From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect

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INTERNATIONAL REFUGEE RIGHTS INITIATIVE

ABOUT THE INTERNATIONAL REFUGEE RIGHTS INITIATIVE

The International Refugee Rights Initiative (IRRI) was founded in 2004 to inform and improve responses to the cycles of violence and displacement that are at the heart of large-scale human rights violations.

Over the last 13 years, we have developed a holistic approach to the protection of human rights before, during, and in the aftermath of displacement, by focusing on:
   o identifying the violations that cause displacement and exile,
   o protecting the rights of those who are displaced, and
   o ensuring the solutions to their displacement are durable, rights respecting, safe and timely.

We work to ensure the voices of the displaced and conflict affected communities are not only heard but heeded at the international level through our evidence based advocacy that is built on solid field based research and analysis.

We are registered as a non-profit organisation in the US, the UK, and Uganda.

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ABOUT THIS PAPER
This report was authored by Dr. Marina Sharpe, as part of a consultancy for International Refugees Rights Initiative, drawing on previous internal research by Dominique Mystris and Godfrey Musila. Olivia Bueno, Andie Lambe and Thijs Van Laer provided input to the report.

Cover Photograph: Advance contingent of AMISOM troops deployed in Baidoa, Somalia © AMISOM 2012

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Executive Summary

In the last decades, the African continent has been the theatre of massive human rights abuses, including genocide, war crimes and crimes against humanity, and is still prone to various forms of intra-state violence. The failure of regional and international actors to protect civilian populations against international crimes, most horribly illustrated during the 1994 genocide in Rwanda, has prompted UN members to unanimously adopt the principle of responsibility to protect (R2P). This commitment provides that states are primarily responsible for protecting their populations from genocide, war crimes, crimes against humanity and ethnic cleansing and should assist each other in fulfilling this responsibility, but also entails that if a state fails to do so, the international community will respond, using peaceful means or, if such means fail, through coercive action.

The principle of R2P has gradually also been introduced at the African level. While the Organisation of African Union (OAU) had no legal power to get involved in internal conflicts on the continent and was largely inactive on this front, its successor, the African Union (AU) has been granted the right to intervene in a member state in respect of war crimes, genocide and crimes against humanity. Those provisions, contained in the AU Constitutive Act, have together been termed "non-indifference" and may be viewed as the African equivalent of R2P.

This paper explores how R2P has taken root within the AU in the form of non-indifference.

Part one provides background on the principle of R2P and the relevant legal and institutional framework of the OAU and the AU. It describes the challenging legal framework of the OAU on the matter, whose principles of non-intervention, coupled with persistent financial difficulties effectively prevented it from tackling conflict in Africa. This ineffectiveness contributed to the transformation of the OAU into the AU, formalised in 2001. The AU's legal framework allows the organisation to intervene in a member state, following a decision by the assembly of heads and state, in case of international crimes, or when members request intervention to restore peace and security. This, coupled with a new prominence to the protection of human rights, led to the creation of an elaborate institutional framework to implement the right to intervene.

Within the AU, the most important body to implement this principle is the Peace and Security Council (PSC), which is tasked with respond to conflict and crisis situations. It is supported by the AU Commission and three dedicated bodies: the Panel of the Wise, the Continental Early Warning System and the African Standby Force. In addition to those institutions, the New Partnership for Africa's Development (NEPAD) also bears relevance for the AU's conflict prevention set-up, as it aims to improve governance and peace and security, including by instituting a peer review mechanism.

Furthermore, the AU's human rights bodies, the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACtHPR), also play a role, furthering the normative development and referring to the concept of R2P in its decisions. The Malabo Protocol, intended to merge the ACtHPR with the African Court of Justice, explicitly recalls the right to intervene and will, when established, grant criminal jurisdiction over, amongst others, genocide, crimes against humanity and war crimes.

In the Ezulwini Consensus, the AU clarified its position on the normative conflict between the AU's right to intervene and the required authorisation for the use of force by the UN Security

Council (UNSC). It recalls the importance of regional organisations to take action in the case of security situations, if necessary with an approval from the UNSC after the fact.

In the second part of the report, cases of intervention under the OAU and the AU are analysed. The OAU was largely unsuccessful in its attempts to intervene in conflict situations. It played a modest role when Morocco attempted to claim border areas of Algeria, but failed outright in its efforts to intervene in the Biafran war in Nigeria, because of its focus on non-interference. In 1981, the OAU deployed its first peacekeeping force, in Chad, where a civil war was raging, but was unable to achieve any results. Its role in the conflict in Western Sahara conflict was similarly unsuccessful, but it was the Rwandan genocide in 1994 which painfully showed the OAU's weakness. Only in the context of the war between Ethiopia and Eritrea, did the OAU finally achieve a measure of success in mitigating conflict.

In Burundi, the first test of the AU's ability to better deliver than its predecessor, regional leaders assisted in brokering the Arusha Peace and Reconciliation Agreement (2000), and the AU sent a peacekeeping mission in 2003. However, the AU has to date failed to resolve a new crisis, which erupted in April 2015: proposed sanctions and a peacekeeping mission never materialised. The AU deployed a peacekeeping force in Sudan's Darfur region in 2004, which later transformed into a hybrid AU-UN operation (UNAMID), and in Somalia (AMISOM), both struggling from a lack of resources and criticised for its failure to protect civilians. It obtained better results in the Comoros, where a coalition of African states military intervened to restore unity, and after Kenya's disputed 2007 elections, where a Panel of Eminent African Personalities mediated and ultimately resolved the crisis. The AU was less relevant in 2011 during the crises in Ivory Coast and Libya, where its role was overshadowed by other regional and international actors. However, more recently it supported the strong regional action of the Economic Community of West African States (ECOWAS) in Gambia, when long-time autocrat Jammeh refused to step down after losing elections.

Part three analyses how the AU has implemented R2P in the form non-indifference. Firstly, it discusses how the two terms relate. Secondly, it mentions the absence of clear triggers for AU action, as there is no consistent approach. Third, it discusses the lack of clarity about decision-making between the AU heads of state, the PSC and the UNSC, partially addressed in the Ezulwini Consensus. Fourthly, it highlights the challenges of accompanying commitments with significant resources, especially for its peacekeeping missions and conflict prevention efforts. Finally, it addresses the weak political will among heads of state to deal with abusive leaders and to take meaningful action.

Based on these conclusions, the International Refugee Rights Initiative (IRRI) recommends to the African Union to increase efforts, individually and collectively, to protect populations against international crimes, by more pro-active conflict prevention efforts, effective intervention in crises and the adoption of sanctions, if necessary. It should clarify its relation to the UN, commit the necessary financial resources and come up with a framework for decision-making. These efforts should be supported by the African Commission and receive adequate support from donors.

Recommendations

To the member states of the AU:

- Increase efforts, individually and collectively, to protect civilian populations against international crimes, by more pro-active conflict prevention efforts, effective intervention in crises and the adoption of sanctions;

- Engage in a strategic dialogue with the UN about R2P, including on the Ezulwini Consensus, and on decision-making for interventions;

- Commit sufficient financial resources to all AU mechanisms on conflict prevention, crisis response and mediation;

- Adopt a clear and consistent framework to guide decision-making on intervention, building on existing documents, such as the UN Framework of Analysis;

- Reinforce the use of the AU principle of "non-indifference" and clearly reflect the language of R2P in official AU documents;

- Sign and ratify the Malabo Protocol, to enable the effective creation of the African Court of Justice and Human and Peoples' Rights, and ensure the necessary political and material support.

To the African Commission:

- Increase the operational capacity for early warning, conflict prevention and mediation;

- Convene a strategic dialogue with regional economic communities about R2P, in order to create a common framework and to share best practices;

- Evaluate past successes and failures of interventions, including peacekeeping missions, to learn lessons for the future design of interventions;

- Further operationalise the Continental Early Warning System and the African Stand-by Force, by providing sufficient financial and human resources and political support.

To the AU's donors:

- Ensure adequate funding and political support for the AU's conflict prevention, crisis response and mediation activities and for the AU's existing Peace Fund.

To the UN:

- Further assist the AU in operationalising the AU principle of the right to intervention, including by streamlining decision-making, exchange of best practices and by continuing dialogue.

Responsibility to Protect

Since 2005, R2P has been recognised as the unanimous political commitment of UN member states to act to prevent international crimes. This commitment, formally expressed in paragraphs 138 and 139 of the 2005 World Summit Outcome Document, provides that states are primarily responsible for protecting their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and will assist each other in fulfilling this responsibility.[2] It also states clearly that if a state fails to protect its population from, or is the perpetrator of, one or more of these crimes, the international community will respond, using diplomatic, humanitarian or other peaceful means in accordance with Chapters VI and VIII of the UN Charter. If these peaceful means fail, the international community is, "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate."[3] While R2P is a political commitment and not a binding legal obligation, it does derive from binding norms, such as those assumed under the Convention on the Prevention and Punishment of the Crime of Genocide, as well as from emerging principles of customary international law.

One of the earliest advocates of R2P was the then-United Nations (UN) Secretary-General Kofi Annan. In 2003, he convened the High-level Panel on Threats, Challenges and Change, which published a report in 2004 endorsing "the emerging norm that there is a collective international responsibility to protect, exercisable by the UN Security Council (UNSC) authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[4] Annan's own 2005 report, entitled "In Larger Freedom: Towards Development, Security and Human Rights for All", called on states to "embrace the responsibility to protect, and, when necessary, [to] act on it."[5]

R2P received UNSC recognition in 2006 in the form of Resolution 1674 on the Protection of Civilians in Armed Conflict, which "reaffirmed" the paragraphs on R2P in the World Summit Outcome Document.[6] Annan's successor, Ban Ki-moon, also championed R2P. In 2008, he appointed Edward Luck as the first UN Special Adviser on the issue. He also authored several reports to inform the UN General Assembly (General Assembly) informal interactive dialogues on R2P, beginning with his 2009 report, "Implementing the Responsibility to Protect", where he articulated the principle in a three-pillar strategy. The three pillars of this approach, which today constitute the dominant conceptualisation of the R2P, are visualised in the graphic below.

