the PSC’s call on the imperative need for all countries and organizations involved in the implementation of that resolution to act in a manner fully consistent with international legality and the resolution’s provisions, whose objective is solely to ensure the protection of the civilian population.<sup>135</sup>

There were some efforts towards a peaceful settlement of the conflict. Gaddafi, however, rejected the opposition’s proposal, despite its unexpected narrow focus that would have allowed the long-time Libyan dictator to remain in power.<sup>136</sup> Hereafter, the AU proposed a “Roadmap” for a ceasefire and political reforms to eliminate the causes of the current crisis.<sup>137</sup> This proposal was accepted by Gaddafi,<sup>138</sup> but was rejected by the opposition.<sup>139</sup>

In a nutshell the AU’s intention of peaceful settlement of the dispute is in place, so also is the resolution passed by UNSC. However, there has been widespread criticism by many people on the handling of the Libyan crisis by the UN through NATO and the AU. My take on the situation is that resolution 1973 (at the time) was essential as military action was necessary to neutralize the threat posed by Gaddafi as well as to protect

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<sup>134</sup> African Union Press Release: The AU intensifies its efforts towards a political solution in Libya and stresses the importance of the respect of the letter and spirit of resolution 1973(2011), 3/5/2011.

<sup>135</sup> n134 above.

<sup>136</sup> P. Bernis, Libya and the limits to the R2P. Published in New Routes vol. 16, 2/2011 by the Life & Peace Institute pg. 36-39.

<sup>137</sup> Bernis (n136 above) at 38.

<sup>138</sup> Economics Newspaper, Gaddafi accepts the “roadmap” of the African Union, available at <http://economicsnewspaper.com/world-economics/libya-gaddafi-accepts-the-roadmap-of-the-african-union-12016.html>, last accessed 5/5/2011.

<sup>139</sup> n138 above.

Libyans from the atrocities being perpetrated against them by their leader. The wide interpretation of resolution 1973 and its implementation by NATO is what should be questioned.

I believe that the bombings should have been restricted to military structures and in extreme cases military personnel if they posed an imminent threat to civilians. Arming the rebels and targeting Gaddafi's Palaces and members of his family is beyond the mandate of resolution 1973 and contrary to R2P. The issue of regime change, especially through military force, is not envisioned in the R2P doctrine.

On the other hand the AU's stance of negotiation is also in place and accords with the R2P doctrine of the use of intrusive measures to protect civilians. My argument is that the threat to civilians had to be neutralized before any form of negotiations could have taken place. Thus resolution 1973 in my view complements the AU's policy, Gaddafi's actions had to be stopped before a request could have been made for negotiations. However, the AU, in dragging their feet in addressing the situation, showed a weakness on their part in swiftly responding to a crisis situation especially one regarding an influential country.

### **3.3 The Continental Early Warning System**

Most people agree that prevention is the most important aspect of R2P. After all the best way to protect populations from mass atrocity crimes is to ensure that they do not occur.<sup>140</sup> Respect for human rights is a viable and less costly method of conflict prevention, rather than reaction after violence erupts. As such human rights monitoring constitutes an effective means for early warning and preventive action.<sup>141</sup> Accordingly, the AU has also recognised that conflict prevention is of great significance in its fight to rid Africa of the scourge of war. In this light the Continental Early Warning System (CEWS) was created by the PSC in order to facilitate the anticipation and prevention of conflicts.<sup>142</sup>

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<sup>140</sup> S. Rosenberg, 'Responsibility to Protect: A Framework for Prevention', (2009) *Global Responsibility to Protect I* pgs 442-477 at 442. Available at: [www.brill.nl/gr2p](http://www.brill.nl/gr2p), last accessed 7/7/2011.

<sup>141</sup> Kuwali (n17 above) at 200.

<sup>142</sup> Article 12 of the Peace and Security Protocol.



Early Warning System refers to the analysing of information and the formulation and communication of analysis and policy options to relevant end-users. It uses open source material and principally depends upon the sharing of information.<sup>143</sup> In the case of the AU the end-users are the Chairperson of the AU Commission, the PSC and other relevant policy organs of the AU and PSC.<sup>144</sup>

In summary the aim of the CEWS is to strengthen the capacity of the Commission, the PSC and structures such as the ASF to identify critical developments in a timely manner, so that coherent response strategies can be formulated to either prevent violent conflict or limit its destructive effects.<sup>145</sup> Therefore the AU in the Peace and Security Protocol established the CEWS as one of the key pillars of the APSA.<sup>146</sup> The provision creating the CEWS also establishes an observation and monitoring centre called the 'Situation Room'.<sup>147</sup>

The Protocol also makes provision for the CEWS to work closely with the UN, Regional Mechanisms (RMs) and Regional Economic Communities (RECs) and other relevant international organisations for the successful running of the CEWS.<sup>148</sup> A good example of this provision being implemented was the adoption of the Livingstone Formula which, *inter alia*, stipulates that: "Civil Society Organisations may provide technical support to the AU by undertaking early warning reporting and situation analysis which feeds information into the decision making process of the PSC".<sup>149</sup>

The 2010 assessment found that the data collection and reporting systems are relatively advanced at the levels of CEWS.<sup>150</sup> At regional level, ECOWARN and CEWARN had made considerable progress in their early warning systems.<sup>151</sup> In other regions, some

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<sup>143</sup> J. Cilliers, 'Towards a Continental Early Warning System for Africa', ISS Paper 102, April 2005.

<sup>144</sup> Cilliers (n143 above) at pg.2.

<sup>145</sup> Cilliers (n143 above), the author citing article 1 of the Protocol on the Establishment of a Conflict Early Warning and Response Mechanism for IGAD Member States.

<sup>146</sup> See article 12 of the Peace and Security Protocol.

<sup>147</sup> Article 12 of the Peace and Security Protocol.

<sup>148</sup> Article 12(3) of the Peace and Security Protocol.

<sup>149</sup> Livingstone Formula adopted 5<sup>th</sup> December 2008, PSC/PR/(CLX).

<sup>150</sup> APSA (n21 above) at 33.

<sup>151</sup> APSA (n21 above) at 33.

progress had been achieved in establishing policy frameworks, specific concepts and approaches to early warning.<sup>152</sup>

Since the adoption of the Framework for the operationalization of the CEWS in December 2006,<sup>153</sup> the CEWS has been able to provide reliable and up-to-date information on potential, actual and post-conflict situations, such as the situation in Liberia as they head towards national elections on the 10<sup>th</sup> of October 2011, Southern Sudan during and after the referendum, Coté D'Ivoire after post-elections violence, Tunisia, Egypt, Libya to name but a few.

### **3.4 Panel of the Wise**

Drawing on Africa's rich tradition of bestowing peacemaking efforts on elders because of their wisdom, the AU established the Panel of the Wise (POW) as one of the key pillars of its peace and security architecture.<sup>154</sup> In its current structure, the Panel's make-up and mandate is provided for in the Peace and Security Protocol.<sup>155</sup> It consists of five highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent.<sup>156</sup>

The Panel consists of: the current Chairperson of the Independent Electoral Commission of South Africa: Brigalia Bam, former President of Algeria: Ahmed Ben Bella, former President of the Constitutional Court of Benin: Elisabeth Pognon, former Prime Minister and President of São Tomé & Príncipe: Miguel Trovoadá and former Secretary-General of the OAU and former AU Special Envoy and chief mediator for the inter-Sudanese political talks on Darfur: Salim Ahmed Salim.<sup>157</sup>

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<sup>152</sup> ASPA (n21 above) at 33.

<sup>153</sup> ASPA (n21 above) at 32.

<sup>154</sup> ASPA (n21 above) at 53.

<sup>155</sup> ASPA (n21 above) at 53.

<sup>156</sup> J. El Abdellaoui, 'The Panel of the Wise: A comprehensive introduction to a critical pillar of the African Peace and Security Architecture', ISS Paper 193, August 2009, at 1.

<sup>157</sup> Abdellaoui (n156 above) at 2.

The Panel functions as an advisory body to the PSC and the Chairperson of the Commission on matters relating to the promotion and maintenance of peace, security and stability on the continent.<sup>158</sup> In addition, the Protocol provides that “...at its own initiative, the POW shall pronounce itself on issues relating to the promotion and maintenance of peace, security and stability in Africa.”<sup>159</sup> This clause is crucial as it gives the Panel a degree of independence, bearing in mind that it nevertheless operates within the larger framework of the APSA.<sup>160</sup>

The Panel’s mandate is twofold: to support the PSC and Chairperson in their peacemaking efforts, and to act independently on issues that it deems significant to the enhancement of human security on the continent.<sup>161</sup> Its mandate was elaborated in the Modalities for the Functioning of the Panel of the Wise, which was adopted in November 2007.<sup>162</sup> Under the Modalities of Action, it is clearly stated that the Panel cannot engage in mediation but can assist and advise mediation teams engaged in formal negotiations.<sup>163</sup>

The Panel’s engagement in conflict situations may take several forms. The Panel periodically discusses crisis situations on the continent from an early warning point of view and makes recommendations to the PSC and the Chairperson of the Commission.<sup>164</sup> In addition to this general overview, the Panel will select up to three ‘priority conflict situations’ per year which it will monitor constantly.<sup>165</sup> The selected countries may also be visited for fact-finding or sensitization purposes, the adversaries in the conflict may be engaged or ongoing peace-making initiatives may be assisted.<sup>166</sup> In addition to maintaining a consistent interaction with priority conflict situations on an

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<sup>158</sup> ASPA (n21 above), at 53. See also article 11(3) of the Peace and Security Protocol.

