

**HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT:
DECONSTRUCTING REGIONAL LEGAL AND THEORETICAL FRAMEWORKS
FOR ACTION IN AFRICA**

**By
John-Mark Iyi**

Supervisor: Professor Garth Abraham

**Being a thesis submitted to the Faculty of Commerce, Law and Management, University
of the Witwatersrand, Johannesburg, in fulfillment of the requirements for the \award
of the degree of**

DOCTOR OF PHILOSOPHY

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ABSTRACT

The ECOWAS and AU peace and security legal frameworks have attracted little study amongst international law scholars despite its far-reaching normative innovations and implications for Africa, the UN Charter-based law of humanitarian intervention and international law in general. With the exception of a couple of writers, the few studies that exist have dismissed such provisions as article 4(h) of the AU Constitutive Act and article 10 and 25 of the ECOWAS Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security Protocol (MCPMRPS) as illegal treaties because of their incompatibility with articles 2(4), 24(1), 53(1) and 103 of the Charter. None of these studies examined the theoretical basis of these treaties and at a time the world is in search of a legal framework for the operationalisation of the Responsibility to Protect (R2P), it has become imperative to undertake an interrogation of the theoretical underpinnings of these treaties. My study tested the legal validity of the AU/ECOWAS intervention instruments using two theoretical frameworks: transformations of world constitutive process of authoritative decision and the illegal international legal reform theories. It also examined the validity of the treaties under conventional and customary international law. The thesis advanced three main arguments:

First, I argued that there are four constitutive processes in the international legal order. The UN was designed to establish a system with effective hierarchical institutions of decision making where unilateral acts would be unnecessary and so illegal. The UNSC failed in its duty as the authoritative decision-maker saddled with the responsibility of maintaining international peace and security and protecting human rights. On this basis the unilateral interventions treaties established by AU/ECOWAS are valid. Secondly, I argued that in a legal system such as the UN Charter-based system that poorly approximates justice and where there are few prospects for legal reform, a unilateral act of illegal international legal reform aimed at bringing about moral improvement in the law is permissible. The AU/ECOWAS treaties constitute illegal international legal reform because they seek to improve the law of humanitarian intervention to prevent future mass atrocities. Thirdly, I argued that under treaty law, there are several grounds for holding the AU/ECOWAS laws valid, basically because they constitute treaty-based interventions for which UNSC authorization is not required. I conclude that the fundamental assumptions on which the Charter was based have been radically altered and African states can plead change of

circumstances to obviate the application of the full weight of the Charter framework. Based on the above conclusions, I proposed the AU/ECOWAS treaty regimes for a theory of regional responsibility to protect as a theoretical framework for the operationalisation of the R2P in Africa.

DEDICATION

This work is dedicated to God for His love and faithfulness.

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To Avitus Agbor, a fellow pilgrim I met on this journey who managed to combine his experience with so much adventurism that he knew no dull moments, and succeeded in pulling me along on a few, even if far between, such adventures, I say thanks. To my fellow PhD candidates in the School of Law: Catherine Namakula, Garufu Paradzai, Luz Helena, Cosmos, Hilda, Phionna, Clement, Muiyiwa, Abiodun, I thank you all for the ideas and jokes we shared. I thank my friends, Fredrick Olotu, Sylvanus Omobude, Clarence, Osazeme, Patrick, and Friday for holding fort for me. I am grateful to my cousin Mercy and my nieces

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To all the Saints in the Vineyard.

John-Mark Iyi,

Johannesburg.

19 December 2013.

TABLE OF ABBREVIATIONS

AJIL	American Journal of International Law
ASIL	American Society of International Law
AU	African Union
AU/ECOWAS	African Union and Economic Community of West African States
AUPSC	African Union Peace and Security Council
ECOWAS MCPMRPS	Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping and Security
ECOWAS	Economic Community of West African States
EU	European Union
EJIL	European Journal of International Law
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Commission of the Red Cross
IDP	Internally Displaced Persons
ILC	International Law Commission
OAS	Organisation of American States
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
R2P	Responsibility to Protect
RHMI	Regional Humanitarian Military Intervention
SADC	Southern African Development Community
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

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DECLARATION

I, _____JOHN-MARK IYI_____,

declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

SIGNATURE

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Following the atrocities that characterised the 1990s, the controversial doctrine of humanitarian intervention and the use of force to protect human rights were tackled by the International Commission on Intervention and State Sovereignty (ICISS). The African Union (AU) and the Economic Community of West African States (ECOWAS) have reenacted the principle of collective security. But the old debates remain. The tension between sovereignty and human rights protection, the legality of unauthorised regional humanitarian intervention and the legitimacy of the international legal order have been recurrent themes. Africa's conflict zones have provided the cases for assessment of UN human rights protection capacity and the result has been dismal. The AU and ECOWAS treaties pose a new challenge to the UN Charter law on humanitarian intervention and may well be the paradigm for future action on the Responsibility to Protect (R2P).

1.2 AIMS

The aim of this research is to analyse the legal validity of the treaty provisions of the AU and ECOWAS on humanitarian intervention under current international law. Further, the research aims to consider how the legal and theoretical framework they provide could be adapted to form an alternative strategy for the implementation of the responsibility to react component of R2P in Africa. Against the background of the UN Charter prohibition of the use of force in article 2(4), the vesting of primary responsibility for the maintenance of international peace and security in the Security Council under article 24, the requirement of United Nations Security Council (UNSC) authorisation for any regional organisation's enforcement action under article 53, and the restriction upon UN members from entering into treaties inconsistent with their Charter obligations in article 103; the research examines through case study of humanitarian intervention and theory of international law, the legality of the treaties and the moral and legal theories underpinning their validity.

The research analyses specific provisions of the AU Constitutive Act¹ - article 4(h) and (j); and articles 3 and 4 of the African Union Peace and Security Council (AUPSC) Protocol which deals with humanitarian intervention.² Under the ECOWAS regime, I am concerned with articles 4(e), (g) and 58 of the ECOWAS Revised Treaty,³ paragraphs 18, 46 and 52 of the ECOWAS Framework for the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security; and articles 10, 22 and 25 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security.⁴ Using the arguments on the legal status of the doctrine of humanitarian intervention under Charter law and customary international law as background, the thesis will examine whether there exists a gap between the *lex lata* and *lex ferenda* in regional practice of humanitarian intervention and international law that these specific treaty provisions seek to bridge.

Since the AU Act and the ECOWAS Revised Treaty came into force there have been doubts about their legal validity.⁵ For example, article 4 of the AU Act provides: the Union shall function in accordance with the following principles:

¹ The Constitutive Act of the African Union (hereafter AU Act) was adopted on 11 July 2000 in Lome, Togo and by virtue of article 28 of the Act came into force on 26 May 2001 by deposit of instruments of ratification by two-thirds of members of the OAU. As of August 2003, all 53 Member states have ratified the Act available at <http://www.african-union.org/root/au/AboutAu/Constitutive_Act_en.htm> (accessed on 28 May 2010).

² The African Union Peace and Security Council Protocol (AUPSC Protocol hereafter) was adopted pursuant to article 5(2) of the AU Act which empowers the AU to establish such organs as it deems necessary. See article 5(2) AUPSC Protocol. The Protocol Relating to the Establishment of the Peace and Security Council of the African Union adopted at the 1st Ordinary Session of the Assembly of the African Union on 9th July 2002 in Durban South Africa available at <http://www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf> (accessed on 31 May 2010).

³ The Economic Community of West African States Revised Treaty (hereafter ECOWAS Revised Treaty) was adopted on 24th July 1993 at Cotonou in Benin Republic. See <<http://www.ecowas.int/sec/index.php?id=treaty&lang=en>> (accessed on 31 May 2010). (hereafter ECOWAS Revised Treaty).

⁴ At a meeting of Heads of State in Abuja between 30-31 October 1998, ECOWAS adopted the Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, reprinted in Jeremy I Levitt (ed) *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian, and Judicial Issues* (2003) 287 (hereafter the ECOWAS Framework). See also Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping and Security adopted at Lome, Togo on 10 December 1999 which entered into force upon adoption, (hereafter the ECOWAS MCPMRPS Protocol). Available at <<http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en>> (accessed on 2 June 2010).

⁵ See for example, David Wippman 'Pro-democratic intervention in Africa' in *Peacemaking from the South*:

(h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

(j) the right of Member States to request intervention from the Union in order to restore peace and security.

The AUPSC Protocol also provides that in discharging its duties, the Council shall inter alia be guided by

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity in accordance with Article 4(h) of the Constitutive Act.⁶

the right of Member States to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act.⁷

Under the ECOWAS treaty regime, the ECOWAS Revised Treaty provides for the ‘maintenance of regional peace, stability and security through the promotion and strengthening of good neighbourliness’⁸ and article 58 deals with regional security arrangements⁹ under which members are to maintain regular consultations between national border agencies,¹⁰ establish local and national joint commissions to look into problems between neighbouring states,¹¹ encourage cooperation and exchange between communities, towns and regions,¹² organise meetings between ministries on inter-state relations,¹³ employ good offices, mediation, conciliation and other peaceful means of dispute resolution where

⁶ AUPSC Protocol, article 4(j).

⁷ Ibid. See also AUPSC Protocol, article 4(k).

⁸ See ECOWAS Revised Treaty, article 4(e).

⁹ By virtue of article 58 (2) member states undertake to cooperate with ECOWAS to establish and strengthen mechanisms for the timely prevention and resolution of intra-state and inter-state conflicts. For an assessment of ECOWAS security arrangements and peacekeeping operations in West Africa, see Robert A Mortimer ‘ECOMOG, Liberia, and regional security in West Africa’ in Edmond J. Keller & Donald Rothchild (eds) *Africa in a New International Order: Rethinking State Sovereignty and Regional Security* (1996) 149-164; Margaret Aderinsola Vogt ‘The involvement of ECOWAS in Liberia’s peacekeeping’ in Edmond J. Keller & Donald Rothchild (eds) *Africa in a New International Order: Rethinking State Sovereignty and Regional Security* (1996) 165-183 (hereafter Vogt ‘The involvement of ECOWAS in Liberia’s peacekeeping’).

¹⁰ See ECOWAS Revised Treaty, article 58 (2)(a).

¹¹ See ECOWAS Revised Treaty, article (2)(b).

¹² See ECOWAS Revised Treaty, article 58(2)(c).

¹³ See ECOWAS Revised Treaty, article 58(2)(d).

necessary,¹⁴ and to provide election observers on the request of a member state.¹⁵ Specifically, it provides for ‘the establishment of a regional peace and security observation system and peacekeeping forces where appropriate.’¹⁶

It was on the basis of the above that the ECOWAS Framework and Protocols were both adopted.¹⁷ ECOWAS has the right to intervene militarily in the internal affairs of a member state if the situation threatens to trigger humanitarian disaster, poses a threat to sub-regional peace and stability or in response to an overthrow or threatened overthrow of a democratically elected government.¹⁸ The legal implications of these provisions for the theory and practice of humanitarian intervention (in Africa in particular and the world in general) have attracted little academic attention, especially from non-Africa international law scholars.¹⁹ This however does not diminish the broader implications, as they raise fundamental normative and practical questions engaged in this thesis.

1.3 Research Questions

- (i) Are the AU Act and ECOWAS Revised Treaty and Protocol granting the AU/ECOWAS a right of regional humanitarian military²⁰ intervention valid in

¹⁴ See ECOWAS Revised Treaty, article 58(2)(e).

¹⁵ See ECOWAS Revised Treaty, article 58(2)(g).

¹⁶ See ECOWAS Revised Treaty, article 58(2)(f).

¹⁷ See ECOWAS Framework op cit note 4. See Jeremy Levitt ‘The evolving intervention regime in Africa: from basket case to market place?’ (2002) 96 *ASIL Proceedings* 136 at 139 (hereafter Levitt ‘Evolving intervention’).

¹⁸ See article 25 of ECOWAS MCPMRPS Protocol.

¹⁹ B S Chimni ‘Third World approaches to international law: A manifesto’ in Anthony Anghie, Bhupinder Chimni, Karin Mikelson, Obiora Okafor (eds) *The Third World and International Order: Law, Politics and Globalization* (2003) 50, describing the scant regard paid to third world scholarship and interests in the development of international law. See also Michael Byers & Simon Chesterman ‘Changing the rules about rules? Unilateral humanitarian intervention and the future of international law’ in J L Holzgrefe & Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 191 (hereafter Byers & Chesterman ‘Changing the rules about rules’), asserting that important works of African writers are disregarded.

²⁰ The term ‘Humanitarian Military Intervention’ (HMI) was adapted from Nsongurua J Udombana ‘When neutrality is a sin: The Darfur crisis and the crisis of humanitarian intervention in Sudan’ (2005) 27 *Human Rights Quarterly* 1149 at 1151 note 13. In this thesis, I use the term ‘Regional Humanitarian Military Intervention’ (hereafter RHMI) to mean military interventions by regional organisations (including sub-regional

international law in view of the prohibition of the use of force by article 2(4) of the UN Charter? This question arises from the conflict between article 2(4), 2(7) of the Charter²¹ and article 4(h), (j) of AU Act, article 25²² (which empowers ECOWAS acting through the Mediation and Security Council and ECOMOG to conduct military operations to enforce sanctions, peacekeeping operations, humanitarian intervention to support humanitarian purposes).²³ Of significance is article 10(c) of the ECOWAS MCPMRPS Protocol which gives the body power to use force to intervene in the internal affairs of member states when certain conditions are met.²⁴ I will examine the arguments on the legality of humanitarian intervention below, but suffice it to mention here that many scholars agree that besides the exceptions in article 51 relating to self-defence and UNSC action under chapter VII of the Charter, use of force in the internal affairs of a state without its consent is illegal and a violation of its sovereignty.²⁵ But what happens when a state consents to future interventions by entering into a treaty like the AU Act and the ECOWAS Revised Treaty and Protocol?²⁶ Can a regional organisation rely on such treaty to intervene?²⁷ Is UNSC authorisation still required not

bodies) while ‘unilateral humanitarian intervention’ is used to denote military interventions not authorised by the UNSC.

²¹ ‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.’ See article 2(4), Charter of the United Nations, signed on 26 June 1945, 59 Stat. 1031, TS No 993 3 Bevans 1153.

²² See also paragraphs 18(i) and 46 of ECOWAS Framework. The Framework provides for military intervention by ECOWAS when: (1) a situation threatens to trigger humanitarian disaster, (2) a situation poses a serious threat to peace and security in the region and (3) in response to the overthrow or threatened overthrow of a democratically elected government. See Levitt ‘Evolving intervention’ op cit note 17 at 139.

²³ See paragraph 52 of ECOWAS Framework.

²⁴ The listed conditions are (1) where there is a threat of a humanitarian disaster or a serious threat to peace and security in the subregion; (2) where there have been serious and massive violations of human rights and the rule of law; and (3) where there has been an overthrow or attempted overthrow of a democratically elected government.

²⁵ Bruno Simma ‘NATO, the UN and the use of force: Legal aspects’ (1999) 10 *EJIL* 1 at 2 (hereafter Simma ‘Use of force’); *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of June 27, 1986, ICJ Report 14.

²⁶ Simma ‘Use of force’ op cit note 25 at 2-4 arguing that states cannot contract out of the norm of nonuse of force at the regional level.

²⁷ David Wippman ‘Treaty-based intervention: Who can say no?’ (1995) 62 *University of Chicago Law Review* 605 at 620 (hereafter Wippman ‘Treaty-based intervention’), highlighting the views of critics who claim that

withstanding such intervention treaties? What happens when a state decides to withdraw its membership from these organisations at the point of intervention? Which regime regulates the relationship – is it the Charter law of nonuse of force or the regional customary law doctrine of intervention? It has been argued that nonuse of force is now a norm of *jus cogens* and as such cannot be derogated from²⁸ even via a treaty arrangement.²⁹ However, I will argue that while this may be so, the doctrine of Regional Humanitarian Military Intervention (RHMI) codified in AU and ECOWAS laws represent a change in the normative character of the principle of nonuse of force and thus constitutes a new regional customary international law in Africa³⁰ since a third exception to the nonuse of force rule includes developments in customary international law which may modify article 2(4).³¹ But does it include regional customary international law? I interrogate whether the AU/ECOWAS practice satisfies the criteria for the formation of a new rule of regional customary international law.

- (ii) By entering into treaties whose provisions are contrary to article 53(1) of the UN Charter, did AU/ECOWAS countries violate their Charter obligations under article 103? The AU/ECOWAS treaties appear to *violate* international law in this respect, but

‘any treaty purporting to authorise states to use force against another state without its contemporaneous consent necessarily violates article 2(4) and therefore also article 103 of the UN Charter’ and so void.

²⁸ On the nature of norms of *jus cogens*, see article 53 and 64 of the Vienna Convention on the Law of Treaties signed at Vienna on 23 May 1969 and entered into force on 27 January 1980, U.N.T.S. 1155, 331.