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[2] United Nations General Assembly Resolution 60/1, UN Doc A/RES/60/1, 24 October 2005, available at http://www.ifrc.org/docs/idrl/I520EN.pdf (accessed on: 16 June 2017).
[3] Ibid., para 139.
[4] United Nations Secretary-General, "A More Secure World: Our Shared Responsibility", Report the High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004, available at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (accessed on: 16 June 2017), para 203.
[5] United Nations Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All" UN Doc A/59/2005, 21 March 2005, available at https://www.un.org/ruleoflaw/blog/document/in-larger-freedom-towards-development-security-and-human-rights-for-all-report-of-the-secretary-general/ (accessed on: 16 June 2017) para 135. (United Nations Secretary-General 2005)
[6] United Nations Security Council, Resolution 1674, UN Doc S/Res/1674, 28 April 2006, available at https://www.un.org/ruleoflaw/blog/document/security-council-resolution-1674-2006-on-protection-of-civilians-in-armed-conflict/ (accessed on: 16 June 2017) para 4.

WHAT ARE THE THREE PILLARS OF THE RESPONSIBILITY TO PROTECT?

The **State** bears the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.

The **international community** has a responsibility to assist states to uphold the Responsibility to Protect

The **international community** must take timely and decisive action, including through the use of appropriate diplomatic, humanitarian, and other peaceful means, to protect populations if a State is unwilling or unable to protect populations. Should peaceful tools prove inadequate, then the international community must take stronger measures, including the use of force, in accordance with the UN Charter.

Adapted from an ICRtoP Infographic.
More info at www.responsibilitytoprotect.org

The UNGA recognised R2P in a resolution in 2009, again recalling the World Summit Outcome Document, taking note of the UN Secretary-General's 2009 report and deciding to continue "consideration of the responsibility to protect."[7] The General Assembly's second informal interactive dialogue on R2P was held in August 2010 and focused on early warning and assessment. Three further dialogues followed. The 2011 session examined the role of regional and sub-regional arrangements in implementing R2P, the 2012 dialogue focused on timely and decisive responses and the 2013 dialogue was devoted to state responsibility and prevention.

In his 2011 report on "The role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect", the then UN Secretary-General Ban Ki-Moon explained that over the previous three years, the UN had "applied responsibility to protect principles in our strategies for addressing threats to populations in about a dozen specific situations" and in each case, "regional and/or sub-regional arrangements have made important contributions, often as full partners with the United Nations."[8]

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[7] United Nations General Assembly, Resolution 63/308, UN Doc A/RES/63/308, 7 October 2009, available at http://responsibilitytoprotect.org/Resolution%20RtoP(3).pdf (accessed on : 16 June 2017).
[8] United Nations Secretary-General, "The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect", UN Doc A/65/877, 27 June 2011, available at http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf (accessed on: 16 June 2017), para 4. (United Nations Secretary-General 2011)

Organisation of African Unity

The OAU was established by its charter on 25 May 1963 to promote regional cooperation among newly independent African countries. The organisation's specific purposes were to promote the unity and solidarity of African states; coordination and cooperation to improve the lives of African peoples; defence of their sovereignty, territorial integrity and independence; the eradication of all forms of colonialism; and the promotion of international co-operation.[9] In practice, the OAU was largely devoted to the consolidation of post-colonial states in Africa.

Given the OAU had no legislative powers, it objectives were to be achieved primarily via the harmonisation of member state policies.[10] The OAU's "supreme organ" was the Assembly of Heads of State and Government (AHSG), whose role was to "discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization."[11] The work of the AHSG was operationalised by the Council of Ministers (CM), composed of member states' foreign or other ministers and charged with implementing AHSG decisions and coordinating inter-African co-operation in accordance with AHSG instructions.[12] In addition to the AHSG and the CM, the OAU also had an Addis Ababa-based General Secretariat and a Commission of Mediation, Conciliation and Arbitration.[13] The latter, a judicial dispute resolution mechanism, was "stillborn and has never worked"[14], because "member states have shown a strong preference for political processes of conflict resolution rather than for judicial means of settlement."[15]

Other bodies were created subsequent to the 1963 adoption of the OAU Charter. In 1993, the Mechanism of Conflict Prevention, Management and Resolution (MCPMR) was established to prevent, manage and resolve conflict.[16] The MCPMR consisted principally of the Central Organ, a political decision-making body functioning at the head of state, ministerial and ambassadorial levels, whose decisions were operationalised by the OAU Secretariat's Conflict Management Centre (also known as the Conflict Management Division).[17] The MCPMR also included a military arm, known as the Field Operations Section, and the Peace Fund, which provided financial support.[18]

Despite the establishment of a dedicated conflict prevention body, the OAU's role in conflict resolution and crisis management has been "characterized by modest success in a few cases and dismal failure in most others,"[19] with the Rwandan genocide, discussed below, representing a stark example of the latter. At the core of this failure was the organisation's legal framework which presented a particular impediment to its potential for conflict prevention and resolution. The OAU Charter affirmed member states' adherence to a number of core principles, including

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[9] Charter of the Organization of African Unity, 479 UNTS 39, 25 May 1963, (OAU Charter) art II (1) available at https://www.au.int/web/en/treaties/oau-charter-addis-ababa-25-may-1963 (accessed on 6 June 2017).
[10] Ibid., art II (2).
[11] Ibid., art VIII.
[12] Ibid., art XIII.
[13] Ibid., art VII.
[14] International Panel of Eminent Personalities, "Rwanda: The Preventable Genocide", Organisation of African Unity, 2000, available at: http://www.refworld.org/pdfid/4d1da8752.pdf (accessed on: 16 June 2017) para 11.4. (International Panel of Eminent Personalities 2000)
[15] ibid.
[16] Organisation of African Unity, "Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution" 13 RSQ 174, 1994, paras 13-15.
[17] Ibid., para 17.
[18] R. Murray, "Preventing Conflicts in Africa: The Need for a Wider Perspective" *Journal of African Law*, 45*L: 13*-24, p. 16.
[19] P. Mweti Munya, "The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation" *Boston College Third World Law Journal*, 19 *B. C:* 537-592, 1998-1999, p. 578.

"[n]on-interference in the internal affairs of States."[20] This situated internal conflict beyond OAU jurisdiction and rendered the MCPMR's Central Organ legally unable to respond to internal strife, except in the rare instances in which the affected state consented to intervention. The OAU Charter also stressed the "sovereign equality of all Member States" and "[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."[21] Relatedly, member states pledged to settle disputes peacefully by "negotiation, mediation, conciliation or arbitration."[22] The OAU's rigorous adherence to these principles – non-intervention in particular – coupled with persistent financial difficulties, effectively prevented it from tackling conflict in Africa.[23]

The African Union

The failure of the OAU to tackle conflict was among the issues that led to the 2001 transformation of the OAU into the AU. The end of the Cold War precipitated major political change in Africa, including democratic changes. The first formal indication of the OAU's declining relevance in this new political landscape came in the form of the 1990 Declaration on the Political and Socio-Economic Situation in Africa, which acknowledged that the "era of focusing mainly on 'political liberation and nation building' should make way for a new era of greater emphasis on economic development and integration."[24] This economic development agenda was concretised in 1991 with the adoption of a treaty establishing the African Economic Community – known as the Abuja Treaty.[25] Its primary objective was "to promote economic, social and cultural development and the integration of African economies"[26] through the gradual coordination of the continent's existing sub-regional economic communities and the establishment of new policies, programmes and institutions.[27]

Eight years later, however, African leaders committed to forming an African union that would fast track the creation and implementation of the institutions contemplated by the Abuja Treaty.[28] The AU superseded the OAU and incorporated the African Economic Community (AEC) on 26 May 2001, when its Constitutive Act entered into force.[29] The AU has been described as "essentially a merger of the largely political ambitions of the OAU and the mainly economically minded AEC, with the addition of some organs and with an acceleration of pace in economic integration."[30] The AU supplanted the OAU largely out of a sense of frustration among African leaders about the slow pace of economic integration and awareness that the many problems on the continent necessitated a new way of doing things.[31]

The AU's Constitutive Act modified the OAU Charter principles, "conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic

[20] OAU Charter, art III (2).
[21] Ibid., arts III(1) & III(3).
[22] OAU Charter, art III (4).
[23] P. Mweti Munya, p. 578.
[24] OAU Assembly of Heads of State and Government, "Declaration on the Political and Socio-Economic Situation in Africa", AHSG/Dec.1(XXVI), 9-11 July 1990..
[25] Treaty Establishing the African Economic Community, adopted 3 June 1991, entered into force 12 May 1994, 30 ILM 1241, available at https://www.au.int/web/en/treaties/treaty-establishing-african-economic-community (Accessed on: 6 June 2017).
[26] Ibid., art 4(1) (a).
[27] Ibid., art 4(2).
[28] OAU Assembly of Heads of State and Government, "Sirte Declaration" AHSG/Draft/Decl (IV) Rev 1, 9 September 1999.
[29] Constitutive Act of the African Union, adopted 11 July 2000, entered into force 26 May 2001, 2158 UNTS 3 (AU Constitutive Act), available at https://www.au.int/web/sites/default/files/pages/32020-file-constitutiveact_en.pdf (accessed on: 6 June 2017).
[30] F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford, 2012, p. 164.
[31] B. Kioko, "The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention", *International Review of the Red Cross*, 85: 807-824, 2003, p. 810.

development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation" of the continent-wide development and integration agenda.[32] While the AU Constitutive Act still prohibits "the use of force or threat to use force among Member States of the Union"[33] and also mandates "[n]on-interference by any Member State in the internal affairs of another"[34], this is followed by a further principle recognising "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[35] AU member states also have the right "to request intervention from the Union in order to restore peace and security."[36]

The inclusion of these R2P-like provisions arose from concern about the OAU's failure to stop internal conflicts, as well as widespread human rights violations occurring within states, including those instigated by the regimes of Idi Amin in Uganda and Jean-Bédel Bokassa in the Central African Republic.[37] Busumtwi-Sam explains that the OAU Charter's non-interference norms:

> may have succeeded in minimizing certain types of conflict … specifically inter-state conflict fuelled by irredentism or other trans-boundary claims, but they also contributed to the initiation and intensification of other types of conflicts by legitimizing the preservation of the status quo and delegitimizing the grievances of disaffected groups. … As a result, little was done to address the underlying political and socioeconomic problems that gave rise to and sustained the vast majority of violent African conflicts.[38]

As such, the birth of the AU represented a clear shift from a policy of non-interference to one of non-indifference. This transition exists within a broader institutional context that accords new prominence to human rights. Of the AU's 16 guiding "principles," six make either explicit or implicit reference to human rights, including respect for "democratic principles, human rights, the rule of law and good governance" and "the sanctity of human life", and the "condemnation and rejection of impunity."[39] The AU's "objectives" are similarly human rights focused, with the organisation aiming to promote peace, security, stability, democracy, good governance and human and peoples' rights.[40]

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[32] AU Constitutive Act, preamble para. 8.
[33] Ibid., art 4(f).
[34] ibid art 4(g).
[35] AU Constitutive Act, art 4(h); The Protocol on Amendments to the Constitutive Act (adopted 11 July 2003) adds "as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council" to article 4(h), however the amending protocol has yet to enter into force, available at https://www.au.int/web/en/treaties/protocol-amendments-constitutive-act-african-union accessed on 6 June 2017
[36] ibid art 4(j).
[37] Kioko, p. 812.
[38] J. Busumtwi-Sam, "Architects of Peace: The African Union and NEPAD", *Georgetown Journal of International Affairs,* 7 (1): 71-81, 2006, p. 74. (Busumtwi-Sam 2006)
[39] AU Constitutive Act, art 4(m) & 4(o)
[40] Ibid., art 3.

Non-indifference in Practice: Institutional Elements

To work towards these objectives, a dedicated AU machinery was created, which supports the organisation's commitment to intervene in respect of war crimes, genocide and crimes against humanity: the Peace and Security Council (PSC) along with its subsidiary organs, the New Partnership for Africa's Development (NEPAD) and the human rights bodies. Each is addressed below in turn.

The Peace and Security Council

The AU's PSC, which superseded the OAU's MCPMR, was established in May 2004 following the entry into force of its establishing protocol (PSC Protocol).[41] The PSC serves as "a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[42] The PSC's objectives are to:

- promote peace, security and stability in Africa;
- anticipate and prevent conflicts;
- undertake peace-making and peace-building functions for the resolution of conflicts;
- promote and implement peace-building and post-conflict reconstruction activities;
- coordinate continental efforts to combat terrorism;
- develop a common AU defence policy; and
- promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law.[43]

To achieve these objectives, the PSC is supposed to perform the following functions:

- the promotion of peace, security and stability;
- early warning and preventive diplomacy;
- peace-making, including the use of good offices, mediation, conciliation and enquiry;
- peace support operations and intervention pursuant to articles 4(h) and 4(j) of the AU's Constitutive Act;
- peace-building and post-conflict reconstruction;
- humanitarian action and disaster management.[44]

Moussa Faki Mahamat, chairperson of the AU Commission, Suzanne Plunkett, 2017

The PSC is composed of 15 member states, ten of which serve two-year terms and five of which serve for three years.[45] Permanent representatives to the PSC meet at least twice per month, while ministerial and head of state/government PSC meetings occur at least once a year.[46] The

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[41] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 9 July 2002, entered into force 26 December 2003, (PSC Protocol) available at http://www.au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union (accessed on: 6 June 2017).
[42] Ibid., art 2.
[43] Ibid., art 3.
[44] Ibid., art 6.
[45] Ibid., art 5(1).
[46] Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

PSC's binding decisions are made by consensus or, failing that, by simple majority for procedural matters and by two-thirds majority for all other matters.[47]

The PSC is supported by the AU Commission, including by its Peace and Security Department, as well as by three dedicated bodies created under the PSC Protocol: the Panel of the Wise, the Continental Early Warning System (CEWS) and the African Standby Force (ASF), with financial support coming from the Peace Fund, also established by the PSC Protocol.[48] The PSC, its three organs and the Peace Fund are collectively known as the African Peace and Security Architecture (APSA).[49] The APSA – in cooperation with the conflict prevention, management and resolution mechanisms of Africa's sub-regional economic communities[50] - operationalises the commitment made by the AU in its Constitutive Act to intervene in respect of grave circumstances and in order to restore peace and security, the commitments explicitly mentioned in the PSC Protocol as among the Council's "principles."[51]

The Panel of the Wise (the Panel) is composed of "five highly respected African personalities … who have made [an] outstanding contribution to the cause of peace, security and development on the continent."[52] The Panel supports the PSC's and AU Commission's conflict prevention efforts by advising them "on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa."[53] In so doing, the Panel employs the Framework of Analysis developed by the Joint Office of the UN Secretary-General's Special Advisers on the prevention of genocide and the R2P.[54] In 2010, the panel was expanded to ten members and in 2013, a Pan-African Network of the Wise was created, which includes mediators of the AU as well as from the Regional Economic Communities (RECs).[55]

Box: Members of the Panel of the Wise (2014 – 2017)

Central Africa: Albina Faria de Assis Pereira Africano, former government minister and special advisor to the president of Angola;

Eastern Africa: Speciosa Wandira Kazibwe, former vice-president of Uganda;

Northern Africa: Lakhdar Brahimi, former foreign minister of Algeria and former Arab League and UN special envoy for Syria;

Southern Africa: Luisa Diogo, former prime minister of Mozambique;

Western Africa: Edem Kodjo, former prime minister of Togo and former OAU secretary-general.

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[47] Ibid., art 8(13).
[48] AU Constitutive Act., art 21.
[49] African Union, *African Peace and Security Roadmap 2016-2020*, 2015, p. 13 available at http://www.peaceau.org/uploads/2015-en-apsa-roadmap-final.pdf (accessed on: 06 June 2017).
[50] PSC Protocol, art 16; the AU recognises eight sub-regional economic communities: the Community of Sahel-Saharan States, the Common Market for Eastern and Southern Africa, the East African Community, the Economic Community of Central African States, the Economic Community of West African States, the Intergovernmental Authority on Development, the Southern African Development Community and the *Union du Maghreb Arabe*.
[51] AU Constitutive Act, art 4(h) & (j).PSC Protocol, art 5(j) & 5(k).
[52] Ibid., art 11(2).
[53] Ibid., art 11(3).
[54] United Nations Security General, 2011, para 27.
[55] ACCORD & African Union, "African Union Mediation Support Handbook", September 2014, available at http://www.accord.org.za/publication/african-union-mediation-support-handbook/

The CEWS, created under the OAU's MCPMR, was integrated into the PSC after the creation of the AU.[56] It consists of an "observation and monitoring centre, to be known as 'The Situation Room' [...] responsible for data collection and analysis" and of observation and monitoring units within the continent's various sub-regional mechanisms, all linked to the Situation Room.[57] The AU Commission Chairperson uses the information collected by the CEWS to advise the PSC on conflict prevention. The ASF is a rapid deployment force composed of standby contingents, which include civilian and military components. It is mandated to perform a range of operations, including:

- observation and monitoring;
- other types of peace support missions;
- intervention in a member state pursuant to article 4(h) or 4(j) of the AU's Constitutive Act;
- preventive deployment to prevent conflict from escalating, spreading or resurging;
- peace-building, including post-conflict disarmament and demobilisation; and
- humanitarian assistance.[58]

The ASF's rules of engagement for each of its missions are established by the AU Commission and approved by the PSC.[59] The ASF is not yet fully operational, facing serious logistical, operational, financial and political challenges.[60]

NEPAD

The APSA is not the only AU mechanism for preventing and managing conflict on the continent. In 2001, the OAU announced the creation of the New Partnership for Africa's Development (NEPAD), which was endorsed at the AU's inaugural summit in 2002 and aimed at creating a new framework for Africa's interaction with the world.[61] Under NEPAD, African states aim to improve their political and economic/corporate governance and peace and security in return for increased development assistance from and trading opportunities with, the major industrialised nations.[62] The industrialised countries part of the G8 responded to the creation of NEPAD by the adoption of the Africa Action Plan at the 2002 G8 summit.[63] According to some, NEPAD "holds the greatest promise for sustained peace and security in Africa by articulating a strong stance on domestic governance issues that are at the root of instability and insecurity on the continent."[64]

NEPAD instituted an African Peer Review Mechanism (APRM) as the principal instrument for measuring African states' progress under NEPAD. The APRM is a system whereby African states monitor each other's progress towards the programme's development goals.

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[56] J. Levitt, "The Peace and Security Council of the African Union: The Known Unknowns" *Transnational Law & Contemporary Problems*, 13 (1) 2003, p. 121. (Levitt 2003)
[57] PSC Protocol, art 12(2).
[58] PSC Protocol, art 13(3).
[59] Ibid., art 13(5).
[60] F. Oluoch, "Africa's standby forces cannot deploy" in *The East African,* 11 June 2016 available at http://www.theeastafrican.co.ke/news/African-union-standby-forces-cannot-deploy-/2558-3245500-836el2/index.html (accessed: 23 May 2017).
[61] African Union, "NEPAD Declaration", 2001, available at http://aprm-au.org/admin/pdfFiles/aprm_dpec.pdf (accessed on 1 September 2017) art 48.
[62] Busumtwi-Sam, p. 74.
[63] Ibid.
[64] Ibid., p 79.

Judicial Bodies

The African Charter on Human and Peoples' Rights[65] (the Charter) was an OAU initiative, adopted in 1981 and which entered into force five years later. It has now been ratified by all AU member states. The Charter affirms international human rights law[66] and international law more generally as relevant sources within the regional system, and includes specific regional standards for civil and political rights as well as economic, social and cultural rights. [67]

The AU's institutional architecture includes judicial bodies with human rights mandates, which implement the Charter. The African Commission on Human and Peoples' Rights (ACHPR), which began operating in 1987, is a supervisory treaty body created by the Charter with a mandate encompassing both promotional and protective functions. However, the ACHPR's decisions in individual and inter-state complaints are widely viewed as not being legally binding. The African Court on Human and Peoples' Rights (ACtHPR) was created, by way of a 1998 protocol (African Court Protocol) to the Charter, in part to remedy this.[68] The ACtHPR became operational in June 2006, when the first cohort of judges was sworn in.

