

The Responsibility to Protect and the Role of Regional Organizations: an Appraisal of the African Union's Interventions

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Abstract

This article examines the dilemmas and opportunities of the African Union, a regional organization, in implementing the responsibility to protect concepts in respect to forceful intervention to prevent or stop the occurrence of genocide, crimes against humanity and war crimes. Article 4(h) of the Constitutive Act of the African Union specifically mandates the Union to forcefully intervene in a Member State in such circumstances. Although the African Union has successfully resolved some situations where peaceful negotiations or consensual military intervention was sufficient, there has also been failure by the Union where such means fail or are inadequate. Such instances include the Darfur conflict where peacekeeping was insufficient, and recently in Libya where the African Union openly opposed enforcement of no fly zones to protect civilians. This article is of the view that the African Union's failure to implement Article 4(h) of the Constitutive Act, even in deserving situations, may have been aggravated by the failure to institutionalize the concept of responsible sovereignty within the Union's legal framework and processes. Despite the forceful intervention mandate, there are also provisions that affirm the principles of non-interference. The AU system therefore fails to resolve the dilemma between sovereignty and intervention. Sovereignty preservation remains as an effective legal and political justification for non-intervention by the AU. This has promoted a subsequent trend of greater sovereignty concerns by the Union. Institutionalization of the concepts postulated under the emerging norm of responsibility to protect within the AU framework and processes can contribute to the elimination of the legal and political dilemmas of forceful intervention by the Union.

A. Introduction

The concept of responsibility to protect was comprehensively formulated in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).¹ Forceful intervention for humanitarian purposes has been problematic due to the principles of State sovereignty and non-intervention. The traditional conceptualization of sovereignty was an

¹ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited 24 April 2012).

effective shield for a State in respect of its domestic affairs, despite its misconduct or atrocities towards its citizenry.² As a way of resolving intervention difficulties associated with the traditional approach, the Commission used a rhetorical strategy by conceiving sovereignty as responsibility rather than control.³ The Commission also sought to address the dilemmas and undesirability of intervention for humanitarian purposes by changing the perspective of action from that of a *right to intervene* to the more acceptable and less controversial *responsibility to protect*.⁴ Intervention for humanitarian purposes under the ICISS Report was premised on a continuum of obligations that extend beyond coercive action.⁵ It included *responsibility to prevent* and *responsibility to rebuild*.⁶

B. The Legal and Political Value of the Concept and its Implementation Mechanism

There have been significant endorsements of the responsibility to protect concept, especially within the General Assembly. Although General Assembly resolutions are not binding per se upon States, they constitute an important part of the fabric of State practice.⁷ State practice and *opinio juris sive necessitates* are essential in the evolution of customary international law.⁸ The responsibility to protect norm has been endorsed in the 2004

² J. Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect', 53 *Journal of African Law* (2009) 1, 1, 4.

³ C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 *American Journal of International Law* (2007) 1, 99, 102. See, International Commission on Intervention and State Sovereignty, *supra* note 1, paras 2.14 - 2.15.

⁴ International Commission on Intervention and State Sovereignty, *id.*, para. 2.29.

⁵ E. McClean, 'The Responsibility to Protect: The Role of International Human Rights Law', 13 *Journal of Conflict and Security Law* (2008) 1, 123, 139.

⁶ International Commission on Intervention and State Sovereignty, *supra* note 1, para. 2.29.

⁷ R. Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), 435, 435.

⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14, para. 207. In respect of *opinio juris*, the International Court of Justice pointed out that it infers a belief that certain conduct has become obligatory due to "the existence of a rule of law requiring it [...] States concerned must therefore feel that they are conforming to what amounts to a legal

High-Level Panel Report (HLP),⁹ the 2005 World Summit Outcome Document,¹⁰ and in September 2009, the General Assembly resolved that States would continue further discussions on the matter.¹¹ There have been annual deliberations on the concept under the auspices of the General Assembly, such as the July 2011 informal thematic debate.¹² In addition, the concept has also been endorsed by the Security Council.¹³

The responsibility to protect concept focuses on intervention by the international community to stop or pre-empt the commission of genocide, crimes against humanity, war crimes or ethnic cleansing.¹⁴ The international community is deemed to have a residual responsibility to intervene where a State is the author of such atrocities, or is manifestly unable to protect its population.¹⁵ Although peaceful means of intervention may be involved, it includes enforcement action in a timely and decisive manner where other means fail or are inadequate.¹⁶ The use of the phrase *enforcement action* in this article, in reference to *forceful intervention* in a State, is consistent with

obligation.” *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, 3, para. 77.

⁹ High-Level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’, GA Res. 59/565, 2 December 2004, para. 203.

¹⁰ World Summit Outcome Document, GA Res. 60/1, 24 October 2005, paras 138-139.

¹¹ United Nations News Centre, ‘General Assembly Agrees to Hold More Talks on Responsibility to Protect’ (14 September 2009) available at <http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+prote&Cr1=> (last visited 24 April 2012).

¹² See United Nations General Assembly Department of Public Information, “‘For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers No Relief’, Secretary-General Cautions in General Assembly Debate’ (12 July 2011) available at <http://www.un.org/News/Press/docs/2011/ga11112.doc.htm> (last visited 24 April 2012) [United Nations General Assembly Department of Public Information, General Assembly Debate].

¹³ SC Res. 1674, 28 April 2006.

¹⁴ World Summit Outcome Document, *supra* note 10, paras 138-139.

¹⁵ The HLP Report affirms the emerging norm of “collective international responsibility to protect.” High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203. The 2005 Outcome Document also notes that the international community has responsibility to use appropriate mechanisms to ensure protection of populations from atrocities. World Summit Outcome Document, *supra* note 10, para.139.

¹⁶ High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203; World Summit Outcome Document, *supra* note 10, para. 139.

the use of the term in the UN Charter and international law.¹⁷ In the responsibility to protect discourse, execution of enforcement action is preserved within the UN collective security, meaning authorization by the Security Council.¹⁸ In addition, intervention may be undertaken by regional organizations such as the African Union (AU), including enforcement action where necessary.¹⁹

The responsibility to protect concept is based on existing law and institutions, in addition to some of the past experiences within the international community.²⁰ The concept “pulls pre-existing norms together and places them in a novel framework.”²¹ The normative element and value of the concept has however been questioned by some scholars. For instance, it has been alleged that there lacks any clear consequences for the failure to implement the responsibility to protect concept, in addition a lack of will to implement it, and it is therefore inappropriate to classify the concept as an emerging norm.²² Orford acknowledges that some scholars are of the mistaken view that the concept lacks any normative value or significance due to the assumption that it does not impose any new binding obligations

¹⁷ Article 2(7) of the Charter exempts Chapter VII “enforcement measures” from the prohibition on intervention in domestic affairs of a State. Article 42 of the Charter empowers the Security Council to authorize the necessary “action” by air, sea or land forces. In addition, Article 53(1) of the Charter allows regional agencies to undertake “enforcement action” provided they have authorization by the Security Council. According to the ICJ, enforcement action is intervention that is not based on the consent of the territorial State. *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, 151, 170.

¹⁸ HLP Report asserts that military action may be resorted with authorization by the Security Council. High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203. See also World Summit Outcome Document, *supra* note 10, para. 139.

¹⁹ World Summit Outcome Document, *id.* Regional organization’s role in the maintenance of international peace and security is recognized in Chapter VIII of the UN Charter. Under Article 53(1) of the Charter, regional organizations may undertake enforcement action but with the authorization of the Security Council.

²⁰ L. Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, 34 *Review of International Studies* (2008) 3, 445, 447-448. An example is the Genocide Convention, which in Article VIII obligates States to prevent the occurrence of genocide. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

²¹ A. Peters, ‘The Security Council’s Responsibility to Protect’, 8 *International Organizations Law Review* (2011), 1, 15, 23 [Peters, Responsibility to Protect].

²² A. Kapur, ‘Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters’, 20 *European Journal of International Law* (2009) 3, 560, 562.

on States or regional organizations.²³ Orford instructively points out that the responsibility to protect concept raises significant legal issues, even if it does not translate into binding legal obligations.²⁴ She correctly observes that the concept represents a form of law that grants powers and provides jurisdiction to the international community for intervention purposes.²⁵ Although it is still doubtful that the concept can be classified as a proper norm of international law, it has previously been endorsed by the General Assembly and the Security Council,²⁶ and qualifies to be regarded as an emerging norm. The legal and political value of the concept may also be discerned from the fact that the concept establishes a framework for complementarity between State sovereignty and intervention for humanitarian purposes, thereby eliminating the problematic tension between the two fundamental principles. The UN Secretary General acknowledges the normative value of the concept, stating that it “is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect.”²⁷

The concept limits the convenience by which sovereignty may be used as a convenient legal or political justification for non-intervention by the international community, or as a shield from external action by the territorial State. As Falk observes, extra sensitivity to the traditional concept of sovereignty provides States within the international community with an effective mechanism to avoid the problems associated with intervention, even where it involves a collapsed government within the subject State.²⁸ In addition, Carty astutely opines that sovereignty provides an effective veil for articulating State interests and security concerns in a manner that is legally acceptable.²⁹ He cites the case of the 1990s peace-enforcement in Bosnia, where States contributing troops (like the United Kingdom) argued that

²³ A. Orford, *International Authority and the Responsibility to Protect* (2011), 22-23.

²⁴ *Id.*, 25.

²⁵ *Id.*

²⁶ High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203; World Summit Outcome Document, *supra* note 10, paras 138-139; SC Res. 1674, *supra* note 13.

²⁷ Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc A/63/677, 12 January 2009, para. 54.

²⁸ R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000), 78.

²⁹ A. Carty, ‘Sovereignty in International Law: A Concept of Eternal Return’, in L. Brace & J. Hoffman (eds), *Reclaiming Sovereignty* (1997), 101, 116.

forceful action would amount to an intervention, thereby actively undermining the mandate that had been issued by the Security Council.³⁰ The responsibility to protect concept seeks to eliminate the convenience with which the concept of sovereignty may be used as an affective legal and political justification for non-intervention by States and regional organizations.