<sup>159</sup> ASPA (n21 above) at 2. See also article 11(4) of the Peace and Security Protocol.

<sup>160</sup> Abdellaoui (n156 above) at 2.

<sup>161</sup> ASPA (n21 above) at 53.

<sup>162</sup> African Union booklet on the Panel of the Wise: ‘A critical pillar of the African Peace and Security Architecture, Modalities for the functioning of the Panel of the Wise’ as adopted by the Peace and Security Council at its 100<sup>th</sup> meeting held on the 12<sup>th</sup> November 2007, section XI.

<sup>163</sup> n162 above.

<sup>164</sup> African Union, Panel of the Wise, Programme of work for 2008, section II (c) (13).

<sup>165</sup> n162 above at (14).

<sup>166</sup> n162 above at (14).

annual basis, the Panel recognized that it should be able to respond to unforeseen developments on the continent or situations that unexpectedly require the Panel's involvement.<sup>167</sup>

The 2008 programme of work also outlined various criteria that the Panel may wish to consider in deciding on which situations to focus or on which to respond,<sup>168</sup> for example they look at the degree to which a conflict situation receives regional and international attention.

The Panel has conducted activities in two countries namely: Central African Republic (CAR) and South Africa (in the case of South Africa their visit was just to observe the electioneering process.<sup>169</sup> Shortly after the appointment of the Panel members, the Panel undertook a mission to the CAR.<sup>170</sup> During its mission to the country the Panel consulted with a number of stakeholders, such as political parties, trade unions, civil society organizations and members of the diplomatic corps.<sup>171</sup> It turned out that a political dialogue was required to move the country forward, and that it should be guided by the principle of inclusivity. In light of this, the Panel received the mandate from President François Bozizé to also engage rebel movements that had recently conducted armed activities against his government.<sup>172</sup> The Panel indeed met with various rebel leaders who are based outside the country, including the former president, Ange-Félix Patassé, who was overthrown by Bozizé in March 2003.<sup>173</sup>

In March 2007, the Panel submitted a report on the need to organize an inclusive political dialogue to President Bozizé, who subsequently forwarded the report to the country's National Assembly and Constitutional Court, as well as to political parties, civil

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<sup>167</sup> n162 above at (15).

<sup>168</sup> n162 above at(16).

<sup>169</sup> ASPA (n21 above) at 56.

<sup>170</sup> ASPA (n21 above) at 56.

<sup>171</sup> African Union, Panel of the Wise, Programme of work for 2008 (n160 above) at 6.

<sup>172</sup> n162 above at 6.

<sup>173</sup> n162 above at 6.

society organisations and the diplomatic community.<sup>174</sup> Such a dialogue was eventually held in December 2008. However, since then fighting by various movements, including those who had taken part in the dialogue, has resumed.<sup>175</sup>

Another great engagement of the Panel was the role it played in Kenya's post-electoral violence.<sup>176</sup> The Panel's activities on the matter concluded, in an international workshop, on the strengthening of the role of the AU in the prevention, management and resolution of election-related conflicts in Africa.<sup>177</sup>

### **3.5 The African Standby Force**

The AU Constitutive Act recognized that in the protection of civilians against mass atrocity crimes there will come a time when the only means of achieving this will be through military intervention. Thus they also included a provision in the Act stipulating that the Union has the right to intervene in a member state on its own accord or by invitation from the country itself pursuant to a decision of the Assembly in respect of grave circumstances.<sup>178</sup>

Significantly, the ASF is established to enable the PSC to perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4(h) and 4(j) of the AU Act.<sup>179</sup> The ASF constitutes standby multidisciplinary contingents, with civilian and military components in their countries of origin which are ready for rapid deployment at appropriate notice.<sup>180</sup>

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<sup>174</sup> United Nations, Report of the Secretary-General on the situation in the Central African Republic and the activities of the United Nations Peace-building Support Office in the Central African Republic. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/386/75/PDF/N0738675.pdf?OpenElement> last accessed 9/8/2011.

<sup>175</sup> African Union, Panel of the Wise, Programme of work for 2008, (n161 above) at pg. 6.

<sup>176</sup> African Union, Panel of the Wise, Programme of work for 2008, (n161 above) at pg. 8.

<sup>177</sup> G. Khadiagala, K. Matlosa and N. Driss, *Strengthening the role of the African Union in the prevention, management and resolution of election-related conflicts in Africa, Final draft report for the African Union Department of Peace and security*, June 2009, 53-54.

<sup>178</sup> Article 4(h) and (j) of the AU Constitutive Act.

<sup>179</sup> Article 13(1) of the Peace and Security Protocol.

<sup>180</sup> Kuwali (n17 above) at 199-200.

The ASF is supported by the Military Staff Committee (MSC) comprised of senior military officers of the Members of the PSC. The MSC is mandated to advise and assist in all questions relating to military and security requirements for the promotion and maintenance of peace and security in Africa. In any case it should be noted that the AU should be capable of deploying African missions not only for peacekeeping but also for peace enforcement and post-conflict activities.<sup>181</sup>

The role of the ASF is to provide Peacekeeping forces on a high level readiness capable of rapid deployment in response to a request by the UN or the AU.<sup>182</sup> Furthermore, it will undertake observation and monitoring, preventive deployment, intervention to prevent or halt mass atrocity crimes and engagement in peace-building tasks, including post-conflict disarmament and demobilization.<sup>183</sup> It is the responsibility of the REC/RMs to prepare their capabilities as mechanisms for the AU Commission to achieve the Peace and Security initiatives of the Union.<sup>184</sup> The Policy Framework document for the establishment of the ASF and the Military Staff Committee outlined a number of typical conflict scenarios in developing its structure and deployment timelines.<sup>185</sup>

In 2005, the Executive Council of the AU stressed the need for the effective operationalisation of the various segments of the APSA including the ASF.<sup>186</sup> In response to this concern the Roadmap for the operationalisation of the African standby Force was adopted.<sup>187</sup> This document divided the operationalisation into two phases. Phase 1 focused on individual training of the Planning Elements (PLANELM) HQs level,

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<sup>181</sup> *Report of the 4<sup>th</sup> Meeting of African Chiefs of defence Staff and Experts on the Establishment of the African Standby Force and the Common African Defence and Security Policy*, EXP/DefeSecRpt (IV), January 2004.

<sup>182</sup> ASPA (n21 above) at 37.

<sup>183</sup> Kuwali (n17 above) at 203.

<sup>184</sup> ASPA (n21 above) at 37.

<sup>185</sup> *African Union Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee*, adopted by the Chiefs of Staff on 17-18 January 2004. Available at <http://www.african-union.org/root/au/auc/departments/psc/asf/documents.htm>, last accessed 10/8/2011. See also n 284 at pg. 3.

<sup>186</sup> ASPA (n21 above) at 39.

<sup>187</sup> Roadmap for the Operationalisation of the African Standby Force, Exp/AU-RECs/ASF/4(I) Addis Ababa 22-23 March 2005. Available at <http://www.african-union.org/root/au/auc/departments/psc/asf/documents.htm>, last accessed 10/8/2011.

Brigade Headquarters and LOG Base at member state level. This phase has been successfully completed.<sup>188</sup> Phase 2, deals with the collective training of the individual groups that is, PLANELM HQs level, Brigade Headquarters and LOG Base and units.<sup>189</sup>

The rationale behind this is to consolidate the ASF tools and concept of operations, identification of capacities for the deployment in the interim period prior to 2010 and capacity building.<sup>190</sup> A second 'roadmap' was therefore introduced in July 2008, which laid emphasis on civilian and police contributions.<sup>191</sup> Roadmap III is intended to be fully operational by 2015.<sup>192</sup> It is a very ambitious project, with the addition of new tasks, including disaster relief and the creation of a Rapid Deployment Capacity by the end of 2012.<sup>193</sup>

According to the 2010 assessment study, the sub-regional bodies are satisfactorily living up to their commitments on the operationalisation of the ASF.<sup>194</sup> For instance all the sub-regional bodies have successfully established their framework documents; they have set up the necessary planning elements, police components, pledged units and centres of excellence.<sup>195</sup> However, some regions are lacking in certain respect, for instance ECOWAS's implementation of its memorandum of understanding is still in process, SADC does not have a brigade headquarters and finally all the regions are yet to include a civilian component in their contribution to the ASF.<sup>196</sup>

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<sup>188</sup> ASPA (n21 above) at 39.

