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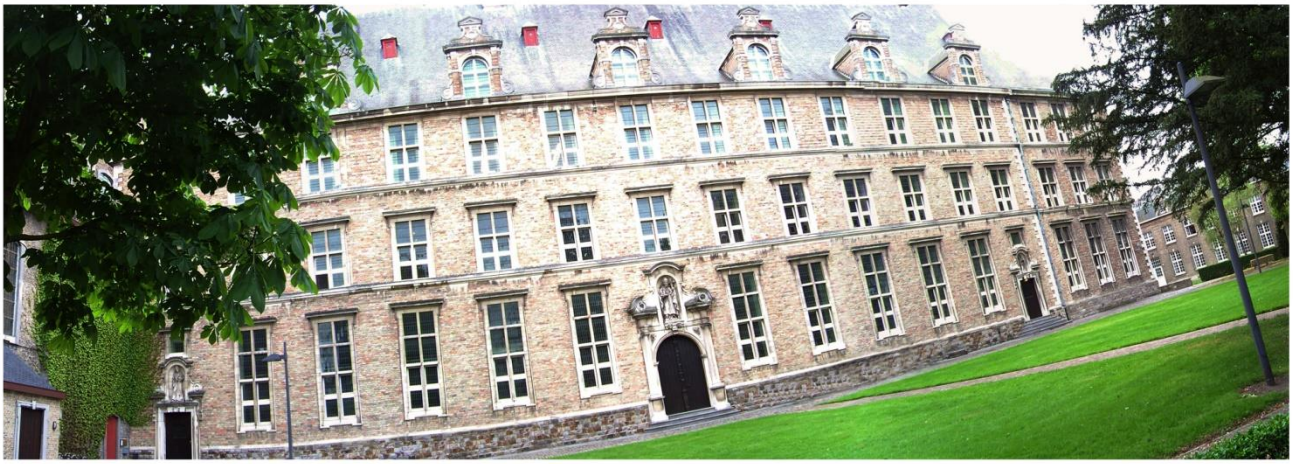
Regional Organisations and the Responsibility to Protect:

Challenging the African Union's Implementation of the Responsibility to Protect



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Abstract

After the Cold War African regional organisations with the African Union (AU) at the forefront, began to develop their own peace and security systems and undertook a proactive strategy, recognising their responsibility to protect African people from further suffering. This *inter alia* manifested in the AU's shift from the principle of non-intervention to the principle of non-indifference, underpinned in AU's right to intervene under Article 4 (h) of its 2000 Constitutive Act. Similar principles for protection of populations were later introduced at the international level in the doctrine of Responsibility to Protect (RtoP) and were presented in its final form in the UN General Assembly at the 2005 World Summit. The first part of this paper seeks to clarify the role of regional organisations in RtoP implementation. It evaluates where regional organisations stand and what role was foreseen for them in the core documents circumscribing RtoP. It then turns to conceptualize AU's RtoP enunciation, arguably one of the most progressive regional implementations of the doctrine. The paper provides an overview of the AU's legal background that correlates to RtoP and places the AU's laudable newly established mechanisms and institutions within the three-pillar RtoP structure. Furthermore, it challenges their effectiveness when used to confront RtoP situations in Africa, either peacefully or through enforcement action, and tries to assess why some attempts to stop or prevent human suffering were more successful than others.

The paper finally concludes that regional organisations are considered an important counterpart in RtoP implementation. The AU's initiatives within the first and second pillars, especially in respect of preventive and peaceful resolution mechanisms, are praised for having a huge potential and have already successfully contributed to the resolution of conflicts in the past. However, its role regarding the use of coercive measures is less clear. The paper pinpoints the discrepancy between the AU's aspirations and actual implementation with regard to RtoP. However, it also demonstrates a growing trend in which the AU provides for the first international response to African conflicts, which is only *ex post facto* buttressed by the broader international community. The AU's RtoP implementation suggests that responses to African conflicts remain of an *ad hoc* nature. Moreover, the success of the AU's RtoP implementation, especially in the course of peacekeeping, is inseparably coupled and interrelated to the effectiveness of AU-UN collaboration and therefore largely depends on the development of a unified and predictable framework of cooperation between the UN and the AU in the pursuit of peace and security.

Key words: regional organisations, implementation of RtoP, African Union, Africa, peace and security, African Union-United Nations cooperation.

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Introduction: Rise of African Collective Security Mechanisms after the Cold War and the Emergence of RtoP

During the Cold War the United Nations Security Council (hereinafter UNSC) was paralyzed from making decisions under Chapter VII of the United Nations Charter (hereinafter UN Charter) due to the constant use of veto power,[1] which enabled superpowers to support undemocratic regimes in Africa through proxy wars.[2] It was only the end of Cold War that heralded a new area in which the UN took a more proactive strategy, widening the scope of situations perceived as threats to international peace and security. However, it soon became obvious that the UN does not have the capacities to address the myriad of conflicts that emerged in the beginning of 1990s, especially in Africa; a region widely considered as the world's deadliest region.[3] Members of the UNSC lacked political will to engage in conflicts that were not in their geostrategic interest, even more so after the 'Somali disaster'[4] which "[heralded a shift towards isolationism that was characterised by greater reluctance (of western countries) to become involved in further deployments elsewhere in Africa."[5] Slogans like 'African solutions for African problems' emerged and African countries were implored to "resolve their conflicts themselves and organise their own security."[6] After liberation from the colonial yoke, newly established African countries had a strong affiliation to the principle of sovereignty and non-interference, but following the 'Liberian bloodbath' African leaders became aware of the threat that intra state conflicts can pose to the regional peace and security and were forced to reconsider the principle of non-interference's expediency. This manifested itself in the second principle of the 1991 Conference on Security, Stability, Development and Cooperation in Africa that underlined the fact that "the security, stability and development of every African country is inseparably linked with those of other African countries. Consequently, instability in one African country reduces the stability of all other countries."[7] It was against this background that African regional

[1] Between 1945 and 1990, members of UNSC vetoed 279 measures involving matters of international security. Benedikt Franke, "Enabling a Continent to Help Itself: U.S. Military Capacity Building and Africa's Emerging Security Architecture", Strategic Insights, Vol. VI, Issue 1, January 2007, pp. 1-2.

[2] *Ibid*, pp. 1-2.

[3] Nearly half of the world's battle deaths between 1989 and 2009 took place in sub-Saharan Africa. Human Security Report 2012: Sexual Violence, Education, and War: Beyond the Mainstream Narrative, 2012, p. 155.

[4] During the Somali war 18 US soldiers were killed, and 75 were seriously injured in Mogadishu. More on that see: Prunier, Gérard, "Somalia: Civil War, Intervention and Withdrawal 1990 – 1995," 1 July 1995. Available at: http://www.refworld.org/docid/3ae6a6c98.html (2. 3. 2014).

[5] Benedikt Franke (2007), *supra* note 1, p. 2.

[6] French President Francois Mitterrand as quoted in The Washington Post, Nov. 10, 1994, cited as in Benedikt Franke, "In Defense of Regional Peace Operations in Africa," Journal of Humanitarian Assistance, Article 185, 26. February 2006, p.1.

[7] Conference on Security, Stability, Development and Cooperation in Africa, Kampala, Uganda, May 19-22 1991, Smock, D., (ed), Making War and Waging Peace: Foreign Intervention in Africa, (Washington, D.C.:

organisations became more proactive, initiated their own security architectures and deployed their first peacekeeping missions.[8] The African Union (hereinafter AU) and its member states took the initiative to engage and resolve conflicts on a continent afflicted by devastating civil wars and indicated their willingness to commit themselves to responsibilities similar to those that were later endorsed in the normative doctrine of Responsibility to Protect (hereinafter RtoP): "No more, never again. Africans cannot … watch the tragedies developing in the continent and say it is the UN's responsibility or somebody else's responsibility. We have moved from the concept of non-interference to non-indifference. We cannot as Africans remain indifferent to the tragedy of our people."[9] Regional interventions, acceptation of African Peace and Security Architecture (hereinafter APSA) and provisions such as Article 4 (h) and 4 (j) of Constitutive Act of AU (hereinafter CA AU) opened a new era of regional peacekeeping and paved the way for peace and security engagements of other regional organisations. At the same time, their engagements indicated insufficiency of existing peace and security mechanisms, especially shortcomings of the UNSC and its veto power, and pushed forward a broad interpretation of the principle of sovereignty. Scholars began to extensively debate about the expediency of the strict Westphalian concept of sovereignty,[10] the so called "sovereignty barrier,"[11] and the legality of humanitarian intervention.[12] The questions of how to respond to situations in which states fail to protect those within their borders and who has the right, or perhaps even a duty, to intervene in such cases was becoming

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United States Institute for Peace, 1993), p. 252, cited as in Comfort Ero, "ECOWAS and the Subregional Peacekeeping in Liberia", The Journal of Humanitarian Assistance, 25. September 1995. Available at: http://sites.tufts.edu/jha/archives/66 (4. 3. 2014).

[8] This introduction is based on the research in Marusa Veber, "Vloga regionalnih mednarodnih organizacij pri zagotavljanju miru in varnosti v Afriki (The Role of International Regional Organisations in Securing Peace and Security in Africa)," Thesis, Faculty of Law, University of Ljubljana, Ljubljana 2014. For development of the role of African Regional Organizations in peace and security in general see: Ademola Abass, "Regional Organisations and the Development of Collective Security: beyond Chapter VIII of the UN Charter", Hart Publishing, 2004; Fredrik Söderbaum and Rodrigo Tavares, "Regional Organizations in African Security", Routledge, New York 2011; Rodrigo Tavares, "Regional Security, The capacity of international organizations", Routledge, New York 2010, pp. 1-80.

[9] Ambassador Saïd Djinnit, African Union's Commissioner of Peace and Security, Addis Ababa, June 28, 2004, cited as in Kristiana Powell, "The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on The Responsibility to Protect", Working Paper (2005). Available at: http://responsibilitytoprotect.org/The%20African%20Union%27s%20Emerging%20Peace%20and%20Security%20Regime.pdf (17. 3. 2014).

[10] See in general: Simona Țuțuianu**,** "Towards Global Justice: Sovereignty in an Interdependent World" The Hague : Asser Press, 2013, chapter 2.

[11] Christian Henderson, " R2P: Room for a Tertiary Responsibility?" in Vasilka Sancin, Maša Kovič-Dine, "Responsibility to Protect in Theory and Practice", Papers presented at the Responsibility to Protect in Theory and Practice Conference, GV Založba, Ljubljana 2013, p. 204.

[12] Jean-Pierre L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter," California Western International Law Journal Vol. 4 (1973-1974), pp. 203; Barry M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities," Fordham International Law Journal, Vol. 16, Issue 1, 1992, Article 4; Terry Gill, "Humanitarian Intervention: Legality, Justice and Legitimacy, Utrecht Journal of International and European Law (2007), 24 (65).

more and more topical and substantially characterised debate within the UN. This manifested in the emergence of the new doctrine of RtoP, which juxtaposed sovereignty with responsibility and introduced principles similar to the 'spirit of AU's non-indifference'[13] at the international level when genocide, war crimes, ethnic cleansing and crimes against humanity occur in UN member states. The main documents that introduced, endorsed and discussed RtoP; the report of International Commission on Intervention and State Sovereignty (hereinafter ICISS); World Summit Outcome Document (hereinafter WSOD); and reports of the Secretary-General, respectively, referred *inter alia* to regional organisations, as one of the possible means of the doctrine's implementation. And indeed it was a regional organisation, the AU, which arguably provided the most progressive regional RtoP implementation. However, its enunciation is in some aspects different from WSOD conceptualisation, especially with regard to the question of military interventions, and therefore its legality remains questioned and discussed by scholars.

The main goal of this paper is to answer how the AU's mechanisms and institutions for promotion of peace and security correspond to the aims outlined in the doctrine of RtoP and how they contribute to the realisation of its three-pillar structure. It aims to evaluate what role is to be played by the AU within this doctrine, how successful the AU's RtoP implementation in relevant crisis situations on the continent has been and, most importantly, what the AU's relationship towards other RtoP actors is, especially the UN?

Following this introduction the contribution comprises four parts which all seek to clarify the AU's role in RtoP implementation. The first part deals with regional organisations in general and briefly explains the normative framework for their engagement in collective peace and security. It then tries to assess what role is to be played by regional organisations in RtoP implementations according to the main documents circumscribing the doctrine. The paper then turns to conceptualize the AU's RtoP enunciation through developments within this first 'all-African' regional organisation. It explains the historical background of the AU's reorganisation and emergence of the 'sovereignty as responsibility' principle, underpinned in Article 4 (h) CA AU. The third part provides an extensive overview of the AU's legal background that correlates to RtoP and reviews newly established mechanisms and institutions, which are placed in the three-pillar RtoP structure accordingly. Within the first pillar, the AU's mechanisms that provided for the realisation of the protection responsibilities of its member states are presented. This is followed by the assessment of the AU's capabilities to assist its member states in case of the existence or imminent threat of RtoP crimes within the second RtoP pillar, which

[13] UN Press Release, "For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers No Relief', Secretary-General Cautions in General Assembly Debate", 12. July 2011, available at: http://www.un.org/News/Press/docs/2011/ga11112.doc.htm (20. 4. 2014).

includes prevention and peaceful settlement of the conflicts mechanisms, as well as deployment of missions for peaceful resolution of conflicts. Finally, the independent response of the AU through imposition of sanctions and coercive use of force is considered within the third pillar. In addition, the AU's implementation of each of the three RtoP pillars is exemplified and challenged by analysis of the conflict management of RtoP situations on the African continent in Kenya, Zimbabwe, Côte d'Ivoire, Libya, Burundi, Guinea, Darfur, Somalia, Mali and Central African Republic. In the fourth part there is a lessons-learned chapter in which trends are drawn to evaluate the emerging blueprints with regard to the AU's peacekeeping operations. According to the drawbacks of up-to-date operations, especially with regard to protection of civilians, the paper proposes a possible way forward, putting a special emphasis on global-regional collaboration in peacekeeping operations.

Regional Organisations and RtoP in the Perspective of UN Documents and the ICISS Report

Chapter VIII of the UN Charter as a Normative Framework for Regional Organisations' Engagement in Collective Peace and Security

The role of regional organisations in peace and security matters and therefore also in RtoP is to be viewed through Chapter VIII of the UN Charter, providing for cohabitation of universal and regional peace and security mechanisms. Since detailed analyses of these provisions exceed the scope of the present research, suffice to say that regional organisations have primary responsibility to "achieve pacific settlement of *local disputes*…before referring them to the Security Council."[14] However, with regard to coercive measures, the UN Charter clearly establishes primacy of the UNSC stating that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council."[15] In addition, regional organisations have to keep the UNSC fully informed of their activities undertaken for the maintenance of peace and security.[16] The scope of these provisions and the relationship between regional organisations and the UN was quite extensively elaborated in a myriad

[14] UN Charter, Art. 52. Emphasis added by the author.
[15] UN Charter, Art. 53. Enforcement action was defined by ICJ in the Certain Expenses case: enforcement action is a military action under Article 42 of Chapter VII UN Charter which is not based on consent of a state. Certain expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion, (20. 7. 1962), ICJ Reports 1962.
[16] UN Charter, Art. 54. See in general: Ademola Abass (2004), *supra* note 8, Chapter 2.

of UN documents, and different means of cooperation were established that go beyond the scope of Chapter VIII and include *inter alia*, consultation, diplomatic support, operational support, co-deployment and joint operations.[17] There were some attempts to provide legal clarification of this relationship and delimitation of roles and division of labour e.g. in peacekeeping, especially with regard to the AU[18] being seen as a 'prototype or a pilot edition of a much wider desire to converge with regional organisations.'[19] However, until today apart from *ad hoc* mechanisms no regular legal framework has been provided to govern this regional-universal relationship.[20]

Regional Organisations and RtoP in the Light of Doctrine's Evolution through the ICISS report, WSOD and Reports of Secretary-General

Various concepts were developed as predecessors to the doctrine of RtoP, the most important and influential being Francis Deng's concept of 'sovereignty as responsibility', which redefined the traditional concept of sovereignty into the responsibility of a state "[to perform the tasks expected of an effective government…(and) the obligation of the state to preserve life-sustaining standards for its citizens."[21] In the global forum of states, these questions were resurrected by the Secretary-General Kofi Annan, who in turn was inspired by and followed Deng's ideology. He urged the international community to reach consensus on ways of deciding what action is necessary, when it is necessary and who has the mandate to undertake it, when the international community is faced with crimes of mass atrocity.[22] His entreaties were fulfilled when Canada responded with the establishment of ICISS,[23] which tried to reach a balance between human suffering on the one hand and state sovereignty and the principle of non-intervention on the other. The ICISS Report moved beyond the interventionist concept and introduced continuum of

[17] One of the first documents that stressed the importance of regional organizations was report of Secretary-General: An Agenda for Peace: Preventive diplomacy, peace making and peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277 – S/2411, 17. June 1992. See also Report of the Secretary-General on the work of the organization, Supplement to An Agenda for Peace: position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations, UN Doc. A/50/60 – S/1995/1, 25 January 1995, chapter IV.