The continuing evolution of the responsibility to protect into a legal norm does not imply the abandonment of the principle of non-intervention, and is not an infringement on territorial integrity. The responsibility to protect concept is actually an endorsement of the principle of sovereignty, rather than its opposition.³¹ The protection of State sovereignty and prohibition of intervention within the international community has the purpose of safeguarding international stability, and therefore protecting natural persons from catastrophes.³² This is due to the fact that interventions and imperialist wars may lead to global instability and humanitarian catastrophes.³³ The emerging norm is not a justification for forceful intervention in any situation, but only in circumstances of stopping or preempting genocide, crimes against humanity, war crimes and ethnic cleansing.³⁴ The concept only seeks to ensure that the protective purpose of sovereignty is maintained by the international community when a State is unable or unwilling to provide it. The State is endowed with both international and domestic responsibilities by the principle of sovereignty, which includes the duty to protect populations within its territory.³⁵ The international community is continually attaching important value to the protection of populations from such gross violations of human rights and humanitarian law, which are also international crimes.³⁶ In addition, in order

³⁰ *Id.*, 115.

³¹ D. Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2011), 97.

³² A. Peters, 'Membership in the Global Constitutional Community', in J. Klabbbers *et al.* (eds), *The Constitutionalization of International Law* (2009), 153, 186 [Peters, Global Constitutional Community].

³³ *Id.*

³⁴ World Summit Outcome Document, *supra* note 10, para. 139.

³⁵ Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary General, UN Doc A/65/877, 27 June 2011, para. 10.

³⁶ Genocide, crimes against humanity and war crimes are international crimes. See, Articles 6-8 of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90.

to avoid subjectivity and unregulated forceful interventions, the concept advocates that such action be maintained within the collective security system of the UN, with the Security Council providing authorization.³⁷ The concept is a mechanism of ensuring that sovereignty serves its purpose, that of protecting the citizens of the State, and is not abused to provide a justification for subjecting them to avoidable humanitarian catastrophes.

C. The Role of Regional Organizations

Although the responsibility to protect concept provides a conceptual basis through which political and legal dilemmas of forceful intervention may be addressed, including by regional organizations, such organizations are also expected to provide mechanisms through which the concept is to be implemented. Regional organizations can provide the mechanisms for the implementation of the concept through various approaches, including peaceful negotiations and consensual interventions. The central focus of this article is however on implementation of the concept through forceful intervention, since it is often the most legally and politically problematic to implement. In addition, it is often the only viable solution for the protection of populations within a State where other mechanisms such as peaceful negotiations and consensual interventions are inadequate, or inappropriate.

The 2005 Outcome Document reaffirmed that the responsibility to protect may be implemented through forceful intervention where other peaceful means are inadequate, and that such action may include co-operation with the relevant regional organization.³⁸ Under Article 52 of the UN Charter, regional organizations may undertake actions aimed at the maintenance of international peace and security. Article 53(1) of the Charter specifically provides that regional organizations may undertake enforcement action, provided they have Security Council authorization. Intervention by regional organizations or their co-operation with the United Nations is important since they may be situated in the theatre of the conflict, and therefore their Member States are the most affected by the negative consequences of the war. Second, for political convenience, it is necessary that the Security Council considers the views of regional organizations since they may have more detailed information and a better appreciation of the

³⁷ World Summit Outcome Document, *supra* note 10, para. 139.

³⁸ *Id.*

conflict given their proximity to the events on the ground.³⁹ The United Nations Secretary General has emphasized the need for greater partnership between the UN and relevant regional organizations with regard to gathering and assessing information on conflict situations of common concern.⁴⁰ Third, timely and decisive intervention and effective protection of civilians is likely to occur where both the UN and relevant regional organization favour similar course of action.⁴¹ Fourth, institutional mechanisms for intervention by regional organizations have promoted the development of the responsibility to protect concept. According to the UN Secretary General, the roots to the emergence of the concept can be traced to declarations by the Economic Community of the West African States and the spirit of non-indifference espoused in the African Union.⁴² Fifth, regional organizations have a crucial role in the establishment of measures aimed at preventing the occurrence or escalation of conflicts. The UN Secretary General has observed that such organizations contribute to the development of regional “norms, standards, and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity.”⁴³ Sixth, since the effects of mass atrocities have an effect on neighbouring States through consequences such as massive refugees flow, they require a cross-border response which can be facilitated by the relevant regional and sub-regional organization.⁴⁴ Seventh, the mass atrocity crimes may be committed by transnational non-State actors such as armed groups and terrorists, thereby necessitating collective action by States through regional and sub-regional organizations.⁴⁵

D. The Dilemma of Implementing the African Union’s Forceful Intervention Mandate

The Constitutive Act of the African Union, which was adopted in July 2000, in Article 4(h) confers the Union with the right of intervention in a

³⁹ Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 35, para. 6.

⁴⁰ *Id.*, para. 31.

⁴¹ United Nations General Assembly Department of Public Information, *supra* note 12.

⁴² *Id.*

⁴³ Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 35, para. 23.

⁴⁴ *Id.*

⁴⁵ *Id.*

Member State in respect of *grave circumstances*, namely; crimes against humanity, war crimes and genocide.⁴⁶ Article 4(h) of the Constitutive Act gives the Assembly of the African Union the authority to decide on intervention due to the *grave circumstances*. Therefore, intervention under Article 4(h) of the Constitutive Act is not dependent on a specific request or invitation of the territorial State, and the actual intervention may actually be aimed at the government of a State if it is the author or perpetrator of the atrocities. It may also involve the use of military force, given that according to Article 4(h) of the Constitutive Act, such intervention takes place in situations of genocide, crimes against humanity or war crimes.⁴⁷ It is in the form of enforcement action that regional organizations are empowered to undertake in Chapter VIII of the UN Charter.

The formation of the African union has commendably contributed to the maintenance of peace and security in the African region, through peaceful negotiations, peacekeeping and consensual interventions. In addition, as the UN General Secretary observed, the emergence of the responsibility to protect concept, and its eventual adoption in the 2005 Outcome Document, has some of its roots in the spirit of non-indifference postulated within the AU.⁴⁸ On the other hand, the African Union has been ineffective in implementing forceful intervention as postulated under the responsibility to protect concept and as provided under Article 4(h) of its Constitutive Act, where peaceful negotiations and consensual interventions are inappropriate or inadequate. Interventions by the African Union so far, like in Burundi,⁴⁹ Sudan (Darfur)⁵⁰ and Somalia⁵¹ have been of a

⁴⁶ *Constitutive Act of the African Union*, 11 July 2000, 2158 U.N.T.S. 3.

⁴⁷ The fact that it may involve the use of military force is affirmed by Article 13 of the African Union Peace and Security Council Protocol which establishes the African Standby Force. Article 13(3) (c) of the Protocol specifically provides that one of the African Standby Force mandate shall be intervention in a Member State due to *grave circumstances*, in accordance with Article 4(h) of the Constitutive Act. *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002, available at http://www.africa-union.org/rule_prot/PROTOCOL-%20PEACE%20AND%20SECURITY%20COUNCIL%20OF%20THE%20AFRICA%20UNION.pdf (last visited 24 April 2012).

⁴⁸ United Nations General Assembly Department of Public Information, *General Assembly Debate*, *supra* note 12.

⁴⁹ See Organization of African Unity, 'Communiqué of the Eighty-Eighth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level' (2003) Central Organ/MEC/AMB/Comm. (LXXXVIII).

peacekeeping nature and were based on the consent of the territorial State. The African Union has been reluctant to undertake or even endorse forceful intervention even where it has been necessary, like the case of Darfur, or recently, in relation to Libya. Therefore, despite the African Union adopting a more interventionist stance in its Constitutive Act unlike under the preceding Organization of African Unity, “the norm of non-interference continues to trump human rights concerns.”⁵²

The African Union reaction to the widespread and systematic atrocities in Darfur, Sudan, (since 2004) and the 2011 Libyan crisis exemplify the Union’s deficiencies in promoting robust forceful intervention where necessary, and therefore ensure effective regional implementation of the responsibility to protect concept. In respect to Darfur, Christine Gray particularly regretted that:

This failure to prevent a major humanitarian crisis demonstrates that the universal acceptance in principle of a ‘responsibility to protect’ in the *World Summit Outcome Document* cannot guarantee action [...] The AU was not willing to intervene in the absence of consent by the government of Sudan. It may be that the World Summit’s acceptance of the ‘responsibility to protect’ has created expectations which will not be fulfilled in practice.⁵³

It would have been expected that at the regional level, the African Union, given its “right” of intervention, would have either lobbied for robust and decisive forceful intervention in Darfur, Sudan, as a way of ending both the conflict and mass atrocities, or undertaken such action thereby compensating for the failure of the international community. In the case of Libya, the African Union could have assumed greater responsibility in ensuring protection of civilians from massive and indiscriminate military

⁵⁰ In the case of Sudan, the African Union had been involved in negotiating ceasefire agreements and the formation of the African Union Mission in Sudan was agreed on by all the parties to the conflict, including the Government of Sudan. See, for example, African Union, ‘Press Release’ (21 December 2004) available at <http://www.africa-union.org/DARFUR/Press%20release%20closing%20Peace%20Talks%2021%2012%2004.pdf> (last visited 24 April 2012).

⁵¹ See African Union, ‘The Commissioner for Peace and Security of the African Union Signed the Status of Mission Agreement (SOMA) for the AU Mission in Somalia with the Ambassador of Somalia’ (6 March 2007) available at <http://www.africa-union.org/root/UA/Conferences/2007/mars/PSC/06%20mars/Draft%20PR%20SOMA-%20Somalia-%206%20-03-071.doc> (last visited 24 April 2012).

⁵² P. D. Williams & A. J. Bellamy, ‘The Responsibility to Protect and the Crisis in Darfur’, 36 *Security Dialogue* (2005) 1, 27, 42-43.

⁵³ C. Gray, *International Law and the Use of Force*, 3rd ed. (2008), 55.

attacks (which are elements of crimes against humanity), including supporting the implementation of no fly zones. However, there is now a trend of the African Union failing to implement intervention responsibilities that require robust enforcement action, focusing only on peaceful and consensual approaches even where they are manifestly inappropriate and inadequate. In a sense, the subsequent conduct by the AU contradicts the spirit of the responsibility to protect concept, which envisages appropriate intervention (including enforcement action) in a timely and decisive manner, if peaceful means are inadequate.⁵⁴ Forceful intervention is not panacea, but as recognized by the ICISS, it is a crucial option where mass atrocities are being committed.⁵⁵ Political settlements proved inefficient in ending conflicts and protecting civilians in places like Darfur in Sudan, resulting in a proliferation of peace agreements between the parties to the conflict and an endless cycle of mass atrocities. Therefore, forceful intervention or its threat is occasionally necessary for negotiations to be successful, and in order to ensure effective protection of civilians.⁵⁶ There is need for “a robust and borderless” intervention mechanism in the African region based on the fragile human rights protection record in the continent,⁵⁷ which has on some occasions permitted commission of crimes against humanity and war crimes against civilian populations.