²⁹ See Wippman ‘Treaty-based intervention’ op cit note 27 at 611 discussing the ‘freedom-to-contract’ and ‘Jus Cogens’ models of treaty-based intervention. Cf. Ian Brownlie *International Law and the Use of Force by States* (1963) 152 (hereafter Brownlie ‘Use of Force’); Oscar Schachter ‘The legality of pro-democratic invasion’ (1984) 78 *AJIL* 645; Fernando R. Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2 ed) (1997) (hereafter Teson, ‘Law and Morality’) at 147 note 42 where he gives a list of writers opposed to the legality of humanitarian intervention, but for authors supporting the legality of the doctrine, see the writers he lists at page 148 note 44.

³⁰ Allen Buchanan ‘Reforming the international law of humanitarian intervention’ in J L Holzgrefe & Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 138. See generally, Levitt ‘Evolving intervention’ op cit note 17 supporting the emergence of a new intervention regime in Africa.

³¹ Academic Council of the United Nations ‘Embracing the elephant: Perspectives on humanitarian operations’ A Policy Brief of the Academic Council of the United Nations System and the American Society of International Law Workshop on International Organisations, University of Namibia (5 – 18 August, 2001) 10. available at <http://www.drjeremylevitt.com/files/Embracing_the_Elephant.pdf> (accessed on 20 November 2010). Treaties could be modified by customary international law. See the preamble to the Vienna Convention on the Law of Treaties 1969. See also *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (1962) Merits, Judgment of 15 June 1962 ICJ Report 6 at 33-5, stating that the subsequent practice of parties to a treaty could modify the treaty.

as I argue here, these treaties actually comply with and further the purposes of the Charter while reinforcing the legitimacy of international law.³² The treaties while acknowledging that the UNSC has primary responsibility for the maintenance of international peace and security however do not require the AU/ECOWAS to obtain UNSC approval before undertaking enforcement action within their jurisdictions as provided by article 53(1) of the Charter.³³ Assuming it can be argued that they are valid because the prohibition on the use of force under the Charter is not absolute,³⁴ can the AU/ECOWAS states initiate treaties that limit the right of future action of a sovereign state?³⁵ Does this invalidate the AU/ECOWAS treaties or do the treaties themselves represent evidence of normative change in regional customary international law that has received wide acceptance within the given community of states (Africa) and with a capacity to modify general international law on the use of force?³⁶

- (iii) African states are traditionally noninterventionists. What informed the willingness to cede a part of their sovereignty to the AU/ECOWAS while very reluctant to do the same with the UN?³⁷ To what extent do such considerations influence the fidelity to the current international legal order by African states or their preparedness to act in violation of it?

³² See generally Allen Buchanan 'From Nuremberg to Kosovo: The morality of illegal international legal reform' (July 2001) 111 *Ethics* 673 (hereafter Buchanan 'From Nuremberg'), exploring the theory of illegal international legal reform and how illegal acts of states are used as instruments for international law reform.

³³ See AU Act article 4(h) and articles 16 and 17 of AUPSC Protocol on the relationship between the AU and the UN. It gives the AUPSC primary responsibility for the maintenance of peace, security and stability in Africa. This is inconsistent with article 24 of the UN Charter which confers those powers on the UNSC. See article 10 and 25 of ECOWAS MCPMRPS Protocol and paragraphs 18, 46 & 52 of ECOWAS Framework.

³⁴ See Teson 'Law and Morality' op cit note 29 at 148 notes 44.

³⁵ Wippman 'Treaty-based intervention' op cit note 27 at 678 arguing that states can sign such treaties so long as it is signed by the de jure government.

³⁶ Mark E Villiger *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sces* 2 ed (1997) 56 (hereafter Villiger 'Customary International Law and Treaties').

³⁷ Jeremy Levitt 'The Peace and Security Council of the African Union: The known unknowns' (2003) 13 *Transnational Law & Contemporary Problems* 109 at 127 (hereafter Levitt 'Peace and Security Council'); Levitt 'Evolving intervention' op cit note 17 at 137. It has been observed that there is a 'perception disparity in the assistance given, to displaced persons from Kosovo, as opposed to that given to Africa.' See Jeremy Levitt 'Conflict prevention, management, and resolution: Africa – regional strategies for the prevention of displacement and protection of displaced persons: The cases of the OAU, ECOWAS, SADC, and IGAD' (2001) 11 *Duke Jnal of Comparative and International Law* 39 at 71 (hereafter Levitt 'Conflict prevention') citing Sadako Ogata 'Promoting peace and security: Humanitarian assistance to refugees in Africa', briefing at the formal session of the Security Council (July 26, 1999).

(iv) What theory underpins the challenge posed to the international legal order by the AU/ECOWAS humanitarian law regime and what are the normative and practical implications?³⁸ When states consent to a treaty such consent operates to suspend the normal principles of international law that otherwise regulate the relationship.³⁹ Arguably this includes intervention, but some scholars argue that where the legal norm involved is one of jus cogens, states cannot contract to suspend such norm.⁴⁰ At the normative level, the key provisions in the AU/ECOWAS treaties indicate a deliberate departure from the UN humanitarian intervention law regime to pursue the protection of human rights, peace and security and stability in Africa outside the UN framework, cooperating when possible and necessary, but retaining the authority to decide on matters of intervention.⁴¹ I will argue that this is an attempt to start a process of reforming the international legal order from without rather than from within the UN. The research will attempt a synthesis of two theoretical approaches to validate this claim: Transformation of world constitutive process model of the Realist theory of international law⁴² and the illegal international legal reform model of the nonideal theory of international law.⁴³ I will briefly discuss these theories and their application in this research.

³⁸ Levitt argues that the AU/ECOWAS treaties are not inconsistent with the UN Charter as long as they affirm and reinforce UN's key objectives – promote, maintain and keep international peace and security albeit through regional action. Even if the provisions were seemingly incompatible with the Charter, it does not render the treaties void or voidable whether in whole or in part. See Levitt 'Peace and Security Council' op cit note 37 at 127.

³⁹ Roberto Ago *The International Law Commission Eight Report on State Responsibility* (1979) 2 *Yearbook of International Law Commission* 1, 31-32 UN Doc A/CN. 4/318.

⁴⁰ Ibid.

⁴¹ See Wippman 'Pro-democratic intervention' op cit note 5 at 145, observing that ECOWAS is apparently arrogating to itself the authority to decide on when to use force to intervene in its jurisdiction and is apparently 'less concerned with the legal basis of such intervention than building the institutional capacity to respond to emergencies in the subregion.'

⁴² W M Reisman 'Unilateral action and the transformations of world constitutive process: The special problem of humanitarian intervention' (2000) 11:1 *EJIL* 3 (hereafter Reisman 'Unilateral action'); Myres S McDougal, Harold D Lasswell & W Michael Reisman 'The world constitutive process of authoritative decision' in Richard A Falk and Cyril E Black (eds) *The Future of the International Legal Order: Trends and Patterns* (1969) 73 at 74. See also Tom J Farer 'Humanitarian intervention before and after 9/11: Legality and legitimacy' in J L Holzgrefe & Robert O Keohane *Humanitarian Intervention* op cit note 19 at 53, 65-66 (hereafter Farer 'Humanitarian intervention before and after 9/11').

⁴³ Buchanan 'From Nuremberg' op cit note 32 at 673.

- (v) What will be the normative consequences of the above for the UN Charter law on nonuse of force? How will it affect the United Nation's capacity for humanitarian intervention, particularly in Africa? Does opinio juris support the emergence of a doctrine of RHMI in Africa? Can AU/ECOWAS treaties and state practice subsequently operate to modify the Charter law and general customary international law on the use of force? The most obvious consequences would be positive and negative. Negatively such conflict could weaken the UN system normatively.⁴⁴ But I will argue in this thesis that this impact will most likely be temporary as the regional customary international law could produce a 'ripple effect' that will result in a modification of, and produce a more responsive general customary international law and thereby reinforce the legitimacy of international law.⁴⁵ Jean Allain argues, and I think correctly too, that the real challenge to the UN system on the use of force is its own failures to respond to humanitarian emergencies.⁴⁶
- (vi) How can the RHMI model be adopted to foster a global consensus on implementing the responsibility to react component of the responsibility to protect⁴⁷ principle? Since the 1990s, ECOWAS has consistently pursued a practice of unauthorised humanitarian intervention.⁴⁸ The case for regionalisation of humanitarian military intervention has been advocated severally in the past⁴⁹ and even recently too.⁵⁰ NATO and ECOWAS

⁴⁴ See Andreas Paulus & Johann Ruben Leib 'Article 103' in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary* 3 ed (2012) 2114, (hereafter Paulus & Leib 'Article 103'). In his contribution to the second edition of the volume Rudolf Bernhardt argued that treaties of intervention like the AU/ECOWAS imperil the entire international legal order. See Rudolf Bernhardt 'Article 103' in Simma Bruno et al (eds) *The Charter of the United Nations: A Commentary* 2 ed (2002) 1297 (hereafter Bernhardt 'Article 103').

⁴⁵ Kristin M Haugevik Regionalising the responsibility to protect: Possibilities, capabilities and actualities' (2009) 1 *Global Responsibility to Protect* 346 at 351 (hereafter Haugevik 'Regionalising the Responsibility to Protect'), arguing that the failure by the UN to halt humanitarian crises shows it is 'fundamentally flawed and opens the possibilities for regional bodies. ...' However, she is opposed to a 'full' regionalisation strategy because it could lead to pursuit of national interests and hegemonic aspirations.

⁴⁶ Jean Allain 'The true challenge to the United Nations system of the use of force: The failures of Kosovo and Iraq and the emergence of the African Union' (2004) 8 *Max Planck United Nations Yearbook* 237 at 261.

⁴⁷ R2P hereafter.

⁴⁸ For example, ECOWAS humanitarian intervention operations in Liberia in 1990, Sierra-Leone in 1997 and Cote d'Ivoire in 2000.

⁴⁹ W Michael Reisman & Myres S McDougal 'Humanitarian intervention to protect the Ibos' in Richard B. Lillich (ed) *Humanitarian Intervention and the United Nations* (1973) 167-195 at 179 (hereafter Reisman & McDougal 'Humanitarian intervention to protect the Ibos'); Boutros Boutros-Ghali *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary General A/47/277-S/241117*

have been the most proactive in the use of RHMI and the AU/ECOWAS treaty regime is a direct effort to provide the legal backing for the existing practice and moral imperatives.⁵¹ At a time when the world failed at the 2005 World Summit to work out a useful framework for implementing the responsibility to react by use of force under R2P, does the AU/ECOWAS humanitarian intervention legal framework provide sufficient scope and authority for such implementation in Africa?⁵² As observed by some scholars ‘it is extremely unlikely that workable criteria for a right of humanitarian intervention without UNSC authorisation will ever be developed to the satisfaction of more than a handful of states.’⁵³

- (vii) What mechanism is required for the implementation of the responsibility to react component of R2P and what are the obstacles? If the AU/ECOWAS treaties are valid, how do their frameworks overcome these obstacles? The ICISS in its report achieved two main objectives both normative in character: a reinterpretation of sovereignty that shifts emphasis away from a ‘right to intervene’ to a ‘responsibility to protect’,⁵⁴ and an enlargement of the scope of this responsibility to include prevention, reaction and

June, 1992. (Available at <http://www.un.org/Docs/SG/agpeace.html> <http://www.un.org/Docs/SG/agpeace.html>). (accessed on 30 March 2010). See Wippman ‘Treaty-based intervention’ op cit note 27 at 609, suggesting that states may soon be persuaded to accept Stanley Hoffman’s proposal for a multilateral treaty regime in which the parties would consent to intervention in their internal affairs to halt mass atrocities. See also the Report of the Secretary General on the Work of the Organisation A/54/1 September 20, 1999, where Kofi Annan observed that states may be justified to take unilateral action if the UNSC is paralysed in compelling cases of massive human rights violations.

⁵⁰ See the Report of the International Commission on Intervention and State Sovereignty (2001) available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (hereafter ICISS) (accessed on 24 June 2010).

⁵¹ Patricia Taft & Jason Ladnier ‘Realising “Never Again”: Regional capacities to protect civilians in violent conflicts’ (January 2006) *Fund For Peace* 8 at 11 available at http://www.fundforpeace.org/web/images/pdf/realizing_never_again.pdf (accessed on 25 May 2010) (hereafter Taft & Ladnier ‘Realising “Never Again”’).

⁵² See Vogt ‘The involvement of ECOWAS in Liberia’s peacekeeping’ op cit note 9 at 168-9. See para 138 & 139 of the World Summit Outcome Document 2005 A/60/L.1, available at [www.responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://www.responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf) (accessed on 24 June 2010).

⁵³ Byers & Chesterman ‘Changing the rules about rules?’ op cit note 19, at 202.

⁵⁴ Penelope Simons ‘From intervention to prevention’: The emerging duty to protect’ available at <http://www.worlddialogue.org/content.php?id=328&PHPSESSID=b14321baa899b4533a4962c2609f3448> (accessed on 24 June, 2010).

rebuilding.⁵⁵ My research is concerned with the responsibility to react through military force as a sub-set of the R2P component. Through a theoretical conceptualisation, it engages the main challenges facing R2P in this respect⁵⁶ - conceptual, institutional and political. It argues that while controversy still surrounds the scope of R2P at the doctrinal level at the UN, the AU/ECOWAS treaty regimes already captured the essentials of the doctrine by encompassing war crimes, crime against humanity and genocide.⁵⁷ However, there are definitional questions as the crimes are not defined in the treaties. The thesis will also show that regional treaties can provide the institutional framework for the use of force to implement R2P.⁵⁸ Drawing on the analysis of the AU/ECOWAS, I hope to show that the political obstacle to implementing R2P could be reduced through a regional arrangement like the AU/ECOWAS frameworks.

- (viii) How will the question of abuse that article 2(7) of the Charter seeks to curtail be addressed within the framework?⁵⁹ The AU/ECOWAS is founded on the principle of equality of states and though with organs similar to the UN, their constitutive documents differ.⁶⁰ The frameworks situate victims at the centre of the humanitarian intervention law regime and confirm the findings of an ICRC research that two-thirds of people in war ravaged societies actually want more intervention.⁶¹

1.4 LITERATURE REVIEW

⁵⁵ Gareth Evans 'Ending mass atrocity crimes once and for all' Law Week Oration 2009, Law Foundation and Melbourne Law School, Melbourne, 22 September, 2009, available at <<http://www.lawisanasswingate.blogspot.com/2009/11/professor-hon-gareth-evans-qc-ao-html>> (accessed on 26 June 2010).

⁵⁶ Ibid.

⁵⁷ See AU Act, article 4(h).

⁵⁸ See AU Act, article 13 (1), (2), (3) establishing the African Standby Force and stating its roles. See also article 17 ECOWAS MCPMRPS Protocol establishing the ECOMOG.

⁵⁹ See Thomas Weiss 'Kenya and R2P' in Piet de Klerk et al (eds) *A Major Boost for the UN: A Collection of Essays on the Occasion of the Departure of Frank Majoer from New York* (2009) 107 at 112 available at <<http://www.netherlandsmission.org/files/pdf/amajoerboostfortheun.pdf>> (accessed on 20 April 2010).

⁶⁰ See generally, Nsongurua J Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western International Law Jnl* 69.

⁶¹ Greenberg Research 'The people on war report' (1999) *International Committee of the Red Cross* (Geneva) xvi available at <http://www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf> (accessed on 21 April 2010).

Since the Treaty of Westphalia of 1648, states have traditionally claimed exclusive jurisdiction over their citizens and have been averse to any criticism of how they treat their nationals as undue interference in their internal affairs.⁶² But that has been altered by the structure of the modern world of interdependence which has raised the level of international concerns with human rights with the international community developing more intrusive norms and mechanisms for monitoring and protecting human rights. The oldest of these is probably the doctrine of humanitarian intervention. This doctrine did not have a precise meaning in the writings of early jurists and for a very long time, its scope and content remained unclear.⁶³ Early state practice of the doctrine was based on ‘religious solidarity’ and it was only in the nineteenth century that it began to acquire a specific and technical meaning.⁶⁴ But its legal validity before and after the Charter came into force remains controversial.

1.4.1 *The Pre-Charter Era*

Writing in the seventeenth century, Hugo Grotius approved of humanitarian intervention but also recognised the likelihood of its abuse.⁶⁵ Some writers in that period supported the

⁶² For a detailed treatment of the contents and protection of human rights see Henry J Steiner, Philip Alston & Ryan Goodman *International Human Rights in Context: Law, Politics, Morals* 3 ed (2008); R McCorquodale & R Fairbroth ‘Globalization and human rights’ (1999) 21 *Human Rights Quarterly* 739.