[18] See Report of the Secretary-General: A regional-global security partnership: challenges and opportunities, UN Doc. A/61/204–S/2006/590 (28 July 2006).

[19] Luk Van Langenhove, Tânia Felício and Ademola Abass, "The UN and Regional Organisations for Peace: Tracking a Slippery Partnership," in Philippe De Lombaerde et al. (eds), The United Nations and the regions: Third World Repot on Regional Integration, 2012, Dordrecht: Springer, para. 8.6.

[20] More on UN-regional organisations relationship see: *ibid* and Ademola Abass, "UN Cooperation with Regional Organisations in Peacekeeping Operations" in Philippe De Lombaerde et al. (eds), The United Nations and the regions: Third World Repot on Regional Integration, 2012, Dordrecht: Springer.

[21] Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, I. William Zartman, "Sovereignty as Responsibility: Conflict Management in Africa", Brookings Institution, Washington, DC, 1996, pp. vii, xviii.

[22] Kofi Annan, "Two Concepts of Sovereignty", The Economist, 16 September 1999, available at: http://www.economist.com/node/324795 (11. 3. 2014).

[23] ICISS was co-chaired by Gareth Evans (Australia) and Mohamed Sahnoun (Algeria).

RtoP: to prevent, to react and to rebuild[24] that "first and foremost" lies with the state to protect its population from serious and irreparable harm.[25] However, the ICISS agreed that when the state is unable or unwilling to protect its population, and other peaceful means prove to be insufficient, the "interventionary measures by other members of the broader community of states may be required."[26] To provide for greater legitimacy of such interventions it specified principles for military intervention serving as guidelines to the UNSC, which included: just threshold, four precautionary principles (right intention, last resort, proportional means, reasonable prospects), and the authority with right to approve of intervention.[27] It was precisely with regard to military interventions that the ICISS attached an important role to regional organisations. Primary responsibility for use of coercive measures was bestowed upon the UNSC, nevertheless the right of other (non-UNSC actors) to militarily intervene was ambiguously defined and could be understood as if presupposing only formal request to the UNSC and not actual authorisation: "[those calling for the intervention must *formally request* such (Security Council's) authorisation]."[28] Special emphasis was added to them in case of UNSC deadlock: "there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be *certain leeway* for future action in this regard."[29] However, there was no broader consensus regarding the content of the report and it therefore merely heralded the beginning of more intense debate on RtoP and laid the foundations for the evolution of what was to become a universally accepted normative concept. Followed by the endorsement of RtoP in the *Report from High-Level Panel on Threats, Challenges and Change: A More Secured World Our Shared Responsibility*[30] and the report of the Secretary-General, *In Larger Freedom*,[31] the idea of RtoP was gradually

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[24] Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect, December 2001 (hereinafter ICISS Report), pp. 19-45, available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf (22. 4. 2014).

[25] *Ibid*, para. 2.30.

[26] *Ibid*, para. 4.1.

[27] *Ibid*, pp. 32-37, 47-55; See also William R. Pace, Nicole Deller, "Preventing Future Genocides" World Order, 2005, Vol. 36, No. 4, p. 20.

[28] ICISS Report, para. 6.15. See also Vasilka Sancin, Maja Bavdek, Mark Jo Moggi, Nenad Mrdaković, Nastasja Suhadolnik, Katarina Škrbec and Nina Zupan: "Lokalni zločinci - univerzalni zločini: Odgovornost zaščititi," (Local Criminals – Universal Crimes, The Responsibility to Protect) GV Založba, Ljubljana 2010, p. 94.

[29] ICISS Report, para. 6.35. Emphasis added by the author.

[30] "We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large- scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent." The report merely focused on intervention rather than prevention and determined five criteria UNSC should address when authorizing military force: the just cause threshold and precautionary principles. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004), para. 203, 207.

[31] Secretary-General made it clear, that RtoP is not equivalent to military intervention, but is "[also about a normative and moral undertaking requiring a state to protect its own civilians," he therefore urged governments to incorporate RtoP as means of preventing and combating genocide, ethnic cleansing and crimes against humanity." William R. Pace, Nicole Deller (2005), *supra* note 27, p. 24; In larger freedom: towards

reshaped and gained international support with universal consensus at the highest international level, in the General Assembly, at the 2005 World Summit. The WSOD changed the expression of RtoP and reduced it to two paragraphs. The normative framework of the doctrine was now set in three pillars based on the subject that bears the responsibility to protect and the doctrine is to be activated in case of four types of atrocities: genocide, war crimes, ethnic cleansing and crimes against humanity.[32] Within the first pillar, states accepted their primary responsibility to protect their populations from these atrocities. However, in situations uncontrollable for the state, the second pillar responsibility is shifted to the international community, to help states, on request or upon acceptance of the latter, to build their capacities and encourage them to exercise responsibility to protect their populations.[33] If measures from the first and second pillars proved insufficient and authorities are manifestly failing to protect their populations, the independent responsibility of the international community under the pillar three is invoked. Such invocation is to be done independently, regardless of the state's approval or consent. Within this pillar the responsibility of the international community was recognised to use diplomatic, humanitarian and other peaceful means in accordance with Chapter VI and VIII of the UN Charter.[34] Conversely, states only expressed *readiness* and not the obligation to use coercive measures: "we are *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 organisations as appropriate."[35] Consequently this formulation could be taken "[to mean that the commitment to an international responsibility did not exist, (but there only exists) a commitment to a national responsibility."[36] In addition, no guidelines were set in the WSOD to govern the potential use of force and the questions of UNSC deadlock and the potential use of coercive measures to protect human rights by regional organisations with *ex post facto* approval of the UNSC were left out of the text. Only a humble and far from precisely defined reference to regional organisations was left in the WSOD. Being part of the international community, the potential role of regional organisations was acknowledged in preventive measures and pacific settlement of disputes as well as regarding coercive measures, should the former prove to be inadequate. But decision-making regarding the latter was limited to the UNSC. Even

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development, security and human rights for all, Report of the Secretary General, UN Doc. A/59/2005 (21 March 2005).

[32] UNGA resolution 60/1, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005) (hereinafter WSOD), para. 138.

[33] *Ibid*, para. 139.

[34] *Ibid*, para. 138, 139.

[35] *Ibid,* para. 139, emphasis added by the author.

[36] William R. Pace, Nicole Deller (2005), *supra* note 27, p. 27.

though some hailed provisions on RtoP in the WSOD as a true success,[37] others argued that the WSOD has done little to increase the likelihood of preventing future Rwandas and Kosovos and of progress in the near future.[38] The meagreness of the accepted text can be ascribed to the intense intergovernmental negotiations and the aspiration to unanimously accept the WSOD.[39] Despite its endorsement, RtoP has therefore remained one of the "less understood ideas of our times".[40] But if the concept were to be interpreted by countries consistently, further endeavours ought to be taken to conceptualize it.

Upon the recommendation of the UN Secretary-General,[41] this soft-law document was endorsed by the UNSC in Resolution 1674 on the Protection of Civilians in Armed Conflict[42] and more importantly in Resolution 1706, on Darfur,[43] and Resolution 1973, regarding the situation in Libya in which the UNSC explicitly referred to paragraphs 138 and 139 of the WSOD when authorising deployment of a mission with consent of the government (Darfur) or against its will (Libya). However, the momentum was diluted because the UNSC acted too late in Darfur and then failed to find the political will to endorse RtoP and stop mass human rights violations in comparable or even worse situations e.g. Somalia and Syria. At this point it has to be stressed that even though the WSOD was 'universally' accepted by 154 heads of state, endorsed by the UNSC and is derived from pre-existing law, such as the Convention on the prevention and punishment of the Crime of Genocide, the normative value of the doctrine remains questionable[44] and will therefore be referred hereinafter as an evolving normative concept.

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[37] *Ibid*, p. 27.

[38] Alex J. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit," Ethics & International Affairs, Vol. 20, Issue 2, June 2006, pp. 145, 146.

[39] Deviation from ICISS proposals, can inter alia be ascribed to 2003 US invasion in Iraq under pretext of human protection which according to Evans "[almost choked at birth what many were hoping was an emerging new norm justifying intervention on the basis of the principle of 'responsibility to protect." Gareth Evans, "When is it right to fight?", Survival, Autumn 2004, vol. 46, no. 3, pp. 63 and William R. Pace, Nicole Deller (2005), *supra* note 27, pp. 26, 28.

[40] Secretary-General defends, clarifies 'Responsibility to Protect' at Berlin event on "Responsible Sovereignty: International Cooperation for a Changed World', 15 July 2008, available at: http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm (18. 3. 2014).

[41] Report of the Secretary-General on the protection of civilians in armed conflict, UN Doc. S/2005/740 (28 November 2005), para. 54.

[42] UNSC Resolution, Protection of civilians in armed conflict 1674 (2006), para. 4.

[43] Security Council referred to both WSOD and Resolution 1674, furthermore it recognized the responsibility of the Government of the Sudan, to protect civilians under threat of physical violence. UNSC Resolution, Sudan 1706, (2006).

[44] See e.g. Anne Peters, "The Security Council's Responsibility to Protect" International Organizations Law Review (2011).

UN Secretary-General Ban Ki Moon persisted with the aspirations of his two predecessors and took the initiative to further clarify the RtoP through his reports in order to turn it from aspiration into reality.[45] These five reports[46] in general considered the implementation efforts by regional organisations as having the potential to bring added value to each of the three pillars[47] and therefore introduced some clarification of their roles. Amongst others, activities of the AU were recognised as being in the vanguard of international efforts to develop the principles of RtoP[48] and global-regional collaboration was set as a key priority of the strategy for operationalising the responsibility to protect.[49]

Within the first pillar, regional organisations were acknowledged to have the potential to oversee the state's responsibility and help to strengthen national preventive measures through technical assistance, training, education, and awareness-raising.[50] They can namely "play a critical facilitating role as political and operational bridges between global standards and local and national action"[51] and encourage governments to meet their obligations under relevant international conventions and to resolve friction in the country before they escalate into widespread violence. Considering Africa, the UN Secretary-General stressed that already existing state-to-state learning processes through peer mechanisms, e.g. African Peer Review Mechanism, in recent years provided candid evaluations and reform recommendations to African governments with regard to RtoP principles.[52] Likewise, regional organisations were recognised to be well placed to contribute to peaceful settlement of disputes within the scope of the second pillar through, *inter alia*, good offices and diplomacy. Their ability to ensure "accurate and timely flow of information…while lessening the risk of misinterpretation, misinformation, and deliberate distortions" was perceived as their special value.[53] Significant emphasis was placed on their preventive capacities. Against the backdrop of Articles 33(1) and

[45] Secretary-General defends, clarifies 'Responsibility to Protect,' *supra* note 40.
[46] Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/63/677, 12 January 2009; Early warning, assessment and the responsibility to protect: Report of Secretary-General, UN Doc. A/64/864, 14 July 2010; The role of regional and sub-regional arrangements in implementing the responsibility to protect: Report of Secretary-General, UN Doc. A/65/877-S/2011/393, 27 June 2011; Responsibility to Protect: timely and decisive response: Report of Secretary-General, UN Doc. A/66/874-S/2012/578, 25 July 2012; Responsibility to protect: State responsibility and prevention: Report of Secretary-General, UN Doc. A/67/929–S/2013/399, 9 July 2013.
[47] UN Doc. A/65/877-S/2011/393, 27 (2011), *supra* note 46, para. 9.
[48] UN Doc. A/63/677 (2009), *supra* note 46, para. 8 and UN Doc. A/65/877-S/2011/393, 27 (2011), *supra* note 46, para. 4.
[49] UN Doc. A/63/677 (2009), *supra* note 46, para. 65.
[50] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 15. See also UN Doc. A/67/929–S/2013/399 (2013), *supra* note 46.
[51] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 11.
[52] *Ibid*, para. 17.
[53] *Ibid*, para. 27.

52(2) of the UN Charter, it was affirmed that preventive diplomacy should begin with local and regional initiatives, which are to be complemented or supplemented by global efforts of the UN only if needed.[54] Therefore further improvement of the already widely recognised dimensions of regional organisations in operational prevention was set as one of the most urgent priorities of the UN.[55] In respect to Africa, increases of civilian capacities, through capacity-building and capacity-sharing in the AU's African capacity-building programmes and early warning and early response systems, were described as a possible illustration for other regions and an innovative step, which could be shared through region-to-region learning processes in the future.[56] The UN Secretary-General stressed the important role of the UN with regard to capacity building and capacity sharing:

> Better modes of collaboration between the United Nations and regional and subregional arrangements are also needed. Such arrangements need to consider capacity-sharing and not just capacity-building, as is now the case in mediation support. The African Union-United Nations 10-year capacity building programme is particularly crucial in that regard. We must redouble our efforts to ensure that it succeeds and that the African Standby Force realizes its full potential. Global-regional collaboration is a key plank of our strategy for operationalising the responsibility to protect, including for establishing the early warning capability mandated in paragraph 138 of the Summit Outcome, and it deserves our full and unambiguous support.[57]

In terms of a structural prevention component,[58] regional organisations have the capacity to help with acceptance of various norms, standards and institutions in order to promote tolerance, transparency, accountability, and the constructive management of diversity.[59] Due to their access to information, understanding of history, culture and direct effects on the regions by the actions taken on the international level, views of regional organisations may be taken into account when determining the course of action that is

[54] UN Doc. A/64/864 (2010). *supra* note 46, para. 11.
[55] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 21.
[56] UN Doc. A/63/677 (2009), *supra* note 46, para. 37, 38, 65.
[57] UN Doc. A/63/677 (2009), *supra* note, 46, pp. 27.
[58] Secretary-General in his previous report incorporated two categories of preventive action: operational preventions which refers to "measures applicable in the face of immediate crisis" and structural prevention as "measures to ensure that crises do not arise or, if they do, that they do not recur." Prevention of armed conflict, Report of the Secretary-General, UN Doc. A/55/985–S/2001/574, 7 June 2001. See also Rama Mani, "Peaceful Settlement of Disputes and Conflict Prevention," in Thomas G. Weiss and Sam Daws (ed.), "The Oxford Handbook on the United Nations," Oxford University Press 2007, chapter 18.
[59] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 23.

about to be taken in a particular situation.[60] Regarding the third pillar, the UN Secretary-General stressed that a wide range of non-coercive and non-violent response measures under Chapters VI and VIII can be undertaken through regional organisations without explicit authorisation of the UNSC, while, authorisation is needed for the use of coercive measures. While the UN Secretary-General urged permanent members of the UNSC "to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect",[61] he recognised that coercive measures could, *inter alia*, also be undertaken by regional organisations under Article 53 of the UN Charter, however only with the prior authorisation of the UNSC.[62] No further elaboration or explanation is provided regarding the question of UNSC deadlocks. The key to the third pillar is that in a "rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through "timely and decisive" action."[63] In contrast to that, the UN Secretary-General pinpointed:

> Doctrine for the possible use of peacekeeping and military assets in the context of preventing, deterring or responding to atrocity crimes is not well developed. There is need for a deeper and more inclusive discussion of such matters both among governments and among independent experts. The roles of both the United Nations and its regional and sub-regional partners should be considered in such dialogues and assessments.[64]

He stressed that regional organisations can enrich UN decision-making. Therefore the two-way flow of information between the UN and regional organisations regarding RtoP should be regularised.[65] In situations of common concern, information sharing including exchanging assessments of situations is highly important since the same base of information is necessary to undertake a comprehensive international response and agree on the measures that ought to be taken.[66]

To sum up, the support to regional organisations and recognition of how important their activities can be for the implementation of RtoP was acknowledged within the first and second pillar. However, this cannot be said for the third pillar, where regional

[60] *Ibid,* para. 6.
[61] UN Doc. A/63/677 (2009), *supra* note 46, para. 61.
[62] *Ibid*, para. 59.
[63] UN Doc. A/63/677 (2009), *supra* note 46, para. 50.
[64] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 35.
[65] UN Doc. A/63/677 (2009), *supra* note 46, Annex, para. 2.
[66] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 31, 33.

organisations are mainly seen as "possible partners to the UN"[67] and the role they are to play is not clear:

> More work is required to increase understanding of the roles that regional and subregional arrangements can play and to build stronger relationship between United Nations and the regions to facilitate shared understanding and common approaches.[68]

Even though the approach to RtoP is narrow and limited to only four mass atrocity crimes, its depth should provide us with a wide array of instruments.[69] However, those are defined especially weakly within the third pillar. Recommendations in reports seem to be very similar to those that were published by the UN Secretary-General regarding the role of regional organisations in peace and security and their cooperation with the UN in general from 1992 onwards. The important role of regional organisations is invariably stressed in all these reports, but as has already been mentioned, they fail to provide a concrete legal framework and to concretize pleas for their better cooperation and enhanced role of regional organisations.