<sup>189</sup> ASPA (n21 above) at 39.

<sup>190</sup> ASPA (n21 above) at 39.

<sup>191</sup> Policy Framework for the civilian Dimension of the African Standby Force, adopted by the African Ministers of Defence and Security, March 2008.

<sup>192</sup> The African Standby Force: External support to an African solution to African problems? Institute of Development Studies, Research Summary to Report 67, April 2011.

<sup>193</sup> Policy Framework for the civilian Dimension of the African Standby Force, adopted by the African Ministers of Defence and Security n184.

<sup>194</sup> ASPA (n21 above) at 40.

<sup>195</sup> ASPA (n21 above) at 40.

<sup>196</sup> ASPA (n21 above) at 40.

### **3.6 The African Commission on Human and Peoples' Rights and The African Court of Justice and Human Rights**

Article 19 of the PSC Protocol provides that the PSC should 'seek close cooperation' with the African Commission 'in all matters relevant to its object and mandate' and that the African Commission should also inform the PSC of all relevant issues.<sup>197</sup> Due to the fact that the African Commission is mandated to receive complaints from states, individuals and NGOs, its close relationship with the PSC has the potential to detect impending atrocities and inform the PSC to intervene before the mass atrocity crimes are committed.<sup>198</sup> The immediate role the African Commission can play is to provide a reliable report to the PSC on human rights deprivations, which can serve as the basis for deciding whether or not to intervene.<sup>199</sup>

However, I must hastily mention that the African Commission is a quasi-judicial body without the authority to render decisions binding on member states.<sup>200</sup> Therefore the recommendations made by the Commission have been scarcely enforced by State Parties, as Kuwali puts it; "the scantiness of the enforcement and compliance control mechanism contained in the Banjul Charter, however, is hardly surprising given the paucity of democracy and the prominence of autocracy on the continent..."<sup>201</sup>

The establishment of the African Court of Justice and Human Rights (ACHRt) can solve this problem.<sup>202</sup> Unlike the African Commission, the ACHRt has power, if it considers that there was a violation of human or peoples' rights, to order any appropriate measures in order to remedy the situation.<sup>203</sup> Furthermore, the Court's statute provides

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<sup>197</sup> Article 19 of PSC Protocol.

<sup>198</sup> Kuwali (n17 above) at 206.

<sup>199</sup> Kuwali (n17 above) at 207.

<sup>200</sup> Kuwali (n17 above) at 206.

<sup>201</sup> Kuwali (n17 above) at 207.

<sup>202</sup> Article 18 of the AU Constitutive Act.

<sup>203</sup> Article 1 of the Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as Protocol to the African Human Rights Court).



that State Parties are required to comply with, and guarantee the execution of any of the judgements of the Court.<sup>204</sup>

The decisions of the Court are final and binding on State Parties and can be referred to the AU Assembly for enforcement. Moreover, where a state party fails to comply with the judgement, the Court shall refer the matter to the AU Assembly which shall decide upon measures to take such as imposing sanctions to give effect to that judgement.<sup>205</sup>

Now the question is how does this association benefit the PSC and its mandate of protecting civilians from mass atrocity crimes? The jurisdiction of the African Court is wide which gives it enough latitude to deal with cases of mass atrocity crimes.<sup>206</sup> Furthermore, with the decisions of the court being binding on Member States, it will have a greater impact on civilian protection and the prevention of mass atrocity crimes.<sup>207</sup>

### **3.7 New Partnership for Africa's Development and the African Peer Review Mechanism**

NEPAD sprung from a new philosophy of African renaissance, a theory of African re-birth proposed by former President Mbeki of South Africa in his Millennium Partnership for the Africa Recovery Programme Plan (MAP),<sup>208</sup> and the OMEGA plan for Africa (OMEGA Plan)<sup>209</sup> presented by President Wade of Senegal. On the other hand, the APRM assesses a range of state activities under four broad themes, namely, democracy and political governance; economic governance and management; corporate governance and socio-economic development.<sup>210</sup> The NEPAD Declaration

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<sup>204</sup> Article 27 of the Protocol to the African Human Rights Court.

<sup>205</sup> Article 29 of the Protocol to the African Human Rights Court.

<sup>206</sup> Kuwali (n17 above) at 210.

<sup>207</sup> Kuwali (n17 above) at 210.

<sup>208</sup> N. Waitchira, *Ships Passing in the Night? Opportunities to integrate the African Peer Review Mechanism Early Warning Findings within the African Union Peace and Security Architecture* at pg. 25. Unpublished dissertation 2008.

<sup>209</sup> Available at <http://www.sarpn.org.za/NEPAD/Omega.pdf>, last accessed 14/8/ 2011.

<sup>210</sup> Waitchira (n208 above) citing the Briefing of the World Economic Forum Meeting-Millennium Africa Renaissance Programme implementation issues.

highlights conflict prevention as one of the objectives of the agendas by African leaders for the continent.<sup>211</sup>

Furthermore, the declaration emphasizes the need to build the capacity of African institutions for early warning, as well as enhancing their capacity to prevent, manage and resolve conflict.<sup>212</sup> These provisions can be equated to the elements of R2P especially looking at the early warning provisions which can promote the responsibility to prevent. APRM can be used to aid the AU and especially the CEWS in gathering and analysing information through its Country Review Report.<sup>213</sup>

For instance the Kenyan Country Review Report identifies several strands of conflict, mostly interconnected and feeding on each other.<sup>214</sup> It showed that the conflicts were politically induced. The power struggle provides a basis for the politicization of ethnic differences, abuse of political power and authority, causes the existence of militias in political parties, and limited opportunities for effective political participation.<sup>215</sup> These signs were signals of the post elections violence that took place in the country in 2008.<sup>216</sup> Therefore information gathered from country reports can be used to prevent conflicts and mass atrocity crimes.

Moreover, the reviews are under taken by Peer Review Teams who then submit the reports to the APRM participating Heads of State and Government. If inadequacies are reported and the state concerned demonstrates a willingness to rectify the shortcomings, participating States are obliged to assist their peers and urge the international community to do likewise. However, in the absence of political will to mend its ways, the peers should then engage the defaulting country in constructive dialogue

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<sup>211</sup> Waitchira (n208 above) at 26.

<sup>212</sup> Paragraph 72 of the NEPAD Declaration.

<sup>213</sup> Paragraph 5 of the African Peer Review Mechanism (APRM): Base Document (2003).

<sup>214</sup> African Peer Review Mechanism, Country Review Report of the Republic of Kenya, May (2006) 69 <http://www.nepad.org/2005/files/aprm/APRMKenya-report.pdf>, last accessed on 14/8/2011.

<sup>215</sup> African Peer Review Mechanism Country Report (n210 above) at 65.

<sup>216</sup> *Report by the Commission of Inquiry into Post Election Violence, often referred to as the Waki Report, after the Chairman Judge Phillip Waki.* Available at [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf), last accessed 14/8/2011.

before undertaking punitive measures collectively.<sup>217</sup> Thus the peer review mechanism can be used to prevent mass atrocity crimes as it enables governments to address a country that is defaulting in protecting its citizens against human rights violations.

### **3.8 Conclusion**

I can safely conclude by saying that indeed Africa has moved from the stage of non-intervention in the affairs of another country to the protection of civilians against mass atrocity crimes. The institutions set up by the AU to implement R2P have shown some amount of commitment by African leaders to accomplishing their obligation to prevent and protect people in Africa against these egregious crimes. I must applaud the Union for their perseverance and for the successes it has registered in the short while that the Union was established.

It has made several strides in protecting civilians, something that its predecessor lacked. However, much needs to be done as the continent still faces gruesome conflicts in which mass atrocity crimes are being committed against civilians. The leaders have to show more willingness in fulfilling their obligations. As stated the operationalisation of the ASF has been postponed to 2015 which is quite a setback as an operational stand-by force would serve as deterrence to perpetrators of these mass atrocity crimes. Furthermore, it is my opinion that more attention should be paid to the CEWS, the African Court on Human and Peoples' Rights and other institutions that provide intrusive measures in implementing R2P.

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<sup>217</sup> Kuwali (n17 above) at 217.

#### **4.1 Challenges Facing the AU in implementing the Responsibility to Protect**

The above analysis has shown how the AU is implementing its R2P obligation. However, it must be noted that the AU is still faced with many obstacles hindering them from effectively protecting civilians from mass atrocity crimes. These obstacles can be categorized as follows: human and financial resources, lack of political will, relationship between sub-regional organisations and finally the relationship between the AU and other international organisations especially the UNSC and the ICC.