⁶³ See P H Winfield ‘The history of intervention in international law’ (1922/23) 3 *British Yearbook of International Law* 130, discussing how the meaning of the world has changed over several centuries. At some point in time, it meant diplomatic pressure, espionage, infiltration, sabotage, assassination, embargo, threat, display of force, economic disruptions, subversion of government and direct use of military force were termed intervention at different times. See for example, Brownlie ‘Use of Force’ op cit note 29 at 44 stating that interference in the affairs of a state even by mere diplomatic protest is tantamount to intervention.

⁶⁴ For a review of the historical development of the doctrine, see Jeane-Pierre L Fonteyne ‘The customary international law doctrine of humanitarian intervention: Its current validity under the U.N. Charter’ (1974) 4 *California Western International Law Jnl* 203 at 205 footnotes 7 (hereafter Fonteyne ‘The customary international law doctrine’); L B Sohn & T Buergenthal, *International Protection of Human Rights* (1973); Nicholas Onuf ‘Humanitarian intervention: The early years’ (2004) 16 *Florida Jnl of International Law* 753, offering a historical development of the doctrine from an international relations perspective, (hereafter Onuf ‘The early years’); R George Wright ‘A contemporary theory of humanitarian intervention’ (1988-9) 4 *Florida International Law Jnl* 435.

⁶⁵ Ryan Goodman ‘Humanitarian intervention and pretexts for war’ (2006) 100 *AJIL* 107. ‘Kings and those who are with a Power equal to that of Kings, have a right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise for those which do not particularly concern them, but which are, in any persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of Consulting the Benefit of human Society, by Punishments that War is lawful against those who offend against Nature.’ Hugo Grotius *De Jure belli ac Pacis* Bk 2 chapter 20 section 40, 1 & 4 (English transl (1738) 436 –

validity of the doctrine so long as it was civilized nations who intervened in uncivilized nations.⁶⁶ Others argued that there was a customary right of humanitarian intervention before 1945 and as Fonteyne submits, state practice supports this conclusion.⁶⁷ This thesis finds it necessary briefly to relate the historical background to the extent that I draw on it to support my argument that the AU/ECOWAS interventionist treaties are anything but novel because state practice of humanitarian intervention in the pre-charter era was based on the treaty system.⁶⁸ This is significant because if such treaty rights existed under customary international law in the pre-Charter era did that right survive the prohibition of use of force by the Charter? If yes, what is the implication for the AU/ECOWAS treaties? If no, were there assumptions or conditions precedent implicit or explicit in the Charter, the fulfillment of which was to be the basis for the surrender of the rights?⁶⁹ Were those conditions fulfilled afterwards? If no, how does it affect the validity of the AU/ECOWAS treaties under the fidelity to law argument (in this case compliance with articles 2(4) 24, 53 and 103) and their actions under the world constitutive process theory?

4389, as cited in L C Green 'General principles of human rights' (1955) 8 *Current Legal Problems* 162. The term has been defined as 'the reliance upon force for the justifiable reason of protecting the inhabitants of another state from treatment which is so arbitrary or abusive as to exceed the limit of that authority within which the sovereign is presumed to act within reason and justice.' See Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* (2001) 1 quoting Ellery C Stowell *Intervention in International Law* (1921) 53 (hereafter Chesterman 'Just War or Just Peace?').

⁶⁶ Richard B Lillich & Frank C Newman *International Human Rights: Problems of Law and Policy* (1979) 499.

⁶⁷ Fonteyne 'The customary international law doctrine' op cit note 64 at 235-6. See also Richard Falk *Legal Order in a Violent World* (1968) 161.

⁶⁸ For example, in 1827, Great Britain, France and Russia under the Treaty of Locarno intervened in Greece to protect Christians which culminated in the independence of Greece from Turkey in 1830. See Onuf 'The early years' op cit note 64 at 765. See Chesterman 'Just War or Just Peace?' op cit note 65 at 32 asserting that the intervention in Greece 'is at best a questionable precedent for the doctrine' and that there is no conclusive proof that a doctrine of humanitarian intervention existed in the pre-charter era. Other examples include the intervention of France in Syria in 1860 to stop the massacre of Christians; the Russian intervention in Bosnia, Herzegovina and Bulgaria in 1877 based on the Treaty of London. See generally, Nicholas Onuf op cit note 64.

⁶⁹ W Michael Reisman, 'Criteria for the lawful use of force in international law' (1985) 10 *Yale Jnl of International Law* 279 at 279-80 (hereafter Reisman 'Criteria for the lawful use of force'). See also R George Wright 'A Contemporary theory of humanitarian intervention' (1988-9) 4 *Florida International Law Jnl* 435 at 439, discussing the issue and concluding that the approach is doubtful. Richard B Lillich 'Forcible self-help by states to protect human rights' (1967) 53 *Iowa Law Review* 325, arguing for unilateral or collective humanitarian intervention in the absence of UN action.

1.4.2 *Post-Charter Era*

No sooner was the UN Charter adopted than it was realised that ‘there was tension between the UN’s primary purpose—maintenance of international peace and security and a secondary purpose that was fast becoming important—promotion and protection of human rights ...’⁷⁰ Various theories surround the doctrine and I consider the disciplines of law and international relations.

1.4.3 *International Relations Theories of Humanitarian Intervention*

Under the UN Charter, international relations view nonintervention as a norm of friendly relations and intervention as a violation of state sovereignty.⁷¹ Within the field of international relations, the debate has been between Pluralists and Solidarists.⁷²

1.4.3.1 Pluralist Objections to Humanitarian Intervention

To pluralists, states, and not individuals are the rights holders in international law and as such, attempts to use force to enforce individual rights violate the principles of sovereignty, non-interference and non-use of force as well as endangers inter-state relations, international order and stability.⁷³ The society of states depends on a rules-based system that allows states to protect ‘the values of individual life and communal liberty’ within their territories.⁷⁴ Pluralists prioritise order over justice. For example, it is argued that the protection of individual rights within states depends on the existence of a minimum level of harmony and

⁷⁰ Richard B Lillich, ‘Kant and the current debate over humanitarian intervention’ (1997) 6 *Jnal of Transnational Law and Policy* 397 at 399. See also the preambles and articles 1(1), (3), 2(4), 2(7), 55 and 56 of the UN Charter.

⁷¹ Christopher C Joyner & Anthony Clark Arend ‘Anticipatory humanitarian intervention: An emerging legal norm?’ (1999-2000) 10 *Jnal of Legal Studies* 27 at 27.

⁷² For an analysis of the subject from international relations perspective, see Sean D Murphy *Humanitarian Intervention: the United Nations in an Evolving World Order* (1996); Oliver Ramsbotham & Tom Woodhouse *Humanitarian Intervention in Contemporary Conflicts: a Reconceptualisation* (1991).

⁷³ Nicholas J Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000) 11 (hereafter Wheeler ‘Saving Strangers’).

⁷⁴ Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4 ed (2006) 108 (hereafter Walzer ‘Just and Unjust Wars’).

stability in international society,⁷⁵ because any attempt at recognising a right of unilateral humanitarian intervention when there is no central authority and without states agreeing on what 'human rights' means could undermine the international system.⁷⁶ Hedley Bull argues that this explains why states have refused to embrace the practice and it is in the best interest of all that humanitarian intervention should remain prohibited.⁷⁷ But is this assertion still true today in the face of the universalisation and international concern with human rights? Does it mean that states will accept the doctrine once it is codified in a convention or treaty like the AU/ECOWAS?

1.4.3.2 Solidarists Argument for Humanitarian Intervention

Solidarists argue that sovereignty is not absolute and that states must meet a minimum standard of human rights to be eligible for the protection accruing from sovereignty and nonintervention. Michael J Smith argues that because states' rights derive from individual rights, when a state violates the rights of individuals it loses its legitimacy and moral right to 'full sovereignty'.⁷⁸ In such cases, intervention by other states is not only allowed,⁷⁹ it is also a moral duty.⁸⁰ Solidarists base their argument on the ground that national boundaries are mere artificial creations that do not have the authority to limit our moral responsibility to fellow human beings and as such, states not only have a domestic responsibility to observe human rights but also an international responsibility to protect human rights even at the risk of their own soldiers.⁸¹

⁷⁵ See Wheeler 'Saving Strangers' op cit note 73 at 29 reviewing some of these arguments.

⁷⁶ Hedley Bull 'Conclusion' in Hedley Bull (ed) *Intervention in World Politics* (1984) 181-95 at 193. Realists advance the following main arguments against humanitarian intervention. First they argue that it will always be open to abuse. Second, relying on examples of selective intervention, they argue that intervention by states will always be driven by national interests and never wholly by humanitarian motives and at best by a convergence of purposes. Third, they submit that states have no right to risk the lives of their soldiers to protect strangers in foreign lands from human rights abuse.

⁷⁷ Ibid

⁷⁸ Michael J Smith 'Humanitarian intervention: An overview of the ethical issues' (1989) 3 *Ethics and International Affairs* 74. See also Teson 'Law and Morality' op cit note 29 at 174.

⁷⁹ Walzer 'Just and Unjust Wars' op cit note 74 at 107.

⁸⁰ R J Vincent & Peter Wilson 'Beyond non-intervention' in Ian Forbes & Mark Hoffman (eds) *Political Theory, International Relations and the Ethics of Intervention* (1993) 122-30 at 123, 128.

⁸¹ Wheeler 'Saving Strangers' op cit note 73 at 39.

1.4.4 *International Law Theories of Humanitarian Intervention*

Various classifications have been adopted to distinguish theorists on humanitarian intervention in international law.⁸² However, the debate is generally between two main schools of thought:

1.4.4.1 Restrictionists

Restrictionists argue that article 2(4) prohibits the use of force by states except in the case of the exceptions provided in article 51 and Chapter VII of the Charter.⁸³ To these writers, the use of force to protect human rights is illegal under current international law.⁸⁴ Chesterman contends that there was no right of unilateral humanitarian intervention in the pre-Charter era and it is prohibited by article 2(4) under the Charter, concluding that humanitarian intervention will remain in a 'legal penumbra' for the foreseeable future.⁸⁵ This prohibition does not admit of any exception and use of force to secure a legal right⁸⁶ or to assist in the administration of justice is a violation of article 2(4) and illegal.⁸⁷ The International Court of Justice (ICJ) held that much in *The Corfu Channel Case*⁸⁸ and again confirmed the view in

⁸² J L Holzgrefe 'The humanitarian intervention debate' in J L Holzgrefe & Robert O. Keohane (eds) *Humanitarian Intervention* op cit note 19 at 18-19, distinguishing between naturalist, consensualist, collectivist and individualist theorists.

⁸³ Michael Akehurst 'Humanitarian intervention' in Hedley Bull (ed) *Intervention in World Politics* (1984) 95-118 at 99.

⁸⁴ See Brownlie 'Use of Force' op cit note 29 at 267.

⁸⁵ See Chesterman 'Just War or Just Peace?' op cit note 65 at 87

⁸⁶ Oscar Schachter *International Law in Theory and Practice* (1991) 112-114 (hereafter Schachter 'International Law in Theory').

⁸⁷ See *The Corfu Channel Case* (United Kingdom of Great Britain v Albania) (Merits) Judgment of 9, April 1949 ICJ Report 4 at 35.

⁸⁸ Where it was held that the Ct '...can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot find a place in international law It is still less admissible in the particular form it would take here – it would be reserved for the most powerful states.' Id.

Nicaragua Case.⁸⁹ Even if it is conceded that human rights have achieved the status of *jus cogens*, it still does not mean that force can be used for its protection.⁹⁰ They argue that the prohibition in article 2(4) is a total ban and the inclusion of the words ‘...in any other manner inconsistent with the purposes of the Charter’ was not intended to create an exception but to stress the totality of the prohibition.⁹¹ Thus, Gray asks rather rhetorically, [i]f art. 2(4) of the UN Charter is a dynamic provision opened to changing interpretation over time, what developments in fact justified a new interpretation?’⁹² However, it is my contention that besides the failure to develop an effective collective security mechanism and the ineffectiveness of the UNSC, state practice as it relates to the use of force as well as intervention treaties and obligations of member states under article 53 and 103 need a reappraisal in view of recent developments: interventions by NATO and ECOWAS and the AU/ECOWAS intervention treaties. The literature indicates that subsequent state practice can modify a treaty and a treaty is to be interpreted in the light of such practice.⁹³ I argue that on the basis of the principle of *rebus sic stantibus* the role of regional organisations in the use of force vis-à-vis the UNSC needs a re-examination. For example, what impact does the non-implementation of article 43 of the Charter have on the obligations of states under the Charter?

1.4.4.2 Counter-Restrictionists

The argument of these theorists turn on the approach to be adopted in the interpretation of the Charter and the views here are split between the Classicists and the Realists. Classicists opine that the parties to a treaty have intentions that are discoverable from an analysis of the

⁸⁹ *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), (Merits) Judgment of June 27, 1986 ICJ Report 14 at para 190, where the Court held article 2(4) to be a norm of *jus cogens* from which no derogation is permitted. For a critique of the judgment see Teson Law and Morality op cit note 29 at 267-312.

⁹⁰ Christine Gray *International Law and the Use of Force* 2 ed (2004) 46 (hereafter Gray ‘International Law’).

⁹¹ Simma ‘Use of force’ op cit note 25 at 2.

⁹² Gray ‘International Law’ op cit note 90 at 35.

⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, (Advisory Opinion) 21 June 1971 ICJ Report 16 at 22. See also article 62(1) of the Vienna Convention on the Law of Treaties 1969 which permits states to suspend, terminate or even withdraw from treaty obligations due to a fundamental change of circumstances upon which the treaty obligations were assumed. See Teson ‘Law and Morality’ op cit note 29 at 35. But see ‘Just War or Unjust Peace?’ op cit note 68 at 56.

text of the treaty whose provisions should be respected until varied or expired.⁹⁴ Realists assert that article 2(4) prohibits humanitarian intervention only to the extent that it is directed ‘against the territorial integrity or political independence of any State.’⁹⁵ From a Classicist view, unauthorised humanitarian intervention is illegal, but from a Realist standpoint, its legality or otherwise depends on the attitude of contemporary international community.⁹⁶ The second argument of Realist is that since the UN failed in one of its purposes (the establishment of a mechanism of collective security) the basis and assumption upon which states surrendered their right of use of force was not fulfilled and states reverted back to their customary international law status on the use of force, hence if the UN fails to halt violations of human rights, states have a right to do so.⁹⁷ Their third argument seeks to give article 39 an expanded interpretation under which the UNSC is said to have the authority to approve the use of force to halt humanitarian crises even where such crises lack cross-boundary effects.⁹⁸

1.5 THEORETICAL FRAMEWORK

There is the need to examine the validity argument not only from a theoretical perspective but also by drawing on contemporary cases and this thesis adopts this approach. It examines the legal validity of the AU/ECOWAS RHMI regimes by applying the Realist theory of the

⁹⁴ Tom J Farer ‘An inquiry into the legitimacy of humanitarian intervention’ in Lori Fisler Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 186 (hereafter Farer ‘An inquiry into the legitimacy of humanitarian intervention’).

⁹⁵ Teson ‘Law and Morality’ op cit note 29 at 151; Reisman & McDougal ‘Humanitarian intervention to protect the Ibos’ op cit note 49 at 177. But see Oscar Schachter ‘Legality of pro-democratic invasion’ op cit note 84 at 649, arguing that to interpret the words in this way would require ‘an Orwellian construction of those terms.’ Realism views ‘explicit and implicit agreements, formal texts, and state behavior as being in a condition of effervescent interaction, unceasingly creating, modifying and replacing norms. Texts themselves are but one among a large number of means of ascertaining original intention.’ See Farer ‘An inquiry into the legitimacy of humanitarian intervention’ op cit 94 at 186.

⁹⁶ See J L Holzgrefe & Robert O Keohane *Humanitarian Intervention* op cit note 19 at 39.

⁹⁷ Reisman ‘Criteria for the lawful use of force’ op cit note 69 at 279-80; W Michael Reisman ‘Sovereignty and human rights in contemporary international law’ (1990) 84 *AJIL* 866 at 869.

⁹⁸ Jost Delbruck ‘A fresh look at humanitarian intervention under the authority of the United Nations’ (1992) 67 *Indiana Law Jnl* 898-99. Cf. Lori Fisler Damrosch ‘Commentary on collective military intervention to enforce human rights’ in Lori Fisler Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 219. See generally, Richard B Lillich ‘Humanitarian intervention: A reply to Ian Brownlie and a plea for constructive alternatives’ in *Law and Civil War in the Modern World* John Norton Moore (ed) (1974) 229-251. See also John Norton Moore ‘Toward an applied theory for the regulation of intervention’ in John Norton Moore (ed) *Law and Civil War in the Modern World* (1974) 3-37.

transformation of world constitutive process of authoritative decision as developed by Reisman.⁹⁹ I consider the four stages of the constitutive process in international law and determine what stage the law on humanitarian intervention is at today. I argue that the envisaged stage as at the time the Charter was drafted was stage 4 hence the rule on nonuse of force; but as it turned out, the system failed and it reverted back to stage 3 and it is the basis for the legality of the unilateral acts of AU/ECOWAS (states) participants in the world constitutive process.