Conceptualising RtoP: the Case of the African Union

The role of regional organisations in implementing RtoP was partly embraced in the above analysed documents, however until today it remains ill-defined. Regardless of that, the AU continues its deep engagement in regional peace and security matters, and is developing its own mechanisms and practices to combat security problems on the continent. It has to be stressed that the majority of the AU's institutions predate RtoP official endorsement in 2005 and are the outcome of the AU's non-indifference policy. The aim of this study is therefore solely to place this newly established peace and security mechanism within the three-pillar RtoP structure in order to evaluate the AU's overall capacities for RtoP implementation and furthermore to challenge its effectiveness when used to confront RtoP situations in Africa.

[67] See Jan Wouters and Philip De Man, "The Responsibility to Protect and Regional Organizations: The example of the European Union" in Vasilka Sancin, Maša Kovič Dine (2013), *supra* note 11, pp. 363-374.
[68] UN Doc. A/66/874-S/2012/578 (2012), *supra* note 46, para. 48.
[69] UN Doc. A/63/677 (2009), *supra* note 46, para. 10(c).

From the Organisation of African Unity's traditional Concept of Sovereignty to the AU's Sovereignty as Responsibility

The idea of the first 'all-African' regional organisation materialised in 1963 with the formation of the Organisation of African Unity (hereinafter OAU). However, due to its strict sovereignty, non-interference and non-intervention praxes,[70] peace and security matters on the continent remained largely unanswered[71] or were left to be addressed by other organisations, such as the Economic Community of West African Stats (hereinafter ECOWAS) and the UN. Initiatives for a stronger role of an 'all African' regional organisation, with more effective conflict prevention and resolution mechanisms that are crucial for RtoP implementation, were already launched in the time of OAU, but remained words on paper until the organisation went through significant institutional changes. OAU Declaration on a Mechanism for Conflict, Prevention, Management and Resolution[72] adopted in 1993 was one of these initiatives, providing very ambitious mechanisms for anticipation and prevention of conflicts, peace-making and peace-building but it failed to match them with institutional capacities needed for its realisation. It was not until the transformation of the OAU into the AU in 2000[73] that the sovereignty principle was softened and African countries shifted their view from non-interference to the principle of non-indifference. By then it was obvious that the 'never again' commitment of the international community in the aftermath of Rwandan genocide was only to be effective if new international institutions as well as regional mechanisms were to be introduced to confront the challenges on the continent. Neglected by the international community, African countries were determined to become more active in the continent's peace and security matters, which manifested in the Article 4 (h) CA AU, giving member states "the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[74] State sovereignty and territorial integrity[75] were now complemented with responsibility to

[70] Charter of the Organization of African Unity, 1963, Addis Ababa, Ethiopia, 479 U.N.T.S. 39, article III.

[71] OAU did deploy a peacekeeping mission to Chad, and various small observer missions to e.g. Burundi, Comoros, Democratic Republic of Congo, Ethiopia-Eritrea, Rwanda and Western Sahara, however they have had very limited success. Paul D. Williams, "The African Union's Peace Operations: A Comparative Analysis" in Fredrik Söderbaum and Rodrigo Tavares (2011), *supra* note 8, pp. 29, 30. See also: Møller, Bjørn, "The pros and cons of subsidiarity : The role of African regional and subregional organisations in ensuring peace and security in Africa," *DIIS Working Paper no 2005/4*, Danish Institute for International Studies Working Paper 2005:4, Copenhagen 2005, pp. 17-20.

[72] OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration), 29th Ordinary Session of the Heads of State and Government of the Organization of African Unity in Cairo, Egypt, from 28 - 30 June 1993. Available at: http://www.dipublico.com.ar/english/oau-declaration-on-a-mechanism-for-conflict-prevention-management-and-resolution-cairo-declaration/ (24. 3. 2014).

[73] Constitutive Act of African Union was signed on 11th July 2000, it entered into force in 2001 but it was only on 9th July 2002 that AU begun working independently following the first Assembly meeting in Durban.

[74] Constitutive Act of African Union (2000) Lome, Togo, 2158 UNTS 3 (hereinafter CA AU), Art. 4(h).

[75] CA AU, Art. 4 (a).

protect states' populations from these atrocities. Apart from 'ethnic cleansing,' which was not included in the CA AU, the same elements for human protection were accepted as were latter introduced in the WSOD. In 2003 the CA AU was amended to include another 'grave circumstance,' serious threat to legitimate order. Even though the amendment is not yet in force due to an insufficient number of ratifications,[76] this provision "[may be understood as reprioritising regime security over human security"[77] and therefore provides a breakaway from the AU's non-indifference commitment. Notwithstanding these provisions, the AU retained the principle of non-intervention between member states, prohibiting interference in the internal affairs of another[78] and use or threat of force among them.[79] Accordingly, a clear distinction was drawn between prohibited unilateral military intervention by a state and possible collective action by the AU as such.[80] The additional possibility for the AU's intervention, even in cases of 'non-RtoP crimes,' is foreseen in Article 4 (j) CA AU conferring on member states the right to request intervention from the Union in order to restore peace and security in the country. RtoP encompasses a broad variety of measures for securing international peace and security. Preventive measures, peaceful resolution and post conflict peacebuilding arguably being at the core of the doctrine, leaving the use of coercive measures, e.g. military intervention, only as the matter of last resort. However, given the controversies that attach to the latter, this study will now briefly discuss the already mentioned AU's right to intervene under Article 4 (h) CA AU.

Article 4 (h) CA AU

With the acceptance of Article 4 (h) CA AU, the AU became the first international organisation to include the right to intervene in a member state to prevent mass atrocities in its Constitutive act, however the question of final authority for the 'African RtoP endorsement' substantially characterised debates regarding this Article, since it allows for an interpretation that opposes the one accepted in the WSOD. The decision on intervention from Article 4 (h) CA AU is namely bestowed upon the Assembly[81] with no reference being made to authorisation of the UNSC and its primary responsibility for the

[76] Protocol on Amendments to the Constitutive Act of the African Union, 3 February 2003 Addis Ababa, Ethiopia and 11 July 2003, Maputo, Mozambique. Until April 2014, 28 countries ratified the protocol, whereas the protocol shall enter into force thirty days after the deposit of the instruments of ratification by a two-third majority of the member states.
[77] Alex J. Bellamy (2006), *supra* note 38, p. 159.
[78] CA AU, Art. 4 (g).
[79] CA AU, Art. 4 (f).
[80] Alex J. Bellamy (2006), *supra* note 38, p. 157.
[81] CA AU, Art. 7.

maintenance of international peace and security.[82] The latter was later explicitly recognised in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (hereinafter Protocol relating to PSC),[83] however prior authorisation of the UNSC in AU's documents remained not to be seen as a *conditio sine qua non*. The AU's position on RtoP was subsequently endorsed in the Ezulwini consensus which acknowledged the primacy of the UNSC in the maintenance of international peace and security, nevertheless in circumstances requiring urgent action, where the international community does not act promptly, the UNSC approval could be granted 'after the fact.' Moreover, member states assumed to reserve themselves the right to act under the principle of RtoP in all African conflicts, but without specific prior authorisation of the UNSC.[84] CA AU's compliance with the UN Charter and the principle of Prohibition of use of force is therefore questionable. In addition, it remains contentious whether the AU has sufficient capacities and appropriate institutions to determine genocide, war crimes or crimes against humanity, which are seen as prerequisites for AU's engagement on the basis of Article 4 (h) CA AU in the course of RtoP, and would require assessment to be taken prior deployment of mission to provide for its legality.[85] The Protocol relating to PSC provides that the PSC is to recommend the AU Assembly such intervention in respect of grave circumstances as defined in relevant international conventions and instruments,[86] nevertheless it is not defined who is to determine that such crimes are taking place in a certain country. There seems to be a lack of authority that would be able to establish when we talk about RtoP situations and to determine the seriousness of the threat in a specific situation.

The AU can indeed be seen as unique in the international community, being the first to actually introduce legal obligation and commit to RtoP principles and its legal and institutional changes may "be held as an expression of the development towards diminishment of the sovereignty of States."[87] However, detailed and further legal examination of this question exceeds the framework of this research, since in fact the AU

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[82] UN Charter, Art. 24/1, 53/1 and Chapter VII.

[83] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, Durban (hereinafter Protocol Relating to PSC), Preamble. See also UN Charter, Art. 24/1, 53/1 and Chapter VII.

[84] "It is imperative that Regional Organizations, in areas of proximity to conflicts, are empowered to take actions in this regard." The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus," 7th Extraordinary Session of the Executive Council, Ext/EX.CL/2 (VII), 7-8 March 2005, Addis Ababa, Ethiopia, (hereinafter Ezulwini Consensus), para. B (i). See also Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee, Exp/ASF-MSC/2(I), 16 May 2003, Addis Ababa, para. 1/4b, 1/6, 2/9c.

[85] Ademola Abass, "The United Nations, the African Union and the Darfur Crisis: of Apology and Utopia", Netherlands international Law Review, vol. 54, Issue 03, December 2007, p 426.

[86] Protocol relating to PSC, Art. 7/1 (e).

[87] Dan Kuwali, "Art. 4 (h) + R2P: Towards a Doctrine of Persuasive Prevention to end Mass Atrocity Crimes" Interdisciplinary Journal of Human Rights Law, Vol. 3, 2008-2009, p. 78.

has never intervened on the basis of Article 4(h) CA AU. Despite the fact that in the last 14 years of its existence there were situations that arguably could have been or were classified as war crimes, genocide or crimes against humanity by the International Criminal Court (hereinafter ICC) and necessitated Article 4 (h) application, the AU instead deployed all of its missions with the consent of the concerned state, on the basis of Article 4 (j) CA AU. As will be discussed below, even when other peaceful means of resolving the problems proved to be insufficient, the AU continued in its reluctance to deploy missions with a robust mandate without the consent of a perpetrating state, regardless of the fact that this would arguably be the only way to solve problems in those states e.g. Darfur or Somalia.

AU's Implementation of the Three RtoP Pillars

The operational dimension to the CA AU provisions was provided through various institutions and capacity changes, circumscribed in an emerging African Peace and Security Architecture (APSA), providing for "the most significant and far-reaching implementation of RtoP by any regional, or indeed any international organisation."[88] The APSA rollout and implementation formally began in 2001, with an OAU decision on the integration of central components of the OAU Declaration on a Mechanism for Conflict, Prevention, Management and Resolution.[89] It was later provided with a legal framework in the Protocol relating to PSC which established five APSA pillars that are crucial for effective implementation of RtoP: the Peace and Security Council, the Panel of the Wise, the Continental Early Warning System, the African Standby Force, and the Peace Fund to financially support peace and security engagements of the AU.[90] It was also recognised that additional support from the UN regarding APSA implementation will be needed: "Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability in Africa."[91] Member states further confirmed their commitment to combat security problems on the continent and to strengthen their collective efforts with the adoption of the Solemn Declaration on a

[88] Jan Wouters and Philip De Man, *supra* note 67, p. 375.
[89] OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution, *supra* note 73.
[90] See in general: Engel, U. in Porto, J. G.: The African Union's New Peace and Security Architecture: Toward an Evolving Security Regime? in Fredrik Söderbaum and Rodrigo Tavares (2011), *supra* note 8, pp. 14-28.
[91] Protocol relating to PSC, Art. 17.

Common African Defence and Security Policy (CADSF)[92] which, *inter alia*, aims to "ensure that Africa's common defence and security interests and goals, especially as set out in Articles 3 and 4 of the Constitutive Act of the African Union, are safeguarded in the face of common threats to the continent as a whole."[93] It specifically refers to intra state conflicts, e.g. existence of grave circumstances, namely war crimes, genocide and crimes against humanity, the causes of which necessitate a new emphasis on human security.[94] As was already mentioned, member states further endorsed RtoP in the Ezulwini consensus, in which they mostly focused on the last resort: interventions and use of coercive measures.[95] In 2007 the African Commission on Human and Peoples' Rights specifically addressed RtoP implementation in the Resolution on Strengthening the Responsibility to Protect in Africa. It expressed its deep concern on the slow response of the international community to 'RtoP situations' and on ongoing conflicts in Africa.[96]

The article hereinafter seeks to provide an overview of AU's institutionalisation of RtoP in the course of a three-pillar structure. It focuses on legal frameworks and mechanisms established within it as well as on some examples of actual implementation of these pillars when confronting RtoP situations in Africa, either peacefully or through enforcement action. Due to limited space, the author however does not provide detailed analyses of African conflicts but merely focuses on issues that she considers fundamental for understanding of the AU's RtoP engagements in recent years. It also has to be acknowledged, that none of the RtoP pillars are designed to work in isolation from the others,[97] rather they are to complement each other and therefore different measures can sometimes be attributed to one or more pillars. The following layout of the AU's mechanism and responses is therefore not absolute and could indeed be altered.

[92] Solemn Declaration on a Common African Defense and Security Policy (hereinafter CADSF), 28 February 2004, Sirte, Libya.
[93] CADSF, Art. 1, 4.
[94] CADSF, Art. 8 (i).
[95] Ezulwini Consensus, *supra* note 84, para. B (i).
[96] Resolution on Strengthening the Responsibility to Protect in Africa, The African Commission on Human and Peoples' Rights, 42nd Ordinary Session, Brazzaville, Republic of Congo, 15 - 28 November 2007, available at: http://www.achpr.org/sessions/42nd/resolutions/117/ (4. 4. 2014).
[97] UN Doc. A/63/677 (2009), *supra* note 46, p. 15.

First RtoP Pillar: Mechanisms Provided for the Realisation of the Protection Responsibilities of the AU Member States

Within the first pillar we are to look into mechanisms provided for the realisation of the state's responsibility to protect its populations.[98] Apart from the already mentioned Resolution on Strengthening the Responsibility to Protect in Africa, one of the most significant achievements in this respect on the African continent is the acceptance of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.[99] It is the first international legal instrument on a matter closely related to RtoP.[100] Its objectives are namely to promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement including those resulting from RtoP crimes.[101] It provides that state parties "bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind."[102] Furthermore, it obligates states to respect their obligations under international law and to devise early warning systems to prevent arbitrary displacements of persons.[103] Another important commitment of AU member states to RtoP can be observed through the New Partnership for Africa's Development (NEPAD) promoting good governance, human rights as well as peace and security which are seen as prerequisites for sustainable development. It also includes an initiative to enhance capacities for the early warning and prevention as well as conflict management on the continent.[104] In addition, there is also the African Peer Review Mechanism (APRM) through which policies for sustainable development and political stability are promoted together with experience sharing and reinforcement of successful and best practices.[105] State-to-state learning processes and promotion of best practices are very important within the first pillar and have the potential to be further reinforced by introducing criteria relating to RtoP into such peer review mechanisms in the future.[106]

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[98] According to some scholars the AU's norms, standards and institutions presented in this chapter could indeed be placed under structural prevention component of the second RtoP pillar. However, this contribution follows the three-pillar RtoP sturcture as presented in Reports of the UN Secretary-General. See: UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46.

[99] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereinafter Kampala Convention), Special Summit of the Union, Kampala, Uganda, 23 October 2009.

[100] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 20.

[101] Kampala Convention, Art. 4/4.

[102] *Ibid*, Art. 5/1.

[103] *Ibid*, Art. 4/1,2.

[104] New Partnership for Africa's Development (NEPAD), October 2001, available at: http://www.un.org/africa/osaa/reports/nepadEngversion.pdf (31. 3. 2014), p. 18.

[105] Official site of African Peer Review Mechanism: http://aprm-au.org/about-aprm (4. 4. 2014).

[106] UN Doc. A/63/677 (2009), *supra* note 46, p. 13.

Of crucial importance is also the acceptance of international human right treaties and their supervisory organs, which can significantly contribute to conflict prevention and can "promote and monitor the implementation of international human rights standards and domestic law."[107] For the purpose of this research we will however only focus on African regional human rights instruments. The African Charter on Human and People's Rights together with the African Commission on Human and People's Rights have introduced new regional mechanisms to address individual responsibility for human rights violations and improve human rights protection on the continent through, *inter alia,* state parties' reports on legislative and other measures undertaken for protection and realisation of human rights, which are to be submitted every two years.[108] The Commission is to share its collected relevant data e.g. widespread human rights violations in certain countries, with other AU organs. Most importantly it can help the PSC to carry out its mandate and respond promptly and efficiently to conflicts through close cooperation in all matters relevant to the PSC's objectives and mandate.[109] Even though this type of cooperation and coordination has prospects to bring fruitful results, there is no regular procedure ensuring actual communication between these two organs.[110] Indeed all the mechanisms and institutions mentioned have the capacity and potential to prevent small crimes escalating into large-scale human rights violations. However, the Commission solely has 'quasi-judicial' status and therefore lacks capacities to fully provide for "incitement of RtoP crimes through appropriate and necessary means"[111] and "condemnation and rejection of impunity"[112] as advocated in the WSOD and Article 4 (o) CA AU, respectively. The African Court of Human and Peoples' Rights,[113] established recently, could help to bridge the gap between accountability and reconciliation in order to provide palliatives for neglected victims of mass atrocity crimes on the continent.[114] In 2011 the first ruling against a state was rendered by the Court, accusing Libya of human rights violations[115] in

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[107] UN Doc. A/67/929–S/2013/399 (2013), *supra* note 46, para. 50.