Intervention pursuant to invitation or consent of the territorial State (the limit which the African Union has difficulty exceeding) is based on the sovereign right of a State to invite external intervention, and is unlikely to be effective where the government is party to the conflict and atrocities. As Cassese observes, the principle of consent replicates the universally recognized principle of *volenti non fit injuria*, meaning that an otherwise illegal action is precluded from illegality where there is prior consent from the party whose rights have been infringed.⁵⁸ Brownlie similarly argues that States may lawfully confer the right of intervention to others, and it may

⁵⁴ The 2005 Outcome Document reaffirms the role of regional organizations such as the AU in the implementation of the responsibility to protect through forceful intervention, where necessary. See, World Summit Outcome Document, *supra* note 10, para. 139. For the role of regional organizations in the maintenance of international peace and security, including forceful intervention, see Articles 52 and 53 of the UN Charter.

⁵⁵ T. G. Weiss, ‘RtoP Alive and Well after Libya’, 25 *Ethics & International Affairs* (2011) 3, 287, 290.

⁵⁶ *Id.*, 289.

⁵⁷ Kuwali, *supra* note 31, 98.

⁵⁸ A. Cassese, *International Law* (2001), 316.

involve the use of armed force within the territory of the requesting or consenting State.⁵⁹ Consensual intervention and peacekeeping under the African Union is based on Article 4(j) of the Constitutive Act, which allows a Member State to request the Union's intervention for the purposes of restoring peace and security. Where intervention is by consent, the territorial State regulates the limits and modes of the intervention. If the intervening States or regional organization exceeds the limits permitted by the inviting or consenting State, it then becomes a form of forceful intervention.

The African Union's subsequent practice, which demonstrates the existence of legal and political dilemmas in the implementation of its forceful intervention mandate, is enhanced by the Union's failure to institutionalize the concept of responsible sovereignty in its legal framework and processes. There is a failure to effectively address the dilemma between State sovereignty and intervention for humanitarian purposes within the AU legal framework. The tension between sovereignty and intervention is maintained within the African Union legal framework by enumerating the two principles without establishing a framework of complementarity and synergy between them. For instance, while Article 4(g) of the Constitutive Act reaffirms the principle of non-interference in a Member State's internal matters by another, Article 4(h) establishes the right of the African Union to intervene in a Member State due to genocide, crimes against humanity or war crimes. In addition, there are similar opposing provisions in the African Union Peace and Security Council Protocol.⁶⁰ Article 4(e) of the Protocol affirms the sovereignty and territorial integrity of Member States and Article 4(f) prohibits Member States from interfering in the domestic affairs of another State. However, on the other hand, Article 4(j) of the Protocol reaffirms the African Union's right of intervention in a Member State due to genocide, crimes against humanity or war crimes.

Failure to establish a synergy and complementarity between State sovereignty and intervention for humanitarian purposes could have promoted a subsequent practice of greater sovereignty concerns over those of humanitarian protection, by providing an elaborate justification for such action within the legal framework. Contrary to the tension within the AU legal and institutional framework, the responsibility to protect concept addresses the problematic dilemma between State sovereignty and

⁵⁹ I. Brownlie, *International Law and the Use of Force by States* (1963), 317.

⁶⁰ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 47.

intervention for humanity. Both State sovereignty protection and intervention to stop or prevent genocide and crimes against humanity are conceptualized as complementary responsibilities that the international community has a duty to perform, and which is not a discretionary right. In a sense, despite some progressive provisions in the AU legal framework, there is need to institutionalize some of the concepts postulated in the emerging norm as a way of enhancing the elusive legal and political consensus that is necessary for forceful intervention. Some of the inconsistencies between the AU and the responsibility to protect concept, which are examined in the relevant section in this article, are likely to aggravate legal and political predicaments in the Union's implementation of the concept and its forceful intervention mandate under Article 4(h) of the Constitutive Act.

I. African Union's Success: Consensual Interventions and Peaceful Negotiations

We have observed that one of the ways the responsibility to protect concepts may be implemented is through intervention pursuant to a request or with the consent of the territorial State. The interventions analyzed in this section are not necessarily a case of implementation of responsibility to protect, but have the objective of analyzing the AU's subsequent practice in order to demonstrate the continued constraints of Westphalian concepts of sovereignty in the Union's interventions. It is more of an analysis of the AU's institutional capacity to implement the ideas postulated under the responsibility to protect, through an appraisal of the AU's response to some regional conflicts since its establishment. This is because while the concept of responsibility to protect is expected to help regional organizations such as the AU address dilemmas of intervention, such organizations are also expected to be mechanisms through which the concept is to be implemented. The African Union's subsequent interventions have been pursuant to the consent of the territorial State, or of a peacekeeping nature. However, where such an approach is inadequate to protect civilians or the government is a perpetrator, like the case of Sudan, there may be need to shift from consensual intervention to enforcement action as envisaged in Article 4(h) of the Constitutive Act. It is important to examine some of the successes of the African Union through consensual intervention and peacekeeping, like in the case of the Burundi conflict.

1. The 2003 African Union Peacekeeping Mission in Burundi

The 2003 AU peacekeeping mission in Burundi was successfully implemented by the Union before the formal endorsement of the responsibility to protect concept by the General Assembly in 2005. Despite the peacekeeping mission not having been a direct case of implementation of the emerging norm by the AU, it is a significant precedent in examining the AU's subsequent practice, especially in demonstrating the Union's intervention capacity. It is an important case that should be considered while making a balanced analysis on whether the AU has effectively institutionalized the concept of responsible sovereignty, which is the central concern of the emerging norm. Therefore, as Evans observes, the Burundi intervention is a perfect example of how the responsibility to protect concept can function.⁶¹

The African Union Mission in Burundi (AMIB), which was predominantly a peace operation, was the first intervention wholly initiated and implemented by African Union members.⁶² AMIB was established to supervise the 2 December 2002 ceasefire agreement, including earlier ones, by the Transitional Government of Burundi and the rebels.⁶³ The African Union intervention was significant since it had the responsibility of establishing peace "in a fluid and dynamic situation in which the country could relapse into violent conflict."⁶⁴ Emphasis on an African Mission rather than a United Nations one, and unwillingness of the United Nations to deploy troops in the absence of a comprehensive peace agreement had led to its establishment and deployment.⁶⁵ AMIB was successful in plummeting tension in the then potentially volatile State.⁶⁶

⁶¹ G. Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come...and Gone?', 22 *International Relations* (2008) 3, 283, 291.

⁶² 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 *African Security Review* (2008) 1, 70, 75.

⁶³ Organization of African Unity, *supra* note 49.

⁶⁴ Murithi, *supra* note 62, 75.

⁶⁵ E. Svensson, 'The African Mission in Burundi: Lessons Learned From the African Union's First Peace Operations' (Swedish Defence Research Agency, 2008), 11, available at http://www.foi.se/upload/projects/Africa/FOI2561_AMIB.pdf (last visited 24 April 2012).

⁶⁶ T. Murithi, 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur', 6, available at <http://www.humansecuritygateway.com/documents/>

2. The 2008 African Union Mediation in Kenya

Another commendable success of the African Union, but in the context of peaceful negotiations to resolve a regional conflict, is in respect of the 2008 post election violence in Kenya. The country was engulfed by ethnic violence due to the December 2007 disputed presidential elections.⁶⁷ President Kufuor of Ghana, the then Chairman of the African Union, requested Kofi Annan to lead the mediation in the State on behalf of the Union under the auspices of the Panel of Eminent African Personalities.⁶⁸ The mediation successfully resolved the conflict. However, the crisis in Kenya and the international community reaction was branded as a responsibility to protect situation only retrospectively.⁶⁹ Kofi Annan has subsequently used the phrase, stating that the “effective external response” in Kenya was proof “that the responsibility to protect can work.”⁷⁰ According to Ban Ki Moon, Kenya was an illustration that an early intervention in a State that was degenerating into violence could forestall its escalation, resulting in the responsibility to protect being implemented without the necessity of using force.⁷¹ He further stated that the Kenyan case represented the first time the UN and regional actors viewed a conflict situation partly “from the perspective of the responsibility to protect.”⁷²

II. African Union’s Failure: Decisive Forceful Intervention

Despite the fact that peaceful negotiations and consensual intervention play a significant role in ending some conflicts, and may be a basis for the implementation of the responsibility to protect concepts, they may be inadequate or inappropriate in other situations. The reality of the potential of

JPCD_AUsForayIntoPeacekeeping_HybridMissionDarfur.pdf (last visited 24 April 2012).

⁶⁷ International Coalition for the Responsibility to Protect, ‘Crisis in Kenya’ available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> (last visited 24 April 2012).

⁶⁸ K. Annan, ‘Opening Remarks to the Opening Plenary Session - Kenya National Dialogue: One Year Later’ (30 March 2009) available at <http://allafrica.com/stories/200903301452.html> (last visited 24 April 2012).

⁶⁹ International Coalition for the Responsibility to Protect, *supra* note 67.

⁷⁰ Annan, *supra* note 68.

⁷¹ Implementing the Responsibility to Protect: Report of the Secretary General, *supra* note 27, para. 11(c).

⁷² *Id.*, para. 51.

their inadequacy or inappropriateness in some circumstances demonstrates that the AU should have the capacity to be flexible and respond appropriately as any situation may require, from peaceful negotiations to enforcement action in deserving situations. The UN Secretary General has emphasized that there should be no delay in implementing the responsibility to protect through robust action, including forceful intervention, where diplomacy is ineffective.⁷³ The forceful intervention may be executed by a regional organization after authorization by the Security Council.⁷⁴

1. The Darfur Conflict and the Necessity for Robust Enforcement Action

It has been argued that Darfur was a “litmus test for the responsibility to protect framework” for both the AU and the UN.⁷⁵ However, despite the Darfur crisis providing a splendid example of a government that was both unable and unwilling to protect its nationals, the international community has also been unable and unwilling to assume the residual responsibility envisaged under the responsibility to protect concept.⁷⁶ As an analysis of the conflict in Darfur will indicate, implementation of robust enforcement action to protect civilians in accordance with the responsibility to protect was long overdue.

The Darfur conflict commenced in 2003, and by the turn of 2005, there were widespread and systematic atrocities that included killing of civilians, displacements, destruction of villages, rapes and other types of sexual violence that amounted to crimes against humanity.⁷⁷ According to the UN estimates in July 2010, an approximated 300,000 people had died in Darfur since the conflict began, with 2.7 million displaced.⁷⁸ The responses

⁷³ *Id.*, para. 56.