Secondly, in consideration of the moral object of international law (particularly, Charter law), the thesis relies on the illegal international legal reform model of the nonideal theory of international law as developed by Allen Buchanan to assess the present law on humanitarian intervention especially as applied to Africa and concludes that the international legal order being morally defective, it imbues the AU/ECOWAS with a moral right to embark on a reform of the system provided they meet certain conditions.¹⁰⁰ The fact that African states readily ceded away part of their sovereignty by acceding to these interventionist treaties lends credence to the moral forfeiture theory espoused by these treaties.¹⁰¹

Implicit in the AU/ECOWAS RHMI regimes is the Lockean social contract theory that the relationship between the government and the governed is contractual.¹⁰² A people organise themselves into a political community and appoint an authority to ensure law and order.¹⁰³ The agency so appointed derives its legitimacy from the consent of the governed in whom sovereignty resides and the rights and duties of the sovereign government subsists only as long as it adheres to its legitimate roles under the contract which consist basically of

⁹⁹ See generally Reisman 'Unilateral action' op cit note 42; Myres S McDougal, Harold D Lasswell & W Michael Reisman 'The world constitutive process of authoritative decision' op cit note 42.

¹⁰⁰ Buchanan 'From Nuremberg' op cit note 32 at 130.

¹⁰¹ Teson 'Law and Morality' op cit note 29; Christopher C. Joyner & Anthony Clark Arend 'Anticipatory humanitarian intervention: An emerging legal norm' (1999-2000) 10 *Jnl of Legal Education* 27 at 48 (hereafter Joyner & Arend 'Anticipatory humanitarian intervention'); Bryan Hehir 'Interventions: From theories to cases' (1995) 9 *Ethics & International Affairs* 1.

¹⁰² John Locke *Two Treatise of Government and a Letter Concerning Toleration* Thomas I Cook (ed) (1966) 168-9, 174, 184.

¹⁰³ Joyner & Arend 'Anticipatory humanitarian intervention' op cit note 101 at 48.

protecting its citizens.¹⁰⁴ When a state therefore violates the rights of those it was appointed to protect, it loses its legitimacy.¹⁰⁵ My argument is that the AU/ECOWAS states have, by signing the treaties limiting their sovereign authority accepted that popular sovereignty resides in their citizens and should the states fail in their duty to protect those citizens, such states lose the claim to legitimacy, sovereignty and nonintervention, and the authority of the regional organisations to intervene is activated. It is antithetical to the moral objectives of international law to argue that such treaty is invalid and that the states reserve their right to absolute sovereignty notwithstanding their willingness to place a limitation on that sovereignty and subject it to the protection of the human rights of their citizens from whom they derived the authority in the first place. One legal implication of the treaties is an acknowledgement by states that: popular sovereignty resides in the people; states derive their legitimacy from their citizens; states are under obligation to respect those rights as their continued legitimacy rests on it; that they forfeit their immunity from external intervention if they violate those rights.

1.5.1 *Testing the Legal Validity of AU/ECOWAS RHMI Regimes under International Law*

1.5.1.1 The Illegal International Legal Reform Theory¹⁰⁶(ILR)

The thrust of this theory is summed up as follows ‘... given the relatively undeveloped state of international law—in particular, its inadequate protection of basic human rights and the limited resources for timely and lawful change in the direction of more adequate protection—there are opportunities for acts which are both illegal and highly desirable as steps towards morally improving the system.’¹⁰⁷ This approach contends that the present international legal order is defective and in dire need of moral reform.¹⁰⁸ However, given the difficulties of

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Is a contribution to the nonideal moral theory of international law and it seeks to answer the question of ‘... when, if ever, illegal acts directed towards improving the international system are morally justified.’ See Buchanan ‘From Nuremberg’ op cit note 32 at 675. For a critique of the theory, see J S Watson ‘A Realistic Jurisprudence of International Law’ (1980) *The Yearbook of World Affairs* 271-2; Alfred P Rubin *Ethics and Authority in International Law* (1997) 124.

¹⁰⁷ Buchanan ‘From Nuremberg’ op cit note 32 at 680.

¹⁰⁸ Ibid at 676.

norm-making in international law,¹⁰⁹ law reform at the international level is particularly problematic and slow.¹¹⁰ Ironically, ‘some of the most important moral improvements in the international legal system have resulted, at least in part, from illegal acts.’¹¹¹ If such significant progress has been a product of illegal acts in the past and international law is still ill-equipped to deal with problems like human rights protection, the question of illegal reform of international law is unavoidable.¹¹² This theory however does not lend itself to every type of intervention but only to ‘illegal humanitarian intervention directed towards reform of the international legal order’¹¹³ because it aims to bring the system significantly closer to the ideal of the rule of law by rectifying the most substantive injustice supported by the system, and reducing the systemic defects that undermines its legitimacy.¹¹⁴ Although Buchanan does not deal with illegal reform through treaty formation as the AU/ECOWAS seek to do, I will argue that the treaties combine the benefits of codification with a moral improvement of the international legal order.

The theory of IILR basically asks the question ‘under what conditions, if any, is it morally justifiable to breach international law in order to try to improve the system from a moral point of view?’¹¹⁵ In other words, when is it permitted to break the law to improve the law? If you so much as give allegiance to the law, then you should at least obey it as it is rather than break it and bring it into disrepute. So goes the fidelity to the ideal of rule of law argument. It is argued that the rule of law as an ideal has the following components: that the law should be clear enough, it should be general and public, not subject to arbitrary change

¹⁰⁹ International law norms are mostly created through treaties and customary international law. See article 38 of the Statute of the International Ct of Justice, annexed to the UN Charter.

¹¹⁰ Buchanan ‘From Nuremberg’ op cit note 32 at 679. Treaties and customary international law require state consent. While states often enter reservations to the former, they raise persistent objections to the latter. And it is often difficult to ascertain *opinio juris* or how wide a state practice should be to form a custom.

¹¹¹ Ibid at 682, where he cites the Nuremberg Trials which has been criticized as victor’s justice because some of the acts complained of were neither criminal acts as at the time they took place nor was there prescribed punishment. Yet some of the principles formulated at the Trials form the basis of international criminal law, and have contributed to the development of international human rights and international humanitarian law.

¹¹² Ibid.

¹¹³ Ibid at 676.

¹¹⁴ Ibid.

¹¹⁵ Buchanan, ‘From Nuremberg’ op cit note 32 at 682.

and it should apply to all equally.¹¹⁶ The Fidelity Argument says that as a result of our moral allegiance to the normative ideal of rule of law, it will be inconsistent to call for an illegal act even if directed at reforming the law while we yet hold or claim that allegiance.¹¹⁷

The Fidelity Argument presupposes that the law meets certain basic characteristics to be able to attract the required moral allegiance. Yet the current international law does not meet one such critical element: equality before the law. States are far from being equal before the law under current international law both in theory and in practice. Since international law does not meet this requirement, its moral appeal for allegiance is weakened and states are less likely to feel any moral obligation to obey.¹¹⁸ In fact, states feel a moral obligation to undertake acts (even if illegal) that could improve the legal system and fidelity to law.¹¹⁹ To what extent states will refrain from violating international law due to their allegiance to the ideal of rule of law depends on how close international law approximates the ideal.¹²⁰ The moral failures of the UN, and by extension, the international legal order in Rwanda, Somalia, Liberia, Sierra-Leone, Sudan and so on. compel unilateral acts of legal reform. The treaties in issue here are a response to these moral imperatives and, though they breach articles 53 and 103, they are aimed at improving the system.¹²¹

¹¹⁶ Ibid at 683.

¹¹⁷ Ibid at 684.

¹¹⁸ Ibid. See also Laurie Gorman 'The implications of regional peace operations on the United Nations capacity for peacekeeping' in Ann Livingstone (ed) *Challenge of Effective Cooperation and Coordination in Peace Operations* (Spring 2008) 11:1 *The Pearson Papers* 1 at 9 (hereafter Gorman 'The implications of regional peace operations'), asserting that the decade between 1995 and 2005 saw a significant reduction in troops contribution to UN operations whereas regional operations increased.

¹¹⁹ See generally, Buchanan 'From Nuremberg' op cit note 32.

¹²⁰ Ibid at 684.

¹²¹ Ibid at 868, citing as example the remarks by the US Secretary of States during the Kosovo intervention that it was the first step in the formation of a new customary law to reform the law on humanitarian intervention. See the International Independent Commission on Kosovo *Kosovo Report: Conflicts, International Response: Lessons Learned* (2000) 4 describing the NATO intervention in Kosovo as 'illegal but legitimate'.

1.5.1.2 *Realist Theory of Transformations of World Constitutive Process of Authoritative Decision*¹²²

It is pertinent to give a short background of the New Haven School (NHS) as a theoretical approach to the study of international law for two reasons: first, the theory of the Transformation of the global constitutive process applied by Reisman to the problem of humanitarian intervention (that I also employ here) is located within the theoretical framework of the NHS Jurisprudence. Secondly, Reisman's theory pays particular attention to the specific question of the lawfulness of unilateral action such as the AU/ECOWAS RHMI regimes under international law and thus provides the tools for analysing the circumstances under which such treaties are valid if at all.

This theory derives from the New Haven School of jurisprudence which conceives of law as a process of decision that is both 'authoritative and controlling' aimed at enhancing human dignity and ensuring international peace and security as well as stability in the legal order.¹²³ According to the NHS, the international legal order should support a system where every individual can achieve power, wealth, enlightenment, skill, wellbeing, affection, respect and rectitude.¹²⁴ It adopts a functional analysis that seeks to account for the variation

¹²² The term 'constitutive' is used differently from its ordinary meaning by the NHS. The 'world constitutive process' means international law while 'human dignity' refers to 'human rights'. See Teson 'Law and Morality' op cit note 29 at 17-19. 'Constitutive decisions' are those decisions which identify and characterise the different authoritative decision-makers in a community, specify basic community policies, establish appropriate structures of authority, allocate bases of power for decision and sanctioning processes, authorise procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions. See Mryes S McDougal, Harold D Laswell & W Michael Reisman 'The world constitutive process of authoritative decision' in Mryes S McDougal, Harold D Laswell & W Michael Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspectives* (1981)191 at 191-92, (hereafter McDougal, Laswell & Reisman 'The world constitutive process of authoritative decision'). See Bardo Fassbender 'The United Nations Charter as constitution of the international community' (1998) 36 *Columbia Jnal of Transnational Law* 529 at 544. Fassbender asserts that the UN Charter is seen as a constitutive decision that spells out the designated authorities (authoritative decision makers) and the procedural requirements for decision making. Collectively, they form part of the global constitutive process. 'Authority' as used by the NHS refers to the expectations of community members with regard to the appropriateness in relation to the different stages of the decision process and the ensuing outcomes. See McDougal, Laswell & Reisman 'The world constitutive process of authoritative decision' at 191.

¹²³ W Michael Reisman, Siegfried Wiessner & Andrew Willard 'The New Haven School: A brief introduction' (2007) 32 *Yale Jnal of International Law* 575 at 576 (hereafter Reisman, Wiessner & Willard 'The New Haven School').

¹²⁴ Id.

between the rules defined in the constitutive document and the modifications often occasioned by practice.¹²⁵ It conceives of the process of international law as consisting of five intellectual tasks: clarification of community goals, explanation of past trends moving towards or away from the realisation of these goals, an explanation of the factors that shaped those decisions, projection of the course of future decisions or trends, and the creation and assessment of possible options.¹²⁶ The objective of the NHS is the recommendation of alternatives in policy choices and application in order to realise maximum human dignity.¹²⁷ It achieves this by studying the different phases of the decision-making process and the participants in the process (such as states and intergovernmental organisations).¹²⁸ NHS policy-oriented search for a minimum world public order of human dignity is based on the premise that law is meant to serve human beings to achieve certain universal values which are empirically expressed in human aspirations already stated above.¹²⁹

Here, the ‘perspectives of authority’ can influence how a problem is perceived, decisions made, criteria for decisions selected, and alternatives pursued.¹³⁰ If a decision is made by the appropriate authority it will be more effective and authoritative. For example, a decision by the UNSC to intervene in a state will be more authoritative than unilateral intervention by a single state. But a decision made without reference to the designated agent could still

acquire a retrospective authority if the degree of their effectiveness is such as to reshape community expectations; ... a flow of comparable decisions through time, whatever their

¹²⁵ Ibid at 577.

¹²⁶ Id.

¹²⁷ W Michael Reisman ‘The view from the New Haven School of international law’ (1992)86 *ASIL* 118 at 120 (hereafter Reisman ‘The view from the New Haven School’).

¹²⁸ McDougal, Laswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 122 at 200.

¹²⁹ W Michael Reisman ‘Law from the policy perspective’ in Mryes S McDougal, Harold D Laswell & W Michael Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspectives* (1981) 1-14 at 4; Reisman, Wiessner & Willard ‘The New Haven School’ op cit note 123 at 579-80.

¹³⁰ McDougal, Laswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 122 at 191.

initial relation to authority, may under certain conditions perform a prescriptive function in creating new expectations of authority in regard to projected future decision.¹³¹

It is unhelpful in the world constitutive process to remain fixated on the parochial constitutionalism of the Charter for example, because intergovernmental organisations like the AU, ECOWAS, OAS and the League of Arab States have all become important participants and forums in the constitutive process.¹³² The world comprise of several systems of public orders each according to its own development approximating different levels of human dignity.¹³³ Hence, Reisman states that '[a]ny reasonably comprehensive world history will quickly indicate that the Western assumption that international law is a creation of Hugo Grotius and his contemporaries is outstanding only for its inaccuracy, narrowness and arrogance.'¹³⁴ Unfortunately, the presence of regional differences in the elucidation of allegedly universal norms and the fundamental principles relating to the distribution of authority continue to be obscured by the argument that such divergences are mere deviations from the normative prescriptions.¹³⁵

This professed universality of certain norms is weakened by the practice of Western scholars who on the one hand affirm Eurocentric notion of human rights while waging an intellectual war against principles like those articulated in the New International Economic Order and the Third World agitation for a right to development. The pretended claim to universality in the international legal order in almost all aspects obscures pressing demands of the different system of public orders that some of these conflicting claims are unsettled and so need reappraisal.¹³⁶ A case in point here would be the question of use of force by regional

¹³¹ Id. Under this configurative jurisprudence, (i.e. NHS), 'law' or 'authoritative decision' means a process of decision 'characterised both by expectations of authority and by effective control.' The degree of effective control require for a rule to qualify as law varies. See Ibid at 192.

¹³² Ibid at 226.

¹³³ Mryes S McDougal, Harold D Laswell & W Michael Reisman 'Theories about international law: Prologue to a configurative jurisprudence' in Mryes S McDougal, Harold D Laswell & W Michael Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspectives* (1981) 43 at 226 (hereafter McDougal, Laswell & Reisman 'Theories about international law')

¹³⁴ Ibid at 133.

¹³⁵ Mryes S McDougal & Harold D Laswell 'The identification and appraisal of diverse systems of public order' in Mryes S McDougal, Harold D Laswell & W Michael Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspectives* (1981) 15-42 at 16.

¹³⁶ Ibid at 17.

organisations to prevent genocides and mass atrocities and the distribution of authority between the UNSC and regional organisations under the Charter. ‘Unless the institutional details of all systems of public order are open to reconsideration in the light of the contribution that they make to the realisation of human dignity in theory and in fact, the plight of the world community will remain as precarious as we know it today.’¹³⁷ Such reappraisal must acknowledge that beyond the state lay another public order system – ‘regional international law’ (including its sub-regional compositions).¹³⁸

The NHS evaluates the legality of unilateral action in a legal system using two criteria: substantive and procedural.¹³⁹ Unilateral action by participants that seek to displace the authoritative agent saddled with the right to make the decision is said to be legal if:

1. The pertinent legal system allows such unilateral acts in certain circumstances and on conditions that substantive tests of lawfulness are met;
2. The circumstances for the particular unilateral act are claimed to be appropriate; and
3. The act despite its procedural irregularities, has complied with the relevant substantive requirements of lawfulness;¹⁴⁰
4. The pertinent question is whether the legal system in any circumstance allows unilateral action and whether the particular unilateral action in question has complied with the substantive requirements. They argue that the only important thing is the substantive rules.

Can the compliance of AU/ECOWAS with the substantive criteria for humanitarian intervention cure the procedural defects of noncompliance with articles 53 (the need for UNSC authorisation) and 103 (the obligation not to enter into treaties inconsistent with the Charter)?¹⁴¹ Critics argue that

[n]o matter how noble a cause may be, actions taken in the common interest but without formal authorisation could have incalculable public and private costs and this explains

¹³⁷ Ibid at 19.