[108] African (Banjul) Charter on Human and People's Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 62.

[109] Protocol relating to PSC, Art. 19.

[110] Dan Kuwali, "The African Union and the Challenges of Implementing the 'Responsibility to Protect,'" Nordic Africa Institute, April 2009, available at: http://responsibilitytoprotect.org/African%20Union%20and%20RtoP.pdf (14. 4. 2014). See also Frans Viljoen, "The African system of human rights" in Gentian Zyberi (ed), "An Institutional Approach to the Responsibility to Protect," Cambridge University Press 2013.

[111] WSOD, para. 138.

[112] CA AU, Art. 4 (o).

[113] CA AU, Art. 18; Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), adopted in 1998 and came into effect in 2005.

[114] See: Frans Viljoen (2013), *supra* note 110.

[115] Libya: African Rights Court Issues First Ruling Against a State, Human Rights Watch, 30 March 2011, available at: http://www.hrw.org/news/2011/03/30/libya-african-rights-court-issues-first-ruling-against-state (4.4. 2014).

which it issued an order for provisional measures against Libya, which was obliged to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons."[116] Even though this judgment was never really implemented in practice, it provides for a bright example that could pave the way for future condemnation of human rights violations on the African continent. However, states should primarily establish better cooperation with the ICC, arguably the best equipped institution at international level to provide for independent investigation and condemnation of genocide, war crimes and crimes against humanity. Until now, AU member states have been reluctant to cooperate with it, seeing it as another 'western institution' susceptible to political influence, due to the UNSC's ability to recommend situations to the ICC. The AU's relations with the ICC have been largely criticised in the recent years because of controversial decisions of the AU Assembly, not to cooperate with the ICC regarding the arrest and surrender of President of the Sudan, Omar El Bashir.[117] Interestingly, however, South Africa, Nigeria and Gabon voted in favour of the UNSC Resolution 1970, which referred the situation in Libya to the ICC.

Second RtoP pillar: Cooperation between the AU and its Member States: AU's Assistance to its Member States in Case of the Existence or Imminent threat of RtoP Crimes

Assistance to the states by regional organisations within the second pillar may take one of four forms: (a) encouraging states to meet their responsibilities under pillar one; (b) helping them to exercise this responsibility; (c) helping them to build their capacity to protect; and (d) assisting states "under stress before crises and conflicts break out."[118] The AU has developed various institutions to help and encourage its member states meet their responsibilities. In fact the majority of the AU's peace and security engagements were undertaken within this pillar, probably because it is endowed with noteworthy legitimacy attributable to the consent of targeted state. For ease of understanding, the author differentiates measures in this second pillar on measures of prevention, mediation, diplomacy and others that include larger numbers of foreign civilians or military troops on the ground in the course of e.g. peacekeeping operations. Arguably some of these measures could be included in the third pillar including timely and decisive

[116] Case of African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, African Court on Human and Peoples' Rights, Application No. 004/2011, p. 7.

[117] 13th Ordinary Session of the Assembly of the African Union, Decision on the meeting of African State parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13(XIII), (1-3 July 2009), Sirte, Libya. See also: Katarina Škrbec, "The R2P, The Doctrine of Non-Indifference, and Cooperation of African States with the ICC" in Vasilka Sancin, Maša Kovič-Dine (2013), *supra* note 11, pp. 789-816.

[118] UN Doc. A/63/677 (2009), *supra* note 46, p. 15.

response. However, the author classifies measures under the second and third pillars as a function of the consent of the state, which is presupposed in the second but not in the third RtoP pillar.

Prevention and Peaceful Settlement of the Conflicts

The importance and priority of conflict prevention and peaceful settlement of disputes emanates from the Articles 1 (1) and 2 (3) of the UN Charter, respectively. Regional organisations can employ methods explicitly or implicitly catalogued in Article 33 of the UN Charter and are indeed themselves one of key actors in dispute settlement. Moreover they can develop their own mechanisms for peaceful settlement of disputes.[119] Bearing the primary responsibility for peaceful settlement of the disputes[120] and being well positioned for conflict prevention on the continent, the AU has developed various institutions that relate to RtoP. One of the AU's central institutions for prevention of conflicts is the Continental Early Warning System (hereinafter CEWS), helping to identify signs of potential threats and subsequently enables timely and effective preventive action.[121] CEWS consists of an observation and monitoring centre and is mandated with the anticipation and prevention of conflicts. Working closely with the UN, Regional Economic Communities (REC) and non-governmental organisations it seeks to collect relevant data and further analyse and share them with other AU organs and the international community.[122] The important role of non-state actors in this field was specifically acknowledged in the so-called Livingstone Formula, recognising that Civil Society Organisations could play a more significant role in this conflict prevention system since they can "provide technical support to AU Field and fact-finding missions" and could moreover assist "by undertaking early warning reporting and situation analysis."[123] This was also acknowledged by some scholars since non-governmental organisations operating in conflict situations in Africa have a "record of effective investigations of grass-roots level violations of human rights."[124] However, present coordination and

[119] UN Charter Art., 1 (1), 2 (3) and 33. See also: Rama Mani, "Peaceful Settlement of Disputes and Conflict Prevention," in Thomas G. Weiss and Sam Daws (ed.) (2007), *supra* note 58, chapter 18.
[120] UN Charter, Art. 52.
[121] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 27.
[122] Protocol Relating to PSC, Art. 12.
[123] Conclusions of a Retreat of the Peace and Security Council of the African Union, PSC/PR/(CLX), 5 December 2008, Livingstone, Zambia, para. 10.
[124] Ramesh Thakur, "The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect" (2006), cited as in Tom Kabau, "The Responsibility to Protect and the Role of Regional Organizations: an Appraisal of the African Union's Interventions" Goettingen Journal of International Law, Vol. 4, No. 1 (2012), pp. 82-86.

information sharing between different AU institutions and civil societies regarding peace and security on the continent remains poor.[125]

The Panel of the Wise is another APSA pillar, which exemplifies AU's attempt to prioritize prevention of conflict in Africa. It started its work with the inauguration of five highly respected African personalities in December 2007[126] and, in particular, advises and supports efforts of the PSC and the Chairperson of the Commission, but can also act independently to promote and maintain peace and security and stability on the continent if it deems appropriate. It is, *inter alia*, mandated to carry out fact-finding missions, encourage parties to engage in political dialogue, assist and advise parties on how to resolve disputes, and develop and recommend ideas and proposals. Every year it selects priority conflict situations and observes them continuously, however these priorities are not revealed to the public.[127] Through annual workshops and reports these respected regional figures can reinforce global messages about human rights norms and RtoP principles, moreover they can contribute to accountability and the decline of impunity.[128] In practice however, as will be shown below, the AU tends to mediate potential large scale conflicts not through the Panel, but rather establishes *ad hoc* committees aimed at addressing specific situations at hand. The AU also provides for other preventive mechanisms, but for purpose of this research, suffice to mention AU's Political Affairs Commission within Political Affairs Department, which deals with a range of issues that fit within a conflict prevention mandate, including election monitoring in member states.[129] In recent years the AU strongly advocated for resolution of conflicts through these diplomatic and peaceful measures not just when faced with post-election crises in Kenya, Zimbabwe and Côte d'Ivoire but also in much more unstable situations, like Libya.

Kenya

Awaiting 2007 presidential elections in Kenya, the African Peer Review mechanism issued a warning of possible unrest,[130] as the country had experienced a certain degree of ethnic violence during electoral periods in the preceding 15 years. Initial results of the elections

[125] See, Rodrigo Tavares (2010), *supra* note 8, pp. 27.
[126] Current members of the Panel are: Ben Bella (Algeria), Ahmed Salim (Tanzania), Mary Chinery Hesse (Ghana), Kenneth Kaunda (Zambia) and Marie Madeleine Kalala-Ngoy (Democratic Republic of the Congo).
[127] See El Jamila Abdellaoui, "The Panel of the Wise: A comprehensive introduction to a critical pillar of the African Peace and Security Architecture," Institute for Security Studies, No. 193, 2009, Pretoria.
[128] *Ibid* and Protocol relating to PSC, Art. 11.
[129] Kristiana Powell (2005), *supra* note 9, pp. 13; see also AU's Political Affairs Department: http://pa.au.int/ (23. 4. 2014).
[130] Abdulahi Boru Halakhe, "R2P in Practice": Ethnic Violence, Elections and Atrocity Prevention in Kenya", Global Centre for the Responsibility to Protect Occasional Paper Series No.4, December 2013, p. 8.

indicated the victory of Raila Odinga, a member of the Luo ethnic group. However, the official announcement was postponed and under non-transparent circumstances[131] Mwai Kibaki, a member of Kikuyu ethnic group, was declared winner. As soon as he was sworn-in, systematic and violent attacks between his supporters and opponents broke out and "revealed underlying tensions between ethnic groups."[132] Some of the crimes awakened memories of Rwanda. For instance, thirty ethnic Kikuyu families were burned to death in a church. Hate speech on the radio was one of the means of spreading violence.[133] More than 1,100 Kenyans were killed in the ethnic violence and hundreds of thousands were displaced or injured.[134] The response of the AU was quick and efficient. Only 10 days after the violence broke out, the panel of Eminent African Personalities under chairmanship of Kofi Annan[135] was initiated and led a fruitful mediation, a Kenya National Dialogue and Reconciliation (KNDR) process in which both Kibaki and Odinga, agreed to cooperate. Subsequently, a coalition government was established with Kibaki assuming the post of President and Odinga taking up the position as Prime Minister of the country, only two months after the Election Day. Besides the AU, other international actors were involved in the peace process including Archbishop Desmond Tutu, former US Assistant Secretary of State for African Affairs, Jendayi Fraizier and former heads of state from Tanzania, Mozambique, Botswana and Zambia. In addition, the ICC launched an investigation into crimes against humanity with regard to the post-election violence in the county.[136]

At the time of highest tensions, turmoil in Kenya was rarely referred to as an RtoP situation. That said, the UN Secretary-General reminded the Kenyan government of its responsibility to protect its citizens.[137] However, significant engagement with the doctrine

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[131] European Union Election Observation Mission, Kenya Final Report on General Elections 27 December 2007 (3 April 2008), available at: http://eeas.europa.eu/human_rights/election_observation/kenya_2007/final_report_en.pdf (28. 2. 2014).

[132] Johannes Langer, "The Responsibility to Protect: Kenya's Post-Electoral Crisis", Journal of International Service, Fall 2011, available at: http://www.american.edu/sis/jis/upload/1LangerF11.pdf (23. 3. 2014), pp.1.

[133] Abdulahi Boru Halakhe (2013), *supra* note 130, pp. 3, 8.

[134] *Ibid,* p. 3.

[135] The panel was authorized with the task by AU Chairman John Kufour, with the consent of Kenyan President Kibaki. More on the panel see Kenya National Dialogue and Reconciliation: http://www.dialoguekenya.org/ (23. 3. 2014).

[136] ICC Situations and Cases: Kenya, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx (23. 3. 2014).

[137] "The Secretary-General reminds the Government, as well as the political and religious leaders of Kenya, of their legal and moral responsibility to protect the lives of innocent people" full statement available at: Secretary-General troubled by escalating Kenyan tensions, violence, http://www.un.org/News/Press/docs/2008/sgsm11356.doc.htm (25. 3. 2014). The doctrine was mentioned in a statement by French Foreign and European Affairs Minister Bernard Kouchner:"In the name of the responsibility to protect, it is urgent to help the people of Kenya. The United Nations Security Council must take up this question and act." Statement Made by Bernard Kouchner on the situation in Kenya, 31 January 2008,

was only recognised by the international community *ex post facto*. Ethnic violence is namely one of the indicators for the application of the RtoP doctrine and timely and decisive response is crucial to prevent escalation of such violence. Due to the AU's prompt response this is often described as a successful prevention action and implementation of RtoP,[138] and even more so after the elections in 2013 were carried out peacefully. Nevertheless it has to be acknowledged that in Kenya, the AU had significant support from the international community and resolution of the situation is now hailed as successful especially because of AU-UN cooperation.[139]

Zimbabwe

Similar to Kenya, Zimbabwe plunged into turmoil after the brutal response of President Robert Mugabe to his loss in general elections in 2008. However, concurrently to the possible escalation of RtoP crimes, Zimbabwe was facing a serious economic crisis, food shortages and HIV problems.[140] Even though there were no signs of ethnic violence in the country, serious human rights abuses were committed that could amount to crimes against humanity and therefore the situation was referred to as one invoking similar RtoP measures as in Kenya.[141] Nevertheless, Zimbabwe was reluctant to accept this and President Robert Mugabe's spokesman, George Charamba, indicated that the success in Kenya would not be easily replicated: "Kenya is Kenya. Zimbabwe is Zimbabwe. We have our own history of evolving dialogue and resolving political impasses the Zimbabwean way."[142] The AU proposed a peaceful solution to the crisis, appointing the AU's special representative to Zimbabwe, but the appointment was rejected by the government of Zimbabwe, which was unwilling to negotiate with the opposition. Interest of the broader international community in the resolution of the situation in Zimbabwe was not even close to the level of attention that Kenya had, and mediation efforts were subsequently left to another regional organisation: the Southern African Development Community (hereinafter SADC). The AU supported its endeavours but actively participated only in the final stages of the mediation process, which led to the signing of the agreement providing

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available at: http://www.responsibilitytoprotect.org/index.php/component/content/article/129-africa/1501-violence-in-kenya-statement-made-by-french-foreign-and-european-affairs-minister-bernard-kouchner (23. 3. 2014).

[138] UN Doc. A/63/677 (2009), *supra* note 46, para. 11(c); Abdulahi Boru Halakhe (2013), *supra* note 130, pp. 3.

[139] UN Doc. A/63/677 (2009), *supra* note 46, para. 51.

[140] See World Report 2009, Human Rights Watch, pp. 141 – 147, available at: http://www.hrw.org/sites/default/files/reports/wr2009_web_1.pdf (15. 4. 2014).

[141] Desmond Tutu, "Zimbabwe: A case of responsibility to protect," available at: http://www.sundaytimes.lk/080504/International/international0009.html (14. 4. 2014).

[142] President Robert Mugabe's spokesman, George Charamba, cited as in Brian-Vincent Ikejiaku and Jubril Dauda, "African Union, Conflict and Conflict Resolution in Africa: a Comparative Analysis of the Recent Kenya and Zimbabwe Conflicts," International Journal of Development and Conflict, Vol. 1, No. 1 (2011), p. 74.

for a Government of National Unity (hereinafter GNU).[143] Contrary to Kenya, the AU did not publicly pronounce illegitimacy of Mugabe's presidency and human rights abuses committed by his government and was moreover reluctant to accept sanctions, e.g. suspension from the organisation as was the case in the Côte d'Ivoire. In 2013 Mugabe was peacefully re-elected in the presence of an AU Observer Mission, which despite some shortcomings in the conduct of elections, e.g. voters getting turned away, praised them as successful and democratic.[144] In spite of Human Rights Watch (hereinafter HRW) report findings that "there has been little progress in implementing key aspects of agreement" and that political violence is still present in the country,[145] Robert Mugabe was recently elected as First Vice-Chair of the African Union Bureau, a supreme organ of the AU.[146] It seems therefore that the AU invokes double standards and adopts different conflict resolution strategies in its member states.

Côte d'Ivoire

Similar to Kenya and Zimbabwe, post-election violence in Côte d'Ivoire broke out after Laurent Gbagbo refused to acknowledge the results that declared his opponent Alassane Ouattara as winner. Gbagbo instead proclaimed himself as winner. Even though international missions including the AU's were present to observe the run-off election,[147] the announcement of the results was followed by intense and direct clashes between supporters of the candidates, which resulted in widespread human rights violations. The situation in the country continued to deteriorate until Gbagbo was arrested and Ouattara was sworn in as president. By then about 3,000 persons were killed, 300,000 persons were internally displaced and 200,000 persons fled to neighbouring countries.[148] In

[143] Assembly of the African Union, 11th ordinary session, Resolution on Zimbabwe, 30 June to 1 July 2008, Assembly/AU/Res.1 (XI). See also: Tim Murithi, "The African Union's Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect?" 2009, pp. 95-96, available at http://library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf (14. 4. 2014).

[144] African Union Election Observation Mission to the Harmonised Elections of 31 July 2013 in the Republic of Zimbabwe, Preliminary Statement, 2 August 2013 and Zimbabwe election praised by African Union, sidesteps rigging claims: http://edition.cnn.com/2013/08/02/world/africa/zimbabwe-election/ (14. 4. 2014).

[145] World Report 2013 Zimbabwe, Human Rights Watch, available at: http://www.hrw.org/world-report/2013/country-chapters/zimbabwe (14. 4. 2014).