The PSC is mandated in particular to "seek close cooperation" with the ACHPR "in all matters relevant to its objectives and mandate."[69] For its part, the ACHPR is to "bring to the attention of" the PSC "any information relevant to [the Council's] … objectives and mandate."[70] The ACHPR also calls attention to severe and/or systemic human rights violations in its resolutions and concluding observations on state party reports, and can address violations raised by individual complaints within its protective mandate.

17th Ordinary AU Summit in Malabo, Equatorial Guinea
© Embassy of Equatorial Guinea, 2011

The ACHPR has engaged explicitly with R2P, promulgating its "Resolution on Strengthening the Responsibility to Protect in Africa" in 2007. The resolution's preamble recalls article 4(h) of the AU's Constitutive Act, takes the Ezulwini Consensus (discussed below) into account and expresses awareness of the UN World Summit Outcome Document. The substance of the resolution then commends state parties to the Charter for their troop contributions to the AU Mission in Sudan (AMIS), as well as the UNSC for its establishment of the AU/UN Hybrid Operation in Darfur (UNAMID), while calling on the AU, UN and African states to expedite UNAMID's operationalisation. It also condemns rebel groups in Darfur for their attacks on AMIS troops and humanitarian agencies and calls on them and other parties to the conflict to observe an immediate ceasefire and to pursue peace negotiations within the framework of the AU and

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[65] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58, available at https://www.au.in t/web/en/treaties/african-charter-human-and-peoples-rights (accessed on: 6 June 2017).
[66] Ibid., art 60.
[67] Ibid. art 61.
[68] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT, available at https://www.au.int/web/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (accessed on: 6 June 2017).
[69] PSC Protocol, art 19.
[70] Ibid.

UN. Beyond Sudan, the resolution calls on the UN and AU to enhance AU peacekeeping forces in Somalia and urges parties to the conflicts in eastern Democratic Republic of Congo, Chad and Central African Republic to observe their obligations under international human rights law.[71]

Between the 1998 adoption of the African Court Protocol and the ACtHPR's operationalisation in 2006, then AHSG Chairperson and Nigerian President, Olusegun Obasanjo, revived a dormant idea to merge the ACtHPR with the African Court of Justice, in order to save on costs and rationalise pan-African institutions.[72] At the time of Obasanjo's proposal, a protocol establishing the African Court of Justice had been adopted but had not yet entered into force.[73] The AHSG adopted Obasanjo's suggestion in July 2004,[74] which prevented the AU Court of Justice from being established, despite the formal entry into force of its establishing protocol on 11 February 2009. A protocol establishing the African Court of Justice and Human Rights (Merged Court), with the Merged Court's statute annexed to it, was adopted in 2008 (the Merged Court Protocol).[75] As of April 2017, five states had ratified the Merged Court Protocol,[76] ten ratifications short of the 15 required for entry into force.[77]

In June 2014, the Merged Court Protocol was again amended by way of a further protocol (the Malabo Protocol),[78] which created the African Court of Justice and Human and Peoples' Rights (New Merged Court). The Malabo Protocol foresees the expansion of the jurisdiction of court with criminal jurisdiction over crimes such as genocide, crimes against humanity and war crimes, as well as a range of other international crimes.[79] Sitting heads of state and other senior officials are, however, controversially exempted from this international criminal jurisdiction.[80] The New Merged Court Protocol has been signed by nine states; it needs 15 ratifications for entry into force.

The Malabo Protocol recalls "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances."[81] Hopefully, if and when it is established, the New Merged Court will use this international criminal jurisdiction in a way supportive of R2P. The ACtHPR has demonstrated its willingness in this regard, for example ordering Libya to "refrain from any action that would result in loss of life or violation of physical integrity of persons,"[82] which is discussed further within the Libya case study below.

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[71] African Commission, "Resolution on Strengthening the Responsibility to Protect in Africa", ACHPR/Res. 117 (XXXXII) 07, 28 November 2007, available at http://www.achpr.org/sessions/42nd/resolutions/117/ (accessed on: 6 June 2017).

[72] S. Sceats, "Africa's New Human Rights Court: Whistling in the Wind?" *Chatham House*, 2009, available at https://www.chathamhouse.org/publications/papers/view/109010 (accessed on: 16 June 2017).

[73] Protocol of the Court of Justice of the African Union, adopted 11 July 2003, entered into force 11 February 2009, available at https://www.au.int/web/en/treaties/protocol-court-justice-african-union (accessed on: 6 June 2017).

[74] AU Assembly of Heads of State and Government, "Decision on the Seats of the African Union", Assembly/AU/Dec.45 (III) Rev. 1, 6-8 July 2004, para 4 available at https://www.au.int/web/sites/default/files/decisions/9550-assembly_en_30_31_january_2005_auc_third_ordinary_session.pdf (accessed on: 6 June 2017).

[75] Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008, AU Doc. Assembly/AU/Dec.196 (XI) (Merged Court Protocol) available at https://www.au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights (accessed on: 6 June 2017).

[76] Benin, Burkina Faso, the Republic of Congo, Libya and Mali.

[77] Merged Court Protocol, art 9(1).

[78] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014 (Malabo Protocol) available at https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed on: 6 June 2017).

[79] Ibid., art 3(1) & Annex, art 28A.

[80] Ibid., art 46A *bis*.

[81] New Merged Court Protocol, preamble para 8.

[82] *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, App No 00412011, Order for Provisional Measures, 25 March 2011, available at http://en.african-court.org/index.php/55-finalised-cases-details/836-app-no-004-2011-african-commission-on-human-and-peoples-rights-v-great-socialist-people-s-libyan-arab-jamahiriya-details (accessed on: 6 June 2017) para 25.

The Ezulwini Consensus

At its seventh extraordinary session, held in March 2005, the AU's Executive Council (Executive Council) adopted an institutional position on the UN reforms proposed in the above-mentioned report of the High-level Panel on Threats, Challenges and Change. The AU's common position was expressed in a report known as the Ezulwini Consensus. In it, the Executive Council formally endorsed R2P, noting that "[a]uthorization for the use of force by the Security Council should be in line with the conditions and criteria proposed by the [High-level] Panel, but this condition should not undermine the responsibility of the international community to protect."[83] The Executive Council went on to "reiterate the obligation of states to protect their citizens" but clarified that this responsibility "should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states."[84] Further engagement with the principle followed. For example, on 23 October 2008, the AU hosted the "Round-table High-level Meeting of Experts on the Responsibility to Protect in Africa" in order to reflect on the principle and its application in Africa.[85]

The AU also used the Ezulwini Consensus to clarify a previously problematic aspect of its Constitutive Act: the normative conflict between the AU's right to intervene under article 4(h) on the one hand and the UN Charter regime, which reserves decision-making on the use of force to the UNSC, on the other hand. The Executive Council explained that since the UNGA and the UNSC are often far from the scenes of conflicts and may not be in a position to effectively undertake a proper appreciation of the nature and development of conflict situations, it is imperative that regional organisations, in areas of proximity to conflicts, are empowered to take actions in this regard. The AU agrees with the [High-level] Panel that the intervention of regional organisations should be with the approval of the UNSC; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[86]

Thus when circumstances are urgent, the AU heads of state and government are willing to sanction intervention and seek subsequent approval from the UNSC.[87] "After the fact" UNSC ratification of sub-regional decisions on intervention has occurred in a number of cases, including ECOWAS' interventions in Liberia, Sierra Leone and Guinea Bissau.[88] It has never occurred in the AU context, as the heads of state have yet to invoke their power in article 4(h).

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[83] AU Executive Council, "The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus", Ext/EX.CL/2 (VII), 7-8 March 2005, (Ezulwini Consensus) available at http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf (accessed on: 6 June 2017) p. 6.
[84] Ibid.
[85] AU Commission chairperson Jean Ping, Keynote address at round-table high-level meeting of experts on the responsibility to protect, 23 October 2008, available at: http://www.responsibilitytoprotect.org/index.php/component/content/article/129-africa/1910-african-unions-commission-on-r2pkeynote-speech-by-chairperson-jean-ping (accessed on: 6 June 2017).
[86] Ezulwini Consensus p 6.
[87] 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", *Journal of African Law,* 53(1): 1-33, 2009, p 7.
[88] Levitt 2003, p. 130.

Non-Interference and Non-Indifference in Practice

An understanding of the AU's interaction with R2P necessitates not only an understanding of the institutional architecture through which it could act, but also of the real-world cases that reveal how the AU has responded to conflict and atrocities in practice. This section outlines selected key cases of intervention under both the AU and its predecessor, the OAU, with the latter demonstrating how the OAU's institutional framework limited its conflict prevention and peace-building role.

The OAU and Non-Interference

Morocco's attempt to claim the Tindouf and Bechar border areas of **Algeria** was the first test of the OAU's role in conflict. When the conflict erupted in 1963, the Commission of Mediation, Conciliation and Arbitration contemplated by the OAU Charter had yet to be established. As an alternative, the OAU's Council of Ministers, sitting in an extraordinary session in November 1963, mandated a special committee – composed of representatives from Ethiopia, Ivory Coast, Mali, Nigeria, Senegal, Sudan and Tanganyika (now Tanzania) – to settle the conflict.[89] The special committee failed to effect a legal settlement of the border dispute and its recommendations were never made public. The protagonists ultimately settled the conflict, with assistance from a ceasefire committee established at an October 1963 meeting of the two parties, along with Emperor Haile Selassie of Ethiopia and President Modibo Kaira of Mali.[90]

If it could be argued that the OAU's involvement in the Morocco-Algeria border conflict was modestly successful, then the organisation's role in the Biafra war was markedly less so. The conflict, which began in 1967, pitted the Nigerian federal government against the secessionist eastern region known as **Biafra**. The resolution emanating from the OAU's September 1967 summit recognised the conflict as an internal Nigerian affair, but "placed the services of the Assembly [the AHSG] at the disposal of the Federal Government of Nigeria."[91] The AHSG sent a mission to Nigeria to assure the head of state of "the Assembly's desire for the territorial integrity, unity and peace of Nigeria."[92] In dispatching its mission to the Nigerian government, the OAU "interfered not as an impartial umpire bent on genuinely mediating between the parties and ending the conflict, but as a supporter of the federal government."[93] The OAU's response to the Biafra war has been characterised as an "unmitigated diplomatic blunder," which resulted from the "tension between the desire to resolve the conflict and to remain faithful to the OAU Charter,"[94] in particular its core principle of non-interference in the internal affairs of member states.