#### **4.2 Lack of Human Resources**

With regard to human resources, the situation is very dismal. Even though the PSC Protocol provided for a secretariat, it took the AU fifteen months to recruit the first staff member, and nearly two years for it to appoint the head of the division.<sup>218</sup> According to the 2010 APSA Assessment Study, the PSC Secretariat only consisted of 4 professional staff members, one secretary and an administrative assistant and even the professional staff were appointed through external partner support.<sup>219</sup>

To complicate matters, the PSC Secretariat does not have a legal expert despite the fact that it deals with a lot of issues requiring legal interpretation.<sup>220</sup> There is also a shortage of staff dealing with the CEWS. In order to accomplish its mandate of gathering and analysing data the Protocol made provision for a Situation Room.<sup>221</sup> The Situation Room is responsible for the monitoring of potential, actual and post-conflict situations in Africa.<sup>222</sup> In order to perform its function there are 10 Situation Room Assistants working on a 24/7 shift basis. This number is substantially inadequate to cover all regions in Africa.<sup>223</sup>

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<sup>218</sup> Williams (n92 above) at 620.

<sup>219</sup> ASPA (n21 above) at 30.

<sup>220</sup> ASPA (n21 above) at 30.

<sup>221</sup> Article 12(2) of the PSC Protocol.

<sup>222</sup> ASPA (n21 above) at 34.

<sup>223</sup> ASPA (n21 above) at 34.

### **4.3 Lack of Reliable Financial Resources**

If the AU is to succeed in its goal of promoting peace, security and stability on the continent, an extra-budgetary resource mobilization is required to meet its goal. Member states should show more commitment in terms of funding and training experts to work in the organisation. It is devastating to note that only 10 Situation Room assistants are gathering and analysing data for a continent that is approximately 300 million square kilometres in size.

According to a World Bank report published in 2009; an estimated average of 23,000 qualified academics were emigrating from Africa each year leading to an acute shortage of skilled human resources on the continent. The AU like many other institutions in Africa is implicated in this brain-drain phenomenon. There are few technocrats working in this institution as pointed out above. It is my opinion that the financial status of the AU makes it unattractive for experts to render their services in this organisation. Unlike other major organisations like the United Nations and the European Union who have considerable resources available, the AU depends on a few African States and largely on donor organisations for funding, as a result the level of benefits, allowances and salaries available to its staff is less attractive compared to these other organisations.<sup>224</sup>

The AU has in a number of situations invoked article 4(h) of its Constitutive Act, these situations include Burundi (AMIB), Sudan (AMIS) and Somalia (AMISOM). The majority of the peacekeepers came from a handful of African states; in fact the Somalia mission had only two troop contributing countries, Uganda and Burundi.<sup>225</sup> Furthermore, the largest operation conducted by the AU, the Sudan mission, had only four contributing states, (Nigeria, Rwanda, Senegal and South Africa).<sup>226</sup> The deployment of peacekeepers in these conflict situations exposed a major gap between the PSC's willingness to authorize such missions and the AU's ability to implement them.<sup>227</sup>

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<sup>224</sup>For example see salaries, allowances and benefits of the United Nations, available at [http://www.un.org/depts/OHRM/salaries\\_allowances/allowanc.htm](http://www.un.org/depts/OHRM/salaries_allowances/allowanc.htm), last accessed 21/11/2011.

<sup>225</sup> Williams (n92 above) at 619.

<sup>226</sup> Williams (n92 above) at 619.

<sup>227</sup> ASPA (n21 above) at 26.

It goes without saying that the AU needs reliable financial resources to fund its institutions and to engage in its peace and security mandate effectively or in this case to perform its R2P Obligations. In relation to the second aspect of its mandate, article 21 of the PSC Protocol provides for the establishment of a peace fund, to pay for peace support missions and other peace and security related activities.<sup>228</sup> The sources of generating income for this fund are three-fold: firstly, financial appropriations from the AU's budget; secondly, voluntary contributions from Member States of the Union and finally contributions from external sources within and outside Africa.<sup>229</sup>

The lack of financial resources has affected the AU's peacekeeping and intervening capability. This can be seen in its peacekeeping missions. Firstly, in Burundi, the total approved strength of AMIB was 3,335 and the troop-contributing states were South Africa, Mozambique and Ethiopia.<sup>230</sup> The total budget for the first year of this mission was estimated at \$110 million dollars.<sup>231</sup> This proved to be a huge problem as such resources were not available to the Union.<sup>232</sup> This hampered the ability of troop-contributing countries to fully deploy their troops.<sup>233</sup> To salvage the situation, the AU requested that troop-contributing countries should be responsible for the first two months of deployment, awaiting reimbursement from them, with the AU assuming responsibility at the end of this period.<sup>234</sup>

This policy did not work out, as Ethiopia and Mozambique did not have the resources to deploy their troops leaving the initial burden on 1600 South African troops to deliver the

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<sup>228</sup> Article 21 of the Peace and Security Protocol.

<sup>229</sup> E. Omorogbe, 'Can the African Union Deliver Peace and Security?' (2011) *Journal of conflict & Security Law*, 1-28.

<sup>230</sup> Omorogbe (n229 above) at 12.

<sup>231</sup> F. Agaoye, *The African Mission in Burundi: Lessons Learned from the first African Union Peacekeeping operations*, (2004) 2 *Conflict-Trends* 9-13.

<sup>232</sup> Omorogbe (n229 above) at 12.

<sup>233</sup> Omorogbe (n229 above) at 12.

<sup>234</sup> Omorogbe (n229 above) at 12.

complex mandate on their own.<sup>235</sup> AMIB never reached its approved strength of 3,335. During May 2004, at the close of the mission, its strength stood at 2,600.<sup>236</sup>

The AU encountered the same or even worse problems when it conducted its peacekeeping mission in Sudan. The AMIS I was the first mission which only consisted of 60 military observers and 300 protectors to the observers.<sup>237</sup> It became evident that the small number of personnel coupled with the vast land area of the Sudan resulted in the AU's failure to effectively monitor the ceasefire agreement in Darfur.<sup>238</sup> This mission was supported by the European Union (EU) which provided €12 million in June 2004 for a period of 12 months.<sup>239</sup>

The PSC decided to enhance the mission in Sudan, which became AMIS II.<sup>240</sup> The mission's personnel were increased to 3,320 in 2004<sup>241</sup> and later to 7,731 in 2005.<sup>242</sup> With the increase in personnel came greater responsibility. The AMIS II's mandate was strengthened to include: "monitoring compliance with the ceasefire agreements, it was to contribute to a secure environment for the delivery of humanitarian relief and the return of internally displaced persons and refugees to their home".<sup>243</sup> However, of great importance was the provision that AMIS II could "protect civilians whom it encounters under imminent threat and who were in the immediate vicinity of dangers."<sup>244</sup> With the increase in personnel and the mandate for AMIS II the AU was again faced with resource constraint to enable AMIS II in efficiently carrying out this extended mandate.<sup>245</sup>

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<sup>235</sup> Omorogbe (n229 above) at 12.

<sup>236</sup> 'The Chairperson of the AU Commission Welcomes the Decision of the UN Security Council to Authorize the Deployment of a Peacekeeping Operation in Burundi' (22 May 2004) Press Release No 046/2004.

<sup>237</sup> Omorogbe (n229 above) at 12.

<sup>238</sup> Omorogbe (n229 above) at 12.

<sup>239</sup> EU Mobilizes € 12 million from Peace Facility to Support African Union Peace Keeping Operations in Darfur Sudan, (10 June 2004), Press Release IP/04/727.

<sup>240</sup> Omorogbe (n229 above) at 15.

<sup>241</sup> AU Communiqué (20 October 2004), PSC/PR/Comm (XVII) 7.

<sup>242</sup> AU Communiqué (28 April 2005), PSC/PR/Comm (XXVIII) 9.

<sup>243</sup> n236 at 4.

<sup>244</sup> n235 at 6.

<sup>245</sup> Omorogbe (n229 above) at 16.

The budget for AMIS II for 1<sup>st</sup> July 2005 to 30<sup>th</sup> June 2006 was estimated at \$466 million.<sup>246</sup> The AU received pledges from its international partners amounting to \$291 million, including \$77 million from the EU. However, these pledges were slow to come in and by October 2005, only \$64 million of this amount had been received by the AU.<sup>247</sup>

Meanwhile the situation on the ground remained unstable.<sup>248</sup> By September 2006 the security situation had deteriorated and there were ceasefire violations by all parties.<sup>249</sup> As a result of the continued fighting in Darfur 130,000 people were displaced and AMIS troops increasingly became the subject of attacks.<sup>250</sup> Based on these events in June 2007, the PSC requested that the UN urgently authorize the deployment of the hybrid force, and that was decided by a UNSC resolution on the 31 July 2007.<sup>251</sup> The resolution established UNAMID as a joint AU-UN peace support mission with a Chapter VII mandate to protect civilians.<sup>252</sup>

The same difficulty continues to face the AU (AMISON). From the beginning of its mission, AMISON's lack of financial resources led to problems in obtaining and deploying sufficient troops.<sup>253</sup> Like AMIB in 2003, the AU relied on troop contributing states to be self-sustaining during deployment.<sup>254</sup> The result was that by January 2008 the only deployment was two battalions of Ugandan troops (approximately 1600) together with an advance party of 192 Burundian soldiers.<sup>255</sup>

The lack of resources by the AU is seriously affecting both the deployment of troops and the operations on the ground in Somalia. At the time of writing the situation has not improved, the country remains fragile and volatile.