[146] Mugabe Elected African Union Bureau Vice-Chair at AU Summit: http://www.voazimbabwe.com/content/african-union-summit-mugabe/1841188.html (14. 4. 2014).

[147] Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, UN Doc. S/2011/211, p. 2.

[148] Twenty-eighth report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 24 June 2011, UN Doc. S/2011/387, pp. 9, 10.

contrast to ECOWAS and the UN,[149] the AU once again took the position that the crisis could be solved through a peaceful mediation process. It stressed that the situation necessitated "a rapid peaceful solution which will allow for the preservation of democracy and peace, through the respect for the will of the Ivorian people."[150] It recognised Ouattara as the legitimate president[151] and urged Gbagbo to respect the results of the election.[152] Moreover it suspended the participation of Côte d'Ivoire in AU activities, until the legitimate President would assume office.[153] It held a number of high-level meetings[154] and considered adoption of targeted sanctions. However, the latter were only accepted by the UN.[155] The AU appointed Mr. Raila Odinga as Special Envoy of the African Union to Côte d'Ivoire and established a High-level Panel on the Côte d'Ivoire, mandated to evaluate the situation in the country and advocate for a political solution to crisis.[156] Gbagbo however, was reluctant to cooperate with the High-level panel and Special Envoy, making the AU's attempt to peaceful resolution unsuccessful. Peace in the country was therefore restored only after France and the UN intervened.[157] In spite of that, the overall security situation in Côte d'Ivoire remains fragile.[158]

Libya

The situation in Libya seriously deteriorated after Muammar Gaddafi suppressed a democratic uprising using indiscriminate force, e.g. aerial bombing. Again similarities with the Rwandan situation in 1994 were made. The protestors were called by Muammar Gaddafi 'cockroaches,' moreover he called on his supporters to "cleanse Libya house by house."[159] Even though the scale of violence significantly exceeded the one in Kenya,

[149] UN Doc. S/2011/211 (2011), *supra* note 147 and Resolution A/RES.1/03/11 Of the Authority of Heads of State and Government of ECOWAS on the Situation in Cote D'Ivoire, 25 March 2011.
[150] Communique of the Peace and Security Council, 259th mtg., 28 January 2011, PSC/AHG/COMM(CCLIX), Addis Ababa, Ethiopia.
[151] Communique of the Peace and Security Council, 265th mtg., 10 March 2011, PSC/AHG/COMM.1(CCLXV), Addis Ababa, Ethiopia.
[152] UN Doc. S/2011/211 (2011), *supra* note 147, p 6.
[153] Communique of the Peace and Security Council, 252nd mtg., 9 December 2010, PSC/PR/COMM.1(CCLII), Addis Ababa, Ethiopia.
[154] UN Doc. S/2011/211 (2011), *supra* note 147, p 6.
[155] UNSC Resolution 1975 Côte d'Ivoire (2011).
[156] At that point AU also lifted its sanctions. PSC/AHG/COMM(CCLIX) (2011), *supra* note 150.
[157] Report of the Chairperson of the Commission on the Situation in Cote d'Ivoire, PSC/PR/2(CCLXXIII), 21 April 2011.
[158] Thirty-third report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 24 December 2013, UN Doc. S/2013/761, p. 4.
[159] Vasilka Sancin, "Briefing paper on 'Responsibility to Protect', European Parliament (May 2011), p. 12, available at:

Zimbabwe or the Côte d'Ivoire, the AU again pushed for peaceful resolution of the conflict, fearing further escalation of violence or its spread to neighbouring countries. The Libyan government failed to protect its citizens[160] and committed war crimes and crimes against humanity[161] and the situation therefore triggered reactions from the broader international community. The AU decided to establish an AU 'Ad Hoc High Level Committee' on Libya, comprising of five Heads of State and Government mandated to "facilitate an inclusive dialogue among the Libyan parties" and to seek peaceful solution of the conflict.[162] Subsequently, a Framework Agreement on a Political Solution of the conflict was proposed, which included cessation of hostilities, formation of a transitional government and organisation of the elections. The agreement was accepted by Gaddafi but rejected by the National Transitional Council.[163] The AU condemned "indiscriminate and excessive use of force and lethal weapons against peaceful protestors"[164] and expressed its "deep concern at the prevailing situation in Libya, which poses a serious threat to peace and security in that country and in the region as a whole," but by the same token the members emphasised territorial integrity of the country and rejected "any foreign military intervention, whatever its form."[165] Instead, it expressed its conviction that the situation in Libya "calls for an urgent *African action* for the immediate cessation of all hostilities"[166] and advocated for an inclusive peace agreement combined with a democratic transition. The ability of the AU to broker an agreement was, however, questioned by the international community due to Gaddafi being "prime financier of the continental organisation."[167] It was another regional organisation that gained more support from the international community: the League of Arab States (hereinafter LAS). The LAS mainly advocated for more robust action[168] calling for the "imposition of a no-fly

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http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201106/20110614_309r2pep_en.pdf (5.3. 2014).

[160] UNSC Resolution 1970 (2011) and UNSC Resolution 1973 (2011).

[161] Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (A/HRC/17/44), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (14. 4. 2014).

[162] Communiqué of the 265th Meeting of the Peace and Security Council PSC/PR/COMM.2 (CCLXV), Addis Ababa, Ethiopia, (10 March 2011), para. 8.

[163] Libya: Gaddafi government accepts truce plan, says Zuma, 11 April 2011, available at: http://www.bbc.co.uk/news/world-africa-13029165 (14. 4. 2014). See also Matthias Dembinski and Theresa Reinhold, "Libya and the Future of the Responsibility to Protect – African and European Perspectives," Peace Research Institute Frankfurt, 2011, pp. 10-11.

[164] Communiqué of the 261st Meeting of the Peace and Security Council PSC/PR/COMM.2 (CCLXI), Addis Ababa, Ethiopia, (23 February 2011), para. 2.

[165] PSC/PR/COMM.2 (CCLXV) (2011), *supra* note 162, para. 3, 5, 6.

[166] *Ibid*, para. 7. Emphasis added by author.

[167] Matthias Dembinski and Theresa Reinhold (2011), *supra* note 163, pp. 10-11.

[168] Inter alia Gulf Cooperation Council and Organization of Islamic Cooperation also supported use of coercive measures. See Alex J. Bellamy and Paul D. Williams, "The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect," International Affairs, Vol. 87, Issue 4, July 2011, pp. 841-846.

zone on Libyan military aviation, and establishment of safe areas" for civilians.[169] This was allegedly crucial for the quick reaction of the UNSC[170] which, *inter alia*, imposed sanctions under Chapter VII of the UN Charter,[171] referred the situation to ICC,[172] established a no-fly zone[173] and finally authorised "all necessary measures to protect civilians" without the consent of 'host' state.[174] These measures, however, prevented further mediation endeavours of the AU's *Ad Hoc* High Level Committee since it was unable to enter the country as soon as the no-fly zone came into effect.[175] Initiatives of the AU, providing for peaceful resolution of the conflict were side-lined once NATO began its enforcement action and, having no international support, the AU's subsequent endeavours were hampered politically and financially.[176] The AU was of the view that the NATO-led air campaign defeated "the very purpose for which it was authorised in the first place, i.e. the protection of the civilian population, and further complicate(ed) any transition to a democratic dispensation in Libya" and reiterated that the only way to achieve sustainable peace in the country is through a political solution.[177] It is worth mentioning however, that African Members of the UNSC voted in favour of Resolution 1973.[178] Had they abstained and adhered to the AU non-intervention stance, the resolution would not have been adopted. The AU later reiterated its commitment to the resolution, but noted that actions on the ground fell outside the scope of the resolution and "expressed deep concern at the dangerous precedence being set by one-sided interpretations of these resolutions, in an attempt to provide a legal authority for military and other actions on the ground."[179] Despite its limited success in implementation, probably one of the most significant regional attempts to condemn violations in Libya was through the accusation of Libya of human rights violations by African Court of Human and Peoples' Rights, ordering Libya to halt its attacks on civilians.[180] At the international level intervention in Libya represented a major breakthrough, clearly and unequivocally affirming "the international community's determination to fulfil its responsibility to

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[169] UNSC Resolution 1973 (2011), p. 2.
[170] See Jennifer Welsh, "Civilian protection in Libya: Putting Coercion and Controversy Back into RtoP," Ethics & International Affairs 2011.
[171] UNSC Resolution 1970 (2011), para. 4-8.
[172] *Ibid*.
[173] UNSC Resolution 1973 (2011), para. 6.
[174] *Ibid*, para. 7.
[175] Matthias Dembinski and Theresa Reinhold (2011), *supra* note 163, p. 11.
[176] Alex Dewaal, The African Union and the Libya Conflict of 2011 (19. December 2012), available at: http://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/ (20. 4. 2014). Communiqué of the 275th Meeting of the Peace and Security Council PSC/MIN/COMM.2 (CCLXXV), Addis Ababa, Ethiopia, (26 April 2011), para. 12, 13.
[177] Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, Decision on the Peaceful Resolution of the Libyan Crisis, EXT/ASSEMBLY/AU/DEC/(01.2011), Addis Ababa, Ethiopia (25 May 2011), para. 3, 5.
[178] Matthias Dembinski and Theresa Reinhold (2011), *supra* note 163, pp. 10-11.
[179] EXT/ASSEMBLY/AU/DEC/(01.2011), (2011), *supra* note 177, para. 7.
[180] African Rights Court Issues First Ruling Against a State, Human Rights Watch (2011), *supra* note 115.

protect,"[181] and NATO intervention was hailed as a successful implementation of RtoP,[182] whereas the role of the AU was largely criticised as being passive and indecisive. However, Dewaal argues that the approach of an inclusive negotiated settlement was not given a serious chance and indeed, a partnership between the UN and the AU could have benefited Libya and both organisations.[183]

The AU's interventions in Kenya, Zimbabwe, Côte d'Ivoire and Libya show, how important it is for the AU and broader international community to unite their efforts in RtoP implementation. Their endeavours are most successful when they advocate for similar measures and support each other's actions.

Deployment of Missions for Protection of Populations

Peace and Security Council, African Standby Force and their Ability to Protect Populations in the course of RtoP

Arguably the fundamental objective of RtoP is protection of populations from mass atrocity crimes: war crimes, crimes against humanity, genocide and ethnic cleansing[184] and when states fail to protect them, the realisation of this objective is commonly reflected in the international community's deployment of civilian or military groups on the ground either in a peacekeeping mission (second pillar) or collective military enforcement actions (third pillar). At this point we will briefly analyse the AU's actual capacities to provide for effective protection of the populations on the ground in the course of its peace operations, when faced with massive human rights violations. By all means the two most important APSA pillars in this respect are the Peace and Security Council (hereinafter PSC) and African Standby Force (hereinafter ASF).

Comprised of 15 members, the PSC is a collective security and early warning arrangement and key peace and security, as well as RtoP, institution facilitating timely and efficient responses to conflict and crisis situations in Africa.[185] Even though the PSC is usually associated with peacekeeping and enforcement action measures, its mandate is broad and can indeed contribute to the implementation of both second and third pillars, since it encompasses, *inter alia*, anticipation and prevention of conflicts, peace-making

[181] Secretary General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence' (18 March 2011), available at: http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm (24. 4. 2014).
[182] Tom Kabau, (2012), *supra* note 124, p. 74.
[183] Alex Dewaal (2012), *supra* note 176.
[184] WSOD, para. 138, 139.
[185] Protocol relating to PSC, Art. 2.

and peace-building functions, recommendations to the Assembly pursuant to Article 4(h) CA AU, approval of modalities for interventions pursuant to Article 4(j) CA AU as well as support and facilitation of humanitarian action.[186] It is nevertheless not clear how the PSC can operationalise all these mandated objectives. Actual decision-making power regarding interventions is bestowed upon the AU Assembly, the regional body representing all member states mandated to accept the most important decisions within the AU,[187] either by consensus or two-thirds majority. The key APSA pillar for actualisation of interventions is the ASF, established to enable realisation of the AU's responsibilities, with respect to the deployment of peace support missions and interventions pursuant to article 4(h) and (j).[188] ASF is therefore mandated to undertake a multiplicity of missions from observing missions to enforcement actions,[189] and its undertakings could therefore also be placed either under second or third RtoP pillars, respectively. ASF comprises five brigades from five of Africa's sub regions: Southern (SADCBRIG), East (EASBRIG), Central (FOMAC), West (ECOBRIG) and North (NASBRIG) and has the aspiration to provide regional troops that could be deployed independently within the African continent. Realisation of ASF is however lagging behind schedule due to financial, technical and capacity problems.

Ever since the adoption of APSA and subsequent initialisation of PSC and ASF, the AU is presupposed to have operational capacities to mount peace operations, however in contrast to some other organisations (e.g. UN, NATO) and some nations (e.g. Canada, United Kingdom, United States of America, France),[190] the AU did not develop specific peace operations doctrine and its endeavours were therefore marked as "action without doctrine."[191] There is no legal framework or explicit written guidelines for deployment of AU-led missions, especially with regard to robust peacekeeping. Even though there are 6 estimated scenarios for its rapid and prompt deployment within the time frame of 14 to 90 days,[192] the 2011-2013 APSA roadmap acknowledged the need for the establishment of a legal framework for the deployment and revival of ASF scenarios in order to "ensure

[186] *Ibid*, Art. 7.
[187] CA AU, Art. 7/1 and African Union, Rules of Procedure of the Assembly of the Union, 9–10 July 2002, Durban, South Africa, available at: http://www.africa-union.org/rule_prot/exec-council.pdf (18. 4. 2014).
[188] Protocol relating to PSC, Art. 13/1.
[189] *Ibid*, Art. 13/3.
[190] See Victoria K. Holt and Tobias C. Berkman, "The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations," The Henry L. Stimson Center, September 2006, pp. 110-128.
[191] *Ibid*, p. 128.
[192] See Jakkie Cilliers, "The African Standby Force, An Update on Progress," Institute for Security Studies, No. 160, 2008, Pretoria.

that it is appropriately prepared for its intended objectives."[193] This conundrum gets even more intricate when mandates of peacekeeping missions explicitly include protection of civilians.[194] Without the proper framework and doctrine, the relatively new mandates for protection of civilians, which are not yet operationalised and clarified even in organisations or states with highly developed peace operations doctrines, failing "to specify ways to meet the needs for coercive protection of civilians, (and) the challenge of the responsibility to protect,"[195] represents a difficult task for the AU. The questions of neutrality and impartiality, as well as training of peacekeepers and allocation of resources are namely the general operational challenges for peace operations with a mandate to protect civilians of e.g. the UN in the Democratic Republic of Congo. Even though there were attempts to clarify and conceptualize the protection of civilians by the UN[196] as well as the AU,[197] this mandates too often remain 'impossible' due to "the absence of a clear, operationally-focused and practical concept."[198] Regardless of the capacity and deficiencies respecting the realisation of the mandate, protection of civilians was generally part of the AU's missions' mandates in the last 15 years. As will be shown below, it was either explicitly mentioned as part of the mandate e.g. in missions deployed to Darfur, Mali and Central African Republic, or was merely an implied goal as in Somalia and Burundi, in the latter case it was explicitly mentioned only in the mandate of subsequent UN missions.

Nevertheless ASF intensely tackled peace and security problems on the continent in the last decade, mostly through its peacekeeping capacities. The demand for blue helmets in Africa is increasing and according to the UN Secretary-General regional, military

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[193] Indicative elements for the APSA Roadmap 2011-2013, available at: http://www.peaceau.org/uploads/indicative-elements-apsa-roadmap-2011.pdf (15. 4. 2014).

[194] One should not confuse the two concepts: RtoP and Protection of Civilians, which evolved separately, the latter being older and broader than the former. Even though this two protection concepts share the central purpose to "protect people's most basic rights of physical security from large-scale violence" and there is a "substantial overlap between them" they should not be understood as synonyms. While the first refers to *populations* "irrespective of their involvement in hostilities" and applies to four mass atrocity crimes, the latter applies to *civilians* which can be defined as persons not taking part in the hostilities and not affiliated to any party of the conflict, protection of whom derives from the International Humanitarian Law. Hugh Breakely, Angus Francis, Vesselin Popovski, Charles Sampford, Michael G. Smith, and Ramesh Thakur, "Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of civilians in Armed Conflicts," Institute for Ethics, Governence and Law, 2012, pp. x, xi, 9.

[195] Weiss, "The Humanitarian Impulse," in Malone, ed., The UN Security Council: From the Cold War to the 21st Century, cited as in Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, pp. 103.

[196] Draft DPKO/DFS Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, 2010.

[197] Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations, Addis Ababa, March 2010.

[198] Draft DPKO/DFS Operational Concept (2010), *supra* note 196, para. 4.

capabilities such as the ASF "should be encouraged as an alternative" [199] to UN's collective security system.