In keeping with this foundational principle, in June 1981 the AHSG approved the establishment of its first-ever peacekeeping force, for **Chad**, where a civil war had been raging since the 1960s. Then-AHSG Chairman, President Moi of Kenya, required that the force be invited by the Chadian government.[95] He further required that Libyan troops, which had been in Chad since 1980 at the

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[89] P. Berko Wild, "The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes Among African States" *International Organization,* 20: 18-36, 1966, pp. 30-31.
[90] Ibid., p 26.
[91] Ibid., p 573
[92] Ibid., p 574.
[93] Ibid.
[94] Ibid.
[95] G. Naldi, "Peace-keeping Attempts by the Organisation of African Unity" *The International and Comparative Law Quarterly,* 34 (3), 1985, p. 594. (Naldi 1985)

invitation of Chadian President Goukouni, be withdrawn.[96] Both requirements were met and the OAU force was deployed. However, the peacekeeping force met challenges from the outset. Its mandate was unclear and the OAU was unable to adequately control and fund the force, raising logistical difficulties.[97] The force was ultimately drawn into hostilities and President Goukouni accused it of worsening the situation.[98] The force was withdrawn a year after its authorisation and has been characterised as an "abject failure" and "a costly venture that achieved little merit and which gave rise to grave disappointment."[99]

The OAU's involvement in the **Western Sahara** conflict between Morocco and the *Frente Popular de Liberación de Saguía el Hamra y Río de Oro* (Polisario Front) liberation movement was similarly unsuccessful. In 1976, the Polisario Front unilaterally declared the independence of the Saharawi Arab Democratic Republic (SADR). In response, Morocco and Mauritania occupied the area in furtherance of their territorial claims.

The OAU became formally involved in 1978, when the AHSG resolved to establish an *ad hoc* committee of five heads of state, known as the Committee of Wise Men, mandated to "seek a solution to the Western Sahara dispute compatible with the right of self-determination."[100] In 1981, the OAU created a further committee, known as the Implementation Committee, composed of representatives from seven African states, to establish "in collaboration with the parties to the conflict, the modalities and all other details relevant to the attainment of a cease-fire and the conduct and administration of a referendum" on the independence of Western Sahara from Morocco.[101] Neither committee achieved much, with Morocco and the Polisario Front's inability to agree on the make-up of the Saharawi population for the purposes of a referendum representing a particular stumbling block. Morocco withdrew from the OAU in 1984 in protest of SADR's 1982 admission to the organisation and has only recently rejoined the AU.[102] Having "shaken the very foundations of the OAU,"[103] the conflict remains at a stalemate to this day.

If the conflict in Western Sahara shook the OAU's foundations, then the Rwandan genocide surely shook the whole house. The OAU's involvement in the **Rwanda** crisis began in October 1990, when the Rwandan Patriotic Front (RPF), a rebel group made up primarily of Tutsi exiles, invaded the country with an agenda of ensuring the right of members of their community to return from exile. The OAU brokered a ceasefire between the RPF and the government of Juvénal Habyarimana, followed by observation, consultation, mediation and conciliation among regional heads of state, which ultimately contributed to the August 1993 signing of the Arusha Peace Agreement.[104] The OAU was then involved in working towards its doomed implementation.[105] On 6 April 1994, President Habyarimana's plane was shot down. Shortly thereafter, the interim government, established following his death, began an organised campaign to exterminate the minority Tutsi ethnic group, killing more than 500,000 Tutsi and moderate Hutu, with an unprecedented scale and speed.

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[96] Naldi 1985
[97] Ibid.
[98] Ibid., p. 595.
[99] Ibid.
[100] Ibid., p 596.
[101] Ibid., p 597.
[102] For an account of the SADR's admission to the OAU, see J. Naldi, "The Organization of African Unity and the Saharan Arab Democratic Republic", *Journal of African Law,* 26:2, 1982, pp. 152-162.
[103] P. Mweti Munya, p. 561.
[104] International Panel of Eminent Personalities 2000, chapter 11.
[105] Ibid.

During the months of April to July 1994, the OAU failed to call the mass murder being perpetrated in Rwanda by its rightful name: genocide. The condemnations issued by the organisation were "strangely impartial; no group was condemned by name, implying that the two combatants were equally culpable."[106] At an OAU summit held in June 1994, the interim government was recognised as Rwanda's official representation, despite 14 individual African heads of state having condemned the events occurring in Rwanda as genocide only days earlier.[107] The International Panel of Eminent Personalities, convened by the OAU to investigate the Rwandan genocide and surrounding events, concluded that the OAU's unwillingness to label the massacres as genocide "constituted a shocking moral failure."[108] This failure notwithstanding, the International Panel of Eminent Personalities found that the OAU threw itself into diplomatic attempts to end the bloodshed as swiftly as possible. In the end, however, "none of these efforts succeeded. Just as Rwanda, when the crunch came, did not finally matter to the international community, neither did the world heed the appeals of Africa's leadership."[109] Of course, it is arguable that had those appeals had been framed in stronger terms, they might have produced different results.

It was in the context of the war between **Ethiopia** and **Eritrea** that the OAU finally achieved a measure of success in mitigating conflict. The war began in May 1998 when Ethiopia alleged that Eritrea had invaded Badme and Sheraro, areas Ethiopia claimed as part of its north-western territory. For its part, Eritrea claimed that Ethiopia had made incursions into the same areas, which it claimed as part of its southwest. The escalation of hostilities coincided with an OAU Summit in Ouagadougou, in June 1998.[110] There, the warring parties accepted a "Framework Agreement" and a related document setting out the modalities for the agreement's implementation.[111] This plan and a series of further interventions by the OAU's MCPMR did not, however, produce peace.[112]

Talks held in May and June 2000 under the auspices of Algerian President and then-AHSG Chairperson Abdelaziz Bouteflika were more successful, culminating with the signing of an agreement for the cessation of hostilities.[113] This agreement included a commitment by the parties to respect the earlier OAU Framework Agreement and related modalities document.[114] The cessation of hostilities agreement was to be monitored by a UN peacekeeping mission, deployed under OAU auspices.[115] In practice, this led to the establishment of two distinct peacekeeping forces: the OAU's Liaison Mission in Ethiopia-Eritrea (OLMEE) and the UN's Mission to Ethiopia and Eritrea (UNMEE). Meanwhile, peace talks, facilitated by the OAU and President Bouteflika continued and in December 2000, Ethiopia and Eritrea signed a comprehensive peace agreement.[116]

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[106] International Panel of Eminent Personalities 2000, para 15.86.
[107] Ibid.
[108] Ibid., para 15.87.
[109] Ibid. 15.88.
[110] F. Aboagye, "Towards New Peacekeeping Partnerships in Africa? The OAU Liaison Mission in Ethiopia-Eritrea" *African Security Review,* 10 (2), 2001, p. 20.
[111] Ibid.
[112] Ibid.
[113] Ibid., p. 21.
[114] ibid.
[115] ibid, p 22.
[116] ibid.

The AU and Non-indifference

Burundi represented the first test of the AU's ability to better deliver on peace and security matters than its predecessor. The conflict re-emerged following the assassination, on 21 October 1993, of President Melchior Ndadaye, a member of the Hutu ethnic majority, by soldiers in the Tutsi-dominated army.[117] This was followed by clashes between Hutu and Tutsi political groups. Mediation initiatives of regional leaders that began in 1996 led to the 28 August 2000 conclusion of the Arusha Peace and Reconciliation Agreement for Burundi (Arusha Agreement), though not all fighting factions signed. The Arusha Agreement included provisions for power sharing between the two major ethnic groups and for the deployment of a UN peacekeeping force to assist with the its implementation.[118] The UN was unwilling, however, to deploy its force in the absence of a comprehensive ceasefire.[119] Subsequent ceasefire agreements, concluded in the context of negotiations facilitated by then-South African Vice-President Jacob Zuma, permitted the peacekeeping role to be fulfilled by either the UN or the AU.[120] Accordingly, on 3 February 2003, the AU MCPMR Central Organ—the PSC had yet to be established—approved the creation of the African Mission in Burundi (AMIB) to support the peace process.[121]

AMIB was chronically underfunded and as a result lacked the resources required to fulfil its mandate, which included monitoring the various ceasefire agreements, supporting disarmament and demobilisation and protecting certain politicians; AMIB's mandate did not include any explicit civilian protection function.[122] In March 2004, the PSC announced that AMIB had fulfilled its primary objective of creating an environment conducive to the deployment of a UN force and requested that the UN take over peacekeeping functions.[123] AMIB formally disbanded in May 2004 and on 21 May the UNSC authorised the UN Operation in Burundi (ONUB).