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<sup>246</sup> 'Report of the Chairperson on the situation in the Sudan' (28 April 2005) PSC/PR/2(XXVIII) at 50.

<sup>247</sup> n246 at 62.

<sup>248</sup> Omorogbe (n229 above) at 16.

<sup>249</sup> 'Report of the Chairperson on the situation in the Sudan' (18 September 2006) PSC/MIN/2(LXIII) at 40.

<sup>250</sup> 'Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur' (5 June 2007) UN Doc S/2007/307/Rev1, at pg 21-28.

<sup>251</sup> 'Communique on the Situation in Darfur' (22 June 2007) PSC/PR/Comm(LXXIX) [8];

<sup>252</sup> UNSC Res 1769 (31 July 2007).

<sup>253</sup> Omorogbe (n229 above) at 23.

<sup>254</sup> AU Communiqué, (19 January 2007), PSC/PR/Comm (LXIX) 9.

<sup>255</sup> 'Report of the Chairperson of the Commission on the situation in Somalia' (18 January 2008) PSC/PR/2(cv) at 34.



It must be noted that the AU created the peace fund, which the Union will use to pay for peace support missions and other peace and security-related activities.<sup>256</sup> According to the AU Scale Assessment done on 1 January 2006, Algeria, Egypt, Libya, Nigeria and South Africa each pay a ceiling rate of 15% each of the AU budget, with the remaining 25% allocated to the other 48 Member States.<sup>257</sup> By mid 2009 only 30 of the 53 states, including only two of the five ‘ceiling states’ were up-to-date with their payments.<sup>258</sup> According to reports, the total arrears of Member States amounted to \$127 Million in 2009.<sup>259</sup> As of 2011 the trend has not changed, two-third of Member States are still in arrears.

According to Omorogbe, “this unreliability helps explain why only 6% of the regular budget is allocated to the peace fund”.<sup>260</sup> Judging from this statement, I argue that having Member States contribute troops for the AU’s peace missions operations is very difficult because the AU do not have the available resources to sustain such missions. Furthermore, the states themselves cannot afford such expensive undertakings. This was evidenced by Mozambique and Ethiopia postponing the deployment of their troops in Burundi, as they could not pay for the sustenance of their troops. Therefore, in my opinion, African countries are more willing to contribute troops to the UN or the new AU-UN hybrid peacekeeping operations than to the AU, because the AU lacks sufficient resources to provide the required equipment and other necessary logistics for their troops. The UN however, can solicit enough funds from its members to embark on peacekeeping missions.

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<sup>256</sup> see salaries, allowances and benefits of the United Nations (n224 above).

<sup>257</sup> AU, ‘Decision on the Scale Assessment’ (5 July 2005) Assembly/AU/Dec 88 (V4).

<sup>258</sup> AU ‘Decision on the Contributions of Member States’ (26-30 January 2009), EXCL/Dec457 (XIV).

<sup>259</sup> ‘AU States Contributions in Arrears Estimated at U.S. \$127 Million’ (29 June 2009), available at <http://allafrica.com/stories/200906291577.html>, last accessed 05/05/2011.

<sup>260</sup> AU ‘Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa. (25 May 2004) PSC/AHG/3 (IX) 24. See also E. Y. Omorogbe, ‘Can the African Union Deliver Peace and Security? Journal of Conflict & Security Law, Oxford University Press 2011.

#### **4.4 Political Activism as a Challenge to the Implementation of the Responsibility to Protect by the African Union**

Of great importance is the willingness of top political figures to undertake their obligation to implement R2P. It must be noted that there have been many statements, declarations and laws that signal a broad international consensus about the importance of civilian protection.<sup>261</sup> The depth of political commitment to realising this lofty goal is not always clear and varies considerably across governments and organisations. Specifically, what costs are African Leaders willing to endure in order to protect civilians, and how far are they willing to challenge the old notion of sovereignty in countries where the government is the main perpetrator and the leader of that government is an influential figure in the continent's political sphere? On paper article 4(h) of the AU Constitutive Act implies that the Union is willing to override the norm of non-intervention in what is called 'situations of grave circumstances'.

However, when the need arose for African Leaders to rise to the occasion they were unwilling to undertake the obligations and commitments to which their states had subscribed. When the Libyan situation erupted many people declared the situation as one of grave circumstance requiring intervention. African Leaders were silent as to the violent action taken by the Gaddafi regime against the Libyan people, due to the influential role Gaddafi played in Africa's politics. In fact when the international community reacted, African Leaders took a negative stance refusing to cooperate with the UNSC resolution 1970 and the ICC's request to arrest and surrender Gaddafi and members of his government.

Another example of how a lack of political will by African leaders can serve as a hindrance to the protection of civilians is the role of the Sudanese Government in the Sudan Conflict. It can be seen from the AU-UN peacekeeping mission in Sudan that Sudan's blocking tactics not only delayed the deployment of peacekeeping forces, but damaged peacekeeping's wider political credibility, creating a political systemic crisis.<sup>262</sup>

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<sup>261</sup> For instance, the AU Constitutive Act, the UN World Summit Outcome, Ezulwini Consensus.

<sup>262</sup> R. Gowan, 'The Strategic Context: Peacekeeping in Crisis, 2006-08', *International Peacekeeping*, p, 454.

The Sudanese Government was also notorious for using ceasefire periods to consolidate its position, regroup with a view to launching subsequent military incursions. Thus when they declared a ceasefire on 12 November 2008 in Darfur and pledged to disarm all its allied militia, the armed groups in Darfur met the declaration with suspicion.<sup>263</sup>

According to Murithi, the basic conditions required for an effective peacekeeping operation based on the Brahimi Condition<sup>264</sup> were absent in Darfur.<sup>265</sup> It was stated that “there was no peace to keep and the Government and the parties continued to pursue a military solution to the conflict”. It was further acknowledged that “as far as the situation in Darfur was concerned ‘the effectiveness’ of a peacekeeping operation was largely contingent upon the commitment of the parties to the peace process without which peacekeepers can be vulnerable themselves”.<sup>266</sup>

#### **4.5 The Relationship between the African Union and Sub-Regional Organisations**

As pointed out in the above analysis, considerable effort has been made by sub-regional organisations in the implementation of R2P. Despite the above reasons for sanguinity, there are several challenges and obstacles to the effective institutional cooperation between inter-African organisations in implementing R2P. These impediments can be put into two categories. Firstly, there is a continuing existence of a ‘disharmony’ of regional groupings; and the dissonant nature of sub-regional

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<sup>263</sup> T. Murithi, ‘The African Union’s Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur, Journal of Peace, Conflict and Development, (2009) Issue 14, at pg 14. Available at [www.peacestudiesjournal.org.uk](http://www.peacestudiesjournal.org.uk), last accessed 17/02/2011.

<sup>264</sup> UN General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations*, (Brahimi Report), A/55/305-5/2000/809, 21 August 2000. The report issued strong recommendations in August 2000. It urged improvements in strategy and doctrine, planning and management of operations, and rapid and effective deployment. The report pushed for UN Member States to advance reforms, make UN headquarters more capable and improve their contributions to peace operations.

<sup>265</sup> Murithi (n263 above) at 14.

<sup>266</sup> ‘United Nations Report of the Secretary-General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur’ S/2008/659, 17 October 2008 at 14.

cooperation and integration processes. Secondly, the overlapping membership within these groupings is also a point for concern.<sup>267</sup>

After the Cold War, African countries developed a policy known as 'African Solutions to African Problems'. In order to enact this policy, a large quantity of sub-regional organisations emerged. These organisations established peace and security structures to promote peace and security in Africa and recently are also actively involved in the protection of civilians (R2P).<sup>268</sup> The absence of clear lines of communication or hierarchical structure amongst these organisations makes it complicated as there is no coordination when they are implementing their human security protective mandates, but also breeds the danger of confusion, duplication of effort and a dissipation of energies and resources.<sup>269</sup> For instance, there is no direct linkage between the PSC, POW and similar structures in the RECs/RMs, which means that there is a coordination deficit in the activities of the Union and these sub-regional organisations.<sup>270</sup> A clear example was seen in the Niger crisis when ECOWAS and the AU appeared uncoordinated in their response.<sup>271</sup>

Another key challenge to the AU's effective implementation of R2P is the dissonant nature of the sub-regional cooperation and integration process. No serious interface has been institutionalized among RECs themselves to allow for the building and deepening of synergies and to ensure that they work individually and collectively according to a grand continental African Peace and Security Architecture.<sup>272</sup> A clear example is exhibited in the interlocking system that is envisaged, whereby the decisions of the PSC benefit from information and analysis from other components such as the early warning

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<sup>267</sup> B. Franke, 'Competing Regionalisms in Africa and the Continent's Emerging Security Architecture, Spring 2007, African Studies Quarterly, vol. 9, Issue 3, pg 36-64 at 50. Available at <http://www.africa.ufl.edu/asq/v9/v9i3.pdf>, last accessed 21/11/2011.