¹³⁸ Ibid at 41.

¹³⁹ Reisman ‘Unilateral action’ op cit note 42 at 3-4.

¹⁴⁰ Ibid.

¹⁴¹ Ibid at 5. See also the threshold principles listed by the ICISS.

why the law frowns at ... legally unauthorised actions no matter how urgent the circumstances or morally imperative the impulse.¹⁴²

Such that

even where it is sometimes clear that the formal decision-maker is failing in responding to a situation with grave consequences, some scholars still insist that the good intentions notwithstanding, greater systemic injury will be caused by the prospective unilateral action than by the failure of the designated decision maker to respond adequately.¹⁴³

However, how often states or regional organisations like AU/ECOWAS will undertake RHMI or enter into treaties of intervention outside the UN framework depends on how effective the UNSC responds to mass atrocities because ‘...the less effective the system, the more the impulse for and use of unilateral action and vice versa.’¹⁴⁴ But who determines when the current law on humanitarian intervention is ineffective? This has been the main obstacle to reforming the legal order. My research draws on case study to answer the question: has the response of the UNSC to use of force to protect human rights especially in Africa been effective? If not, is it enough grounds for unilateral acts by regional organisations like AU/ECOWAS? How should such devolution of powers be pursued, within or without the UN framework?

Four Categories of Constitutive Process:

1. Constitutive process without hierarchical institutions of decision: this is likened to the Hobbesian state of nature and the pre-League of Nations era where might was right and ‘the strong do what they will and the weak suffer what they must’.
2. Constitutive process in which there are hierarchical institutions which are manifestly ineffective: this type of legal system has a constitutive document with hierarchical decision-making institutions but in reality, de jure power is wielded by outside actors, such as the League of Nations.
3. Constitutive process in which the hierarchical institutions are generally effective, but prove to be ineffective in applying particular norms such as the UNSC and the use of force to protect human rights under the Charter. In a legal system with this defect,

¹⁴² Reisman ‘Unilateral action’ op cit note 42 at 6.

¹⁴³ Ibid at 7. For writers who share this view, see Schachter, ‘International Law in Theory’ op cit note 86, Chesterman ‘Just War or Unjust Peace?’ op cit note 65, Gray ‘International Law’ op cit note 90.

¹⁴⁴ Reisman ‘Unilateral action’ op cit note 42 at 6-7.

unilateral acts are usually allowed to fill the lacuna and an example is article 51 on self-defence which was designed as a temporary exception to the use of force.

4. Constitutive process in which hierarchical institutions are highly effective and as such unilateral acts are unjustified.¹⁴⁵

Under the first, unilateral action was not just legal, it was the only rule because the legal system had no hierarchical institution effective or not. Under the second and third, there is a contest over the legality or otherwise of unilateral action because the body to which the constitutive process has assigned the primary authority (such as the UNSC on the use of force) has failed or is incapable of exercising it when needed. With the coming of the League of Nations states attempted to create the second type of constitutive process by transferring their rights to use force to the body but with limitations that weakened the body until it failed and the system reverted back to type 1.

Under the Charter, states created type 4 by surrendering the right to use force exclusively to the UNSC which was to act on the principle of collective security for the protection of all. To the extent that UNSC was effective in the use of force to protect human rights, unilateral action is illegal under international law. However, the veto had incapacitated the UNSC and having failed in several cases to exercise its authority to use force to protect human rights, the system reverted back and now fluctuates between types 2 and 3 pushing states to seek unilateral arrangements outside the UN framework to protect human rights.¹⁴⁶

The above process has been facilitated by the rapid changes in the international system which has seen a broadening of the legal space with new and varied participants in the international constitutive process such as NGOs and other actors. These new actors have internationalised and re-characterised human rights from mere aspirational norms to norms of

¹⁴⁵ Ibid at 8-10

¹⁴⁶ Ibid at 11-12. See also Richard A Falk 'What future for the UN Charter System of war prevention?' (2003) 97 *AJIL* 590 at 594-97 asserting that due to the prevalent double standards and power-imbalance in the international system, states tend to seek their own security arrangements and it is pertinent that humanitarian intervention be allowed as a narrow exception to article 2(4).

jus cogens worthy of international protection.¹⁴⁷ But widespread violations continued and as the veto paralysed UNSC enforcement decisions, unilateral use of force became legal under the transformed constitutive process of the international legal order. Because the current international legal order is transformed, procedural constraints such as articles 24 and 53 are inoperative and only substantive rules (such as the principles regulating humanitarian intervention) count.¹⁴⁸

However, this theory's limitation is that it implies using different parameters for determining the legality of different unilateral acts based on their objectives.¹⁴⁹ 'Legal realists like Reisman provide a conception of the legal process that dissolves the distinction between legality and legitimacy.'¹⁵⁰ The AU/ECOWAS treaties attempt to resolve this by its humanitarian intervention legal framework under which the legality question is answered before rather than after the fact.¹⁵¹ Further, if the AU/ECOWAS models are adopted, they will be an improvement on the current international constitutive process by trying to revert it back to type 4 where it becomes effective and unilateral action once again becomes unnecessary and illegal. The perceived illegality of unilateral action arises from failure to comply with procedural requirements under the Charter but since the substantive criteria are satisfied, the unilateral act is legitimate and as far as the enforcement of human rights are concerned, the current constitutive process is type 3 under which failure to comply with procedural criteria are irrelevant for purposes of the validity of unilateral interventions.¹⁵²

¹⁴⁷ Ibid 14-15. See also the *Case Concerning the Barcelona Traction Light and Power Ltd*, (Belgium v Spain) 1970 ICJ Report 4 at 134 where the ICJ held that human rights are erga omnes in which all states have interest and obligations.

¹⁴⁸ Reisman 'Unilateral action' op cit note 42 at 15-16.

¹⁴⁹ See Tom J Farer 'Humanitarian intervention before and after 9/11: Legality and legitimacy' in J L Holzgrefe & Robert O Keohane Humanitarian Intervention op cit note 19, 53-89 at 65-68.

¹⁵⁰ Farer 'Humanitarian intervention before and after 9/11' op cit note 42 at 68.

¹⁵¹ See notes 2 and 4 above.

¹⁵² Reisman 'Unilateral action' op cit note 42 at 5.

1.6 AU/ECOWAS HUMANITARIAN INTERVENTION LAW V ARTICLES 2(4), 53(1) AND 103 OF THE UN CHARTER

Article 4(h) of the AU Act, article 25 of the ECOWAS MCPMRPS Protocol and paragraphs 46 and 52 of the ECOWAS Framework empower the organisations to intervene in the internal affairs of their members on humanitarian grounds. This is in conflict with article 2(4) of the Charter which forbids the use of force. Article 16 of the AUPSC Protocol gives the ‘primary responsibility’ for the maintenance of peace and security in Africa to the AU contrary to article 24 of the UN Charter which gives that role to the UNSC.¹⁵³ This seems to suggest that the AU/ECOWAS do not require UNSC approval before undertaking enforcement action and this is contrary to article 53 of the UN Charter. Apparently, the combined effect of articles 4(h) and (j) of AU Act; 4(j) and (k), 6(d), 7(c)–(g), 16(1), 17(1), (2), of AUPSC Protocol is that the AU does not require UNSC authorisation for its enforcement actions. This apparently *violates* article 103 of the Charter and some writers have concluded that ‘...any treaty purporting to authorise states to use force against another state without its contemporaneous consent necessarily violates article 2(4) and therefore also Article 103. ...’ and such treaty, it is argued, must be declared void.¹⁵⁴ Similarly, in the second edition of the Commentary on Article 103, Bernhardt puts it more poignantly:

If the members of a regional arrangement, ... agree that in case of internal disturbances or other events within one of the States concerned, the other States can intervene with military forces without the consent of the *de jure* or *de facto* government, the compatibility of such a special agreement with the Charter becomes *doubtful* and must, in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force is at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103.¹⁵⁵

¹⁵³ Article 17 (2) states ‘where necessary, recse 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, in keeping with the provisions of Chapter VIII of the UN Charter. ...’.

¹⁵⁴ Wippman Treaty-based Intervention op cit note 27 at 620; Wippman ‘Pro-democratic intervention’ op cit note 5 at 145.

¹⁵⁵ See Rudolf Bernhardt ‘Article 103’ op cit note 44 at 1121-2. Paulus and Leiß put it less poignantly: ‘[w]hen a provision violates Charter law that reflects *jus cogens*, the norm is not merely suspended in the event of a conflict—be it temporal or permanent—but void.’ See Paulus & Leib ‘Article 103’ op cit note 44 at 2136 (italics in original). See also *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) Jurisdiction and Admissibility Judgment (1984) ICJ Report 392 at 440, where the Court held inter alia ‘... regional, bilateral and multilateral arrangements that the parties to this case have made ... must be made always subject to the provisions of Article 103’.

Other writers however argue that when states intervene to protect human rights on the basis of a treaty of intervention, in so far as they act in accordance with the ‘will of the state expressed in the consent’ UNSC approval is not needed and such states are in fact, giving effect to UN purposes.¹⁵⁶ This type of intervention does not come within the ambit of Chapter VIII because it derives its legality from the prior express consent of the concerned state.¹⁵⁷ Yoram Dinstein on the other hand argues that article 2(4) is only concerned with interstate rather than intra-state conflicts and since article 4(h) deals with intra-state conflicts it falls outside the scope of article 2(4).¹⁵⁸ Moreover he cites article 2(7) which precludes UN from intervening in the internal affairs of member states.¹⁵⁹

However, the problem with this approach to the legality question is that it unnecessarily concedes the moral validity (even if not legal validity) of current international law on humanitarian intervention. Also, it implies that the Charter and the UN are the only forums for law reform and this could undermine the possible reform impact of regional humanitarian intervention law practice and norms on the use of force under the Charter. Further, it seems to assume that humanitarian intervention under the Charter is illegal whereas the scope of the prohibition in article 2(4) is still a subject of debate.

Some other writers have taken a more cautious approach to reconciling the AU/ECOWAS RHMI regimes with the UN Charter and the current international law on humanitarian intervention reform without necessarily addressing the question of whether such regional treaties are valid.¹⁶⁰ Others like Stromseth argue that codification would resolve the

¹⁵⁶ See Farer ‘An inquiry into the legitimacy of humanitarian intervention’ op cit note 94 at 332.

¹⁵⁷ Ehrlich Thomas ‘Cyprus, “The war-like Isle”: Origins and elements of the current crisis’ (1966) 18 *Stanford Law Review* 1021.

¹⁵⁸ Yoram Dinstein *War, Aggression and Self-Defence* 3 ed (2002) 80.

¹⁵⁹ Ibid. While this may apply to AU, it does not apply to ECOWAS because its provisions cover both inter and intra-state conflicts. See article 3 of the ECOWAS MCPMRPS Protocol.

¹⁶⁰ Ademola Abass *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 131, employing the social contract theory. See also Ademola Abass ‘The role of African Union in Darfur’ (2007-8) 24 *Merkios-Utrecht Jnal of International & European Law* 24 at 51 arguing that the AU Act travaux preparatoires do not show that AU member states intended to ‘unequivocally’ confer a right of intervention in their internal conflicts on the AU. Cf. Ben Kioko ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’ (December 2003) 85:852 *International Review of the Red Cross* 807 at 821 (hereafter Kioko ‘The right of intervention under the African Union’s Constitutive Act’) stating that AU member states decided to confer the right of intervention without UNSC authorisation on the AU because of Africa’s exasperation at the ‘slow pace of reforms in the international order’

tension between sovereignty and human rights and the ‘illegal but legitimate’ dilemma.¹⁶¹ But by offering other justifications, these approaches presuppose that the existing law or rule is good and does not need improvement. I do not accept this. The current international law on humanitarian intervention is not serving the most fundamental normative values of the international legal system (peace and security and human rights) effectively which makes reform imperative.

From the review of authorities above, it is clear that besides having not attracted significant academic attention, the few writers who have written on the AU/ECOWAS treaties have either been quick to dismiss the treaties as illegal, null and void, or those that support the legality argument see it as codification of existing regional norms. Those who argue that the treaties are invalid have tested the legality by applying mainly the Charter law, while those who support the treaties relied basically on regional customary international law and the ‘benefit’ argument. But none of these approaches satisfy the twin requirements of meeting the test of legality and also showing need for moral improvement that the treaties seek to bring to the law on humanitarian intervention.

For one, those opposing the legality of the AU/ECOWAS treaties argue that the laws are invalid because they violate international law, but they do not discount their reform potentials for international humanitarian intervention law in general and R2P implementation in particular. Nor do they prescribe how else to achieve the object of halting egregious human rights violations without changing the rules these laws now seek to change albeit through illegal reform. Their argument is therefore the same as the pluralists in international relations

and UN’s disinterestedness in Africa’s problems in relation to other parts of the world. See Dan Kuwali ‘Persuasive prevention: Towards a principle for implementing article 4(h) and R2P by the African Union’ (2009) 42 *Current African Issues: Nordic African Institute* at 17-20, arguing that since article 4(h) is aimed at preventing genocide and mass atrocities just like R2P and does not target the sovereignty of a state, it is in consonance with the principles and purposes of the Charter. These writers do not advocate that the AU/ECOWAS frameworks constitute illegal international legal reform aimed at moral improvement of international law. For example Kuwali argues that the AU intervention provisions do not constitute humanitarian but ‘statutory intervention’. See Dan Kuwali ‘The end of humanitarian intervention: An evaluation of the African Union’s right of intervention’ (2010) 9:1 *African Jnl of Conflict Resolution* 41 at 56.

¹⁶¹Jane Stromseth ‘Rethinking Humanitarian Intervention: The case for Incremental Change’ in J L Holzgrefe & Robert O Keohane *Humanitarian Intervention* op cit note 19 at 256. See Sean D Murphy ‘Calibrating global expectations regarding humanitarian intervention’ Paper presented at Harvard University Conference on After Kosovo: Humanitarian intervention at a Crossroads (18-19 January 2001) calling for an international framework for intervention.

and the restrictionists of international law, preferring order over justice and sovereignty over human security.

1.7 UNDER CUSTOMARY INTERNATIONAL LAW

There is controversy about whether there is sufficient state practice of unauthorised humanitarian intervention by states or regional organisations in the post-Charter era to be viewed as modifying article 2(4).¹⁶² In relation to AU/ECOWAS, the validity argument can be viewed from two perspectives in relation to customary international law. First, did the treaties codify an existing regional customary international law¹⁶³ or are they evidence of an emerging norm of regional humanitarian intervention in Africa?¹⁶⁴ To answer these questions, it will be important to determine the ingredients for the formation of a regional customary international law and then examine the AU/ECOWAS practice.¹⁶⁵ I draw a distinction between widespread practice required to form general customary international law and the principle of law that where a practice is not general enough, it could still constitute 'local or regional customary rule.'¹⁶⁶ It is trite that such rule constitutes customary law binding on a limited number of states usually a particular geographical region on the basis of *lex specialis derogat legi generali*.¹⁶⁷

¹⁶² See article 62 of the Vienna Convention on the Law of Treaties 1969 stating that a treaty could be modified by subsequent state practice.

¹⁶³ What has been the attitude of the AU/ECOWAS members to RHMI? See *Asylum Case* (1950) ICJ Report 277; Villiger *Customary International Law and Treaties* op cit note 36 at 20, observing that the conduct of parties to a treaty is significant for the formation of customary law.

¹⁶⁴ Ibid at 17 stating that '[p]ractice of international organisations is significant for the question of customary law of the organisations themselves, provided that such practice can be distinguished from individual practice of State representatives in these bodies.'

¹⁶⁵ Ibid. See *Fisheries Case* (United Kingdom v Norway) 18 December 1951 ICJ Report 116 at 131 stating that the statements of states is important, and *Nicaragua Case* supra note 89 at para 189 that article 2(4) is now a norm of customary international law because it is often cited by states to that effect. In 1950, the International Law Commission listed treaty provisions as one of the forms of evidence of a customary international law norm. For a detailed account of AU/ECOWAS practice of RHMI, see generally, Levitt Conflict prevention, management and resolution op cit note 37; Jeremy Levitt 'Humanitarian intervention by regional actors in internal conflicts: The cases of ECOWAS in Liberia and Sierra-Leone' (1998) 12 *Temple International and Comparative Law Jnl* 333.

¹⁶⁶ Villiger *Customary International Law and Treaties* op cit note 36 at 30; *Right of Passage Case* (1969) ICJ Report 39.

¹⁶⁷ Ibid at 56.