ONUB was active until 31 December 2006, during which time the transitional period provided for under the Arusha Agreement ended, elections were held further to the power sharing provisions, all significant parties to the hostilities entered into ceasefire agreements and over 21,000 combatants were demobilised. Not surprisingly given its more robust funding, ONUB was more successful than AMIB, however AMIB's role should not be underestimated. The AU force succeeded in "de-escalating a potentially volatile situation," demonstrating "that the AU can play a role in stabilizing situations on-ground prior to UN deployment, but that it lacks the resources necessary to deploy its troops, sustain its mission or to fulfil its mandate."[124]

Instability, however, re-emerged in Burundi in April 2015, when President Nkurunziza declared his intention to stand for a contested third term.[125] The announcement sparked protests and an attempted coup. Nkurunziza won a highly controversial election, in a climate of serious

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[117] Eki Yemisi Omorogbe, "Can the African Union Deliver Peace and Security?" J Conflict Security Law, 16 (1): 35-62, 2011, p. 45. (Omorogbe 2011)
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid., p. 46.
[123] Ibid., p. 47.
[124] Ibid., p. 48.
[125] See International Refugee Rights Initiative, "Burundi: A Country on the Edge" (April 2016), available at http://www.refugee-rights.org/Publications/Papers/2016/BurundiACountryonthe%20Edge-FINAL.pdf (accessed on: 6 June 2017.) (International Refugee Rights Initiative ,2016)

restrictions of basic liberties.[126] His government continues to commit serious human rights abuses and more than 400.000 refugees have left Burundi for neighbouring countries since April 2015.[127]

The AU's recent role in Burundi began with a call for a delay in planned elections and its cancelling of a planned election observation mission.[128] In October 2015, the PSC also resolved to institute travel bans and asset freezes against "all Burundian stakeholders whose actions and statements contribute to the perpetuation of violence."[129] As of May 2017 the AU Commission – which was charged with identifying individuals for sanction – had yet to act.

With the situation continuing to deteriorate, in July 2015 the PSC authorised the deployment of military observers to supervise the disarmament of political youth leagues involved in the violence. Then in December of that same year, the PSC announced its intention to deploy peacekeepers to the country.[130] The PSC invited the UNSC to endorse the mission with a Chapter VII resolution, however the UNSC responded with a far less powerful press statement.[131] The PSC then asked Burundi to authorise the force, however the government refused.[132] In response, the PSC referred the matter to the AU's AHSG, which resolved to, instead, send a mission of five heads of state to address the crisis diplomatically.[133] The leaders secured agreement from Burundi to allow a mission consisting of 100 human rights observers and the same number of military monitors,[134] however only a small number of these have been deployed to date and the Burundian government continues to obstruct its functioning. A UNSC decision to send police officers to Burundi received the same refusal and obstruction from the Burundian authorities.

President Zuma flanked by President Nkurunziza and President Sall at the end of the African Union High-Level Delegation of Heads of State and Government meeting. ©GCIS, 2016

[126] International Refugee Rights Initiative, 2016.
[127] UNHCR, *Refugees from Burundi: Current Situation,* available at http://data2.unhcr.org/en/situations/burundi (accessed on: 6 June 2017).
[128] International Refugee Rights Initiative, 2016, p 7.
[129] Ibid. p 7.
[130] ibid, p 17.
[131] ibid.
[132] ibid.
[133] ibid.
[134] ibid, p 18.

While the PSC seems to have abandoned the idea of deploying peacekeepers to Burundi, it did accomplish this in **Sudan**. However, chronic underfunding prevented the force from achieving its objectives. The PSC deployed its first ever - and its largest - peacekeeping force to Sudan's **Darfur** region in July 2004, in response to the conflict between the Sudanese government and Arab *Janjaweed* militias on the one hand and the rebel Sudan Liberation and Justice and Equality Movements on the other.[135] This force, known as the AU Mission in Sudan (AMIS), was, however, hamstrung by a severe lack of resources.[136] In October 2004, the PSC expanded AMIS's mission and augmented its personnel, however underfunding continued to prevent AMIS from effectively carrying out its enhanced mandate.[137]

In light of this, in early 2006 the PSC supported the transformation of AMIS into a UN force.[138] The Sudanese government, however, refused to support such a transition, on the grounds that the force would represent an attempt at re-colonisation.[139] In response, a panel composed of the UNSC's five permanent members and African states proposed a hybrid AU-UN operation.[140] In July 2007, UNAMID was established with a Chapter VII mandate to protect civilians.[141] It took over from AMIS on 31 December 2007. However, the situation in Darfur remains volatile to this day, and many citizens have criticised UNAMID's lack of protection outside IDP camps and the restrictions on its freedom of movement.[142]

In 2008, Comorian unity was threatened by the breakaway of Anjouan Island. The PSC supported military intervention in **Comoros**, however the mission was undertaken by a coalition of states, including Tanzania, Senegal and Sudan, rather than by an AU force as such. The intervention succeeded in restoring the government of President Ahmed Sambi.

Somalia's President Siad Barre was overthrown in 1991. Since then, the country has been ruled by warlords and plagued by inter-clan warfare. The UN deployed a peacekeeping force in 1992, which ended, after different incarnations, in failure in 1995. This history contributed to future UN reluctance to get involved in Somalia and in Africa more generally and to the UN's failure to intervene effectively in Rwanda in 1994.

Against this background of international reticence, in 2006 neighbouring Ethiopia deployed troops to prop up the Transitional Federal Government (TFG), which had emerged as a result of the 2002 Somalia National Reconciliation Process led by the Intergovernmental Authority on Development (IGAD).[143] Ethiopia's involvement, however, only escalated the conflict. On 19 January 2007, the PSC authorised the deployment of the AU Mission in Somalia (AMISOM), and principally mandated it to support the TFG in the face of challenges to its authority from the Union of Islamic Courts (UIC) and UIC's armed wing, *Al-Shabaab*.[144] On 21 February 2007, the

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[135] C. Riziki Majinge, "Regional Arrangements and the Maintenance of International Peace and Security: The Role of the African Union Peace and Security Council" *The Canadian Yearbook of International Law*, 48 (1), 2010, p. 129. (Majinge 2010)
[136] Omorogbe 2011, p. 48-49.
[137] Ibid., p 49.
[138] Ibid., p 50.
[139] Ibid., p 50.
[140] Ibid., p 50.
[141] United Nations Security Council, Resolution 1769, UN Doc S/Res/1769, 2007, available at: http://www.un.org/press/en/2007/sc9089.doc.htm (accessed on: 16 June 2017).
[142] See International Refugee Rights Initiative, "No one on the earth cares if we survive except God and sometimes UNAMID: The challenges of peacekeeping in Darfur" (June 2016), available at http://www.refugee-rights.org/Publications/Papers/2016/UNAMID%20FINAL.pdf (accessed on: 6 June 2017.).
[143] Omorogbe 2011, p. 54.
[144] Ibid., p. 56.

UNSC endorsed AMISOM and provided it with a Chapter VII mandate.[145] The PSC's view was that AMISOM would replace the Ethiopian force and that it should itself be quickly replaced by UN troops, however this has not come to pass.[146]

AMISOM is, and has always been, chronically underfunded, leading to repeated PSC calls for the UN to take over the mission.[147] On 16 January 2009, the UNSC resolved to establish a UN mission.[148] Funding for the UN mission was pledged, but insufficient troop contributions from UN member states meant the mission was never deployed.[149] Instead, the UNSC and the PSC have continued to extend AMISOM's mandate, in addition to a light UN presence in the country. The PSC has continued to regularly request

AMISOM Troops on Mogadishu's Frontline
© United Nations Photo, 2012

that the UN take over AMISOM, but given AMISOM's withdrawal, which, depending on the capacity of the Somali armed forces, is due to start in 2018, such calls have been reduced.[150]

Not surprisingly given its lack of funding, AMISOM is often judged as "an ill-conceived mission that essentially entailed sending a small number of under-resourced peacekeepers to a war zone in order to prop up one of the belligerent factions."[151] Many Somali citizens criticised the mission for its lack of results, insufficient protection of civilians and abuses.[152]

Kenya's disputed December 2007 presidential elections triggered widespread violence in the country, including the commission of crimes against humanity. Then-AHSG Chairman, President John Kufuor of Ghana, convened the Panel of Eminent African Personalities to mediate the crisis, led by former UN Secretary-General Kofi Annan and including Graça Machel and a number of former heads of African states.[153] The panel's various meetings, discussions and other diplomatic efforts ultimately resolved the crisis, with a power sharing agreement being signed on 28 February 2008.[154] The situation was also referred to the International Criminal Court (ICC) and of the four cases commenced, two have been closed after much controversy and the defendants in two other cases are still at large. Annan and then-UN Secretary-General Ban Ki-moon have retrospectively viewed the AU and more general international response to the

[145] United Nations Security Council, resolution 1744, UN Doc S/Res/1744, 21 February 2007, available at http://www.refworld.org/docid/4600f97e2.html (accessed on: 16 June 2017).
[146] Omorogbe 2011, p. 56.
[147] Ibid., p. 58.
[148] United Nations Security Council, resolution 1863, UN Doc S/Res/1863, 16 January 2009, available at http://dag.un.org/handle/11176/12182 (accessed on: 16 June 2017à;
[149] Omorogbe 2011, p. 58.
[150] Peace and Security Council of the African Union "Communiqué" (15 October 2010) PSC/MIN/1(CCXXXXV).
[151] PD Williams, "Into the Mogadishu Maelstrom: The African Union Mission in Somalia" *International Peacekeeping,* 16: 4, 2009 p. 527.
[152] International Refugees Rights, "They say they're not here to protect us: Civilian Perspectives on AMISOM", 1 June 2017, available athttp://refugee-rights.org/Publications/Papers/2017/AMISOM - final june. (accessed on: 16 June 2017);
[153] International Coalition for the Responsibility to Protect, "The Crisis in Kenya", available at http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya (accessed on: 25 May 2016).
[154] T. Kabau, "The Responsibility to Protect and the Role of the Regional Organizations: an Appraisal of the African Union's Interventions" *Goettingen Journal of International Law*, 4 (1), 2012, p. 65. (Kabau, 2012)

Kenyan crisis through the lens of the R2P.[155] Annan cited the Kenya case as proof "that the responsibility to protect can work."[156]

Tensions simmering in the **Ivory Coast** boiled over in November 2010, when incumbent Laurent Gbagbo lost the presidential election but refused to relinquish power to Alasane Ouattara, who was widely regarded – and soon broadly recognised – as the winner. The PSC issued a statement calling on the parties to respect the Ivoirian Electoral Commission's determination of the result.[157] When Gbagbo refused, the Ivory Coast was suspended from the AU, in line with the Constitutive Act and the PSC Protocol's provision on unconstitutional changes of government.[158]

With the crisis still unresolved in January 2011, the PSC established the High-Level Panel for the Resolution of the Crisis in the Ivory Coast. The panel consisted of heads of state from Burkina Faso, Chad, Mauritania, South Africa and Tanzania, as well as the AU Commission's chairperson and the president of ECOWAS.[159] The panel proposed the formation of a government of national unity and eventually, an "honourable exit" for Gbagbo, who ultimately rejected the proposal. A range of other multilateral and bilateral measures were also taken to stem the crisis.[160] For the most part, however, ECOWAS took the lead in resolving the situation by imposing sanctions on Gbagbo and key figures in his regime.[161] On 11 April 2011, forces loyal to Ouattara, supported by French troops and UN peacekeepers, arrested Gbagbo, who is currently being tried at the ICC for crimes against humanity.