<sup>268</sup> M. Berdal, 'Peacekeeping in Africa 1990-1996: The Role of the United States, France and Britain, in Furley, Oliver and May, Roy(eds.), *Peacekeeping in Africa*, Ashgate Publishing, Aldershot, 50.

<sup>269</sup> Berdal (n268 above) at 50.

<sup>270</sup> ASPA (n21 above) at 65.

<sup>271</sup> ASPA (n21 above) at 65.

<sup>272</sup> ASPA (n21 above) at 54.

systems of the AUC and the RECs has been limited. This is due to the different levels of development of the various early warning systems by the sub-regional organisations.<sup>273</sup>

Another example is the incongruent development between the RECs concerning the establishment of the ASF.<sup>274</sup> At another level, there seems to be a huge communication gap between the AU PSC and similar organs in the RECs.<sup>275</sup> This is a fundamental challenge given that enforcing decisions of the PSC rests with members who are also members of the RECs/RM. Therefore without proper coordination, implementing PSC decisions will be significantly diminished, potentially undermining the credibility of the PSC.<sup>276</sup>

The institutional anarchy is further complicated by the fact that many African States simultaneously belong to more than one regional intergovernmental body that aspires to play a role in the maintenance of security, conflict management and in the recent past the protection of civilians against mass atrocity crimes.<sup>277</sup> Of the 53 Member States to the Union, 26 are members of two sub-regional organisations, 19 are members of three such organizations and two AU Member States, the Democratic Republic of the Congo and Swaziland, even belong to four such organizations.<sup>278</sup>

This overlap amongst Africa's organisations not only leads to wasteful duplications of effort and counterproductive competition among countries and institutions, but also tends to dispel collective efforts towards the common goals of the AU and muddy the goal of integration.<sup>279</sup> There is a huge burden on countries belonging to two or more organisations, as they are faced with multiple financial obligations and they have to cope with different meetings, policies, decisions, instruments, procedures and schedules.<sup>280</sup>

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<sup>273</sup> ASPA (n21 above) at 64.

<sup>274</sup> ASPA (n21 above) at 64.

<sup>275</sup> ASPA (n21 above) at 64.

<sup>276</sup> ASPA (n21 above) at 64.

<sup>277</sup> Berdal (n268 above) at 50.

<sup>278</sup> Berdal (n268 above) at 51.

<sup>279</sup> Berdal (n268 above) at 51.

<sup>280</sup> N. Udombana, 'A Harmony or a Cacophony? The Music of Integration in the African Union treaty and the New Partnership for Africa's Development, *Indiana International and Comparative Law Review*, Vol. 13, No. 1 (2002), 185-236.

#### **4.6 The Relationship between the African Union and the United Nations as a Challenge to the African Union's Effective Implementation of the Responsibility to Protect**

A key challenge to the AU's effective implementation of R2P is its relationship with the UN, especially the UNSC. I will firstly discuss the challenges brought out by resolution 1973. On 17 March 2011 the UNSC unanimously adopted resolution 1973, this resolution demanded a ceasefire and authorised the international community to establish a no fly zone and use all necessary measures short of foreign occupation to protect civilian populations.<sup>281</sup> As stated above, this resolution was supported by all three African countries in the UNSC at the time. However in the wake of continuous NATO-led air strikes across Libya, criticisms of this resolution have mounted from the AU and individual African leaders.<sup>282</sup>

Disapproval centres on allegations that NATO and its allies are conducting a campaign for regime change or political assassination rather than the protection of civilians and that NATO have over-stepped its mandate.<sup>283</sup> The AU took a more intrusive approach to the settlement of the crisis aiming for a more diplomatic resolution of the conflict. However the tension between these organisations rose to such an extent, that the AU explicitly condemned NATO's action, stating that, "the African Union hereby orders an immediate stop to the bombing of any African country by NATO forces or there will be a complete break in diplomatic relations with all the countries participating in the military aggression against Africa..."<sup>284</sup>

With such conflict existing between the two organisations, it would be really difficult to protect vulnerable civilians. For example, the AU is now threatening to cut diplomatic ties with NATO countries that are involved in the bombing campaigns. This could be costly not only for the credibility of the R2P doctrine. This situation is cause for concern,

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<sup>281</sup> Resolution 1973 (n124 above).

<sup>282</sup> A. Louw, *Situation Report: Perspectives on Africa's response to the ICC's arrest warrants in the Libya situation* International Crime in Africa Programme, Institute of Security Studies, 22 July 2011 at 2.

<sup>283</sup> Welcoming remarks by President Jacob Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, Pretoria, 26 June 2011.

<sup>284</sup> AU Condemns "NATO Countries & Their Sponsored UN Resolutions 1970 and 1973" Over Libya—Report available at <http://www.republicreport.com/african-union-au-condemns-nato-countries-au-press-release-reports>, last accessed 21/9/2011.

as African countries need the support of these countries both economically and for the maintenance of peace and security. Furthermore the AU does not have the necessary military resources to undertake peacekeeping missions without the support of these countries.

#### **4.7 The Relationship between the International Criminal Court and the African Union as a Challenge to the African Union's Implementation of the Responsibility to Protect**

In addition, the relationship between the ICC and the AU should also be considered as a hindrance to the AU's effective implementation of R2P. The strain in their relationship can be seen in the two situations referred to the ICC by the UNSC, the first concerning Darfur<sup>285</sup> and more recently Libya.<sup>286</sup> The AU holds a certain perception about the ICC which can briefly be stated as follows. Firstly, there is the suggestion that the ICC is a hegemonic tool of western powers.<sup>287</sup> Secondly, they argue that the ICC is an institution which is specifically targeting and discriminating against Africa.<sup>288</sup> Thirdly, there is a suggestion that the ICC is undermining, rather than assisting, African efforts to solve its problems.

This complaint was expressed most in terms of the Sudan referral and now the Libyan arrest warrants. This emphasises the point that the court's work is undermining the peace efforts or conflict resolution processes in these situations.<sup>289</sup> The situation of Sudan was so alarming, that African States through the AU, accordingly called on the Security Council to defer the ICC's investigation into President al-Bashir by invoking article 16 of the Rome Statute.<sup>290</sup>

As international criminal prosecution is one aspect envisaged by the ICISS in the implementation of R2P this strain in relationship between the ICC and the AU is having

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<sup>285</sup> Resolution 1593, S/RES1593 (2005) available at [www.unsudanig.org/unsudan/data/res1593.pdf](http://www.unsudanig.org/unsudan/data/res1593.pdf) last accessed on 8/8/2011.

<sup>286</sup> Resolution 1970, S/RES/1970 (2011), n119.

<sup>287</sup> S. Lamony, 'Africa and the International Criminal Court' Coalition for the International Criminal Court, 14 April 2009.

<sup>288</sup> BBC quote of Jean Ping "it was unfair that all those indicted by the ICC so far were African. BBC News, 27 September 2008 available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> last accessed 6/9/2011.

<sup>289</sup> M. du Plessis, 'The International Court that Africa Wants' at 14, 2010 Institute of security Studies.

<sup>290</sup> Du Plessis (n289 above) at 14-15.

an adverse effect on the continent, especially in its protection of civilians against mass atrocity crimes. The ICC does not have its own police force and has to rely on the cooperation of states to conduct investigations and to arrest and surrender suspects.<sup>291</sup> This strain in relationship between these organisations have helped high profile suspects evade justice in the case of al-Bashir,<sup>292</sup> and at the time of writing, there was little show of willingness from African states to help arrest or facilitate the surrender of Gaddafi until his subsequent death.

With the failure of the UNSC to effectively reconsider the AU's article 16 request, the AU Assembly in July 2009 in Sirte, Libya took a decision not to cooperate with the ICC.<sup>293</sup> In this decision the AU observed that because its request to the UNSC has never been acted upon, all member states "shall not cooperate" with the ICC, pursuant to the provision of article 98 of the Rome Statute relating to the immunities, in the arrest and surrender of al Bashir.<sup>294</sup> This position was further reiterated at the AU Assembly in Kampala, Uganda in July 2010.<sup>295</sup>

Many African states have taken this position concerning the arrest warrant of Gaddafi as is seen in the statement Chadian President Idriss Deby's press adviser who stated that "it is true we ratified the Rome Statute which established the International Criminal Court but we also endorsed the decision of the African Union adopted on July 2009 in Sirte, Libya refusing to cooperate with ICC."<sup>296</sup> Even though this AU decision refers to the al-Bashir matter specifically, the press adviser said this decision is extended to all suspects wanted by the ICC who are still at large.<sup>297</sup>

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<sup>291</sup> Article 98 of the Rome Statute.