Deployment of Missions for Peaceful Resolution of Conflicts

Observing and monitoring missions, peace support missions and preventive deployment[200] are important parts of RtoP implementation, aiming to support the country in its efforts to meet its obligations to protect its populations. Juxtaposed to the use of coercive measures, traditional peacekeeping missions attain a higher level of legitimacy, since they are to be deployed only with consent of all the parties, and therefore no UNSC authorisation is needed. These second pillar measures largely rely on civilian expertise and presence (civilian and police components), however, they also include deployment of military units with the consent of government, either for non-coercive purposes, such as prevention, protection, peacekeeping and disarmament or to counter non-state actors that threaten states and their populations with widespread violence.[201] Even though a military presence in the country is often associated with the third pillar coercive measures under Chapter VII of the UN Charter, military assistance is also a substantial part of the second pillar.[202] These troops usually neutrally supervise cease-fire agreements between disputed parties and are lightly armed since they may only use force in self-defence. Bellamy and Hunt correctly argue:

> [with the consent of the host government, the military sector can provide many functions that assist the State to protect civilians and enable peace, provided they are 'early, targeted and [their deployment is] restrained.[203]

<u>*Burundi*</u>

Arguably one of the most successful regional peacekeeping missions was the AU's first mission deployed in Burundi (AMIB). It represents a milestone for the AU being its first implementation of the APSA and the doctrine of non-indifference. Even though RtoP was yet to be generally accepted in the international community, according to Evans this is

[199] UN Doc. A/65/877-S/2011/393 (2011), *supra* note 46, para. 29
[200] Protocol relating to PSC, Art. 7, 13.
[201] UN Doc. A/63/677 (2009), *supra* note 46, pp. 15, 18.
[202] Alex J. Bellamy and Charles T. Hunt, "Mainstreaming the Responsibility to Protect in Peace Operations," Asia-Pacific Centre for the Responsibility to Protect, Program on the Protection of Civilians, Working Paper No. 3, March 2010, p. 20.
[203] *Ibid*, p. 20.

"perhaps the best case study we have of what RtoP means" and perfect example of the RtoP concept in practice.[204] Ever since the Civil War in Burundi erupted in 1993,[205] the OAU was actively involved in the mediation process and tried to broker an agreement between government and the opposition. As a result, in 2002 a cease-fire agreement was signed in Arusha,[206] which included provisions for the African mission to monitor the cease-fire and peace process. Even though the AU acted upon the request of the government, it discussed the mandate, financing and logistics of the AU Mission in Burundi (AMIB)[207] with the UN, which supported external military presence in the country and approved it *ex post facto*.[208] AMIB did not have the explicit mandate to protect civilians and was instead primarily mandated to monitor and verify the implementation of the Arusha Agreement and to facilitate and provide technical assistance to the disarmament, demobilisation and reintegration (DDR) process as well as to ensure favourable conditions for the establishment of a UN Peacekeeping mission.[209] Even though AMIB suffered from political, financial and military problems it nevertheless "succeeded in deescalating a potentially volatile situation,"[210] and provided for a stable security situation in most provinces of Burundi. This facilitated the success of the mission by the UN operation in Burundi (ONUB) in 2004[211] which successfully finished its mandate after two years. Numerous scholars share the opinion that AMIB was one of the AU's biggest success stories,[212] as it was crucial for establishing peace in the Great Lakes region where the existing ethnic frictions between Tutsis and Hutus had the potential to

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[204] Gareth Evans, "The Responsibility to Protect: An Idea Whose Time Has Come…and Gone?" International Relations vol. 22, no. *3* (September 2008), p. 291.

[205] Similar to Rwanda, the country experienced repeated violent clashes between Tutsis (minority 15 %) and Hutus (majority, 85%) in the since 1972. The country suffered from an uneven power distribution, all high ranking positions were namely reserved for the Tutsi minority. After the introduction of a multi-party system in 1992, a Hutu president, Ndadaye Melchior, was democratically elected but soon afterwards he was assassinated and the country erupted into a Civil War. More on historical background see: Annemarie Peen Rod, "The African Mission in Burundi, The Successful Management of Violent Ethno-Political Conflict?" Ethnopolitics Papers, May 2011, no. 10. Available at: http://centres.exeter.ac.uk/exceps/downloads/Ethnopolitics%20papers_No10_peen%20rodt%20-%20african%20union.pdf (14. 2. 2014).

[206] Before that, other agreements were signed, but were never successfully implemented.

[207] Communiqué of the Seventh Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management, and Resolution at Heads of State and Governmental Level (3. February 2003), p. 2. Prior to the arrival of AMIB troops, there were 750 South African soldiers in Burundi, South African Protection Support Detachment (SAPSD), to help guard very important persons (VIP), mostly Hutu politicians. This was Mandela's personal initiative that was supported by Burundi's government and UNSC. UNSC Resolution 1375 (2001), par. 4. Paul D. Williams (2011), *supra* note 71, pp. 31-32.

[208] UNSC resolution 1545 (2004), par. 2.

[209] Communiqué of the Ninety-first Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management, and Resolution at Ambassadorial Level, (2. April 2003), par.5.

[210] Tim Murithi, 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur', Journal of Peace, Conflict and Development, Issue 14, July 2009, pp. 5, 6.

[211] UNSC resolution 1545 (2004), par. 2.

[212] See e.g. Boshoff, Henri, Vrey, Waldemar and Rautenbach, George, "The Burundi Peace Process: from Civil War to Conditional Peace," Pretoria: Institute for Security Studies, 2010, p. 69.

escalate into another devastating Civil War.[213] AMIB was a peacebuilding mission and did not use force, save for self-defence. However, it was succeeded by a more robust UN operation mandated under Chapter VII of the UN Charter. It heralded a new era of regional peacekeeping on the basis of Chapter VIII of the UN Charter merging various international players to prevent escalation into a large-scale conflict.[214] A new trend in collective security emerged, which was to become the regular way of solving African problems: re-hatting or overtaking regional missions by the UN once conditions in the country are more stable. Today however, human rights violations are still a regular feature in Burundi, and another test for the country and for the AU's peace mechanisms will be the upcoming elections in 2015.[215]

Third RtoP pillar: Independent Response of the AU and the use of Coercive Measures

If measures from the first two pillars turn out to be insufficient, the responsibility to protect will be shifted to an independent response of the international community. The main characteristic of this pillar is that no consent of the state is needed for the measures that are to be taken, whether they are peaceful or include use of force, however, in most cases prior authorisation of UNSC will have to be obtained to provide for legality of these measures. Nevertheless, in order to maintain a high level of legitimacy the international community in practice often seeks to gain the consent of a targeted country. The first part of the third pillar overview in this paper focuses on the imposition of sanctions, while the second part emphasizes the use of coercive measures, collective action, when "national authorities are manifestly failing to protect their populations."[216] Not surprisingly, the above mentioned PSC and ASF are to play the most important role in the implementation of this last pillar.

Imposition of Sanctions

Regional organisations' response within the third RtoP pillar largely rely on the imposition of different sanctions, such as suspension of membership and targeted diplomatic and

[213] Tim Murithi, "The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia", 17 African Security Review vol. 17, issue 1 (2008), p. 75.
[214] Gareth Evans (2008), *supra* note 204, p. 291.
[215] UNSC Resolution 2137 (2014).
[216] WSOD, para. 139.

financial sanctions e.g., travel bans and arms embargos. These measures are used to force states violating human rights to comply with requirements of the international community and their obligations under international law through political and economic pressure. Legal background for the AU's sanctions is provided in Articles 23 and 30 CA AU, where their imposition is presupposed in case of non-payment of budgetary contributions, non-compliance with the AU's decisions and policies as well as a manner of condemnation for unconstitutional changes of government of member states. [217] Even though CA AU provisions do not specifically refer to human rights violations, they were in recent years imposed as one of the means for alleviating human suffering in African countries, especially with regard to unconstitutional changes of government that catalysed numerous African conflicts. They can namely "serve as the basis for a bargaining dynamic in which the promise of lifting sanctions becomes an incentive to encourage political concession and cooperation."[218] Given their specific nature, which enables avoidance of coercive military actions on the one hand, but provides for "a more forceful option beyond diplomatic remonstrance"[219]on the other, it remains disputable whether sanctions imposed by regional organisations constitute enforcement action and subsequently require prior UNSC authorisation. This question however exceeds the scope of this research and was addressed in detail by scholars elsewhere.[220]

The AU imposed various sanctions on numerous occasions but only the ones related to RtoP implementation are consider in this contribution. As a reaction to unconstitutional changes of government, the AU suspended Côte d'Ivoire,[221] the Central African Republic[222] and Guinea.[223] However, as will be discussed below, it was only in the latter case, that targeted economic and political sanctions were also accepted. Even though Article 4 (p) CA AU explicitly condemns and rejects unconstitutional changes of governments, the AU demonstrated inconsistent implementation of this provision failing to sanction undemocratic regimes e.g. in Zimbabwe.

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[217] CA AU, Art. 23 and 30. See also Konstantinos D. Magliveras, "The sanctioning system of African Union: part success part failure?" 2011, available at: http://www.academia.edu/1103678/THE_SANCTIONING_SYSTEM_OF_THE_AFRICAN_UNION_PART_SUCCESS_PART_FAILURE (5. 5. 2014).

[218] David Cortright, George A. Lopez and Linda Gerber-Stellingwerf, "Sanctions" in Thomas G. Weiss and Sam Daws (ed.), "The Oxford Handbook on the United Nations," Oxford University Press 2007, Chapter 20, pp. 348.

[219] *Ibid.*

[220] See e.g. Ademola Abbas (2004), *supra* note 8, Chapter 2.4.

[221] See chapter 4.2.1.3.

[222] See chapter 4.3.2.4.

[223] See below, chapter 4.3.1.1.

Guinea

Guinea plunged into political instability following the death of incumbent President Lansana Conté in December 2008 and subsequent power seizure by Guinea's military rulers. This triggered peaceful political protests which were violently suppressed by government forces, committing crimes against humanity.[224] ECOWAS led the regional response in this situation, however the AU also reacted promptly, strongly condemning "the killings and deliberate acts of violence against unarmed civilians" and expressed its support to ECOWAS and to the establishment of an International Commission of Inquiry.[225] As in Côte d'Ivoire, the AU suspended Guinea from the organisation and further imposed targeted economic and political sanctions on military leaders, which included bans on travel and the freezing of assets held outside Guinea,[226] and were communicated to the UNSC.[227] In 2010 these targeted sanctions were lifted.[228]

Coercive use of Force

Where states are unable to prevent atrocities or are seemingly determined to commit them, the key to pillar three is "urgency and decisiveness with which the international community is obliged to respond."[229] In regard to peace operations, this refers to the "speed at which a mission should be deployed and its mandate and configuration adjusted to address human suffering deemed to constitute a threat to international peace and security."[230] Nevertheless the AU has been reluctant to undertake robust enforcement actions without the country's consent even when other peaceful means proved to be insufficient. The interventions discussed below were conducted with consent of states. However, their mandates were enhanced *ex post facto* to include more robust use of force after their merger with UN missions or extensive support from the UN and were against this background positioned under pillar three of RtoP.

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[224] 160 people were killed and 1,200 people were injured. Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, 18 December 2009, UN Doc. S/2009/693.

[225] Meeting at the level of the Heads of State and Government, Peace and Security Council, 207th mtg., PSC/AHG/COMM.2(CCVII), 29 October 2009, Abuja, Nigeria.

[226] AU imposes sanctions on Guinea, 7 November 2009, available at: http://www.aljazeera.com/news/africa/2009/11/200911717315899257 4.html (21. 4. 2014).

[227] PSC/AHG/COMM.2(CCVII) (2009), *supra* note 225.

[228] African Union lifts sanctions against Guinea, 10 December 2010, available at: http://www.reuters.com/article/2010/12/10/ozatp-guinea-au-idAFJOE6B903220101210 (23. 4. 2014).

[229] Alex J. Bellamy and Charles T. Hunt (2010), *supra* note 202, pp. 20, 26.

[230] *Ibid*.

Darfur

The situation in Darfur was characterised by the international community's inability to solve the long lasting conflict promptly and decisively. Marginalised and neglected by the government, rebel groups in Darfur[231] started their attacks in 2002.[232] Surprised by the intensity of the insurrection and weary from the long lasting Civil War between the North and South of the Country, the Government responded violently and recruited local tribes, i.e. Janjaweed, to assist it in suppression of the rebels. In violent fighting, serious violations of international human rights and humanitarian law were perpetrated by the Government and the Janjaweed amounting to war crimes and crimes against humanity. Tens of thousands people were killed and millions have fled the country.[233] The situation necessitated RtoP implementation. In the beginning the Government was reluctant to accept international peacekeepers in the country and had only agreed to an African led mission, making the AU play a leading role in conflict resolution. After the signing of the cease-fire agreement in 2004 providing for a cease-fire mission, prior authorisation of UNSC[234] and approval of the Government[235] was obtained for the establishment of the African Union Mission in Sudan (AMIS) I. [236] In the beginning the mission was observatory, but its mandate was changed repeatedly, however it did not go above that of a peacekeeping mission. Even though the number of AMIS personnel increased from the initial 150 to more than 7000, the mission faced capacity constraints and furthermore had an ambiguously defined mandate regarding protection of civilians,[237] which caused

[231] There were two main rebel groups: Sudanese Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM).

[232] Darfur is the largest region of Sudan with population of 6 million people and lies mostly in an arid desert. Its history was substantially marked with fight for sparse resources between tribes, especially agriculturalists and cattle herders and constant frictions between Arab and African population. In addition the region was marginalized and neglected by the government from Khartoum, leaving it one of the most underdeveloped sections of the country. More on the history of the conflict see: M. W. Daly, "Darfur's Sorrow: A History of Destruction and Genocide, Cambridge, Cambridge University Press 2007; Salih, Mohamed "Understanding the Conflict in Darfur," Centre of African Studies University of Copenhagen, Occasional paper, May 2005, dostopno na: http://www.teol.ku.dk/cas/research/publications/occ._papers/muhamed_salihsamletpaper.pdf (14. 2. 2014); Bergholm, Linnea, "The African Union, the United Nations and civilian protection challenges in Darfur," Working paper series no. 63, Oxford Department of International Development, 2010; Report of the International Commission of Inquiry on Darfur to Secretary-General, UN Doc. S/2005/60 (31 January 2005) (hereinafter ICID report (2005)), p. 17 – 25; Jennifer L De Maio, "Is War Contagious? The Transnationalization of Conflict in Darfur", African Studies Quarterly, Vol. 11, Issue 4, 2010, pp. 30, 31.

[233] ICID report (2005).

[234] UNSC Resolution 1574 (2004), par. 13.

[235] Government of Sudan refused UN mission in its country from the beginning of the conflict.

[236] Communiqué of the 17th Meeting of the Peace and Security council, PSC/PR/Comm.(XVII), Addis Ababa, Ethiopia (20. October 2004).

[237] Communique stated that AMIS II should "protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the Government of Sudan." PSC/PR/Comm.(XVII) (2004), *supra* note 236.

confusion among soldiers and resulted in civilian casualties.[238] Negotiations nevertheless continued and in 2006 the Darfur Peace Agreement (DPA)[239] was signed, providing for, *inter alia,* power and wealth sharing and a Comprehensive Ceasefire.[240] Moreover AMIS's mandate was clarified in 2006 to: "to ensure a more forceful protection of the civilian population."[241] This agreement was not supported by all the armed resistance groups, some of them accused peacekeepers of siding with the Government[242] and engaged in direct clashes with AMIS combatants resulting in the death of 30 AMIS personnel. Eventually the Government of Sudan agreed to allow a UN mission in the country. Followed by the adoption of the UN's plan for three-phased support to the AU in 2007, AMIS was replaced by a more robust hybrid United Nations-African Union Mission in Darfur (UNAMID)[243] under the command and control of the UN.[244] UNAMID was established under Chapter VII of the UN Charter and has had a mandate "to take the necessary action, in the areas of deployment of its forces… and protect civilians, without prejudice to the responsibility of the Government of Sudan."[245] This mandate could arguably provide for a more robust action and goes beyond the peacekeeping mandate of its predecessor. Nevertheless until now UNAMID has not taken such robust action to protect civilians.

UNAMID represents a new way of close cooperation between the UN and regional organisations, providing for a unique structure in which the UN has full command and more importantly entirely subsidizes the mission's expenses. Despite Ibrahim Gambari's (African Union-United Nations Joint Special Representative for Darfur) belief that the situation in Darfur has improved,[246] the UNSC in its last resolution expressed concern because of the increasing number of refugees and continued violence, moreover it

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[238] Paul D. Williams (2011), *supra* note 71, p. 35.

[239] Darfur Peace Agreement 2006, Abuja, Nigeria (hereinafter DPA), available at: http://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf (25. 3. 2014).

[240] *Ibid*, Article 1, 2; Chapter II and Chapter III section A.

[241] AU Peace and Security Council, Communiqué of the 46th Ordinary Session, 10 March 2006.

[242] Tim Murithi, (2009), *supra* note 210, pp. 10; Paul D. Williams (2011), *supra* note 71, p. 36.