In February 2011, civilians in Tripoli began protesting Muammar Gaddafi's 41-year rule of **Libya** as part of the wider Arab Spring phenomenon. Protests quickly spread to the city of Benghazi, which became an opposition stronghold. Gaddafi declared his intention to remain in power and crush all unrest, provoking widespread condemnation from states, civil society and regional organisations, including the AU.[162] The PSC responded immediately by "strongly condemn[ing] the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law."[163] Despite its recognition of the violations being committed, the AU consistently insisted on a purely diplomatic solution to the crisis, to which end the PSC established a High-Level Committee to resolve the situation.[164] The committee proposed a "roadmap" for peace, which called for a ceasefire and political reform, but did not call for Gaddafi's resignation.[165]

The committee was, however, just one of many regional and international actors involved in Libya and it by no means took the lead. The ACHPR also responded, instituting a case against Libya before the ACtHPR, which ordered provisional measures against Libya, insisting that it "immediately refrain from any action that would result in loss of life or violation of physical

[155] Kabau, 2012, p. 65.
[156] Ibid.
[157] Majinge 2010, p. 132.
[158] AU Constitutive Act, art 30. PSC Protocol, art 7(1)(g).
[159] Majinge 2010, p. 134.
[160] See, for example, United Nations Security Council, Resolution 1975, UN Doc S/Res/1975, 30 March 2011, available at http://www.securitycouncilreport.org/un-documents/document/Cote%20d'Ivoire%20SRES%201975.php (accessed on: 16 June 2017);
[161] Majinge 2010, p. 134.
[162] International Coalition for the Responsibility to Protect, "The Crisis in Libya" available at: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya (accessed on: 25 May 2016). (ICRtoP Libya)
[163] AU PSC, "Communiqué of the 261st meeting of the Peace and Security Council", 23 February 2011, available at http://www.peaceau.org/uploads/psc-communique-on-the-situation-in-libya.pdf (accessed on: 14 June 2017).
[164] Majinge 2010, p. 137.
[165] ICRtoP Libya

integrity of persons, which could be a breach of the provisions of the provisions of the Charter or of other international human rights instruments to which it is a party."[166] The ACtHPR further ordered Libya to report on steps taken in response to the order, which, unsurprisingly, Libya ignored.[167]

The League of Arab States requested that the UNSC institute a no-fly zone over Libya to protect civilians and facilitate humanitarian assistance.[168] The UNSC responded with Resolution 1973, which imposed a no-fly zone and authorised member states to take all necessary measures "to protect civilians and civilian populated areas … including Benghazi, while excluding a foreign occupation force."[169] This was in addition to the earlier Resolution 1970, which had affirmed Libya's responsibility to protect its population, imposed an arms embargo on Libya and sanctions on key members of the Gaddafi regime and family and referred the situation to the ICC.[170]

The no-fly zone frustrated the PSC's efforts to further its roadmap process, as the UNSC refused to authorise PSC flights into Libya.[171] The zone was enforced by a coalition of NATO and other states, which the PSC later condemned as having exceeded the Resolution 1973 mandate to protect civilians.[172] However, the AU has itself been criticised for its reaction to the Libyan crisis, with one observer noting that it did no more than hold "a rather inconsequential meeting that called for reconciliation after the crisis had deteriorated."[173] The NATO-led intervention terminated following the capture and killing of Gaddafi by National Transitional Council rebel forces on 20 October 2011. It received a fair amount of criticism for going from R2P to regime change.[174] Proceedings against certain members of Gaddafi's inner circle are ongoing at the ICC.

When **Gambia**'s long-time despot Yahja Jammeh refused to step down in December 2016 after his challenger, Adama Barrow, won the presidential elections, it was ECOWAS, supported by the AU, which took action to force the incumbent president to respect the vote. The AU, the UN and ECOWAS, published several joint statements to pressure Jammeh to accept and to show their support to the new elected president. On 12 December 2016, the PSC called upon Jammeh to adhere to an earlier speech in which he had accepted Barrow's win. At first, an ECOWAS delegation, led by Nigerian President Muhammad Buhari, went to Banjul to try to persuade Jammeh to step down. Other African countries, including Morocco and Mauritania, offered asylum.[175]

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[166] *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, App No 00412011, Order for Provisional Measures, 25 March 2011, para 25.
[167] Ibid.
[168] ICRtoP Libya
[169] United Nations Security Council, Resolution 1973 UN Doc S/Res/1973, 17 March 2011, para. 4, available at http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf (accessed on: 16 June 2017).
[170] United Nations Security Council, Resolution 1970 UN Doc S/Res/1970, 26 February 2011, available at http://www.nato.int/nato_static/assets/pdf/pdf_2011_02/20110927_110226-UNSCR-1970.pdf (accessed on: 16 June 2017).
[171] Majinge 2010, p. 138.
[172] Ibid.
[173] Mwangi S. Kimenyo, "Libya and Ivory Coast Crises Point to Needed Reform of the African Union" Brookings, 31 March 2011, available at: http://www.brookings.edu/research/opinions/2011/03/31-african-union-kimenyi (accessed on: 25 May 2016).
[174] I Davis, "NATO Watch: How Good is NATO after Libya?" http://www.responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3658-how-good-is-nato-after-libya- (accessed on: 24 May 2017).
[175] P. Fabricius, "Today: Gambia – test of ECOWAS's commitment to democracy", 19 January 2017, available at https://www.dailymaverick.co.za/article/2017-01-19-iss-today-gambia-test-of-ecowass-commitment-to-democracy/#.WUFMA2jyjIU (accessed on: 14 June 2017).

Then-President of Gambia, Yahya Jammeh, addressing the UN General Assembly,
© United Nations Photo, 2009.

When Jammeh continued to refuse, a multinational regional force was assembled by ECOWAS member states, who imposed a deadline on Jammeh to depart or face the consequences. The PSC expressed its support for such offensive action, declared that Jammeh would cease to be recognised as legitimate president and warned him of "serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian and human rights disaster, including loss of innocent lives and destruction of properties".[176] After Barrow was sworn in at the Gambian embassy in Senegal, and Jammeh persisted, the UNSC endorsed the ECOWAS and AU decisions and the regional force crossed into Gambia, ultimately forcing Jammeh to accept his defeat, sign a political agreement and leave the country.[177]

It was only after the fact, that it became clearer what the precise mandate was of the ECOWAS military operation, named ECOMIG. The AU, UN and ECOWAS decisions did not contain precise language. The legal basis was also rather unclear, including the "invitation" of the force by Barrow, who was the recognised president, but hadn't taken office in the country yet.[178] In relation to R2P, the AU did warn Jammeh against human rights violations, including the loss of life, but did not mention its right to intervention in any of its statements. It seems its decision was merely guided by the AU's willingness to uphold its principled stance against unconstitutional changes of power, included in the African Charter on Democracy, Elections and Governance.

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[176] Peace and Security Council," The 647th meeting of the AU Peace and Security Council on the post-election situation in The Islamic Republic of The Gambia", 13 January 2017, available at: http://www.peaceau.org/en/article/the-647th-meeting-of-the-au-peace-and-security-council-on-the-post-election-situation-in-the-islamic-republic-of-the-gambia#sthash.Z3oUfMQx.dpuf (accessed on 15 June 2017).
[177] P. Williams, "A New African Model of Coercion? Assessing the ECOWAS Mission in The Gambia", 16 March 2017, available at https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/ (accessed on: 14 June 2017).
[178] Ibid.

Analysis

Article 4(h) of the AU's Constitutive Act has ensured that the new regional body has not faced the former challenge, but the latter problem of resources remains, as evidenced by the AMIB, AMIS and AMISOM experiences. Furthermore, article 4(h) itself raises several issues: of terminology (which label is attached to the principle that states must protect people from international crimes?); of triggering (in what circumstances is intervention warranted) and of authorisation, (which international body has the legal mandate to sanction intervention). Finally, the political will of heads of state, who comprise the AHSG and arguably hold the power to authorise intervention, is a significant concern. Each of these issues is addressed below.

Terminology

R2P is not an AU concept. While the International Commission on Intervention and State Sovereignty (ICISS), which formalised the principle under the name by which it is now widely known, included African members,[179] the commission was, by definition, international and R2P was endorsed at the global level by the UN General Assembly (in the World Summit Outcome Document). Nevertheless, as shown earlier, the principle is clearly reflected in aspects of the AU's legal as well as its institutional framework.

Taken together, these elements - and article 4(h) of the AU's Constitutive Act in particular - may be viewed as reflective of the AU's commitment to non-indifference, which itself may be viewed as the regional analogue of the more general R2P.

At the international level, African states have an obligation to protect their populations from international crimes by virtue of relevant international commitments, such as those assumed under relevant international human rights treaties. The sum total of these obligations gives rise to R2P. The same protective obligations apply at the regional level, where they derive from applicable regional instruments such as the Constitutive Act of the AU and the African Charter. These regional-level commitments may together be termed as "non-indifference." R2P is rooted in international obligations, while non-indifference is rooted in regional ones, but - with a few exceptions - the nature of the obligation is the same and African states, as members of both the international and regional communities, are bound by both principles. Thus the distinction between R2P and non-indifference is largely one of terminology. The substance of the principal underlying obligation - of states to individually and collectively protect populations from international crimes - is merely the same.