⁷⁴ *Id.*

⁷⁵ McClean, *supra* note 5, 142.

⁷⁶ K. Kindiki, ‘Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives’, 131 *Institute for Security Studies Monograph Series* (2007), 6 [Kindiki, Intervention to Protect].

⁷⁷ International Commission of Inquiry on Darfur, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’ (25 January 2005), 3, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 24 April 2012).

⁷⁸ United Nations News Centre, ‘Darfur: UN-African Union Peacekeeping Force Extended as Tensions Rise’ (30 July 2010) available at

by both the African Union and United Nations have been criticized as inappropriate for deterring the commission of atrocities. Abass argues that despite widespread gross violations of human rights in June 2004 when the African Union intervention in Darfur began, the Union decided to deploy peacekeepers rather than conduct a humanitarian intervention.⁷⁹ He states that consequent actions by the Union have amounted to peacekeeping rather than humanitarian intervention.⁸⁰ However, Abass later argues that in any case, the African Union could not be expected to conduct a humanitarian intervention as it lacks such powers, and therefore, the UN was the one that should have intervened in such a manner since it has such powers under Chapter VII of the Charter.⁸¹ This seems to suggest that the African Union could also have sought authorization from the Security Council to undertake forceful intervention in accordance with Article 53(1) of the UN Charter.

It should be noted that the initial involvement of the African Union troops in peacekeeping was with the specific consent of the Government of Sudan, which was consistent with Article 4(j) of the Constitutive Act, not an enforcement action which is premised on the decision of the Union Assembly. The escalation of the civil war eventually led to the formation of a joint United Nations and African Union hybrid operation, the United Nations African Union Mission in Darfur (UNAMID) by Security Council Resolution 1769.⁸² The hybrid operation was a compromise between Sudan, which fervently opposed an independent UN operation, and the UN, which, preferred the expansion of the United Nations Mission in Sudan (UNMIS) to 22,000 personnel, with the possibility that it could take over the African Union Mission in Sudan (AMIS) by 31 December 2006.⁸³

However, UNAMID was nothing more than a larger peacekeeping force, and not a robust enforcement force despite previous unsuccessful peacekeeping, continued civil war and mass atrocities. It is evident in the fact that United Nations earlier objectives were compromised by the Government of Sudan that would consent only to either peacekeeping by the African Union troops or a hybrid operation comprising both the UN and

<http://www.un.org/apps/news/story.asp?NewsID=35493&Cr=%20Darfur&Cr1> (last visited 24 April 2012)

⁷⁹ A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', 54 *Netherlands International Law Review* (2007) 3, 415, 420-423.

⁸⁰ *Id.*, 423.

⁸¹ *Id.*, 425.

⁸² SC Res. 1769, 31 July 2007.

⁸³ Abass, *supra* note 79, 433.

AU, and the fact that Security Council Resolution 1769 expressly stated that the forces would be under unified command and “in accordance with basic principles of peacekeeping”.⁸⁴ The contradictions of peace enforcement by the UN have been evident in Sudan, as mass killings and displacements of civilians continued. Despite the Security Council passing resolutions under Chapter VII powers,⁸⁵ it continued to insist its preference for the Government of Sudan to consent to intervention,⁸⁶ which indicated preference for permission rather than imposition, a basic feature of traditional peacekeeping.

Although consensual intervention was desirable, thousands continued losing their lives and millions being displaced when it was very clear that the Sudan Government was itself unwilling to end its complicity and support for the *Janjaweed* militia responsible for some of the atrocities.⁸⁷ Since both the African Union and United Nations were focusing on Sudan to consent to the deployment of troops and military equipments, its government successfully and severely distracted the deployment and operations of UNAMID, a force which already had a weak peace enforcement mandate *ab initio*.⁸⁸ It should also be noted that the legal framework for intervention by both the African Union and United Nations was contradictory, in as much as they have been involved in joint operations. While the African Union intervened on the basis of specific consent of Sudan and never changed its mandate, the Security Council passed resolutions under Chapter VII that permit enforcement action.

⁸⁴ SC Res. 1769, *supra* note 82.

⁸⁵ For instance, SC Res. 1590, 24 March 2005.

⁸⁶ An example is Security Council Resolution 1706 of 2006 that states, in part, that “UNMIS’ mandate shall be expanded [...] that it shall deploy to Darfur, and therefore invites the consent of the Government of National Unity” for the deployment. SC Res.1706, 31 August 2006.

⁸⁷ International Commission of Inquiry on Darfur, *supra* note 77, 3.

⁸⁸ By December 2007, some of the obstructions and obstacles put by the Sudan Government included failure to officially accept the UNAMID troop list for more than two months. It also rejected troop contributions from some States, notably Nepal, Thailand and Nordic countries, insisting on African troops only. In addition, it deliberately delayed for several months before allocating land for military bases. Further, it refused to grant consent for night flights to UNAMID and continued to impose curfews on the “peacekeepers” in certain places. Joint Non-Governmental Organizations Report, ‘UNAMID Deployment on the Brink: the Road to Security in Darfur Blocked by Government Obstructions’ (December 2007), 1-2, available at <http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp09/UNAMIDDeploymentontheBrinkNGOReport.pdf> (last visited 24 April 2012).

However, the United Nations further proceeded to contradict its enforcement mandate by seeking the consent of the Government of Sudan, which was an accomplice in the commission of mass atrocities. The participation of the government in mass atrocities is evidenced by the indictment of the President of Sudan by the International Criminal Court on allegations of complicity in the atrocities.⁸⁹ In a literal sense, enforcement action cannot be undertaken on the government that is subject to the intervention with its consent. In 1994, the United Nations did not demand or insist on a preference for consent from the Haiti military Government to enforce its Resolution, which had a broad and open mandate.⁹⁰ The approach in Sudan was therefore not logical for effective civilian protection.

The failure of the contradictory peace enforcement approach like in the case of Darfur, Sudan may be attributed to the fact that it has evolved as an exception from the traditional peacekeeping⁹¹ and it is therefore restrained by the impartiality, co-operation and consent of territorial State foundations. Noting the likely inefficiencies and inappropriateness of the peace-enforcement approach, Higgins convincingly argues that enforcement action “should remain clearly differentiated from peace-keeping. Peacekeeping mandates should not contain within them an enforcement function. To speak of the need for more ‘muscular peace-keeping’ simply evidences that the wrong mandate has been chosen *ab initio*.”⁹² A more appropriate approach in serious civil conflicts like the case of Darfur seems desirable, constituting a fully fledged and robust enforcement action to achieve a ceasefire and deter the parties to the conflict, thereby creating the peace. After the ceasefire, a peacekeeping force can now be established to

⁸⁹ *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Second Warrant of Arrest, ICC-02/05-01/09 (Pre-Trial Chamber I), 12 July 2010.

⁹⁰ In the case of Haiti in 1994, the Security Council authorized enforcement action to oust the military leadership and ensure the return of the legitimately elected President, SC Res. 940, 31 July 1994.

⁹¹ The International Court of Justice confirmed that one of the features of peacekeeping operations is that they are established after the consent of the territorial State. *Certain Expenses of the United Nations*, *supra* note 17, 170. The 2000 Report of the Panel on United Nations Peace Operations described the bedrock of peacekeeping as based on consent, impartiality and non-use of force except in self-defence. Panel on United Nations Peace Operations, ‘Report of the Panel on United Nations Peace Operations’, UN Doc A/55/305, August 2000, ix.

⁹² R. Higgins, ‘Peace and Security: Achievements and Failures’, 6 *European Journal of International Law* (1995) 1, 445, 459.

monitor, implement and keep the peace. This would provide a better mechanism to ensure civilians are protected and mass atrocities halted, in a manner consistent with the responsibility to protect concept. Higgins proposes that a peacekeeping force be put on the ground only after an agreement on a cease-fire, which is accompanied by commitment of achieving the undertaking.⁹³

The HLP Report also noted that one of the greatest failures of the United Nations has been halting ethnic cleansing and genocide since at times “peacekeeping and the protection of humanitarian aid” becomes a “substitute for political and military action to stop” the atrocities.⁹⁴ When it became apparent that consensual intervention and peacekeeping was not effective and appropriate for civilian protection in Darfur, the African Union, as the relevant regional organization, and in the spirit of Article 4(h) of the Constitutive Act, should have sought the more appropriate forceful intervention alternative. The African Union could have sought authorization from the Security Council for such action, and requested support from the international community to supplement its resources in the intervention, options which it did not pursue.

2. The Libyan Uprising and the African Union’s Non-Intervention Stance

Another case that has further exposed the continuing constraints of the traditional concepts of sovereignty within the African Union system relates to the Union’s reaction to the 2011 Libyan conflict. In contrast to the African Union’s non-intervention stance, the United Nations was decisive in advocating and authorizing timely forceful intervention, in a manner consistent with the responsibility to protect concept. As Libyan forces continued indiscriminate aerial bombings of both rebels and civilians seeking to overthrow Muammar Gaddafi’s regime, the Security Council promptly referred the matter to the International Criminal Court for investigation and possible prosecution, after finding that gross and systematic violations of human right were being orchestrated.⁹⁵

However, as possibilities of the enforcement of a no fly zone were being deliberated by some of the world powers, the African Union issued a

⁹³ *Id.*, 460.

⁹⁴ High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 87.

⁹⁵ SC Res. 1970, 26 February 2011.

statement on 10 March 2011 that rejected “any foreign military intervention, whatever its form.”⁹⁶ This was despite the African Union finding that there had been “indiscriminate use of force and lethal weapons” leading to “loss of life, both civilian and military.”⁹⁷ The AU actions seem to contradict the spirit of Article 4(h) of the Constitutive Act, which mandates the Union to undertake forceful intervention in such circumstances, which constituted or was leading to crimes against humanity. Departing from the African Union’s non-intervention stance, the Council of the League of Arab States on 12 March 2011 called “for the imposition of a no-fly zone on Libyan military aviation,” and protection of areas inhabited by civilians from military attacks.⁹⁸

Consequently, on 17 March 2011, the Security Council, concerned that the widespread and systematic attacks against civilians that were taking place in Libya amounted to crimes against humanity, and acting under its Chapter VII powers as provided under the UN Charter, authorized Member States to “take all necessary measures” to protect civilians under the threat of attack.⁹⁹ The Resolution however clarified that it excluded any form of a foreign occupation force in any territory of Libya.¹⁰⁰ In addition, the Resolution established a no fly zone, banning all flights in the Libyan airspace for the purposes of protecting civilians.¹⁰¹ Without delay, the United States, United Kingdom, France and other coalition partners launched attacks against Muammar Gaddafi’s forces and military installations with the objective of enforcing the no fly zone.¹⁰² On 25 March 2011, the African Court on Human and Peoples’ Rights (ACHPR) commendably issued interim orders against the Libyan Government to stop any action that could result in the loss of lives or amount to violations of the protection granted to Libyans under the relevant international human rights

⁹⁶ African Union, ‘Communiqué of the 265th Meeting of the Peace and Security Council’ (10 March 2011) PSC/PR/COMM.2 (CCLXV).