[243] Communiqué of the 66th Meeting of the Peace and Security council, PSC/AHG/Comm(LXVI), Abuja, Nigeria (30 November 2006). UNSC Resolution 1769 (2007). It is worth mentioning that UN was already present in the Sudan, but in the course of resolving the north-south problem and it was not until it accepted resolution 1556 and 1591, which imposed arms embargo on the parties to the Darfur conflict that it became more focused on Darfur. Before that the authorization of UNSC for the mission in Darfur was already given in the year 2006 through expansion of UNMIS in South Sudan to support the case-fire agreement in Darfur. But one of prerequisites was assent of Sudanese government which was not given at that time. Against this backdrop Abass sees the deployment of UNAMID as a compromise between Sudan, that opposed to UN intervention and UNSC which proposed expansion of UNMIS. Ademola Abass (2007), *supra* note 85, pp 433. See UNSC Resolution 1590 (2005) and UNSC Resolution 1706 (2006); UNSC Resolution 1556 (2004); UNSC Resolution 1591 (2005).

[244] UNSC Resolution 1769 (2007), para. 7.

[245] *Ibid*, para. 15.

[246] Interview with Ibrahim Gambari, African Union-United Nations Joint Special Representative for Darfur, available at: http://www.un.org/apps/news/newsmakers.asp?NewsID=65 (25. 3. 2014).

prolonged the mandate of UNAMID until august 2014.[247] This conflict represented a "litmus test"[248] for the AU's RtoP framework, but its response was largely criticised since the AU was unwilling to undertake robust intervention without the consent of the Government of Sudan.[249] Although it had a right to intervene under Article 4(h) CA AU and compensate for inaction for the international community, instead it took up a similar stance and waited for the approval of the Government. By the time the AU intervened in the county, large scale crimes were already being perpetrated. The Sudanese government was not just unable to protect its own citizens, but in fact committed heinous crimes in the country. It even prevented entry and deported humanitarian aid workers. The Mission's mandate was insufficient and its capacities were too limited to tackle these challenges and stop the fighting between armed groups. Also contrary to the principle of non-indifference was the AU's noncompliance with the ICC[250] indictment of Sudan's president and requests to the UNSC for cancellation of proceedings against President Omar al-Bashir.[251] Many scholars agree that this was a perfect example of an RtoP situation that would have to be dealt with, with a more robust action by the AU as well as by the UN. Even with the establishment of UNAMID under Chapter VII of the UN Charter, the accepted measures were too mild and the reaction of the international community was slow and too late. Success of the joint UN-AU mission has been limited since it was deployed with the consent of the Government and force is not to be used against it.[252] On the other hand some argue that the RtoP framework suggests that the international community should, as much as possible, work with the governments of states and that "government's consent before deployment is arguably more in line with R2P than immediate intervention."[253] Eight years after its deployment UNAMID is still present in the country, it therefore remains to be seen if more decisive action will be used and comprehensive evaluation of AU-UN cooperation is yet to be provided.

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[247] UNSC Resolution 2113 (2013).

[248] Emma McClean, "The Responsibility to Protect: The Role of International Human Rights Law", Journal of Conflict and Security Law, Vol. 13, Issue 1, (Spring 2008), pp. 142, cited as in George Klay Kieh, Jr., " The African Union, The Responsibility to Protect and Conflict in Sudan's Darfur Region" Michigan State International Law Review, Vol. 21, Issue 1, p. 45.

[249] Tom Kabau, (2012), *supra* note 124, p. 66.

[250] See ICC official website: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/Pages/a.aspx (24. 2. 2014). UNSC referred the situation in Darfur to the Prosecutor of the International Criminal Court in its resolution 1593. UNSC Resolution 1593 (2005).

[251] Assembly/AU/13(XIII) (2009), *supra* note 117.

[252] Tom Kabau, (2012), *supra* note 124, pp. 68, 69.

[253] Max W. Matthews, "Tracking the emergence of a new international norm: the responsibility to protect and the crisis in Darfur" Boston College of International and Comparative Law Review Vol. 31, Issue 1, Article 7 (21. 1. 2008), p. 151.

Somalia

Somalia similarly suffered from a long lasting Civil War which dates back to 1991 when Said Barre lost his position as a president in coup d'état. The humanitarian situation quickly deteriorated and only one year later, one and a half million Somalis were displaced (internally or externally) due to food and water supply shortcomings.[254] Recent reports of HRW 13 years later disclose serious human rights abuses[255] and describe Somalia as a 'failed state' making it an obvious RtoP situation. The international community's attempt to tackle the Somalian conflict was unsuccessful[256] and it was more than a decade later that IGAD mediation efforts led to the formation of a Transitional Federal Government (hereinafter TFG)[257] and set the foundations for the AU's engagement. TGF invited the AU to intervene, however it was only in 2007 that the AU took over the leading role for securing peace and security in the country and resurrected the idea of an African led mission. African Union Mission in Somalia (AMISOM)[258] was established with prior UNSC authorisation under Chapter VII of the UN Charter.[259] Its mandate did not include protection of civilians, the UNSC merely reaffirmed its Resolution 738 (2006) on the protection of civilians in armed conflict, and stressed "the responsibility of all the parties and armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian, human rights and refugee law, in particular by avoiding any indiscriminate attacks on populated areas."[260] Its mandate instead provided for support to the TFG, furtherance of dialogue and reconciliation, provision of humanitarian assistance and creation of favourable conditions that would enable a future UN mission to take over from AMISOM.[261] Being more of a peacekeeping mission than a peace-enforcing mission, AMISOM was trying to achieve a political solution in a country ravaged by Civil War. In

[254] Prunier, Gérard (1995), *supra* note 4 and Mulgueta, Kidist, "The Role of Regional and International organizations in Resolving the Somali Conflict: The Case of IGAD," Friedrich-Ebert-Stiftung, Addis Ababa 2009.

[255] Human Rights Watch (HRW) report 2014, Somalia. Available at: http://www.hrw.org/world-report/2014/country-chapters/somalia (18. 2. 2014).

[256] UN deployed three mission in Somalia: UNOSOM I (1992), a more robust mission UNITAF that included Operation Restore Hope and subsequently UNOSOM II with the peacebuilding mandate. But UN withdrew all forces in the 1995, when UN peacekeepers got involved in direct clashes with rebels.

[257] Mulgueta, Kidist (2009), *supra* note 254, pp. 26-32 and Tim Murithi in Fredrik Söderbaum and Rodrigo Tavares (2011), *supra* note 8, pp. 78-80.

[258] Communiqué of the 69th mtg. of the Peace and Security council, PSC/PR/Comm(LXIX), Addis Ababa, Ethiopia (19. January 2007). The main initiative for the mission came from Ethiopia. It has to be stressed, that Ethiopian acts were legally controversial, since Ethiopia itself was already involved in the conflict and according to the article 8 paragraph 9 of the Protocol relating to PSC: "Any Member of the Peace and Security Council which is party to a conflict or a situation under consideration by the Peace and Security Council shall not participate either in the discussion or in the decision making process relating to that conflict or situation."

[259] UNSC Resolution 1744 (2007), par. 4.

[260] UNSC Resolution 1772 (2007), para. 19.

[261] PSC/PR/Comm(LXIX) (2007), *supra* note 258, para. 8, 14.

addition it suffered from a lack of resources and did not enjoy support of Al-Shabaab, which conducted direct attacks on AMISOM. The mission was characterised by these failures and it was hard to imagine how AMISOM could possibly achieve peace in Somalia where violence was deteriorating and even spreading to the neighbouring countries.[262] The focal turning point for the mission came with the adoption of the AU-UN Strategic Concept[263] in 2012, a catalyst for the expansion of the troops, and broadening of the mandate which was expanded to the areas outside the capital and included authorisation "to take all necessary measures as appropriate to reduce the threat posed by Al Shabaab and other armed opposition groups." There was no explicit referral to the protection of civilians, the UNSC merely welcomed "the progress made by AMISOM in reducing civilian casualties during its operations" and urged "AMISOM to continue to undertake enhanced efforts in this regard."[264] The AU received financial support from various donors e.g. US and the EU. Furthermore, the UN expanded its support package for AMISOM[265] and intensified logistical and capacity support through the United Nations Support Office for AMISOM (UNSOA), a field support operation[266] with authority to use UN resources to support AMISOM.[267] This new structure of support to the AU and collaboration of the AU and UN was new and innovative. It led to development of the so called AMISOM model: *"African boots on the ground backed by western money."*[268] Due to the success of the model, the UN Secretary-General proposed the application of it to the other crisis situations in Africa, like Mali. A new, extensive partnership between the AU and UN has emerged that may help to implement RtoP in the upcoming challenges that are to be placed before the international community.

AMISOM can be considered as having achieved some peacekeeping success, in that it has contributed to the stabilisation of Somalia. The mission seems to have delivered on its mandate, i.e. contributing essential support to the TFG and its institutions. In its role as a peacekeeping mission, AMISOM has significantly

[262] Cecilia Hull Wiklund, "The Role of the African Union Mission in Somalia: AMISOM - Peacekeeping Success or Peacekeeping in Regress?" FOI Swedish Defense Research Agency report, FOI-R—3687-SE, 2013, Stockholm, pp. 17-18. Communiqué of the 245th mtg. of the Peace and Security council, PSC/MIN/1(CCXXXXV), Addis Ababa, Ethiopia (15 October 2010), para. 5.

[263] The strategic concept was finalized during an African Union-United Nations joint technical assessment mission which took place from 5 to 17 December 2011. The assessment mission concluded that the "conditions were ripe to deal a severe blow to Al-Shabaab." The AU-UN Strategic concept aimed at "joining all ongoing separate military operations in Somalia into a coordinated and coherent effort against Al-Shabaab" and represent a "chance to support the Transitional Federal Government in extending its authority across a wider area of southern and central Somalia". Special report of the Secretary-General on Somalia, (31 January 2012) UN Doc. S/2012/74 (2012).

[264] UNSC Resolution 2036 (2012).

[265] *Ibid*.

[266] Official website of United Nations Political Office for Somalia: http://www.unpos.unmissions.org/Default.aspx?tabid=9731&language=en-US (23. 4. 2014).

[267] Holt and Shanahan. 2005:62, cited as in Cecilia Hull Wiklund (2013), *supra* note 262, pp. 30.

[268] *Ibid*, p. 32.

> contributed in bringing Somalia to where it is today and it will continue to be of importance to the future of Somalia. For this reason, AMISOM has come to be seen by some observers as a blueprint for 'African solutions to African problems', with African boots on the ground supported by international resources.[269]

Even though the UNSC recently stressed that "conditions in Somalia are not yet appropriate for the deployment of a United Nations Peacekeeping Operation," we can expect AMISOM to be re-hatted by the UN mission in the near future. The true success of AMISOM and AU-UN collaboration is therefore yet to be seen.

Mali

Following a coup d'état, political violence spread in Mali and once again the regional organisation led the first response. This time the AU played a supporting role to ECOWAS, which led the African-led International Support Mission in Mali (AFISMA), approved by the UNSC.[270] AFISMA was mandated to take all necessary measures to support Malian authorities in their primary responsibility to protect the population[271] and had the potential to become as strong as AMISOM in Somalia. However, violence escalated and this time the international community undertook a different strategy: instead of buttressing the African mission, the latter was rather taken over by the UN-led mission, MINUSMA.[272]

Central African Republic

The Central African Republic (hereinafter CAR) became politically unstable in 2003 when Francoise Bozizé gained control, however, the situation was exacerbated in the beginning of 2013 when his opponents, the so-called Seleka group, angered because of Bozize's noncompliance with the Libreville agreement on power-sharing, unconstitutionally took power. The Panel of the Wise undertook a mission in order to help stabilize the country through inclusive political dialogue between President François Bozizé and rebel movements, but did not succeed in preventing the escalation of the violence. Soon reports spread about Seleka's alleged attacks on the Christian population and in response rebel groups formed and began to target Muslim populations. UN Officials described the

[269] Cecilia Hull Wiklund (2013), *supra* note 262, p. 41.
[270] UNSC Resolution 2085 (2012).
[271] *Ibid*, para. 9.
[272] UNSC Resolution 2100 (2013).

situation in CAR as "a humanitarian catastrophe of unspeakable proportions" and warned that massive ethno-religious cleansing is continuing in the county.[273] By April 2014 there were more than 760,000 internally displaced persons and more than 300,000 persons who sought refuge in neighbouring countries.[274] According to the Special Adviser on the Prevention of Genocide, widespread human rights violations are being committed in CAR which may constitute crimes against humanity or war crimes which necessitate an international response.[275] Similarly to Guinea and Côte d'Ivoire, the AU responded with suspension of CAR from the organisation[276] and also authorised deployment of the AU mission, African-Led International Support Mission in the Central African Republic (MISCA or AFISM-CAR) which replaced the already present but moribund Economic Community of Central African States (ECCAS) mission, Mission de Consolidation da la Paix en République Centrafricaine (MICOPAX). Having prior authorisation of the UNSC,[277] MISCA was mandated under Chapter VII with *inter alia*, "protection of civilians and the restoration of security and public order, through the implementation of appropriate measures."[278] Although MISCA was supported on the ground by the French mission and the AU has had financial support from the European Union (hereinafter EU) and the UN, MISCA nevertheless faced difficulties and pushed for the establishment of stronger international support through the deployment of a UN peacekeeping operation. In April 2014 the EU and UN therefore launched missions in support of MISCA. The EU deployed a temporary operation, EUFOR RCA, whereas the UN established the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) to work in parallel with MISCA, but foresaw the transfer of authority from MISCA to MINUSCA on 15 September 2014.[279] Once again the AU provided the first prompt international response by taking over the mission from an already existing but rather weak regional mission and once again the AU's mission is to be succeeded by a UN mission once the situation is more stable. The scope of the success of this mission and AU-UN collaboration is, however, to be seen in the future.

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[273] UNHCR chief decries "humanitarian catastrophe" in CAR, including massive ethno-religious cleansing, 12 April 2014, available at: http://www.unhcr.org/52fbc6e96.html (22. 4. 2014).
[274] UNSC Resolution 2149 (2014).
[275] The Statement of Under Secretary-General/Special Adviser on the Prevention of Genocide, Mr. Adama Dieng, on the Human Rights and Humanitarian situation in the Central African Republic, 1 November 2013, available at: http://responsibilitytoprotect.org/2013-11-01%20Statement%20on%20CAR%20at%20Aria%20Meeting%20of%20the%20UNSC%20(EN).pdf (18. 4. 2014).
[276] AU suspends CAR after rebels oust the president, 25 March 2013, available at: http://mg.co.za/article/2013-03-25-au-suspends-central-african-republic-after-rebels-oust-the-president (1. 5. 2014).
[277] UNSC inter alia underlined possibility of transformation of MISCA into UN Peacekeeping operation UNSC Resolution 2127 (2013), para. 28, 46-48.
[278] Communiqué of the 385th mtg. of the Peace and Security Council (19. July 2013), UN Doc. PSC/PR/COMM.2(CCCLXXXV), Addis Ababa, Ethiopia.
[279] UNSC Resolution 2149 (2014).

Lessons Learned: Emerging Blue Prints in Peace Operations as a Catalyst for the Possible Way Forward?

Even though responses to RtoP challenges in Africa remain of an *ad hoc* nature, some guidelines and blueprints can be derived from up-to-date AU practice. Especially with regard to peacekeeping, analyses of given conflicts in Burundi, Darfur, Somalia, Mali and CAR show that there is a growing trend in which the AU provides for the first international response and only *ex post facto* receives financial, capacity and logistical support from the UN. It is because of the AU's reluctance to forcefully intervene without the UNSC authorisation or *de facto* approval of the concerned state that these first responses were provided through deployment of peacekeeping missions, in which the AU's lightly armed, ill-equipped and poorly trained peace operations were sent to precarious situations where there was no peace to keep and were only later succeeded by more robust missions, with four possible scenarios: newly established UN mission takes over the AU's mission (Burundi and Mali); new, joint AU-UN mission is established (Darfur); UN solely approves AU's mission a more robust mandate and boosts its capacities (Somalia); or the UN deploys a mission on the ground to support the existing AU mission (CAR). What do these missions have in common? They all faced difficulties and numerous challenges on the ground and it was not until financial help and expertise from the UN was provided for them, that situations improved or stabilised.