1.8 RESPONSIBILITY TO PROTECT AND AU/ECOWAS TREATIES: A CONVERGENCE OF PURPOSES?

The research gives a brief historical background and contends that the responsibility to protect¹⁶⁸ as conceived by the ICISS in 2001 has been weakened under the World Summit Outcome Document of 2005¹⁶⁹ demanding a different implementation framework.¹⁷⁰ For example, the WSOD jettisoned the criteria for intervention which includes the threshold and precautionary principles. It sets a higher threshold for UNSC use of force and also eliminates intervention without UNSC authorisation.¹⁷¹ There is also no legal duty on the international community to intervene.¹⁷²

1.8.1 *Requirements for the Implementation of the Responsibility to React Component of R2P*

The research focuses on the responsibility to react by use of force under R2P and as Gareth Evans points out, there are three challenges to the implementation of R2P—conceptual, institutional and political.¹⁷³ At the conceptual level, forging a consensus on the concept at

¹⁶⁸ See note 47 above.

¹⁶⁹ (WSOD hereafter). See Lee Feinstein & M A Slaughter 'A duty to prevent' (Jan-Feb 2004) 83 *Foreign Affairs* (1), at 149 stating that in an attempt to garner global support for R2P, promoters of the doctrine compromised on most of its critical elements. See also Alex J Bellamy 'The Responsibility to Protect and the problem of military intervention' (2008) 84 *International Affairs* 615 at 622 (hereafter Bellamy 'Problem of military intervention').

¹⁷⁰ See UNSC Resolution S/RES/1674 adopted on 28 April 2006 reaffirming the provisions of para 138 and 139 of the World Summit Outcome Document.

¹⁷¹ See Carsten Stahn 'Responsibility to Protect: Political rhetoric or emerging legal norm' (2007) 101 *AJIL* 99 (hereafter Stahn 'Political rhetoric or emerging legal norm').

¹⁷² See Jeremy Levitt 'The Responsibility to Protect: A beaver without a dam?' (2004) 25 *Michigan Jnl of international Law* 153 at 166, pointing out that AU, ECOWAS and SADC have all codified the threshold principles that remained thorny at the UN. This is contrary to recommendations of International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001); the High-level Panel on threats, challenges and change: *A more secure world: shared responsibility*, Report of the Secretary General (2004). For an analysis of the core principles canvassed in the ICISS Report but jettisoned in the WSOD. See Stahn *Political rhetoric or emerging legal norm* op cit note 171 at 108-110.

¹⁷³ Gareth Evans 'Ending mass atrocity crimes once and for all' Law Week Oration, Victoria Law Foundation and Melbourne Law School, Melbourne, 22 September 2009 available at <<http://www.lawisanass-wingate.blogspot.com/2009/11/professor-hon-gareth-evans-qc-html>> (accessed on 28 June 2010).

the World Summit saw the key elements of the doctrine as conceived by ICISS compromised. But my thesis argues here that the essential norms of R2P converge with the AU/ECOWAS treaty law provisions on war crimes, crimes against humanity and genocide.¹⁷⁴ What role should regional organisations play in the implementation of R2P?

One of the political challenges for R2P will be the issue of authority: deciding to use force where necessary and how to overcome the dangers posed by the veto. The US has rejected any attempt to circumscribe the use of the veto under any circumstances or to impose a positive duty on the UN to intervene.¹⁷⁵ This has already played out in Darfur where both Russia and China threatened to use the veto. The proposal by ICISS that the P5 should limit the use of the veto in R2P cases where their vital national interest is not at stake is unrealistic and instead recommends a theory of regional responsibility to protect.¹⁷⁶

1.8.2 *Available Mechanisms under International Law/UN Charter*

At the UN level, four major documents are related to R2P among which the WSOD is the most authoritative.¹⁷⁷ Paragraphs 138 and 139 of the WSOD provides the legal framework for R2P implementation and I will argue that by limiting use of force for human rights protection to Chapters VI, VII and VIII arrangements under the Charter, the WSOD is a mere restatement of Charter position and demonstrates the impossibility of achieving a consensus within the UN framework compared to a regional approach.¹⁷⁸ Can the current UN enforcement mechanism deliver on the implementation of the responsibility to react component of R2P considering that many states are still wary of the doctrine and its implications for their sovereignty and nonintervention? Could a regional approach utilising

¹⁷⁴ See AU Act, article 4(h); AUPSC Protocol, article 13.

¹⁷⁵ Letter from Ambassador John Bolton to UN Member States conveying U.S. amendments to the Draft Outcome Document being prepared for the High Level Event on Responsibility to Protect' available at <[http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05\[1\].pdf](http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf)> (accessed 15 May 2010).

¹⁷⁶ Richard Falk, 'Humanitarian intervention: Elite and critical perspectives' (Winter/Spring 2005)7:1/2 *Global Dialogue* available at <<http://www.worlddialogue.org/content.php?id=329>> (accessed 20 April 2020).

¹⁷⁷ Stahn 'Political rhetoric or emerging legal norm' op cit note 150 at 102.

¹⁷⁸ Kenya is often cited as the first test of R2P (though it is the preventive component), and it is agreed that it was made possible because it was pursued largely within an African framework with the support of other global actors.

the AU/ECOWAS legal framework be useful alternative?¹⁷⁹ Given that regions vary in their security arrangements and capacities, how will this proposal deal with regions without such treaty arrangements or where such arrangements are weak like IGAD and ASEAN?

1.8.3 *Legal and Theoretical Framework for Humanitarian Intervention and R2P under AU/ECOWAS*

By their intervention treaties, the AU/ECOWAS provide, at least in theory, the legal framework that could be adopted to implement R2P.¹⁸⁰ It is expected that the collective security provisions for the preservation of life and property, early warning arrangements for timely response, decision-making processes, and the human rights criteria for membership, can be effective if use of force is needed for R2P.¹⁸¹ However, these regional organisations face a lot of challenges including financial, planning, doctrinal capacity and so on.¹⁸² There is unanimity that the AU could enjoy legitimacy and support if it can develop the capacity to intervene on the continent.¹⁸³ While the AU/ECOWAS treaties make it clear that they can

¹⁷⁹ See Sean D Murphy Calibrating global expectations of humanitarian intervention op cit note 141 suggesting that it may be expedient to reinterpret the Charter to allow some leverage for regional organisations to use force for enforcement. See Ramesh Thakur 'Iraq and the Responsibility to Protect' (Winter/Spring 2005) 7:1-2 *Global Dialogue* available at <www.worlddialogue.org/content.php?id=327> (accessed on 28 June 2010), arguing that where the UNSC and the United Nations General Assembly fail to act, regional organisations should be able to intervene.

¹⁸⁰ Greg Puley 'The Responsibility to Protect: East, West and Southern African perspectives on preventing and responding to humanitarian crises' Project Ploughshares Working Paper no. 5, September 2005 at 4 available at <<http://www.Ploughshares.ca/libraries/WorkingPapers/wp005.pdf>> (accessed on 12 April 2010).

¹⁸¹ Within the UNSC and under present law, there is no legal, but a moral obligation to act and even so, it has been selective, but '... humanitarian imperative would entail an obligation to treat all victims similarly and react to all crises consistently. ...' See Thomas G Weiss 'The sunset of humanitarian intervention? The Responsibility to Protect in a unipolar world' (2004) 35 *Security Dialogue* 135 at 147. The advantages of regional organisations in humanitarian intervention operations includes: (1) Greater legitimacy among belligerents (2) Knowledge of root causes and the combatants gives opportunity for resolution (3) Proximity to conflicts enhances rapid deployment (4) In better position to reduce or control potential spoilers (5) The interest to avoid spill over makes them more likely to intervene and stay the cse (6) It is likely the only option to the UNSC. See Gorman 'The implications of regional peace operations' op cit note 118 at 2.

¹⁸² Taft & Ladnier 'Realizing "Never Again"' op cit note 51 at 16.

¹⁸³ Alex Bellamy 'Responsibility to Protect or Trojan horse? The crisis in Darfur and Humanitarian Intervention after Iraq' (2006) 19 *Ethics and International Affairs* 31. See Kioko 'The right of intervention under the African Union's Constitutive Act' op cit note 160 at 821, asserting that when the question of whether the AU would seek UNSC approval for intervention was raised at the drafting of the AU Act, 'it was dismissed out of hand' showing the frustrations at the preference given to crisis elsewhere while Africa's more pressing crises are neglected.

take RHMI action unilaterally in Africa, it remains to be seen how this will play out in practice in relation to the UN.¹⁸⁴ In view of the Ezulwini Consensus, the question therefore arises, in the event of a humanitarian crisis in which AU/ECOWAS and the UNSC indicate interest to intervene, who takes precedence? Do these treaties amount to Africa's attempt to renegotiate the Treaty of San Francisco or 'redraft' articles 2(4), 24, 53 and 103?¹⁸⁵

1.9 HYPOTHESES

That the AU/ECOWAS treaties are valid because they are backed by the moral theory of Illegal International Legal Reform and Legal Realist theory of transformations of world constitutive process, and since a useful legal framework for implementing the use of force component of R2P has been difficult to achieve, a theory of regional responsibility to protect based on the AU/ECOWAS legal and theoretical framework should be adopted for the operationalisation of R2P in Africa.

1.10 METHODOLOGY

The thesis will rely essentially on primary and secondary sources: relevant treaties and legislative documents, case law and learned publications both hard and electronic versions. Theoretical illustrations will be drawn from contemporary cases which will be useful in synthesizing extant principles to realise the objective of the thesis: providing a legal and theoretical explanation for the validity of the AU/ECOWAS treaties and their adoption for R2P implementation.

The selection of the cases studied was guided by three criteria: first, they were all African crises to underscore the assertion that the UNSC has not been very effective in its response to crises in Africa. Secondly, the level of the mass atrocities and humanitarian crises involved were such that they reached the threshold of genocide in Rwanda and Darfur, or would probably have reached that threshold but for the intervention of regional organisations. Thirdly, there was no UN intervention at all or where there was intervention it was

¹⁸⁴ Louis Fawcett 'Evolving architecture of regionalization' in Michael Pugh & Waheguru Pal Singh Sidhu (eds) *The United Nations and Regional Security: Europe and Beyond* (2003) 13.

¹⁸⁵ See generally, Rosemary Durward 'Security Council authorisation for regional peacekeeping operations' (2006) 13:3 *International Peacekeeping* 350.

abandoned with the exception of Libya which was included in the study because of its contemporary relevance as the first R2P intervention.

The rationale for choosing two treaties rather than one without necessarily engaging in a comparative analysis lay in the fact that whereas in examining the AU Act, I am able to capture Darfur (post-ICISS and contemporary but outside the ECOWAS jurisdiction) as a test case, but in examining ECOWAS, I am also able to draw on its innovations, provisions and intervention precedents in the African context to explain the new dimensions in African humanitarian intervention legal regime and the normative and practical significance for the doctrine of R2P and the international legal order.

To the extent that the provisions relating to humanitarian intervention in the AU Act and AUPSC Protocol are similar to those in the ECOWAS MCPMRPS Protocol as analysed in this study, I found it useful and convenient to refer to the AU and ECOWAS jointly as ‘AU/ECOWAS’ and deal with both simultaneously. From a theoretical point of view, except where necessary, the distinction between the AU as a regional body and ECOWAS as a sub-regional body is not drawn and both are regarded as regional arrangements as used in Chapter VIII of the UN Charter.

1.11 SCOPE OF THE THESIS

Humanitarian intervention is a broad and controversial subject criss-crossing the disciplines of international law, international relations, political science, and philosophy and so on. The emerging norm of responsibility to protect is no less so even though it apparently has gathered a lot of momentum in its short life. This thesis is not intended to study humanitarian intervention as a doctrine; rather, it is focused mainly on specific humanitarian intervention provisions of the treaties of two regional organisations—the African Union and the Economic Community of West African States; and the validity of such provisions under current international law.

However, to achieve this objective, the thesis looks at how the doctrine has been applied or not applied in the past by states, the UNSC and regional organisations and the effect this has had on the legitimacy of the UN and international law. The focus is Africa though examples are drawn from outside the continent as well. This thesis is not concerned with whether or not the AU/ECOWAS provisions would eventually be efficacious, or how

well they will stem the tide of humanitarian crises on the continent. It will not evaluate the success or failure of these provisions. It will mainly advance theoretical arguments in defense of the legality of the treaties. Beyond the above, the thesis explores the benefits the treaties could provide for the current law on humanitarian intervention. The thesis does not consider the whole gamut of the R2P norm. This focus is further elaborated in the chapter outline below. The thesis does not discuss the AU and ECOWAS as regional organisations per se or their institutional arrangements. I focused on testing the legal validity of specific provisions of particular AU and ECOWAS treaties which are similar in certain respects. However, even though this is not a comparative study, where necessary, distinctions will be highlighted.

1.12 LIMITATION OF THE STUDY

This study does not attempt to prescribe a whole range of legal schema for the implementation of R2P in Africa, for that will require another PhD thesis. Rather, this study takes on the challenge of the ‘legal validity question’ in the belief that significant progress in implementation of R2P through the AU/ECOWAS framework will not be possible so long as the frameworks continue to be hounded by a fundamental question about its validity under international law. The study therefore outlines the contours of the normative incompatibility between the Charter regime and the AU/ECOWAS framework, tackles the theoretical issues involved, and shows why these treaties are valid and their potential utility. Though I suggest a paradigm arising from my discussion of the theoretical issues, the broader question of crafting a full schema for implementation based on this theoretical analysis is not fully engaged and would therefore be an area for further research. While much effort was made to update the materials, cases and developments in the law as the thesis progressed, this effort is also limited by the realisation that international law is in a constant flux particularly in relation to one of its major sources—customary law, as demonstrated by state practice. In view of the developments in the Middle East and North Africa (MENA) in the period during which this study was undertaken, only the events in Libya was included in this research for the important reason that it was the only case that resulted in UNSC-authorized intervention with an R2P dimension.

1.13 SIGNIFICANCE OF THE STUDY

There has been very little written on the AU/ECOWAS RHMI framework and even less on the possibility of adopting them for the implementation of R2P with the exception of Dan

Kuwali's recent publication. The reason for this intellectual apathy is not clear. Perhaps, it is partially attributable to the common misconception surrounding the legal validity of the provisions of these treaties under current international law. Perhaps it is due to the radical reforms they seek to introduce in relation to the law on humanitarian intervention, the relationship between African regional organisations and the UNSC, and certain fundamental norms of international law. That is why this study is even more imperative in order to examine the legal validity question in the hope that should I be able to contribute to its eventual resolution one way or another, I will have advanced the search for a legal framework for the implementation of R2P, at least, in Africa.

This thesis sets out to achieve three objectives: first, is to advance arguments for holding the AU/ECOWAS legal framework legally valid under international law. Secondly, and related to this, it is hoped that upholding the validity of these provisions under international law means that they could now be deployed for the operationalisation of R2P in Africa. Thirdly, it is hoped that it will also draw attention to these provisions than they have attracted until now as a way of stimulating further research in the area. If these objectives are achieved then this study will have achieved its main objectives.

1.14 OUTLINE OF THE STUDY

(a) Chapter 1

This chapter is an overview of the thesis. Further, it provides a general background for the succeeding chapters. It sets out the framework for the interrogation to be undertaken in the research, its main focus and the research tools to be utilised in realising the objectives of the study. It gives a brief discussion of the theoretical framework to be employed and the structure of the research. Finally, it highlights the potential benefits of the study.

(b) Chapter 2

This chapter discusses the evolution of the doctrine of humanitarian intervention in three periods: first, a brief historical account of classical writings and state practice of the doctrine is given to show its origin. Second, a discussion of the doctrine in the pre-Charter era is given to highlight the legal position of the doctrine in international law before the advent of the Charter. The chapter concludes with an examination of four international law norms under

the Charter that have direct bearing on humanitarian intervention and the AU/ECOWAS treaties.

(c) Chapter 3

This chapter examines the effectiveness of UNSC with respect to humanitarian intervention in Africa by drawing on UN post-Cold War interventions in the 1990s. It looks at how the failures of the UN actually set the stage for the emergence of the AU/ECOWAS as regional humanitarian interveners and how the lessons of those interventions led to the new AU/ECOWAS RHMI legal regime.

(d) Chapter 4

Against the backdrop of the ineffectiveness of the UN and current international law in the protection of human rights in Africa already discussed in chapter 3, chapter 4 focuses on a deconstruction of the AU/ECOWAS regional humanitarian intervention legal provisions. Four main areas of normative incompatibility are discussed. The chapter concludes with an examination of specific provisions of the AU Constitutive Act, the ECOWAS Protocols relating to humanitarian intervention vis-à-vis the UN Charter.

(e) Chapter 5

Here, I employ Michael Reisman's theory of transformation of world constitutive process to address the normative conflict between the UN Charter and the AU/ECOWAS treaties in order to determine the validity or otherwise of the latter from a legal perspective.

(f) Chapter 6

This chapter addresses the question of validity of the AU/ECOWAS treaties from a legal reform perspective. I rely on Allen Buchanan's theory of illegal international legal reform as a theoretical framework in analysing the validity of the AU/ECOWAS regimes. Drawing on my case studies in the preceding chapters, the inadequacies of current law on humanitarian intervention in dealing with humanitarian crises in Africa, and the problems of reforming international law in this respect, this chapter discusses the validity of the AU/ECOWAS regimes as a process of illegal international legal reform.