<sup>292</sup> Du Plessis (n289 above) at 2.

<sup>293</sup> Decision on the meeting of African state parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), 13<sup>th</sup> Ordinary Session of the Assembly of the AU, Sirte, 1-3 July 2009.

<sup>294</sup> n292 above.

<sup>295</sup> Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the international Criminal Court (ICC), Doc Assembly/AU/10(XV), 15<sup>th</sup> Ordinary Session of the Assembly of the AU, Kampala, 25-27 July 2010.

<sup>296</sup> Chad says it will not execute ICC warrant against Libya's Gaddafi, Sudan tribune, 19 May 2011, at <http://www.sudantribune.com/Chad-says-it-will-not-execute-ICC,38950>, last accessed 2/9/2011.

<sup>297</sup> M. du Plessis and A. Louw, Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970, Briefing Paper, ISS, Pretoria, 31 May 2011.



In summary, the position taken by the AU not to cooperate with the ICC with respect to the arrest warrants in the Sudan and Libya situation has opened an important can of worms. This dilemma can be summarized as follows: How do you reconcile justice and the protection of civilians against mass atrocity crimes? These questions raise important points of debate which are beyond the scope of this study. Nevertheless, it is noteworthy to state that the ICC warrants are consistent with an expressed agreement in a variety of important African documents, which states that international crimes should not be met with impunity.<sup>298</sup> This fact is also clearly expressed in the AU Constitutive Act.

The AU by refusing to cooperate with the ICC in prosecuting al-Bashir and Gaddafi is clearly failing to fulfil its obligations, undertaken in many international documents, especially its obligations stipulated in the Constitutive Act.

#### **4.8 Conclusion**

Considerable achievements have been made by the AU in implementing its obligation to protect African civilians against mass atrocity crimes. However, like most institutions dealing with this doctrine there are some obstacles which hinder its effective implementation of this doctrine. A cause for optimism can be seen in the fact that African leaders have shown in certain instances willingness to undertake their obligations. The AU's relationship with the ICC, despite its failings can be remedied, because except for the al-Bashir and Gaddafi situation Africa has been a large supporter of this Court. Furthermore, I think there should be more coordination between the UN and the AU especially where both are actively seized of a situation concerning the protection of civilians in Africa. This also goes for sub-regional organisations in the continent as well.

The fact that these institutions are in place gives us Africans hope. As the saying goes "Rome was not built in a day" and so we should not expect instant successes from the Union. I can safely say however, that with a little more political willingness from African

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<sup>298</sup> D. Akande, M. du Plessis and C. Jalloh, An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC, ISS Position Paper 2010.

Leaders and corporation from external sources, donor organisations and other advanced regional body the Union will be able to achieve its R2P obligations. The Union should look at the missions it has conducted and should build on the successes it achieved and should rectify the failures. The challenges highlighted in this chapter are just plain obstacles which can be surpassed with a bit more focus and corporation by the Union and other international organisations such as the UN.

## **Chapter Five: Conclusion and Recommendations**

### **5.1 Conclusion**

After the 1994 genocide in Rwanda, many African leaders resolved to never allow lack of political will to prevent the protection of civilians from mass atrocity crimes. In 2002 the AU was established with one of its aim to protect Africans from the scourge of wars and to bring about peace and security on the continent.

This research was undertaken to show how the AU is implementing its obligation to protect African civilians against mass atrocity crimes. Nine years after the AU held its inaugural meeting in Durban, South Africa, there have been a lot of developments concerning the protection of civilians.

Firstly, the AU has a security architecture specifically established for the promotion of peace and security in the continent. As shown in the course of the study these institutions have played a vital role in making sure that an event similar to the 1994 Rwandan genocide never occurs on the continent again. The PSC is actively seized of conflict situations such as the Darfur crisis, the conflict in Somalia and many more on the continent. The PSC recommended to the AU General Assembly to intervene in a number of situations such as in Burundi, Darfur and Somalia.

The CEWS is another institution vital to the AU's implementation of R2P. CEWS will help prevent the escalation of a prospective dangerous situation which might lead to the perpetration of mass atrocity crimes, thus making possible the AU's duty to prevent these crimes. In the event that they fail to prevent the escalation of violence then the AU will be able to react accordingly. The CEWS work has been commendable to date, as can be seen in its country analysis and regional analysis. As can be seen, the Livingstone Formula has enabled the CEWS system to become more efficient as members of the Situation Room work closely with NGOs, such as the Institute for Security Studies in Africa, the International Committee of the Red Cross and many other

organisations who have first-hand information about certain situations in particular countries and regions.

However, CEWS can be further improved with further human capital investment. There is a need for additional staff, including experts who can analyse and interpret data. At the moment the number of staff working in the Situation Room is inadequate, they are overstretched therefore the quality of their work is negatively affected. With an increase in the financial resources available to the CEWS they could employ more analysts and pay for further training of their staff thus increasing output, efficiency and capacity. As a result of these changes, the data and information passed to the PSC will be more adequate and reliable.

The POW is also of significance in the AU's implementation of R2P. They have undertaken missions in CAR and their most notable achievement was their mediation in the Kenyan post-election situation, which concluded in an international workshop on the strengthening of the role of the AU in the prevention, management and resolution of election-related conflicts in Africa.

There is no doubt that efforts to make the ASF functional are well under way and have registered considerable progress. However, this level of progress varies from region to region. The absence of a binding framework between the AU and the RECs/RMs is a critical gap that needs to be addressed as a matter of urgency.<sup>299</sup> Having the ASF up and running is vital as was clearly shown in the Libyan crisis as they could have stepped in and in fact could have carried out the mandates stipulated in resolution 1973. This could have avoided the strained relationship between the UNSC, NATO and the AU.

In relation to the RECs/RMS, they have also played a crucial role in helping the AU implement its R2P obligations. However, the level of coordination between and among the various institutions at the AU and the RECs/RMs is appalling. Beyond the ASF and CEWS, there seems to be limited coordination between the other institutions.<sup>300</sup> In

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<sup>299</sup> ASPA (n21 above) at 51-52.

<sup>300</sup> ASPA (n21 above) at 63.

2010, there was no direct linkage between the PSC, POW and similar structures in the RECs/RMs.<sup>301</sup>

In a nutshell the AU has come a long way from the OAU's policy on non-interference to that of non-indifference. They have intervened in several situations which would have escalated causing major catastrophe. Like all institutions they are faced with challenges and the sooner they address the issues preventing them from effectively carrying out their obligations the better for African civilians.

## **5.2 Recommendations**

The future looks bright for Africans especially those who are caught up in conflict zones needing protection. The AU has already set up its guiding principles and has set up a peace and security architecture which seems to accommodate the implementation of its R2P obligations. However, they need to ensure a greater harmonization and coherence between its institutions and the sub-regional bodies. This can be done in several ways.

Firstly, the AU needs to improve its staffing levels. It needs to revise the Maputo Structure,<sup>302</sup> which currently limits the Commission's ability to hire staff through its regular budget.<sup>303</sup> The PSC and CEWS need to be provided with additional staff to deal with their additional responsibilities as their current staffs are overwhelmed with their available workload. They also have to ensure that the additional staff they hire are well-trained and have in-depth knowledge of the dynamics of peace and conflict in the continent. This is where the UN comes in very useful. The UN has recognised that one of the AU Commission's major challenges is the lack of sufficient institutional capacity in key management, support and strategic planning functions. This capacity is required to address both its immediate peacekeeping demands and its longer-term goal of operationalizing the African Standby Force.<sup>304</sup> Therefore, the UN under the auspices of

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<sup>301</sup> ASPA (n21 above) at 63.

<sup>302</sup> Decision- African Union available at [http://www.africa-union.org/official\\_documents/Decisions\\_Declarations/Decisions\\_&\\_Declarations.htm](http://www.africa-union.org/official_documents/Decisions_Declarations/Decisions_&_Declarations.htm), last accessed 20/9/2011.

<sup>303</sup> ASPA (n21 above) at 71.

<sup>304</sup> Report of the Secretary-General: Support to African Union peacekeeping operations authorized by the United Nations, General Assembly Sixty-fourth session, Security Council, Sixty-fourth year, UN Doc,A/64/359-S/2009/470.

the 2006 UN-AU 10-year capacity-building programme is working with the AU providing support in a range of activities from early warning and conflict prevention to peacekeeping and conflict resolution through training, staff exchanges and knowledge sharing. In particular, the Departments of Political Affairs, Peacekeeping Operations and Field Support have a number of initiatives under way that include capacity-building in mediation, elections, conflict resolution, early warning, peacekeeping planning and operations, rule of law and security sector reform. Furthermore, under this initiative technical assistance would be provided to the maximum possible extent by the highest caliber personnel with current field experience in African based peacekeeping operations. This might help to alleviate the human resource deficiency facing the AU. However, even the UN has noticed that the AU would ultimately have to develop a capacity that would best suit its own needs; United Nations systems cannot be simply exported but should be seen as a resource that the AU can adapt to meet its own unique requirements.