Ambiguous Mandates of the AU's Peace Operations and Problems they are Facing when Protecting Populations

This new trend indicates the UN and AU's "divergent views of peace operations." The UN is mainly reluctant to send its troops in the absence of a comprehensive cease-fire agreement, while "the AU's peacekeeping posture in Burundi, Darfur and now Somalia points to the emergence of a different peacekeeping doctrine; instead of waiting for a peace to keep, the AU views peacekeeping as an opportunity to establish peace before keeping it."[280] However, can the AU's lightly armed peacekeepers establish peace before keeping it, and endorse their mandates to protect civilians in the most volatile situations of all, e.g. war crimes, crimes against humanity, ethnic cleansing and genocide? Analyses show that ambiguously defined mandates and lack of capacities are a major stumbling block to the AU's aspirations. In Darfur and Somalia the AU suffered numerous

[280] Report of the chairperson of the commission on the partnership between the African Union and the United Nations on Peace and Security: towards greater strategic and political coherence, PSC/PR/2.(CCCVII), January 9, 2012, para. 71. See also Boutellis, A., Williams P., D., "Peace Operations, the African Union, and the United Nations: Toward More Effective Partnership," International Peace Institute, April 2013, pp. 9, 10.

casualties, trying to keep the peace in an uncontrollable situation and the tipping point for both missions came only after the UN's stronger endeavour and acceptance of the three-phased plan for Darfur and Plan of Action for Somalia. Key to both of these plans is not only that the UN covers a large majority if not all expenses of the mission, but more importantly it provides for sensible and efficient distribution of these resources. With regard to the consequences of ambiguously defined mandates, Darfur can again serve as an example. AMIS was present in Darfur with the consent of government and its mandate presupposed it was the Government's responsibility to protect its civilian population, even though it was the Government itself that committed crimes against them. Peacekeepers were therefore confused between respecting those that are eligible to be protected and whether they can open fire upon government members perpetrating heinous crimes against the civilian population. Aware of the ambiguous mandates and problem of non-compliance of conflict parties with humanitarian and human rights law including protection of civilians, the AU adopted Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations in which it stressed that "a clear and achievable mandate is critical to the effective implementation of a protection of civilians' strategy." Moreover the "mandate should be described in precise and detailed terms" and the relationship and tensions between a "protection mandate and other mandated tasks needs to be considered."[281]

This brings us to another problem. All of the AU's missions were deployed with the consent of the state concerned and could therefore only use force in self-defence. In contrast to that, in more robust peacekeeping missions, "the use of force for self-defense is clarified to include the use of force in defense of the mandate or the mission."[282] If the state accepts welcoming neutral peacekeeping forces on the ground, the mandate of this mission cannot be changed in a way that allows for the use of force against the government, even if it is in fact the latter that perpetrates crimes against civilians. Even though DPKO/DFS Framework for Drafting Comprehensive Protection of Civilians Strategies in UN Peacekeeping Operations presupposes the "use (of) force against any party, including elements of government forces, where such elements are themselves engaged in physical violence against civilians,"[283] in such cases, arguably a new mission should be sent into the country, with a different mandate under Chapter VII of the UN Charter. However, this is unlikely to occur, since the AU as well as the UN, is reluctant to intervene without state consent. Peacekeeping missions are therefore often hazardous for peacekeepers as well as civilians since they "operate in a grey zone between more

[281] Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations (2010), *supra* note 197, para. 8.
[282] Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, p. 105.
[283] DPKO/DFS, Framework for Drafting Comprehensive Protection of Civilians Strategies in UN Peacekeeping Operations, 2011, para. 5.

traditional peacekeeping missions and military interventions, navigating questions of sovereignty, consent, impartiality, and mission goals,"[284] and are "challenged to protect civilians in difficult environments where a state's capacity may be severely limited, but where the mission must respect its sovereignty."[285] Luck rightfully stipulates:

> Too often mandates are not tailored either politically or materially to the realities on the ground. From an RtoP perspective, the lack of coherent doctrine underpinning the growing number of mandates that fall between traditional peacekeeping missions and armed engagement with a specific adversary or adversaries poses a particular challenge.[286]

Even though scholars have different opinions with regard to what kind of operations are to be sent into the country to prevent or stop the four RtoP crimes,[287] if a mission with a protection mandate is sent to such a situation as a first response it should have an unambiguous mandate and "must be appropriately resourced, configured and equipped to ensure it has the capacity to fulfil that mandate."[288] It was already stressed that RtoP primarily strives to solve problems through peaceful means; however as has been seen in Darfur and Somalia, when conflicts transcend the possibilities of such solutions, other, more decisive measures ought to be undertaken. At that point arguably a mission with a robust and clear mandate is to be sent to the country and is only to be succeeded by a peacekeeping mission when the situation allows for it, i.e. when there is peace to keep in the country.

Most certainly the main reasons for the above mentioned problems that the AU faces are lack of sufficient capacities, expertise, planning capacities, headquarters management, communication systems, and "operational guidance and military preparation for specific kinds of missions."[289] As Holt and Berkman argue:

> Pushing for protection mandates regardless of capacity could have perverse effects. If forces cannot implement them, they will erode the credibility of peacekeeping as an enterprise. They may also raise civilians' hopes and alter

[284] Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, p. 181.
[285] *Ibid*, p. 182.
[286] Edward C. Luck, "The United Nations and the Responsibility to Protect," The Stanely Foundation policy analysis brief, August 2008, p. 8.
[287] Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, p.72.
[288] Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations (2010), *supra* note 197, para. 9.
[289] Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, pp. 7-8 and 104.

> their behaviour, leaving them vulnerable to attacks from which the UN and other organisations cannot or will not protect them.[290]

There is no mechanism that would provide for capacity and expertise support to the AU of either the UN or the EU, upon which currently most of their activities invariably depend, even though it has *ex ante* approval of the UNSC. There is a "notorious discrepancy between what is demanded from the AU and (its) capacity to deliver."[291] Indeed, the UN and the EU[292] subsidize a large majority of the AU's peace and security endeavours, however, simple 'throwing of the money' to the AU does not bear fruit since its administration seems to be plagued with corruption.[293] AU missions can face serious problems once on the ground in hazardous conditions if they do not get the utmost needed support from the international community, not just in terms of resources but also in command expertise. This problem was addressed in the past through the Ten Year Capacity Building Programme[294] and African Peace Facility[295] and some proposals were made to bridge these problems.[296] However, they were never fully implemented and did not address this problem sufficiently. Indeed, even 5 years later the AU advocates and reiterates its call on the UNSC to:

> address in a systematic manner the issue of the predictability, sustainability and flexibility of the funding of AU-led peace support operations undertaken with the consent of the Security Council, through the use of assessed contributions, bearing in mind, that, in undertaking peace support operations, the AU is contributing to the maintenance of international peace and security in a manner consistent with the provisions of Chapter VIII on the UN Charter.[297]

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[290] *Ibid*, p. 186. See also Report of the Panel on the Peace Operations (The Brahimi Report), UN Doc. A/55/305-S/2000/809, 21. August 2000, para. 63.

[291] Rodrigo Tavares (2010), *supra* note 8, p. 33.

[292] See e.g. The African Peace Facility, European Peacebuilding Liaison Office Briefing Paper 3/2012, June 2012.

[293] Rodrigo Tavares (2010), *supra* note 8, p. 33.

[294] Declaration, Enhancing AU-UN Cooperation: Framework for Ten-Year Capacity Building Programme for the African Union, UN Doc. A/61/630 (12 December 2006).

[295] For detailed overview of EU-AU relationship and cooperation see: Malte Brosig, "Interregionalism at a Crossroads: African-European Crisis Management in Libya-a Case of organized Inaction?" *Journal of Intrnational Organization Studies* 4, no. 2 (2013).

[296] AU-UN panel e.g. recommended "the use of United Nations-assessed funding to support United Nations-authorized African Union peacekeeping operations for a period of no longer than six months. To qualify for such support, the panel believes that the following two conditions should be met: (a) a case-by-case approval by the Security Council and General Assembly; and (b) an agreement between the African Union and the United Nations that the mission would transition to United Nations management within six months." Report of the African Union-United Nations panel on modalities for support for African Union peacekeeping operations, UN Doc. A/63/666–S/2008/813 (31 December 2008), para. 11.

[297] Communiqué of the 397th mtg. of the Peace and Security Council at the level of heads of state and government (23 September 2013), page. 5.

AU-UN collaboration in the field of peacekeeping gained a lot of attention in the last 15 years and is indeed very important for the future of RtoP implementation. However, while this cooperation has developed relatively progressively on paper[298] there is nevertheless a lack of realisation in practice. The UN stressed numerous times that division of labour based on comparative advantages of both the UN and regional organisations could be a solution to address the growing number of peace and security matters on the UNSC's agenda,[299] and various mechanisms for their cooperation were formed.[300] However, as we have seen in practice, the UN always accepted *ad hoc* solutions to conflicts and failed to further concretize this relationship. In the beginning it seemed as if RtoP could finally bridge *ad hoc* AU-UN cooperation with legal framework, and provide for operationalisation and enhancement of regional conflict resolution engagement.

> RtoP could usefully reinforce longstanding UN efforts to improve its modes of collaborating with regional and subregional mechanism, as well as its commitment to building their capacities to anticipate, assess, respond and rebuild.[301]

However, the WSOD and reports of the UN Secretary-General failed to thoroughly address this question[302] and the establishment of predictable relationships and some sort of legal framework is therefore still to be shaped in the future. This could help to overcome the AU's capacity problems and *inter alia* provide for a more consistent RtoP implementation. Most certainly we cannot generalize and apply the same measures to all African conflicts, each represents a unique situation that has to be addressed and evaluated separately, however, with the same human rights protection standards. *Ad hoc* and case-by-case resolution of conflicts mainly fails to consistently and thoroughly address peace and security matters and fails to diminish different levels of attention currently given to numerous conflicts in Africa. The hybrid mission in Darfur or the AMISOM model in Somalia represent two new ways of more institutionalised cooperation with the UN that could set guidelines for further peace and security endeavours in Africa as well as in the other regions. Future collaboration of the AU and the UN is necessary for both institutions: the AU on the one hand needs expertise and capacities and on the

[298] Edward C. Luck (2008), *supra* note 286, p. 8.
[299] UN Doc. A/63/677 (2009), *supra* note 46, p. 27. See also UN Doc. A/59/565 (2004), *supra* note 30, para 270-273.
[300] Regional organisation's representatives met on High level meetings and later High-level Retreats convened by Secretary-General, since 2003 UNSC is regularly meeting with AU to discuss their cooperation in the matters related to peace and security, UN established Office to the African Union (UNOAU) in Addis Ababa etc. More on that see Marusa Veber (2014), supra note 8.
[301] Edward C. Luck (2008), *supra* note 286, p. 8.
[302] See Chapter 2.2.

other hand, the actual demands on the ground have shown that the UN alone is unable to address all the conflicts that are placed on its agenda, and its abilities to take decisive and timely actions are being challenged repeatedly. Despite criticism of the AU's engagements in conflict resolution in e.g. Darfur, it is "apparent that (African) states bear the brunt of the conflict—response burden at both the regional and international levels,"[303] and it remains questionable what kind of response the UN was to construct or indeed if there would be the same level of engagement in such conflicts in the absence of the AU.

Conclusion

The notion of regional organisations as potential contributors to RtoP implementation was present throughout the development of the normative concept of RtoP. A review of the UN documents reveals that regional organisations are to be considered important counterparts to the UN with regard to RtoP implementation. Their initiatives within first and second pillars, not just in respect to preventive and peaceful resolution mechanisms but also with regard to peacekeeping operations, are praised for having a huge potential and have already successfully contributed to the resolution of conflicts in the past, e.g. in Kenya and Burundi. Even though legally and properly applied military force is a "vital component of any workable system of collective security,"[304] the potential role of regional organisations in this context is less clear and should be developed in conformity with the UN Charter provisions in the future.

The AU's commitment to this evolving normative doctrine seems to be double-sided. On the one hand, the principle of non-indifference was at the vanguard of RtoP emergence, it was the first organisation to include the right to intervene in a member state to prevent mass atrocities in its Constitutive act, it accepted the first international legal instrument on a matter closely related to RtoP[305] and strongly advocated for possible intervention when the UNSC was deadlocked.[306] However, on the other hand, it failed to adhere to

[303] In 2012, Ethiopia (fourth), Nigeria (fifth), Egypt (seventh), Rwanda (sixth), and Ghana (tenth) constituted five of the top ten contributing States to UN operation. Jane Boulden, "The Rise of the Regional Voice in UN Security Council Politics," Whitehead Journal of Diplomacy & International Relations, Summer/Fall 2012, Vol. 13 Issue 2, p. 65.
[304] UN Doc. A/59/565 (2004), *supra* note 30, para. 183.
[305] Kampala Convention (2009), *supra* note 99.
[306] Ezulwini Consensus, *supra* note 84.

these aspirations, it was reluctant to intervene on the basis of its well-known Article 4 (h) CA AU and act promptly and decisively when faced with mass atrocity crimes on the continent. When combating security threats on the ground, member states sometimes failed to speak with one voice regarding RtoP,[307] which could be attributable to the fact that the AU encompasses a great variety of countries with different political systems and divergent preparedness to comply with accepted norms: from democratic (South Africa) to autocratic (Zimbabwe) establishments. The AU also seems to have accepted different standards and solutions in countries with similar intensities of human rights violations; it suspended Côte d'Ivoire, Guinea and CAR from the organisation, while in Zimbabwe it did not even take a clear stance on the illegitimacy of Mugabe's regime. The problems of impartiality and hegemony therefore remain vivid and since effectiveness and advancement of RtoP principles largely rely on the consistency with which they are applied,[308] this represents a stumbling block for the implementation of newly established AU mechanisms and RtoP.

Nevertheless, the AU bears primary responsibility for peaceful resolution of the conflicts and immense progress was made in the last decade in the initiation of a multitude of new institutions, e.g.: African Commission on Human and People's Rights, the African Court of Human and Peoples' Rights, the Panel of the Wise, CEWS and various *ad hoc* committees to address specific situations on the ground. It has to be stressed however, that 'dichotomy between appearance and capacity' remains significant and the process of regional development is not to be measured merely by number of created institutions, but political will and capacities to implement them also needs to be taken into account.[309] Arguably further potential for African RtoP implementation lies in prevention, the core of the doctrine itself, having the ability to forestall the use of coercive measures and providing for resolution of tensions at the very beginning, before they escalate into large scale conflicts and is therefore life- and time-saving as well as financially propitious. Indeed, through further operationalisation of presented preventive mechanisms, implementation of the first and second RtoP pillars has the potential to improve in the future. In that respect, combating impunity should be one of the AU's priorities in the future, being a very important segment of prevention and post-conflict rebuilding. With regard to the third pillar, missions with mandates between traditional peacekeeping and armed engagement are the most common way of combating widespread violence. Being

[307] In Libya AU's strong opposition to military intervention was enfeebled by voting in UNSC where African States voted in favour of UNSC Resolution 1973.
[308] UN Doc. A/63/677 (2009), *supra* note 46, para 62.
[309] Benedikt Franke, "Competing Regionalisms in Africa and the Continent's Emerging Security Architecture," African Studies Qaterly, Vol. 9, No. 3, 2007, p. 53.

an important complement to the use of coercive measures, sanctions, especially economic sanctions, should be used by the AU more often.

A review of the AU's peace and security engagements in the last 14 years also reveals a significant correlation between the amount of financial and capacity support from outside donors, especially the UN, and actual success of AU preventive actions as well as peace operations. It was in situations where the AU and the international community advocated for similar measures and were united in what steps ought to be undertaken for the resolution of tensions, that fruitful results were achieved. Arguably the resolution of the Kenyan crisis was successful and the AU's endeavours in Côte d'Ivoire and Libya were to a lesser extent, exactly because of support, or in the latter case lack of support, from the international community. In these two situations, there was still some room for peaceful resolution of the conflict if only the AU's endeavours would have started earlier and would have been supported by the international community. The AU's RtoP implementation with regard to peacekeeping and timely and decisive response within the third pillar is inseparably coupled and interrelated to effectiveness of AU-UN cooperation. In all the cases presented the AU or other African regional organisations provided for first international response. However, the situations started to improve only when *ex post facto* help from the international community was provided. Instead of *ad hoc* solutions, predictable partnership and some sort of legal framework for AU-UN cooperation should be shaped in the future. If the AU is to combat future threats on the continent independently, better preparedness of its peacekeepers should be provided through the evolution of the AU's peace operations doctrine, which represents "an institutional basis to prepare forces for specific missions."[310] Furthermore, the AU has to develop practice in conducting assessments with regard to RtoP crimes, either through fact finding missions or regional tribunals. In most cases the AU was criticised for doing too little too late, however this reflects challenges of broader international community with regard to RtoP, e.g. conceptual challenges, institutional preparedness and political preparedness.[311]

To conclude, in the last 15 years the AU has made immense progress in resolving African conflicts and organising its own security structure, through which it indeed significantly contributes to RtoP implementation, however, contemporary peace challenges require, not just regional actions, but a more "comprehensive approach (and) action across a range of organisations at multiple levels."[312] While the AU can provide for independent responses through peaceful resolutions and early warnings, the challenge for future RtoP

[310] Victoria K. Holt and Tobias C. Berkman (2006), *supra* note 190, pp. 101, 102 and 129.
[311] Gareth Evans (2008), *supra* note 204.
[312] Alex J. Bellamy and Charles T. Hunt (2010) *supra* note 202, p. 25.

implementation in Africa with regard to peacekeeping is to provide for coordinated, coherent and comprehensive responses of all actors, not just the AU but also the international community.

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