Nevertheless, it is important to highlight two distinctions between the otherwise overlapping principles of R2P and non-indifference. First, the commitment underlying R2P extends to genocide, war crimes, ethnic cleansing and crimes against humanity. The AU's right to intervene covers these same crimes, with the exception of "ethnic cleansing" (which is not itself a stand-alone crime under international law). However, war crimes and crimes against humanity are defined sufficiently broadly under international treaty and customary law as to include ethnic cleansing. Moreover, the language of article 4(j) of the AU Constitutive Act, which gives member states the right to request AU intervention to "restore peace and security," is broad. Thus the principle of non-indifference would equally apply to situations of ethnic cleansing.

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[179] Mohamed Sahnoun of Algeria and Cyril Ramaphosa of South Africa.

Secondly, in Africa, non-indifference has included a focus on legal remedies for international crimes. For example, the AU supported Senegal in trying and convicting Hissene Habré for crimes committed while he was President of Chad, the legal framework underlying the Merged Court was amended to include an international criminal jurisdiction and the August 2015 peace agreement for South Sudan contemplates a Hybrid Court for South Sudan. While these developments were influenced in part by the ICC's perceived focus on Africa, they also reflect a strong commitment to justice as an integral element of post-conflict reconstruction and the building of lasting peace and security.

Triggering a conflict prevention or mitigation response

While AU member states must individually and collectively protect their population from international crimes, the organisation's legal framework does not clearly articulate any circumstances which require a conflict prevention or mitigation response. Articles 4(h) and 4(j) of the AU Constitutive Act are framed in terms of rights - respectively, the "right of the Union to intervene" and the "right of Member States to request intervention from the Union" - without any corresponding AU duty or obligation to intervene.

Other aspects of the AU's legal and institutional framework supportive of non-indifference are similarly vague. For example, one of the AU's "objectives" is to "promote peace, security, and stability on the continent,"[180] but no specific obligations to this end are mandated, and in comparison to the R2P principle, the AU's analogue does not specify the type of actions (peaceful, coercive or collaborative) that can be undertaken. The PSC Protocol is stronger in this regard, requiring for example that the PSC take "responsibility to undertake peace-making and peace-building functions" where conflicts have occurred, but this leaves wide scope for discretion.[181]

Nor does AU practice reveal a consistent approach to action. While the AU has intervened - as in the situations described above - it has never explicitly linked its actions to article 4(h) of the Constitutive Act. In other words, article 4(h) has yet to be formally invoked in any AU response.

Obviously, no two conflicts are the same and different situations require different responses. However, the PSC must establish its influence, effectiveness, credibility—which was undermined by Burundi's recent refusal to authorise the PSC's proposed peacekeeping force—and political will to act consistently and appropriately. If the PSC fails in this regard, the margin of appreciation created by the absence of clearly defined triggers in the legal framework, will be viewed negatively as a space for inaction rather than positively as permitting case-by-case assessment.

The AU assessment of the need for action could be strengthened by employing a common set of considerations, which would still allow a tailored response to an individual situation. Other actors have already developed such a framework. Kofi Annan's "In Larger Freedom" report, for example, proposes a framework of analysis for assessing the use of force, based on the following factors
- The seriousness of the threat;
- The proper purpose of the proposed military action;

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[180] AU Constitutive Act, art 3(f).
[181] PSC Protocol, art 3(b).

- Whether other means, short of the use of force, might plausibly succeed in stopping the threat;
- Whether the military option is proportional to the threat at hand; and
- Whether there is a reasonable chance of success.[182]

Similarly, the Joint Office of the UN Secretary-General's Special Advisers on the prevention of genocide and the Responsibility to Protect has developed a Framework of Analysis,[183] which, as mentioned above, is used by the AU Panel of the Wise in its deliberations. The AHSG and the PSC might consider adopting a common standard framework of analysis against which varied situations could be assessed.

Decision-making power for intervention

Under the AU's Constitutive Act, decision-making power regarding intervention in respect of war crimes, genocide and crimes against humanity belongs to the AHSG and there is no requirement for it to seek UNSC authorisation.[184] The PSC Protocol assigns "primary responsibility for promoting peace, security and stability in Africa" to the PSC.[185] However, under the UN Charter—which is hierarchically superior in international law and therefore controlling[186]—the power to authorise intervention lies exclusively with the UNSC[187] and "no enforcement action shall be taken under regional arrangements … without the authorization of the Security Council."[188] The PSC Protocol recognises this authority, stating that the UNSC "has the primary responsibility for the maintenance of international peace and security."[189] The PSC Protocol thus raises questions about consistency and neither its article 16(1) nor the AU Constitutive Act's article 4(h) is entirely consistent with the UN Charter regime.

As mentioned above, the AU has addressed the inconsistency between the UN Charter regime and its own approach to intervention in the Ezulwini Consensus report. There, the AU recognised the UNSC's singular authority regarding intervention but critiqued the UNSC's disconnection from events in Africa and suggested that in certain circumstances, the AU would sanction intervention and seek *ex post facto* UNSC ratification of its actions. Whether this approach can withstand legal scrutiny depends on a complete articulation of its basis in law, which the Ezulwini Consensus fails to provide.

The AU and the UN have multiple times expressed their willingness to collaborate intensively on peace and security issues more broadly. In April 2017, the two organisations signed a joint Framework for Enhanced Partnership in Peace and Security, in which they promise to "strive to collaborate from the earliest indications of conflict on the African continent". It reaffirms the primary role of the UNSC in peace and security issues.[190]

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[182] United Nations Secretary-General, 2005, p. 43.
[183] United Nations Secretary-General, 2011, para. 27.
[184] AU Constitutive Act, art 4(h).
[185] PSC Protocol, art 16(1).
[186] UN Charter, art 103.
[187] Ibid., arts 2(4) & 39.
[188] Ibid., art 53(1).
[189] Ibid,. art 17(1).
[190] United Nations & African Union, "Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security", 19 April 2017, available at http://reliefweb.int/sites/reliefweb.int/files/resources/signed_joint_framework.pdf (accessed on: 16 June 2017).

Resources

If normative development is not accompanied by concomitant resources to fund new commitments, important principles such as non-indifference and R2P will either degenerate into mere rhetoric or produce action without desired results. The latter is particularly problematic, with the risk that "a failure to go beyond the placing of peacekeepers on the ground may, if inadequate results are achieved, tarnish the AU with the same brush used to ridicule the OAU for its inaction and inadequate commitment to solve Africa's many human rights problems."[191] The case studies above—those of AMIB, AMIS and AMISOM in particular—demonstrate how the AU has struggled to adequately resource its peacekeeping missions, financially and also in terms of technical expertise (the UN also faces this challenge). The international community has provided assistance, for example through the European Union's African Peace Facility, but this seems to be insufficient.

It is particularly important to fund conflict prevention efforts, which are less costly in monetary terms, and more importantly in terms of human life, than intervention. The AU has undertaken important preventative work, but these efforts have faltered, including due to a lack of resources. For example, the AU set up field monitoring offices in Central African Republic, Chad, Comoros, the Democratic Republic of Congo, Ethiopia/Eritrea, the Great Lakes region, Ivory Coast, Liberia, Mauritania, Somalia and Western Sahara.[192] These offices can "play many of the functions envisaged within" R2P and "could have dramatic and positive results on preventing and addressing conflict," however achieving such results depends on the field offices being equipped with sufficient resources and staffed by well-trained and skilled individuals.[193] Financial and technical assistance is a critical, if prosaic, element to the effective realisation of non-indifference in Africa.

Political Will

As shown earlier, the AU's record of intervening in conflict is patchy: while it has been credited with some small successes, it has failed in numerous occasions to prevent or address mass human rights violations. In addition, its "solutions" often include suggesting favourable deals to autocratic leaders, such as in Ivory Coast and in Libya, even when those leaders have been accused of committing mass human rights violations.

It is important to consider that the willingness of the heads of state who run the AHSG to deal with abusive political leaders, to take more coercive action if such proves necessary and to fund non-indifference initiatives is likely to depend, in part, upon their own records and political interests. Certain leaders clearly do not have the moral authority to call on a similarly abusive leader to step down and are unlikely to prioritise the funding of AU programmes that may threaten their own grip on power. Many AU heads of state have employed abusive methods to stay in power, or have intervened – openly or covertly – in the affairs of other states, sometimes fuelling conflict and related atrocities. Thus the AU's success at mitigating and addressing conflict on the continent depends first and foremost on leaders' good governance at home – this good governance can then serve as the foundation of the political will to resource and insist on the same abroad.

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[191] J. Sarkin, p. 33.
[192] Ibid., p 24.
[193] J. Sarkin.

Conclusion

African states have granted the African Union a legal basis to intervene in situations of genocide, war crimes and crimes against humanity, based on a decision by the African heads of states and government, or following a request by a member state. An institutional framework has also been put in place to implement this "right to intervene", or "non-indifference", with a primary responsibility for the AU Peace and Security Council.

Both the legal and the institutional framework are positive developments from the inaction of the OAU towards an AU norm and machinery to implement the international principle of responsibility to protect. As the description of the practice of involvement of the OAU and the AU has shown, the AU has been more successful in tackling conflicts and massive human rights abuses on the continent, but continues to struggle to effectively intervene.

The AU's terminology largely overlaps with the international principle, thereby creating multiple layers of responsibility, firstly on the level of the state and secondly on the regional and international level. The relation between the international and regional level has been partly clarified in the Ezulwini Consensus, but needs further dialogue and operationalisation in practice. The AU could also make use of instruments developed at the UN level, to provide better guidance about which situations would trigger AU action. Such action has been hampered by insufficient resources to operationalise the African Peace and Security Architecture, but also by the often limited political will by African heads of state to take action, especially when their own interests or domestic situation prevails.