⁹⁷ *Id.*

⁹⁸ SC Res. 1973, 17 March 2011.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² British Broadcasting Corporation, ‘Libya: United States, United Kingdom and France Attack Gaddafi Force’ (20 March 2011) available at <http://www.bbc.co.uk/news/world-africa-12796972> (last visited 24 April 2012).

instruments.¹⁰³ However, despite the Court adopting such a progressive approach in issuing the orders, which is consistent with the responsibility to protect concept, it had to rely on the AU for the enforcement of its findings. Article 29 of the Protocol that establishes the ACHPR requires that the judgment of the Court be forwarded to the Organization of African Unity (OAU) which was succeeded by the African Union.¹⁰⁴ Rule 64 (2) of the ACHPR Rules provides that the Executive Council of the African Union shall monitor the execution of the Court's judgment on behalf of the Union's Assembly.¹⁰⁵ Based on the fact that the AU was opposed to any form of military intervention within Libya, it could therefore not enforce the Court orders through forceful intervention.

Considering the drafting and phrasing of Resolution 1973, the Libyan intervention has been described as the "first UN-sanctioned combat operations since the 1991 Gulf War."¹⁰⁶ The appropriateness of the international community intervention in Libya, unlike the earlier approach in Darfur, was that it was no longer about peacekeeping and contradictory peace enforcement in a place where there was no peace to keep. It was clearly about decisive forceful intervention in the form of no fly zones to prevent widespread and systematic attacks on civilians. The international military coalition destroyed Libya's air defense system, and besides patrolling Libya's skies to enforce the no-fly zones, targeted tanks and established a naval blockade.¹⁰⁷

According to Weiss, the timely forceful intervention in Libya contrasts with collective hesitation to undertake enforcement action in Ivory Coast during the 2010-2011 post election conflict (despite numerous UN

¹⁰³ *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order for Provisional Measures, ACHPR Application No. 004/2007, para. 25.

¹⁰⁴ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 9 June 1998, available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf (last visited 24 April 2012).

¹⁰⁵ African Court on Human and Peoples' Rights, 'Rules of Court' (2 June 2010) available at http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (last visited 24 April 2012).

¹⁰⁶ R.Thakur, 'United Nations Breathes Life into 'Responsibility to Protect'' (*The Star*, 21 March 2011) available at <http://www.thestar.com/opinion/editorialopinion/article/957664--un-breathes-life-into-responsibility-to-protect> (last visited 24 April 2012) [Thakur, United Nations].

¹⁰⁷ *Id.*

resolutions and widespread condemnation) which illustrates the implications (to civilians) of failure to implement a timely robust military option.¹⁰⁸ Weiss argues that the hesitation by the international community to undertake robust forceful intervention in Ivory Coast permitted the unnecessary escalation of the commission of crimes against humanity and war crimes, and explosion of huge refugees flows, and questions why action could not have been undertaken earlier.¹⁰⁹ Welsh is of the view that the request for action by the Arab League contributed to the Security Council's decisive and timely authorization of the Libyan intervention, and the willingness of the North Atlantic Treaty Organization (NATO) to enforce it.¹¹⁰ This is in addition to the affirmative votes of African States at the Security Council (South Africa, Nigerian and Gabon that were non-permanent members) despite the AU opposing military intervention of any form.¹¹¹ NATO had stated that it was ready to intervene in order to protect Libyan civilians if there was strong regional support for such action, in addition to a demonstrable necessity, and a clear legal foundation.¹¹²

The citation of the responsibility to protect concept in relation to the decisive and timely intervention in Libya is an indication that the concept's continued crystallization into a proper legal norm. The Security Council reaffirmed the Libyan Government's responsibility to protect its population in Resolutions 1970¹¹³ and 1973.¹¹⁴ As the Libyan Government continued to commit mass atrocities, both the UN Secretary General Special Adviser on the Prevention of Genocide and Special Adviser on the Responsibility to Protect cautioned the Libyan authorities that the 2005 World Summit had resolved protection of populations from such atrocities.¹¹⁵ The UN

¹⁰⁸ Weiss, *supra* note 55, 289.

¹⁰⁹ *Id.*, 290.

¹¹⁰ J. Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', 25 *Ethics & International Affairs* (2011) 3, 255, 257-258.

¹¹¹ *Id.*

¹¹² *Straits Times*, 'NATO Chief Urges Quick UN Deal on Libya' (17 March 2011) available at http://www.straitstimes.com/print/BreakingNews/World/Story/STISStory_646287.html (last visited 24 April 2012).

¹¹³ SC Res. 1970, *supra* note 95.

¹¹⁴ SC Res. 1973, *supra* note 98.

¹¹⁵ United Nations Press Release, 'UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya' (22 February 2011) available at <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf> (last visited 24 April 2012).

Secretary General asserted that Resolution 1973 reaffirmed the international community's resolve to fulfil its "responsibility to protect" civilians from State sponsored atrocities in a clear and unequivocal manner.¹¹⁶

III. The African Union's Framework and Constraints of Traditional Concepts of Sovereignty

The 1648 Peace of Westphalia that ended the Thirty Years War in Europe formed the basis of the present structure and configuration of the international community.¹¹⁷ The Treaties of Munster¹¹⁸ and Osnabrück¹¹⁹ referred to collectively as the Peace of Westphalia, are deemed to have consolidated the principle of sovereignty by creating structures that enabled the emergence of independent and territorially demarcated States.¹²⁰ The Westphalian concept of sovereignty "was based on an 'iron curtain like' conception of the state that enshrined the external and internal autonomy of the state."¹²¹ In the period to follow, "state sovereignty was sacred and retained its conception as supreme authority, granting a state exclusive jurisdiction and control over all objects and subjects in its territory, to the exclusion of any other influence."¹²² In the case of the AU, it has continued to place a high premium on the consent of the government of the territorial State before any military intervention can be implemented, and therefore acted inconsistently with the spirit of Article 4(h) of its Constitutive Act, which envisages forceful intervention in deserving situations. The unwillingness to implement the AU's forceful intervention mandate where consensual intervention or peacekeeping is inappropriate or insufficient is a

¹¹⁶ United Nations Secretary General, 'Secretary General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence' (18 March 2011) available at <http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm> (last visited 24 April 2012).

¹¹⁷ Cassese, *supra* note 58, 19.

¹¹⁸ Includes: *Treaty of Peace between Spain and the Netherlands*, 30 January 1648, 1 C.T.S. 1; *Treaty of Peace between France and the Empire*, October 1648, 1 C.T.S. 271.

¹¹⁹ Includes the *Treaty of Peace between Sweden and the Empire*, October 1648, 1 C.T.S. 119.

¹²⁰ A. Hehir, *Humanitarian Intervention: An Introduction* (2010), 45.

¹²¹ J. N. Maogoto, 'Westphalian Sovereignty in the Shadow of International Justice?: A Fresh Coat of Paint for a Tainted Concept' in T. Jacobsen *et al.*, (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (2008), 211, 211.

¹²² *Id.*

demonstration of the continued constraints of some of the traditional concepts of State sovereignty. In addition, the AU's express opposition to any form of military intervention (including imposition of no fly zones) in Libya despite widespread and systematic military attacks on civilians that were in the nature of crimes against humanity was clearly inconsistent with the concept of responsible sovereignty, and the Union's intervention mandate.¹²³ As the UN Secretary General pertinently observed, paragraph 139 of the 2005 World Summit Outcome Document reflected the hard reality that no strategy of implementing "responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases."¹²⁴

Whereas the African Union's legal system does not espouse a traditional model of sovereignty in Africa, and recognizes the necessity for intervention in a Member State in "grave circumstances", it nevertheless creates mechanisms that seek to preserve some of the elements of the traditional model. As Kindiki correctly observes, the AU's legal and institutional framework fails to provide a coherent and orderly relationship between sovereignty and intervention, which buttresses interpretative differences.¹²⁵ The interpretative uncertainty has subsequently been constructed to the benefit and supremacy of sovereignty in the traditional sense. According to Adejo, the continued State centric nature of the AU system is indicated by principles that reaffirm the principle of non-interference, which have subsequently compromised implementation of the intervention framework established under Article 4(h) of the Constitutive Act.¹²⁶ The principle of non-intervention is reaffirmed by Article 4 (g) of the Constitutive Act, prohibiting interference by a State in the domestic issues of another. In addition, Article 4(f) of the AU Peace and Security Protocol endorses the non-interference principle, while Article 4(e) of the Protocol provides that one of the guiding principles of the Peace and Security Council shall be "respect for the sovereignty and territorial integrity" of

¹²³ Security Council Resolution 1973 found that the continued widespread and systematic attacks on the civilians could constitute crimes against humanity. SC Res. 1973, *supra* note 98.

¹²⁴ Implementing the responsibility to protect: Report of the Secretary-General, *supra* note 27, para. 56.

¹²⁵ K. Kindiki, 'The African Peace and Security Council and the Charter of the United Nations', 1 *Law Society of Kenya Journal* (2005) 1, 77, 91 [Kindiki, African Peace].

¹²⁶ A. M. Adejo, 'From OAU to AU: New Wine in Old Bottles?', 4 *African Journal of International Affairs* (2001) 1&2, 119, 136.

members.¹²⁷ According to Adejo, the inconsistency between the two sets of clauses relating to both intervention and non-interference (in the AU context) are an indication of the continued concern for and sensitivity to traditional concepts of State sovereignty.¹²⁸ Adejo therefore correctly opines that the establishment of the AU intervention mechanism amounted to the mere repainting of the preceding OAU with a coat of fresh paint, but failed to tackle inner structural issues that are essential for effective intervention.¹²⁹ Falk laments the impression that continues to prevail, especially in Africa, that sovereignty is a static principle, and not one which is evolving towards the concept of responsibilities of States.¹³⁰ Deng observes that there can be contradictions between the conduct of States within the international community, with some States such as those more vulnerable to intervention continuing to affirm the traditional concept of sovereignty, while the behaviour of others is supportive of the notion of responsible sovereignty.¹³¹

The concepts postulated within the emerging norm of responsibility to protect are of significant value in addressing some of the continuing legal and political dilemmas in the implementation of the African Union's forceful intervention mandate in deserving situations. It may be argued that since the AU has a legal framework for forceful intervention, the lack of political will is merely the obstacle to its implementation. However, the non-intervention oriented provisions within the same framework have the potential to negate the legal and political impact of the intervention clauses. In addition, it should be taken into account that the concept of responsible sovereignty, coherently articulated in the emerging norm of responsibility to protect, is fundamentally concerned with the generation of such political

¹²⁷ *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, *supra* note 47.