(g) Chapter 7

In this chapter, the validity of the AU/ECOWAS RHMI regimes is subjected to further legal validity test under conventional international law and customary international law.

(h) Chapter 8

Having concluded my analyses on the validity question in the preceding chapters, this concluding chapter proposes that the AU/ECOWAS RHMI regimes be adopted for the implementation of the responsibility to react under R2P. I propose a theory of regional responsibility to protect (RR2P) based on the AU/ECOWAS RHMI regimes. To achieve this I call for a recalibration of the R2P schema and a redistribution of authority between the UNSC and AU/ECOWAS.

CHAPTER 2: MEANING AND DEVELOPMENT OF HUMANITARIAN INTERVENTION

2.1 INTRODUCTION

This chapter briefly tracks the debate and the different stages of the normative evolution of the doctrine of humanitarian intervention and relevant international law norms that impact the doctrine. The purpose is to set out the scope and significance of humanitarian intervention as a broad context within which to explore the legal validity of the AU/ECOWAS humanitarian intervention treaties in international law.

2.1.1 *Meaning and Scope of Humanitarian Intervention*

It is pertinent to begin with a definition of our subject, not just because the term ‘intervention’ is a broader concept than ‘humanitarian intervention’, but because the latter has been applied to different situations at different times making a precise definition an onerous task. For a long time, the word ‘intervention’ did not have a technical meaning and was often used interchangeably with ‘interference’, ‘interposition’ and so on. Hence the term is a relatively modern development.¹ The doctrine of ‘humanitarian intervention’ can be seen as a subset of the concept of ‘intervention’.² ‘Intervention’ has been defined as the ‘dictatorial interference by a State [or group of States] in the affairs of another State for the purpose of maintaining or altering the actual conditions of things.’³

Hedley Bull defines the term in similar words thus ‘[i]ntervention is the dictatorial or coercive interference by an outside party or parties in the sphere of jurisdiction of a sovereign state. It may be forcible or non-forcible intervention.’⁴ I am however concerned with

¹ P H Winfield ‘The history of intervention in international law’ (1922-23) 3 *British Yearbook of International Law* 130 at 136 (hereafter Winfield ‘The history of intervention’).

² Ibid at 132. Even mere opinions expressed by states have been regarded as amounting to intervention. See Winfield cites Westlake *International Law* (1904) Pt 1 at 307 to argue that though such opinion may be improper it does not constitute intervention in international law. Winfield believes that mere statement can at best amount to peaceful intervention which must be distinguished from ‘dictatorial intervention’. See Winfield ‘The history of intervention’ op cit note 1 at 141. It is still not uncommon today, however, to hear state leaders condemn statements by foreign governments as undue interference in their internal affairs.

³ See Jean-Pierre L Fonteyne ‘The customary international law doctrine of humanitarian intervention: its current validity under the UN Charter’ (1974) 4 *California Western International Law Journal* 203 at 204 note 4 (hereafter Fonteyne ‘The customary international law doctrine’).

⁴ Hedley Bull ‘Introduction’ in Hedley Bull (ed) *Intervention in World Politics* (1984) 1-6 at 1 (hereafter Bull ‘Intervention in World Politics’). This definition was also upheld by the ICJ in *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) Judgment of 27 June 1986 ICJ Rep 14 at 107-8.

intervention by the use of armed force for the protection of human rights. According to Stowell humanitarian intervention is '[t]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatments which is so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.'⁵ Verwey defines it as

the threat or use of force by a state or states abroad, for the sole purpose of preventing or putting a halt to a serious violations of fundamental human rights, in particular the right to life of persons, regardless of their nationality, such protection taking place neither upon authorization by relevant organs of the United Nations nor with the permission by the legitimate government of the target state.⁶

Although in the eighteenth and nineteenth centuries, humanitarian intervention was mainly undertaken by single states or group of states in Europe, international and regional organisations like the North Atlantic Treaty Organisation (NATO), Organisation of American States (OAS), the Organisation of African Unity (OAU now AU) and ECOWAS have also carried out humanitarian intervention in recent times. Thus, Brownlie's definition of the doctrine as '[t]he threat or use of armed force by a state, a belligerent community, or an international organisation with the object of protecting human rights', is to be preferred in this respect.⁷ This view is also shared by Kofi Abiew who opines that

humanitarian intervention refers primarily to forcible means employed by a state, group of states, an international or regional organization, or humanitarian agencies with the aim (or at least one of its principal aims) of ending egregious human rights violations perpetrated by governments, or preventing or alleviating human suffering in situations of internal conflicts.⁸

This definition seems too broad by including 'humanitarian agencies' but it does highlight the objections by such bodies as the International Committee of the Red Cross on the abuse of the term and the continuing debate about the humanitarianism of bombing to save lives.⁹ Humanitarian intervention has also been defined as the '*coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and*

⁵ See Fonteyne 'The customary international law doctrine' op cit note 3 at 204.

⁶ Wil Verwey 'Legality of humanitarian intervention after the Cold War' in Elizabeth G Ferris (ed) *Challenge to Intervene: A New Role for the United Nations* (1992) 113-22 at 114 (hereafter Verwey 'Legality of humanitarian intervention').

⁷ See Ian Brownlie 'Humanitarian intervention' in J N Moore (ed) *Law and Civil War in the Modern World* (1974) 217 (hereafter Brownlie 'Humanitarian intervention').

⁸ Kofi Francis Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (1999) 18. (hereafter Abiew 'The Evolution of the Doctrine').

⁹ 'There may be few concepts in international law today which are as conceptually obscure and legally controversial' as the doctrine of humanitarian intervention. See Verwey Legality of humanitarian intervention op cit note 6 at 114.

with the purpose of preventing widespread suffering or death among the inhabitants.’¹⁰ To Fernando Teson, the doctrine means ‘the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.’¹¹ Apparently this definition attempts to include all the basic and traditional criteria for a valid act of humanitarian intervention. From the above definitions, the elements of humanitarian intervention include (a) use of armed force (b) for purposes of protecting the target state’s nationals from widespread violations of human rights (c) without the consent of the target state’s government.

There have been debates in the past as to whether the scope of the meaning of humanitarian intervention extends to the use of armed force by a State to rescue its own nationals abroad.¹² Some writers have treated the principle as an extension of the right of self-defence well established in customary international law and also recognised in article 51 of the UN Charter.¹³ Examples include the operation conducted by Israel at Entebbe in Uganda, the 1964 invasion of Congo by Belgium, the United States and the United Kingdom. However, it is doubtful whether this can qualify as humanitarian intervention since the purpose of the intervention is the protection of a state’s own nationals abroad. The right of such act would seem to flow more from the customary international law right of self-defence, of course, its legality or otherwise is a different issue.¹⁴

2.3 STATE PRACTICE OF HUMANITARIAN INTERVENTION

Notwithstanding the Crusades and the religious wars of the sixteenth and seventeenth centuries and other ear similar practices, it is believed that humanitarian intervention actually developed in the latter part of the nineteenth century.¹⁵ The interventions in this period were strongly linked to Christianity. At different times in the nineteenth century, major European

¹⁰ Adam Roberts ‘The so-called right of humanitarian intervention’ (2000) 3 *Yearbook of International Humanitarian Law* 3 at 5 (emphasis in original).

¹¹ Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1997) 5 (hereafter Teson ‘Law and Morality’).

¹² See generally Natalino Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985) (hereafter Ronzitti ‘Rescuing Nationals Abroad’).

¹³ See for example, Sean D Murphy *Humanitarian Intervention: The United Nations in an Evolving World* (1996) at 15 (hereafter Murphy ‘The United Nations in an Evolving World’).

¹⁴ Ibid at 361.

¹⁵ Fonteyne ‘The customary international law doctrine’ op cit note 3 at 206.

Powers intervened in different European countries to protect Christians.¹⁶ It was only in the eighteenth and nineteenth centuries that the doctrine developed its defining features as an institution.¹⁷ I briefly discuss a few of these cases below.¹⁸

2.3.1 *The Intervention in Greece 1827-1830*

At this time, Greece was still a part of the Ottoman Empire presided over by the Porte or Sultan. Greeks were subjected to human rights abuses and many Greek Christians were massacred.¹⁹ This led Russia, Great Britain and France to conclude the Treaty of London on 6 July 1827 in which they proposed that the Sultan grant the Greeks some degree of independence within the Ottoman Empire.²⁰ The Sultan rejected the proposal insisting that the Greek issue was a matter within the domestic jurisdiction of his Empire.²¹ In reaction, Britain, France and Russia embarked on an armed intervention which led to the independence of Greece in 1830.²² Although some have doubted the precedential value of this case for a doctrine of humanitarian intervention, it is noteworthy that the intervening Powers did state in the London Treaty that they were motivated ‘no less by sentiments of humanity, than by interest for the tranquility of Europe.’²³

2.3.2 *Intervention in Syria 1860-1861*

Like Greece, Syria also formed part of the Ottoman Empire during this period. Owing to the massacres of thousands of Christians by the Muslim population, Great Britain, France, Prussia and Russia convened the Conference of Paris and signed a Protocol with Turkey on 3 August 1860.²⁴ The Protocol authorised France to intervene in Syria on behalf of the Concert of Europe in order to halt the atrocities and Turkey gave its consent to this intervention. A Commission was set up and the terms and duration of the French intervention was agreed

¹⁶ See Nicholas Onuf ‘Humanitarian intervention: the early years’ (2004) 16(4) *Florida Journal of International Law* 753 at 762.

¹⁷ Abiew ‘The Evolution of the Doctrine’ op cit note 8 at 33.

¹⁸ For a detailed analysis of these cases of intervention in this period, see generally M Ganji *International Protection of Human Rights* (1962) 13-44.

¹⁹ Fonteyne ‘The customary international law doctrine’ op cit note 3 at 207.

²⁰ See Murphy ‘The United Nations in an Evolving World’ op cit note 13 at 52.

²¹ Fonteyne ‘The customary international law doctrine’ op cit note 13 at 207-8.

²² Id at 207 note 17.

²³ Ibid at 208.

²⁴ Id.

upon.²⁵ There is unanimity that this particular intervention is an example of lawful humanitarian intervention where the motive was humanitarian and where the conditions of the use of force was spelt out in a prior legal instrument to which the parties were expected to abide.²⁶ Although questions have been raised as to the voluntariness of the Sultan's consent and whether Turkey actually had a choice in the matter, it is significant that in keeping with the terms of disinterestedness and the Protocol, the French troops withdrew in 1861 after completing their mission.²⁷ Hence even though Brownlie denies that a right of humanitarian intervention existed in state practice in the period before the UN Charter, he concedes that this one instance was an exception.²⁸

2.3.3 *The Bosnia, Herzegovina and Bulgarian Intervention 1876-78*

As was the case in the other interventions carried out by European Powers in Turkey in that century, the persecution of Christians was again at the heart of the intervention of Italy, France, Great Britain, Germany and Russia in Bosnia, Herzegovina and Bulgaria in order to protect the Christians from Turkish misrule.²⁹ On 30 June 1876, Serbia and Montenegro had declared war on Turkey in view of its continued oppression of Christians in Bosnia, Herzegovina and Bulgaria.³⁰ The European Powers then proposed an International Commission to oversee reforms agreed with Turkey at the Conference of Constantinople on these issues, but this proposal was rejected by the Porte.

Italy, France, Germany, Russia, Great Britain and Austria-Hungary then signed the London Protocol of 31 March 1877 in which they declared their preparedness to take measures if Turkey failed to implement its undertakings under the 1856 Paris Treaty.³¹ Turkey rejected these proposals and Russia declared war on Turkey. The war was eventually brought to an end by the San Stefano Treaty and the Berlin Congress in 1878 which guaranteed autonomy under a Christian government for Bulgaria and independence for Serbia

²⁵ The European Powers based the justification for the intervention on Article IX of the General Treaty of Paris signed on 30 March 1856 but the text of that provision does not reveal any ground for such justification. They were therefore by humanitarian considerations rather than the need to enforce the said treaty. See Fonteyne *The customary international law doctrine* op cit note 3 at 209.

²⁶ Ian Brownlie *International Law and the Use of Force by States* (1963) 338 (hereafter Brownlie 'Use of Force').

²⁷ W Michael Reisman & Myres S McDougal 'Humanitarian intervention to protect the Ibos' in Richard B Lillich ed *Humanitarian Intervention and the United Nations* (1973) 181 (hereafter Reisman & McDougal 'Humanitarian intervention to protect the Ibos').

²⁸ Fonteyne 'The customary international law doctrine' op cit note 3 at 209.

²⁹ Ibid.

³⁰ Ibid at 211.

³¹ Id.

and Montenegro and Rumania while Bosnia and Herzegovina were annexed by Austria-Hungary.³² The other European Powers had maintained their neutrality during the war and the unilateral nature of the intervention thus left room for abuse.³³ However, this does not remove the initial humanitarian motives of the intervention or of its general character though it does show the dangers inherent in the doctrine.³⁴

2.3.4 *Intervention in Macedonia 1903-1908 and 1912-1913*

The Macedonians had risen against the Porte in 1903 and owing to the atrocities committed by the Porte in Macedonia, Austria-Hungary and Russia acting on the authority of the Concert of Europe impressed on the Porte to accept the Murzsteg Program which was designed to carry out reforms in Macedonia.³⁵ The Program was to be overseen by Russian and Austrian diplomats and the Porte had actually begun the implementation before it was truncated by the Young Turk Revolution of 1908. The new rulers pursued a policy of “Turkification” of Macedonia in the most brutal ways, hence Greece, Bulgaria and Serbia declared war on Turkey. The war ended in the Treaty of London in 1913 under which most part of Macedonia was ceded to the Balkan Allies.³⁶

From the above cases, it is clear that the practice of the doctrine of humanitarian intervention in the early stage of its development was largely a European affair. The brief sketch of the practice of states regarding the doctrine in the pre-Charter period shows that states felt that there was a right, and even an obligation to intervene in cases of atrocities on grounds of humanity. Referring to Vattel, Winfield concludes:

To him and those who came after him, “the subject of how it is permitted to enter into a struggle between a sovereign and his subjects” meant something perfectly clear. They were simply stating, nay, strictly limiting the international usage of the eighteenth century, when they conferred upon a nation the right to aid a rebel or his government,—a right as real then as that of ambassadorial inviolability is now.³⁷

It can safely be concluded that states recognised a right of humanitarian intervention and this view was reflected and supported by the writings of jurist to which we now turn.

³² Reisman & McDougal ‘Humanitarian intervention to protect the Ibos’ op cit note 27 at 182.

³³ Fonteyne ‘The customary international law doctrine’ op cit note 3 at 213.

³⁴ Id.

³⁵ Id.

³⁶ Fonteyne ‘The customary international law doctrine’ op cit note 3 at 213.

³⁷ Winfield ‘The history of intervention’ op cit note 1 at 137.

2.4 The Opinion of Jurists on Humanitarian Intervention Before 1945

As mentioned above, the origin of humanitarian intervention is closely linked with religious solidarity and early thinkers like St. Thomas Aquinas supported the right of states to intervene in other states to stop religious persecution. Vitoria states:

If any of the native converts to Christianity be subjected to force or fear by their princes in order to make them return to idolatry, this would justify the Spaniards ... in making war and in compelling the barbarians by force to stop such misconduct, ... and in deposing rulers as in other just wars Suppose a large part of the Indians were converted to Christianity, and this whether it were done lawfully or unlawfully ... so long as they really were Christians, the Pope might for a reasonable cause, either with or without a request from them give them a Christian Sovereign and depose their other unbelieving ruler.³⁸

In lending his weight to the doctrine, Hugo Grotius observes:

The fact must be recognized that kings, and those who possess rights equal to kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on accounts of injuries which do not affect them but excessively violates the law of nature or nations in regard to any persons whatsoever ... Truly it is more honourable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind ... Kings in addition to the particular care of their own state, are also burdened with a general responsibility for human society ... The ... most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient grounds for rendering assistance.³⁹

In conclusion, Grotius states:

There is also another question, whether a war for another's subjects be just, for the purpose of defending them from injuries by their ruler. Certainly it is undoubted that ever since civil society were formed, the rulers of each claimed some especial rights over his own subjects. ... But ... [i]f a tyrant... practices atrocities towards his subjects which no just man can approve, the right of human connexion is not cut off in such case. ... [I]t would not follow that others may not take up arms for them.⁴⁰

Towards mid-nineteenth century, growing nationalism began to entrench the notion of absolute sovereignty and non-intervention. This led to a normative clash with the doctrine of humanitarian intervention in which various scholars of the time took different positions.⁴¹

³⁸ See Abiew 'The Evolution of the Doctrine' op cit note 8 at 33.