The AU need to establish a stronger institutional linkage with the RECs/RMs. They have taken a step closer in addressing this problem by appointing REC/RM liaison officers to the AU as this would boost communication between the AU and the REC/RM. This step has been taken but the AU however needs to clarify the level and mandate of the liaison. For instance should they be serving military officers or civilians and which field should they be experts in, (for example do they need public relations experts)? Furthermore, the level of progress by the RECs/RMs is disproportionate therefore the AU needs to step in and act as a bridge. They would have to ensure that RECs/RMs have equal access to partner support and that they are not lagging behind in the development of their institutions.

Furthermore, partnership between the AU, RECs/RMs and external multilateral and bilateral actors has emerged as a major challenging feature to the efforts of the AU in the operationalization of the APSA. For instance coherence in the decision-making of the United Nations Security Council and the AU PSC on issues on the agenda of both

organizations is critical in ensuring an effective partnership. This is particularly the case on issues where the two organizations undertake joint mediation and peacekeeping efforts. This point was clearly exhibited in the Libyan crisis with the wording of UNSC resolution 1973 stipulating that Libya and the international community should take all necessary measures to protect civilians. I feel a drastic improvement of strategic communication and a shared understanding of issues of mutual concern will help in making coordinated decisions by the respective bodies. Enhanced dialogue on decision-making will improve the collective ability of both organisations to respond to the many peace and security challenges we face in Africa.

The recent trend of having joint peacekeeping (UN-AU) missions is very important and can bridge the financial and human resource gap. The UN can fund the missions as it has the necessary finances to undertake these missions, whereas the AU can provide the human resources. The problem solving capacity of this trend is two-fold. Firstly, it settles the issue of the legality of article 4(h) as this UN-AU cooperation will need the endorsement of the UNSC. Secondly, it will provide the necessary finances required to sustain an effective peacekeeping mission as can be seen in the improvement of resources from AMIS to UNAMID and with the logistics support given to AMISOM by the UN.<sup>305</sup>

The Declaration on ‘Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity Building Programme for the AU’<sup>306</sup> is also of great importance. This declaration on cooperation of these organisations focused on six critical areas: “peace and security (including crime prevention); assistance in institution building, and political and electoral matters; peacekeeping operations; governance, human rights and the rule of law...”

Another important recommendation involves the ICC’s work in Africa. The ICC’s work in Africa is imperative and deserves continued support. The position taken by African States can be remedied. If African leaders think they are being discriminately targeted

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<sup>305</sup> Murithi (n263 above) at 9-15.

<sup>306</sup> Doc. A/61/630.

by the ICC then they can improve their judiciary so that these cases can be tried by their own domestic courts.

In the case of states that are unable or unwilling to prosecute African leaders should summon up the political will to make sure that the actions of these people do not go unpunished. They have undertaken the obligation in several international treaties never to allow heinous crimes to go unpunished therefore they have to summon up the will to undertake their commitment.

The African Commission on Human and Peoples' Rights has also taken a more proactive stance on the implementation of R2P. It has recognised the doctrine of R2P in a resolution it passed,<sup>307</sup> it recalled its mandate to promote and ensure human and peoples' rights under the African Charter and also recalling the principles enshrined under the Constitutive Act of the AU and the PSC Protocol, which provides that the Union shall intervene, to prevent, in situation of genocide, war crimes and crimes against humanity, in a Member State of the African Union.

A clear step in the right direction was also taken by the African Court on Human and Peoples' Right when on 25 March 2011 it issued a unanimous Order for Provisional Measures in respect of Libya.<sup>308</sup> The African Court did this without eliciting the views of the parties to the matter, on the basis of the imminent risk to life and the difficulty in scheduling an appropriate hearing involving Libya.<sup>309</sup> With the African Commission and the African Court taking timely and bold decisions to stop mass atrocity crimes I think this is a lesson to African leaders that the rest of the continent are willing to fight against these heinous crimes.

Finally, I would like to discuss the effect that the small arms and light weapons trade have on the African continent and how it is affecting the AU in its implementation of its responsibility to protect people in Africa. According to the ICISS report, 'civil conflicts

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<sup>307</sup> African Commission on Human and Peoples' Rights, Resolution on Strengthening the Responsibility to Protect in Africa, meeting at its 42<sup>nd</sup> Ordinary Session held in Brazzaville, Republic of Congo, from 15-28 November 2007 ACHPR/Res. 117 (XXXXII).

<sup>308</sup> See *In the Matter of African Commission on Human and Peoples' Rights vs Great Socialist People's Libyan Arab Jamahiriya*, App No. 004/2011.

<sup>309</sup> Plessis and Louw (n297 above) at 5.



are fuelled by arms and monetary transfers that originate in the developed world and their destabilizing effects are felt all over the world from globally interconnected terrorism to refugee flows, the export of drugs, the spread of infectious disease and organised crime.<sup>310</sup>

I would like to extend this view by specifically stating that Africa is feeling the full result of this disturbing state. It is reported that out of an estimated 500 million small arms and light weapons in circulation worldwide, 100 million are found in Africa.<sup>311</sup> Their widespread availability has contributed to massive violations of human rights and international humanitarian law.

In this light I am of the opinion that the AU in its quest to protect people in African against mass atrocity crimes must pay due attention to this trade. It is stated that by themselves these weapons do not cause conflicts, however their widespread availability increases the likelihood of conflict.<sup>312</sup> In this regard to quote Ambassador Sahnoun “...conflicts have several political, economic and social causes, but it would be much easier to prevent and resolve them if the availability of small arms can be checked”.<sup>313</sup>

Accordingly numerous small arms control and disarmament measures have been put in place at regional, sub-regional and national levels.<sup>314</sup> The most prominent instrument in Africa is the Bamako Declaration (2000)<sup>315</sup> the document represents a common African position on the trafficking and proliferation of illicit small arms.<sup>316</sup> This document together with the United Nations Programme of Action on illicit use, trade and proliferation of small arms (2001) have recommended that states establish national focal points (NFPs) which are coordination bodies responsible for devising a national arms control action plan, as well as facilitating small arms control research, monitoring

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<sup>310</sup> ICISS Report (n1 above) at pg 5.

<sup>311</sup> African Union: Small Arms and Light Weapons, available at <http://www.africa-union.org/root/au/AUC/Departments/PSC/Small/Arms.htm>, last accessed on 30/11/2011.

<sup>312</sup> n311 above.

<sup>313</sup> n311 above.

<sup>314</sup> M. Schroeder and G. Lamb, ‘The Illicit Arms trade in Africa: A Global Enterprise’ (2006) 69 Third Quarter African Analyst , available at [www.fas.org/asmp/Library/Articles/SchroederLamb.pdf](http://www.fas.org/asmp/Library/Articles/SchroederLamb.pdf), last accessed on 30/11/2011.

<sup>315</sup> Schroeder and Lamb (n314 above) at 75.

<sup>316</sup> Schroeder and Lamb (n314 above) at 75.

and the formulation of policy and legislation.<sup>317</sup> Many African states have created NFPs. Some of these entities have been active in promoting and enabling small arms controls, such as in Botswana, Kenya, Namibia and Rwanda, while others are meager virtual entities.<sup>318</sup> Many African governments have struggled to have a meaningful impact on illegal transfers as they lack the capacity to police their borders and points of entry effectively, as well as secure state weapons stockpiles.<sup>319</sup> Additionally, there is no body at the continental level that regulates the arms trade in Africa.<sup>320</sup>

Therefore, it is of great important that the AU develop a specialised department that would look into the management and transfer of these weapons. They should work in connection with the situation room of the CEWS so they can analyse and assess information so that they can control the movement of these weapons. Furthermore, they should build strong relationships with other regional bodies who are also engaged in monitoring the movement of small arms and light weapons. It is a known fact that only a handful of African countries have the capacity to manufacture arms and ammunition, with South Africa topping the list. The small arms component of the South African industry comprises less than ten manufacturers and their output is insignificant in terms of the global small arms trade.<sup>321</sup> Therefore if the AU can build a strong institution that can police the borders of countries or help nations build institutions that can patrol their borders it will reduce the number of human rights violations on the continent.

In conclusion, this study has shown that the institutions set up by the AU to implement its R2P obligations are in place. However, it is faced with certain difficulties which are preventing the effective implementation of this doctrine. On the whole with a little more effort and political will many African can be protected by their states and the AU from mass atrocity crimes. This paper has provided recommendations that will address some of the problems identified.

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<sup>317</sup>Schroeder and Lamb (n314 above) at 75.

<sup>318</sup>Schroeder and Lamb (n314 above) at 75.

<sup>319</sup>Schroeder and Lamb (n314 above) at 75.

<sup>320</sup>Schroeder and Lamb (n314 above) at 75.

<sup>321</sup>Schroeder and Lamb (n314 above) at 69.

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