¹²⁸ Adejo, *supra* note 126, 136- 137.

¹²⁹ *Id.*, 137.

¹³⁰ Falk, *supra* note 28, 84.

¹³¹ F. M. Deng, 'Sovereignty, Responsibility and Accountability: A Framework of Protection, Assistance and Development for the Internally Displaced' (Brookings Institution-Refugee Policy Group Project, 1995), 5-6, available at http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1448 (last visited 24 April 2012). He observes that while there has been practice of the international community responding to humanitarian catastrophes in the post-Cold War period, in a manner that has impinged on the traditional notions of sovereignty, there has also been evidence of efforts aimed at reaffirming the traditional concepts of sovereignty by the more vulnerable States. *Id.*

will. As the UN Secretary General observes, the problem of implementing forceful intervention in the international community has partly been conceptual and doctrinal, especially in relation to how the relevant issues and alternatives are understood.¹³² The concept of responsibility to protect has the objective of addressing the conceptual and doctrinal challenges in a coherent manner that will contribute to the elimination of legal and political dilemmas of intervention for humanity.

Both the African Union legal framework and subsequent practice indicates some inconsistencies with the emerging norm of responsibility to protect, which indicate the continued failure to institutionalize the concept of responsible sovereignty. First, State sovereignty is protected in the traditional Westphalian model, rather than being postulated in the context of a duty to effectively protect national populations from atrocities. In contrast, the norm of responsibility to protect acknowledges State sovereignty, but also makes it the basis upon which the international community is obligated to intervene. The norm conceptualizes State sovereignty to include a State's duty "to protect the welfare of its own peoples and meet its obligations to the wider international community."¹³³

The other inconsistency is that the African Union conceptualizes intervention for humanitarian purposes as a *right*. This conflicts with the emerging norm of responsibility to protect conceptualization of intervention, which is deemed as being a *responsibility*.¹³⁴ A *responsibility* implies a duty, which is more helpful than viewing intervention as a right, which implies the discretion of States to either take action or not. The ICISS Report noted that a *rights* approach is unhelpful since it focuses too much attention on the claims and prerogatives of the intervening States rather than on the critical and urgent needs of the beneficiaries of the intervention.¹³⁵ As Kindiki points out, conceptualizing the intervention mandate under Article 4(h) of the Constitutive Act as a right means that the AU has the discretion

¹³² Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 27, para. 7.

¹³³ High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 29. See also, International Commission on Intervention and State Sovereignty, *supra* note 1, paras 2.14-2.15.

¹³⁴ High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 201; World Summit Outcome Document, *supra* note 10, para. 139.

¹³⁵ International Commission on Intervention and State Sovereignty, *supra* note 1, para. 2.28.

to either intervene or not,¹³⁶ despite the occurrence or threat of genocide or crimes against humanity. The HLP Report notes that in respect of avoidable catastrophe, the issue is not about the *right* to intervene of *any* State, but rather, it is the *responsibility* to protect of *every* State.¹³⁷ The responsibility to protect concept discards a rights approach and its corollary limitations, and therefore adopts “the victims’ point of view and interests, rather than questionable State-centred motivations.”¹³⁸ In contrast, adopting a *rights* approach to intervention for humanitarian purposes, like in the African Union model, renders it theoretically and practically more difficult to attain commitment of States on an issue they deem as discretionary, without an obligation to fulfill. It emphasizes the discretion of the AU to decide whether to intervene or not. In contrast, responsibility implies a duty. A duty generates a feeling of an obligation to its bearer to take action.¹³⁹ The UN Secretary General has stated that the problem of intervention has partly been conceptual and doctrinal, including how States appreciate the issues and policy alternatives.¹⁴⁰ Kindiki argues that a contextualization of the AU intervention mandate as a duty is more desirable since “a sense of obligation to intervene is more likely to move the AU into action.”¹⁴¹

Peters has commended the responsibility approach to both sovereignty and intervention under the emerging norm, and astutely observes that the central focus of intervention is being transformed from being an issue of States’ rights to States’ obligations.¹⁴² Peters further points out that the approach under the responsibility to protect concept places the needs of humanity as the starting point of the debate on intervention.¹⁴³ As Evans correctly observes, the ICISS Report pointed out that generating the required political will for intervention is “also a matter of intelligently and energetically advancing good *arguments*, which may not be a sufficient

¹³⁶ K. Kindiki, ‘The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal’, 3 *African Human Rights Law Journal* (2003) 1, 97, 106. [Kindiki, Institutional Framework].

¹³⁷ High-Level Panel on Threats, Challenges and Change, *supra* note 9 para. 201. See also, World Summit Outcome Document, *supra* note 10 para. 139.

¹³⁸ Arbour, *supra* note 20, 448.

¹³⁹ P. Eleftheriadis, *Legal Rights* (2008), 107.

¹⁴⁰ Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 27, para. 7.

¹⁴¹ Kindiki, *Institutional Framework*, *supra* note 136, 106.

¹⁴² Peters, *Global Constitutional Community*, *supra* note 32, 185.

¹⁴³ *Id.*

condition but are always necessary for taking difficult political action.”¹⁴⁴ Based on the dilemmas of intervention, the approach adopted by the AU in respect to the principles of State sovereignty and non-interference, in addition to the “rights” approach to intervention, is unhelpful in generating the elusive legal and political consensus for intervention. There is the necessity of eliminating the continued convenience with which the concept of sovereignty can be used as a convenient legal and political justification for non-intervention within the AU system and in the African region. Although the African States have generally endorsed the responsibility to protect concept in General Assembly deliberations, the African Union remains a significant regional organization through which the African States policy on sovereignty and intervention is shaped and implemented. In a report of the 2009 General Assembly plenary debate on responsibility to protect, only Sudan and Morocco (out of the various African States that participated) are recorded as having been critical of the concept.¹⁴⁵ Similarly, even the AU does not expressly oppose the responsibility to protect, with the problem being the failure to effectively institutionalize the concepts of responsible sovereignty within the system, and a continued higher premium for sovereignty. Despite African States being members of both the UN and the AU, the Libyan case has demonstrated beyond any doubt that the AU and the UN Security Council can adopt radically different policy approaches to a regional conflict, where crimes against humanity are being committed.

Although the UN Secretary General acknowledged that “the spirit of non-indifference that animated the African Union” was among the various factors that provided the roots for the responsibility to protect concept,¹⁴⁶ the emerging norm has developed a more progressive approach to sovereignty and intervention that the AU system can benefit from. From our

¹⁴⁴ Gareth Evans, ‘From Humanitarian Intervention to R2P’, 24 *Wisconsin International Law Journal* (2006) 3, 703, 721.

¹⁴⁵ United Nations Department of Public Information, ‘Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect’ (23 July 2009) available at <http://www.un.org/News/Press/docs/2009/ga10847.doc.htm> (last visited 24 April 2012) [United Nations Department of Public Information, Delegates]. Despite Morocco being an African State, it is not a member of the African Union. See African Union, ‘Member States’ available at http://www.au.int/en/member_states/countryprofiles (last visited 24 April 2012).

¹⁴⁶ United Nations General Assembly Department of Public Information, *General Assembly Debate*, *supra* note 12.

analysis of the AU's subsequent practice, it is clear that while the AU has the capacity and willingness to protect populations from atrocities through peaceful negotiations and consensual interventions, there is serious difficulty in implementing the forceful intervention mandate provided in Article 4(h) of its Constitutive Act in deserving situations. An examination of the African Union reaction to the Darfur and Libyan conflicts have demonstrated this, indicating the high premium that the AU continues to attach to the traditional concepts of sovereignty. Intervention after the consent of the territorial State and peacekeeping are premised on the sovereign right of the subject State to invite or accept assistance, but they may not provide adequate protection to populations where the government is a perpetrator of the atrocities and requires to be stopped, like in the cases of Darfur and Libya. As already observed, the responsibility to protect concept is clear that where peaceful and consensual means are inadequate or inappropriate, enforcement action may be undertaken to protect populations from genocide and crimes against humanity.

IV. Institutionalizing Responsible Sovereignty Concepts within the AU Processes

Effective institutionalization of responsible sovereignty concepts within the African Union processes, including in its legal and institutional framework, will be helpful in building consensus and reducing the legal and political dilemmas of intervention. The responsibility to protect concept provides a valuable reference point that should inform the AU on the manner in which the principles of sovereignty and intervention for humanity should be conceptualized, as a starting point of addressing the subsequent intervention dilemmas. It may be argued that the greatest obstacle to effective implementation of Article 4(h) of the Constitutive Act by the African Union is the lack of political will. That in essence is an acknowledgement of the necessity for an approach that enhances the generation of the elusive political will, and compliance with the concept adopted under the emerging norm would be an important starting point. The core concerns of the emerging norm of the responsibility to protect include the elimination of political dilemmas of intervention. The responsibility to protect concept is a mobilization tool for timely action.¹⁴⁷

¹⁴⁷ Kuwali, *supra* note 31, 378.

If the African Union's legal and political dilemmas of intervention are to be resolved, it may be necessary to reconceive the meaning and attributes of sovereignty and non-intervention within the Union's legal framework. Values of State sovereignty preservation should be postulated as complementary to those of intervention for humanity. Both sovereignty and intervention should be oriented towards the protection of the population of a State from avoidable catastrophes such as genocide and crimes against humanity, and should be postulated as a fundamental duty of the AU system. The African Union should have the capacity to intervene efficiently "on behalf of the people when their sovereign interests are no longer represented by their own government, or when there is no functioning government at all, or when minorities are subjected to extreme oppression by the government in the name of the majority."¹⁴⁸ State sovereignty would still be preserved and protected, but viewed in a more progressive and valuable manner, that of the responsibility to protect nationals from gross atrocities. Indeed, it is impossible that State sovereignty protection and principles can be done away with altogether. State sovereignty has its benefits; it "provides order, stability and predictability in international relations."¹⁴⁹ However, it can be reconceived in a manner that provides impetus to achieve the greater value of protecting the population of a State from mass atrocities such as genocide and crimes against humanity.

Even if it may not be possible to immediately amend the main African Union treaties such as the Constitutive Act, there is a need to adopt declarations and resolutions on sovereignty and intervention as responsibility which may serve as interpretative tools on the meaning and implications of those core principles within the AU system. Declarations and resolutions can be significant instruments to reforms regional norms, standards of behavior and perceptions on the responsibility of sovereignty and the duty to intervene to stop or pre-empt genocide and crimes against humanity. The success of such reforms and change of approach would be manifested by an alteration in the Union's subsequent practice in relation to intervention to stop or pre-empt genocide, crimes against humanity and war crimes. It would include the willingness to undertake forceful military

¹⁴⁸ R. Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (2006), 272-273 [Thakur, *United Nations, Peace and Security*].

¹⁴⁹ R. Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', 33 *Security Dialogue* (2002) 3, 323, 329 [Thakur, *Outlook: Intervention*].

intervention to stop or pre-empt genocide and crimes against humanity in a timely and decisive manner, where consensual intervention and peacekeeping are inadequate or inappropriate. It would therefore entail the implementation of the forceful intervention mandate that is granted under Article 4(h) of the Constitutive Act in deserving situations, by lobbying the United Nations for authorization for robust enforcement action. That way the AU would also contribute to the implementation of the concepts postulated under the emerging norm of responsibility to protect more significantly.

Some factors may offer opportunities for such reforms and more progressive approaches to State sovereignty and intervention to stop or pre-empt mass atrocities. The first is advocacy and pressure from African transnational civil society organizations and other non-State actors. The second is the realities and implications of the continued global interdependence, and the fact that intervention for humanity is increasingly becoming a global concern. The continued evolution of the emerging norm of responsibility to protect is a move towards such a state of affairs within the international community. Therefore, as the case of Libya has illustrated, the AU non-intervention stance may not achieve its objective since the UN disregarded the AU position and proceeded to authorize enforcement action while NATO was willing to implement it. Therefore, in such circumstances, the AU can only remain relevant to the international community concerns on intervention, and prevent external (non-African) intervention in the region through an effective implementation of its forceful intervention mandate under the Constitutive Act.

V. Factors that May Contribute to Institutionalization of the Concept of Responsible Sovereignty within the AU System

1. The Role of Civil Society Organizations

Through focused advocacy and pressure, transnational civil society organizations in Africa may significantly contribute to the institutionalization of responsible sovereignty within the African Union processes, including within its legal and institutional framework. The influence of civil society organizations on States and intergovernmental organizations in the making and implementation of international law is no longer doubtful. The considerable influence of non-governmental

organizations in international law making is already evident, for instance, during the drafting of international agreements.¹⁵⁰ Non-governmental organizations play a significant role in encouraging States to conclude and ratify treaties on various issues, and subsequently monitor States, requesting and advocating for compliance with the treaty obligations and accountability.¹⁵¹ It has been observed that non-governmental organizations insistence on fulfillment of international obligations, including the “naming and shaming” of States that fail to comply, plays a significant role in the internalization of the international law norms.¹⁵² It has also been asserted that the development of vibrant regional civil society organizations in the international community is a significant blow to sovereignty centered regionalism,¹⁵³ which is still a problem within the AU system.

There are various ways in which the civil society organization may lead to the institutionalization of responsible sovereignty and ensure greater concern for the protection of populations in Africa, including forceful intervention for such purposes in appropriate situations by the Africa Union. They may complement the AU in relation to collection and analysis of data and information relating to conflicts and gross violations of human rights within States. They may also publicize the extent of atrocities and push for concrete action from the AU and the international community. Some international organizations that operate in conflict situations in Africa, such as Human Rights Watch and Amnesty International, have a record of effective investigations of grass-roots level violations of human rights.¹⁵⁴ The International Committee of the Red Cross has also proved efficient in investigating adherence to international humanitarian law.¹⁵⁵ The AU may lack institutional capacity to make proper and timely assessments of some situations in order to determine whether they constitute, or are likely to lead to genocide, crimes against humanity or war crimes, the basis upon which it should undertake forceful intervention.

¹⁵⁰ E. Suy, ‘New Players in International Relations’, in G. Kreijen *et al.*, (eds), *State, Sovereignty, and International Governance* (2002), 373, 376.

¹⁵¹ A. Boyle & C. Chinkin, *The Making of International Law* (2007), 81.

¹⁵² *Id.*

¹⁵³ A. Acharya, ‘Regionalism and the Emerging World Order: Sovereignty, Autonomy, Identity’, in S. Breslin *et al.*, (eds), *New Regionalisms in the Global Political Economy* (2002), 20, 26-27.

¹⁵⁴ Thakur, *United Nations, Peace and Security*, *supra* note 148, 104.

¹⁵⁵ *Id.*

Abass has pointed out the likelihood of that institutional limitation, pointing out that the African Union has a weakness of lack of a practice of undertaking prior legal assessments of conditions before commencing action.¹⁵⁶ He is of the view that the lack of an institutional culture of carrying out legal assessments before commencing interventions (such as peacekeeping) was inherited from the preceding OAU, which never developed such practice in its nearly forty years of existence.¹⁵⁷ Abass has also noted that the AU is likely to lack the institutional capacity for efficient evaluation of a condition in a manner that is consistent with the spirit of Article 4(h) of the Constitutive Act.¹⁵⁸ Further, he is of the view that even if there is an assessment of the condition, the AU is unlikely to make a formal announcement of the findings on commission of genocide, crimes against humanity and war crimes.¹⁵⁹ This is unlike the way a judicial or investigative panel would give a formal pronouncement of its findings.¹⁶⁰ Focused advocacy demanding African Union's action, and provision of alternative and complementary information by civil society organizations will be helpful in addressing the aforementioned institutional weaknesses. In relation to the mobilization of political will for the implementation of the AU's intervention mandate, civil societies should push for action, highlight the concerns of victims, and call for accountability of African leaders if they fail to take action.¹⁶¹ Civil society organizations can also supplement or provide alternative funding and intellectual resources for research on matters relating to intervention for humanity and conflict management. In addition, civil society organizations may provide an important feedback mechanism by monitoring and evaluating the efficacy and appropriateness of the African Union's actions.

Advocating for formal amendments to the existing AU legal framework to conceptualize sovereignty and intervention as fundamental responsibilities, or adoption of resolutions and declarations to that effect is another strategic way through which the civil society organizations can engage the AU for purposes of more effective civilian protection in conflict situations. To be effective in such objectives, African civil society organizations should identify strategic entry points where they would be

¹⁵⁶ Abass, *supra* note 79, 426.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Kuwali, *supra* note 31, 378.

capable of influencing decision making and policy issues at the Africa Union. They should also push for greater participation and involvement in the African Union decision making processes. Articles 3(g), 3(h), 3(k) and 22 of the Constitutive Act of the African Union has provisions that recognize or provide basis for civil society organizations participation at various levels of the Union. Civil society organizations may also target certain influential but flexible States that are likely to be more open to the ideas of responsible sovereignty, for instance South Africa, to advocate the position of the civil society position at the African Union meetings.

In addition to international organizations such as Amnesty International and Human Rights Watch that are also active in Africa, there are some transnational African non-governmental organizations. Some worth mentioning include the Centre for Citizens' Participation in the African Union (CCP-AU)¹⁶² and the Africa Governance Monitoring and Advocacy Project (AfriMAP).¹⁶³ There are, however, some obstacles to effective civil society advocacy within the African Union framework which should be addressed and such organizations should strategically engage the Union in order to eliminate some of the impediments. One of these obstacles relates to funding requirements for a civil society organization to participate in the African Union Economic, Social and Cultural Council (ECOSOCC). Article 22 of the Constitutive Act of the African Union establishes ECOSOCC and provides that its role shall be advisory, and that it shall comprise of "different social and professional groups of the Member States of the Union." However, eligibility criteria for civil society organizations participation in ECOSOCC has seriously been criticized and opposed especially on the basis of the requirement that the funding of any organization seeking membership should have at least 50 *per cent* of its funding arising from the contribution of the respective organization's members.¹⁶⁴ It has been pointed out that the requirement, which has the

¹⁶² CCP-AU, formed in 2007, has the objective of coordinating and facilitating activities of various African civil society organisations in their engagement with the African Union.

¹⁶³ AfriMAP objectives include analysis of African States adherence to human rights protection, rule of law and accountable governance, in addition to seeking to complement and engage the African Union on important issues. See, Africa Governance Monitoring and Advocacy Project, 'Mission and Objectives' available at <http://www.afriMAP.org/ourmission.php> (last visited 24 April 2012).

¹⁶⁴ Africa Governance Monitoring and Advocacy Project, 'Towards a People-Driven African Union: Current Obstacles and New Opportunities' (2007), 34, available at

intention of excluding foreign and international organizations from participating in ECOSOCC affairs, “also effectively excludes a large proportion of, for example, human rights organisations, think tanks and other groups likely to be critical of AU activities.”¹⁶⁵ Such funding requirements are complicated by the fact that some African non-governmental organizations have weak financial and professional resources base, thereby having to survive on foreign funding.¹⁶⁶

Another fundamental limitation of African civil society organizations advocacy through ECOSOCC is that although it is the primary organ mandated to facilitate civil society engagements with the African Union institutions, it has an ambiguous role in the decision-making processes of the Union.¹⁶⁷ It has been observed that “ECOSOCC’s legal framework as an organ with only advisory status, and without its own treaty, significantly weakens its position” and therefore it cannot “speak credibly as an independent civil society voice.”¹⁶⁸ Those are some of the limitations and obstacles that African civil societies and the international community should strategically push for elimination in the African Union and civil society relationship. Already, the African civil society organizations are addressing that obstacle and seeking to directly engage the African Union through the CCP-AU. CCP-AU is an umbrella body of various African civil society organizations, formed in 2007 with the objective of facilitating and coordinating activities of various organisations in their engagement with the African Union.¹⁶⁹ Focussed, strategic and relentless pressure on the AU by various African civil society organizations through the CCP-AU for a more robust role, changes to the ECOSOCC mandate, and amendments to the external funding restrictions seem to be the most appropriate avenue of addressing the advocacy limitations identified.

http://www.soros.org/resources/articles_publications/publications/people_20070124/a-people-20071101-english.pdf (last visited 24 April 2012).

¹⁶⁵ *Id.*

¹⁶⁶ D. Neubert, ‘Local and Regional Non-State Actors on the Margins of Public Policy in Africa’, in Anne Peters *et al.* (eds), *Non-State Actors as Standard Setters* (2009), 35, 38.

¹⁶⁷ Africa Governance Monitoring and Advocacy Project, *supra* note 164, 33.

¹⁶⁸ *Id.*, 6.

¹⁶⁹ Centre for Citizens’ Participation in the African Union, *supra* note 162.

2. Realities of Increasing Global Interdependence: Relevance of the AU Intervention System

The 2011 French intervention in Ivory Coast¹⁷⁰ in addition to the NATO intervention in Libya indicates that external (non-African) interventions in the region will continue where the AU fails, and mass atrocities on the ground justify such forceful action by the international community. In the case of Libya, the UN and NATO disregarded the AU's express stance against any form of military intervention.¹⁷¹ It has correctly been observed that implementing an African intervention is the most effective way of avoiding an external (non-African) action.¹⁷² The realization that even with failure by the African Union to intervene in accordance to responsible sovereignty concepts and its mandate under Article 4(h) of the Constitutive Act, the international community is likely to fill the vacuum may lead to action by the AU. The increasing global interdependence and globalization of human rights protection, which implies greater chances for intervention by the international community in Africa in situations of genocide and crimes against humanity, may lead the AU to have a more practical approach to the dictates of the concept of responsible sovereignty. The African Union's desire to remain the focal point and in control of security activities in the African region may provide the impetus for the AU to develop a policy that promotes timely, decisive, and appropriate intervention in situations of mass atrocities. The concept of responsible sovereignty envisages such effective international protection of populations when the State fails or is unable to provide safeguards from genocide, crimes against humanity, war crimes and ethnic cleansing.

¹⁷⁰ Laurent Gbagbo, who had illegitimately held on the presidency leading to the post election violence, surrendered and was ousted from power after French forces supported UN troops and Alasanne Ouattara loyalists in launching military attacks. British Broadcasting Corporation, 'Ivory Coast: Gbagbo Held after Assault on Residence' (11 April 2011) available at <http://www.bbc.co.uk/news/world-africa-13039825> (last visited 24 April 2012).

¹⁷¹ The AU had reaffirmed Libya's sovereignty while opposing any form of intervention. African Union, *supra* note 96.

¹⁷² H. Gandois, 'Sovereignty as Responsibility, or African Regional Organizations as Norm-Setters' (British International Studies Association Annual Conference, University of Saint Andrews, 20 December 2005), 16, available at http://citynewyorkstateniland.academia.edu/HeleneGandois/Papers/10815/Sovereignty_as_responsibility_or_African_regional_organizations_as_norm-setters (last visited 24 April 2012).

E. Complementing the United Nations and Addressing Security Council Inefficiencies

As the case of the 1994 Rwanda genocide illustrates, the Security Council may fail or delay in providing timely authorization for forceful intervention by the AU, despite the occurrence or threat of genocide, crimes against humanity or war crimes taking place. The Security Council may fail or delay due to the actual use of the veto by a permanent member, or threats of its use. In addition, there may be outright lack of interest and urgency in the Security Council especially if the strategic interests of powerful States are not affected by the conflict. The 1994 Rwanda genocide is a clear case where the Security Council lacked interest in authorizing forceful intervention to protect hundreds of thousands of civilians from massacre. Approximately 800,000 people, Tutsis and moderate Hutus, were killed in the Rwanda genocide spanning a mere 100 days, from April to July 1994.¹⁷³ If the AU was transformed into an effective regional organization governed by the desire to implement its Article 4(h) mandate of forceful intervention to protect civilians under its Constitutive Act, but the Security Council delays in issuing authorization, or is threatened by a permanent member's veto despite extreme circumstances on the ground, there is the question of how the AU would proceed. It seems that the most appropriate alternative would be for the AU to seek authorization from an emergency session of the General Assembly, as it would still maintain forceful intervention within the UN collective security system. The Uniting for Peace Resolution reaffirmed the primary role of the Security Council in the maintenance of international peace and security, but resolved that where the Council was unable to discharge that duty, due to lack of unanimity of permanent members, the General Assembly could assume that responsibility, including authorization of force where necessary.¹⁷⁴

The legal viability of the General Assembly alternative has support from eminent scholars. For instance, Brownlie and Apperley argue that rather than act illegally, NATO should have sought a special emergency session of the General Assembly to issue a uniting for peace resolution

¹⁷³ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc S/1999/1257, 15 December 1999, 3.

¹⁷⁴ Uniting for Peace Resolution, GA Res. 377 (V) A, 3 November 1950.

(before invading Kosovo in 1999).¹⁷⁵ Franck specifically proposes that the General Assembly can be a substitute which the African Union can use to avoid the veto prone Security Council.¹⁷⁶ Reisman opines that in circumstances of extreme human rights violations that constitute a threat or breach of the peace, and the Security Council is unable to act, the secondary authority of the General Assembly, substantiated by the Uniting for Peace Resolution, can be brought into operation.¹⁷⁷ While interpreting the intentions of the Charter, it is essential to consider that the Security Council is obligated, under Article 24(2), to “act in accordance with the Purposes and Principles of the United Nations.”¹⁷⁸ The Security Council therefore does not have unlimited powers. Its actions must conform with the purposes and principles of the United Nations. Therefore, when the Security Council is unable to either authorize or prohibit an action, which comprises the purposes and principles of the Charter, then the Security Council may be argued to be acting contrary to its responsibilities.¹⁷⁹ Further, by using the phrase “primary responsibility” in Article 24 of the Charter in respect of Security Council powers, a secondary or subsidiary responsibility which may be executed by the General Assembly is implied.¹⁸⁰ It is acceptable to argue that since the United Nations is a construction of States, the States may resolve to issue secondary responsibility to another competent organ where the Security Council is unable to perform its functions.

It has been argued that uniting for peace resolutions “represents an interpretation of Articles 11(2) and 12 that has been accepted and acted upon” by UN members, including those States originally opposed to their adoption such as the Soviet Union.¹⁸¹ Ten such emergency sessions of the

¹⁷⁵ I. Brownlie & C. J. Apperley, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’, 49 *International and Comparative Law Quarterly* (2000) 4, 878, 904.

¹⁷⁶ T. M. Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’, 100 *American Journal of International Law* (2006) 1, 88, 100.

¹⁷⁷ M. Reisman, ‘Humanitarian Intervention to Protect the Ibos’, in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973), 167, 190.

¹⁷⁸ J. Andrassy, ‘Uniting for Peace’, 50 *American Journal of International Law* (1956) 3, 563, 564.

¹⁷⁹ *Id.*, 565.

¹⁸⁰ *Id.*, 564.

¹⁸¹ N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (1993), 153.

General Assembly have subsequently been convened.¹⁸² Such resolutions were formally recognized by the Security Council in 1971 when it referred the India and Pakistan issue to the General Assembly for purposes of action in accordance with the Assembly's Resolution 377A(V).¹⁸³ Based on the above observations, where the Security Council is unable to discharge its primary responsibility of authorizing intervention and maintaining international security due to the threat of a veto, an emergency session of the General Assembly to authorize intervention in accordance with the uniting for peace resolution provides a viable option for the African Union.

F. Conclusion

The responsibility to protect concept is aimed at addressing the legal and political dilemmas for intervention to stop or pre-empt genocide, crimes against humanity, war crimes and ethnic cleansing. It is premised on a normative framework that establishes complementarity between State sovereignty preservation and intervention for humanitarian purposes, and therefore decreases the tension between the two fundamental principles. It coherently postulates the concept of responsible sovereignty to both the territorial State and the international community. It eliminates the convenience with which the UN, regional organizations and States can use sovereignty as an effective legal or political justification for non-intervention. Forceful intervention is to be undertaken in a timely and decisive manner to protect populations where other peaceful means fail or are inappropriate, and the territorial State is unable or unwilling to provide protection. Although still an emerging norm, it has significant normative and political value in addressing the highly problematic issue of intervention. While the responsibility to protect concept provides the AU with some of the conceptual tools that may be helpful in addressing the continuing legal and political dilemmas of intervention, the Union is one of the regional mechanisms through which the protection concepts of the emerging norm may be implemented.

The African Union has demonstrated the capacity to implement some of the responsibility to protect concepts in some situations where peaceful negotiations or consensual interventions are adequate, like the case of

¹⁸² C. Tomuschat, 'Uniting for Peace' (United Nations Audiovisual Library of International Law, 2008) available at http://untreaty.un.org/cod/avl/pdf/ha/ufp/ufp_e.pdf (last visited 19 March 2012).

¹⁸³ SC Res. 303, 6 December 1971.

Kenya and Burundi. However, it has also failed in situations where timely and decisive forceful intervention is necessary, and may be the only viable option to protect civilians, like in the Darfur and Libyan conflicts. In the case of Libya, the AU expressly opposed any form of military intervention. Therefore, despite the AU's right of forcible intervention to stop genocide and crimes against humanity within its legal framework, traditional concepts of sovereignty and non-intervention continue to prevail within the Union's subsequent practice. Consensual intervention, based on the sovereign right of the territorial State to invite or consent to intervention, is inadequate or inappropriate where the government is the perpetrator of the atrocities, or fails to grant the consent.

The contradictory provisions within the AU legal framework that affirm the principles of non-intervention and traditional concepts of sovereignty may have provided the basis for the subsequent practice. The AU's practice, especially in relation to the Libyan crisis, contradicts its legal mandate to forcefully intervene in deserving situations, and is inconsistent with values postulated under the emerging norm of responsibility to protect. It demonstrates that despite the progressive developments within the African Union system such as the Union's forceful intervention mandate, the concept of responsible sovereignty is yet to be effectively institutionalized within the AU. In order to enhance the legal, policy and operational capacities of the AU to forcefully intervene for purposes of civilian protection, effective institutionalization of the concept of responsible sovereignty within the Union processes is necessary. This article has examined the structural deficiencies within the AU system, including analyzing elements of its consistency with the emerging norm of responsibility to protect.

The emerging norm is a comprehensive and coherent articulation of the concept of responsible sovereignty. The article has explored the manner in which addressing the inconsistencies between the AU framework and concepts postulated under the responsibility to protect can contribute to the elimination of the legal and political dilemmas of forceful intervention by the Union. Besides formal amendments to the core AU treaties, this article has highlighted the role of resolutions in modifying regional norms and attitudes, contributing to the effective institutionalization of the concept of responsible sovereignty. The role of African based civil society organizations has been examined. The likelihood of external (non-African) intervention in situations of the African Union's inaction, and the risk of the Union's irrelevance on regional peace and security matters, has been

identified as a factor that could provide an impetus for acceptance of reforms and change of practice within the AU.