³⁹ Ibid at 35 quoting Hugo Grotius *De Jure Belli ac Pacis Libri Tre* (1625) Kelsey transl. at 5404-505, 582.

⁴⁰ Id. See also Fonteyne 'The customary international law doctrine' op cit note 3 at 214 quoting Hugo Grotius 2 *De Jure Belli Est Pacis* (1853) (Whewell transl.) 438. A writer like Vattel was equivocal in his opinion. On the one hand, he asserts that the sovereign has absolute right to treat his subjects in whatever manner even '[I]f he buries his subjects under taxes, if he treats them harshly ...; no one else is called upon to admonish him, to force him to apply wiser and more equitable principles'; and on the other hand he states: '[i]f the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance.' See Fonteyne 'The customary international law doctrine' op cit note 3 at 215 note 352 quoting E De Vattel *Le Droit des Gens* Pradier-Fodere ed (1863) Chap 5 IV Para 55.

⁴¹ Id.

Some publicists were not prepared to concede that a state had the right to intervene in other states on humanitarian grounds. For example, Kant argues that it is not possible to exercise such a right of humanitarian intervention without falling into the same mischief one was trying to halt and thereby endangering the entire state system.⁴² This assertion is predicated on the view that since action within a territory does not harm those outside it, it cannot give rise to a right of intervention by outside powers or states whose rights have not been affected by the said conduct.⁴³ As will be shown in the next section, this view persisted throughout the Cold War period and only waned after 1990.

Many writers in the late nineteenth century were strongly in support of the view of non-intervention. It was only the sovereign who had authority over his subjects and could punish crimes by his subjects but such authority ended at the limit of the national boundaries.⁴⁴ According to a commentator,

[t]his [humanitarian] intervention is illegal because it constitutes an infringement upon the independence of States, because the powers that are not directly, immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity however condemnable they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no State can stand up in judgment of the conduct of others. As long as they do not infringe upon the rights of the other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed.⁴⁵

Wide and sweeping assertions like the above were made about the principle of non-intervention and absolute sovereignty. ‘Internal oppression, however odious and violent it may be, does not affect, either directly or indirectly, external relations and does not endanger the existence of other States. Accordingly, it cannot be used as a legal basis for use of force and violent means.’⁴⁶ On the other extreme were those who believed that there was indeed a right of humanitarian intervention in international law. These writers based their argument on various grounds. Some believed that intervention was justifiable in the ‘general interest of humanity’;⁴⁷ arguing that:

When a government, even acting within the limits of its rights of sovereignty, violates the laws of humanity, either by measures contrary to the interests of other States, or by excessive injustice or brutality which seriously injures our morals and civilization, the right of

⁴² See Fonteyne ‘The customary international law doctrine’ op cit note 3 at 215.

⁴³ Winfield ‘The history of intervention’ op cit note 1 at 147.

⁴⁴ Id.

⁴⁵ Fonteyne ‘The customary international law doctrine’ op cit note 3 at 216.

⁴⁶ Ibid at 217.

⁴⁷ Ibid at 220.

intervention is legitimate. For, however worthy of respect the rights of independence and sovereignty of States may be, there is something even more worthy of respect, namely the law of humanity, or of human society, that must not be violated. In the same way as *within* the State freedom of the *individual* is and must be restricted by the law and the morals of society, the individual freedom of the *States* must be limited by the law of human society... I recognise right of intervention *in an absolute way as against all States*.⁴⁸

It was also argued that the practice was justifiable in the event of the violations of internationally recognised human rights in an internal conflict,⁴⁹

[t]here is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.⁵⁰

Still, others offered religious grounds as a basis for humanitarian intervention.⁵¹ Woolsey writes '[I]nterference ... can be justified ... on ... the ... following [ground]: ... [t]hat some extraordinary state of things is brought about by the crime of a government against its subjects.'⁵² Such crimes could be the violation of international humanitarian law and where that is the case

[i]naction and indifference of other States would constitute an egocentric policy contrary to the rights of all; for whoever violates international law to the disadvantage of anybody, violates it not only to the detriment of the person directly affected, but as against all civilized States.⁵³

On the other hand, there were writers who maintained a middle ground by proposing that although humanitarian intervention remained technically illegal, it was however permissible in certain circumstances in what they called the 'double-level permissibility' test which could even be a 'positive duty.'⁵⁴ This view discountenanced the fears of likelihood of abuse expressed by critics of the doctrine of humanitarian intervention.⁵⁵ At the end, it was the pro-

⁴⁸ Ibid at 220 quoting *Lattre de M. Arntz* in Rollin-Jacquemyns, 'Note sur la Theorie du Droit d'Intervention', (1876) 8 *Revue de Droit International et de Legislation Comparee* 675.

⁴⁹ Fonteyne 'The customary international law doctrine' op cit note 3 at 220.

⁵⁰ See Hersch Lauterpach *Oppenheim's International Law* 8 ed (1955) 312-3.

⁵¹ Fonteyne 'The customary international law doctrine' op cit note 3 at 205 notes 7.

⁵² Ibid at 220.

⁵³ Ibid at 221 quoting P Fiore *Nouveau Droit International Public* (1885) 521-522 Antoine Transl.

⁵⁴ Fonteyne 'The customary international law doctrine' op cit note 3 at 218 quoting M Bernard *On the Principle of Non-intervention* (1860) 33-4.

⁵⁵ Brownlie argues that since only powerful states could undertake humanitarian intervention, there were often ulterior motives in cases of interventions. The possibility of abuse was not lost on Grotius who nonetheless observed that '...the desire to appropriate another's possession often uses a pretext such as this but that which is used by bad men does necessarily cease to be right. Pirates use navigation, but navigation does not therefore

intervention jurists that triumphed and ‘by the end of the nineteenth century, majority of publicists admitted that a right of humanitarian intervention ... existed.’⁵⁶ It is interesting to note how many of the views expressed by these writers still resonate today in the current debates on humanitarian intervention—the requirement of trans-border effects as a condition for humanitarian intervention, the question of threshold, the debate on whether there should be a ‘positive duty’ to intervene (responsibility to protect) on the international community, who has authority to intervene and so on. These issues are taken up in succeeding chapters.

2.5 HUMANITARIAN INTERVENTION UNDER THE UN CHARTER: THREE NORMATIVE CONSIDERATIONS

One of the most important developments of the last century was the adoption of the United Nations Charter which brought about important changes in inter-state relations on the one hand and the relationship between citizens and national governments on the other. The atrocities of World War II showed the weaknesses of the League of Nations and the many incongruities between providing for human rights protection in theory and the reality of prevalence of abuses. This reality is not necessarily better under the UN Charter that succeeded the League Covenant. As a result certain principles were included in the Charter as the anchor of the new post-war international legal order: the principles of state sovereignty and non-interference, sovereign equality of states and non-use of force.

Thus, the drafters of the Charter seem to realise the linkage and interdependence of human rights and international peace and security by providing that member states and the UN work together to protect and promote human rights and international peace and security.⁵⁷ These provisions have influenced the practice and debates on the legal status of humanitarian intervention since 1945.⁵⁸ Given the institutional and structural deficiencies of the international legal system, the interpretation of the Charter has been problematic and the legal status of the doctrine of humanitarian intervention under the Charter even more so. The whole issue revolves round the seeming contradiction between the Charter principles of non-use of force, state sovereignty and non-intervention on the one hand, and the duty to protect

become unlawful. Robbers use weapons, but weapons are not therefore unlawful.’’ See Abiew op cit note 8 at 35-6 quoting Hugo Grotius 2 *De Jure Belli Est Pacis* (1853) (Whewell transl.) 288.

⁵⁶ Brownlie ‘Use of Force’ op cit note 26 at 388.

⁵⁷ See for example, the Preambles, articles 13, 39, 42, 55 and 56 of the UN Charter. See also Myres S McDougal & Gerhard Bebr ‘Human rights in the United Nations’ (1964) 58 *AJIL* 603 at 612.

⁵⁸ Myres S McDougal & W Michael Reisman ‘Rhodesia and the United Nations: the lawfulness of international concern’ (1968) 2 *AJIL* 1 at 18.

human rights, and the failure of the UN to develop a mechanism of collective security as originally envisaged under article 43 of the Charter on the other. A possible explanation for this is the Cold War politics that engulfed the UN and which greatly circumscribed its effectiveness especially its principal political organ—the United Nations Security Council (UNSC) throughout the first fifty years of its existence. The linchpins were the principles of equality of states, state sovereignty and non-use of force.

In order to analyse the unique character and novelty of the AU/ECOWAS treaty provisions the validity of which is my concern in this thesis, it is imperative at the outset to examine these three fundamental norms and situate their meanings in current international law, not just because they impact the debate on humanitarian intervention and the emerging doctrine of the responsibility to protect (R2P), but also because the argument for or against the validity of the AU/ECOWAS humanitarian intervention regime are also influenced by these norms.

For example, the inherent contradictions in the principle of equality of states as espoused by the Charter on the one hand and the reality of state inequalities also legalised in the same Charter (by granting permanent seat on the UNSC to a select few) have impacted on the ineffectiveness of the UNSC and the erosion of its legitimacy in its practice of humanitarian intervention. Also, the principle of sovereignty and non-interference represent the foremost defence of states to any external scrutiny of their human rights records and also serve as a barrier to external intervention in matters within the exclusive jurisdiction of states. It is the legal basis of granting or withholding consent to external intervention. Finally, the prohibition of the use of force is a fundamental norm that challenges any treaty arrangement amongst states that rely on the use of force as a means of settlement of international disputes and therefore has implications for the validity of the treaty provisions of the AU/ECOWAS. To this extent therefore, I find it imperative briefly to examine the meaning, scope and contents of these principles in contemporary international law.

2.5.1 *Equality of States*

The concept of equality of states means that all states are equal in international law and have equal rights and obligations irrespective of inequalities in other aspects.⁵⁹ This principle

⁵⁹ See Edwin Dew Dickinson *The Equality of States in International Law* (1920) 11 (hereafter Dickinson 'Equality of States'); see also *The Norwegian Shipowners' Claims Case* (Norway v United States of America) Permanent Court of Arbitration 13 October 1922 Vol. XI Reports of International Arbitral Awards 307 at 331.

derives from the natural law theory of the equality of men.⁶⁰ Hugo Grotius is generally credited with developing this principle and other natural law theorists posit that the law of nature which is applicable to all mankind and discoverable by reason was also applicable to inter-state relations in the community of states.⁶¹ It was argued that since states are made up of men who are by the law of nature equal, enjoying equal rights and obligations regardless of their physical size or inadequacies, the states consisting of these men must also be equal amongst themselves.⁶²

Indeed, as men are naturally equal, and as nations are composed only of men, and are considered as being moral persons who enjoy perfect liberty, it follows that they ought to regard one another as naturally equal. The strength or weakness of any one of them does not make any difference in this respect; just as a dwarf is as much a man as a giant, so a small republic is no less a sovereign state than the most powerful kingdom; and, consequently, all the rights assumed by the great kingdoms, such as France or Spain, belong also to the republics of Lucca and of San Marino, and all the duties which these republics are obliged to perform are no less obligatory on the kingdoms of France and of Spain.⁶³

A second argument was that there was no universal superior common to all states and therefore states existed in a state of nature equal to one another in accordance with the principle of natural law.⁶⁴

Thus the equality of states came down to the nineteenth century grounded upon the natural law, the state of nature, natural equality It is the right by virtue of which every sovereign State may demand that another State shall not assume more extensive rights, in their mutual relations, than it enjoys itself, and shall not free itself from any of the obligations imposed upon all. The equality of sovereign states is a generally recognised principle of public law. It has a twofold consequence in that it attributes to all States the same rights and imposes upon them reciprocally the same duties.⁶⁵

Sovereign equality of states was therefore seen as an inevitable consequence of the independence and sovereignty of states and it was only reasonable that states be treated as equals in international law.⁶⁶ The principle of equality of states has regulated the intercourse of inter-state relations for centuries and is a fundamental principle of the current international legal order enshrined in article 2(1) of the Charter which provides '[t]he Organisation is

⁶⁰ For a detailed treatment of the evolution of the principle and a critique of this conclusion see generally Edwin Dew Dickinson 'Equality of States' op cit note 59.

⁶¹ Dickinson disagrees that Hugo Grotius developed this thesis. Ibid at 33 – 37.

⁶² Dickinson 'Equality of States' op cit note 59 at 98.

⁶³ Id citing Burlamaqui *Principes du droit de la nature et de gens* new ed by Dupin IV at 434.

⁶⁴ Ibid at 45 citing Thomasius *Institutionum Jurisprudentiae Divinae* 1, 2. 105

⁶⁵ Ibid at 100 quoting Calvo *Dictionnaire*. Oppenheim says 'The equality before International Law of all member-states of the Family of Nations is an invariable quality derived from their International Personality. Whatever inequality may exist between States as regards their size, population, power, degree of civilization, wealth and other qualities, they are nevertheless equals as International Persons.' See Hersch Lauterpach *Oppenheim's International Law* 8 ed (1955) 168.

⁶⁶ See Quincy Wright 'The equality of states' (1970) 3 *Cornell International Law Journal* 1 at 5 (hereafter Wright 'The equality of states').

based on the principle of the sovereign equality of all its Members.’ However, the contradictions between the equality of states professed by international law and the manifest inequalities amongst states means that the content and application of the principle would be controversial. Though the principle quickly achieved the status of a fundamental norm in international law,⁶⁷ its incubation seemed to have been incomplete and continues to exist side by side with inequalities among states.⁶⁸ In fact, one of the lessons of World War I was that the principle of equality of states was unsustainable in reality in the face of de facto inequalities and the propensities of states to project their power and pursue national interests through the use of force.⁶⁹

Some writers have submitted that a distinction be drawn between juridical equality of states and their political status.⁷⁰ According to this view, the principle does not mean that states must be able to exercise their rights to the same extent but that they should all enjoy equal recognition to the extent that they have the capacity to realise those rights as permitted by each state’s conditions and circumstances.⁷¹ This is the juridical equality of states and it has nothing to do with political inequalities.⁷² However the principle is construed the reality has always been that Great Powers make the rules and weaker states assent and follow those rules.⁷³ From the Concert of Europe to the League of Nations and the UN Charter these states arrogate to themselves the rights to determine the course of events in the international community.⁷⁴ Thus international law in practice permitted exceptions to the rule of equality of states.⁷⁵ This contradiction was summed up thus:

[i]t is worthwhile to have it clearly pointed out that legal equality and political equality differ fundamentally in character and in validity both as ideals and as rules or principles of the actual law. ...It is especially worthwhile to have it emphatically stated that progress in the science and art of international law and relations, and particularly in international

⁶⁷ Kingsbury Benedict ‘Sovereignty and inequality’ (1998) 9:4 *EJIL* 599 at 600.

⁶⁸ Jack Donnelly ‘Sovereign inequality and hierarchy in anarchy: American power in international society’ (2006) 12:2 *EJIL* 139 at 145 (hereafter Donnelly ‘Sovereign equality’).

⁶⁹ Wright ‘The equality of states’ op cit note 66 at 5.

⁷⁰ Pitman B Potter ‘The equality of states in international law’ (1921) 15:2 *The American Political Science Review* 287 at 288. (hereafter Potter ‘The equality of states’).

⁷¹ Dickinson ‘Equality of States’ op cit note 59 at 107. ‘Equality of states means nothing more or less than that each state may exercise equally with other all rights that are based upon its existence as a state in the international society.’ Ibid at 106.

⁷² Ibid at at 3.

⁷³ See In what he describes as ‘legalized hegemony’ Simpson observes that during the Concert of Europe ‘[t]he Great Powers made the law and the middle powers signed the resulting Treaty. The smaller powers, meanwhile were erased from consideration.’ See Gerry Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) 112.

⁷⁴ Ibid at 153.

⁷⁵ For example, right of conquest, reprisals and use of force by powerful states to compel weak states to accept unequal treaties were permitted. See Wright ‘Equality of states’ op cit note 66 at 2-3.

organization and government, can only be made when the de facto inequalities of states are given de jure recognition. ... The small states may balk and delay the march of events, but if facts are facts and men are in any degree candid they must eventually recognize that Haiti and France are entitled to widely divergent measures of political power in international government, albeit they are entitled to equal opportunity to vindicate such rights as in substance they actually possess.⁷⁶

The UN Charter had on the one hand conferred formal recognition on the principle of state equality and on the other hand accorded legal recognition to inequality of states by giving permanent seat of the UNSC to a few states such that they are able to determine and manage the course of global governance as they deem fit. This has proved problematic in operation and nowhere else is its impact felt more than the area of humanitarian intervention as will be demonstrated in the next chapter. It should be noted that one impact of this anomaly is that the system has unwittingly reverted back to the old era of regional hegemonies.⁷⁷

2.5.2 *Sovereignty and Non-intervention*

The term 'sovereignty' has a 'long and troubled history.'⁷⁸ It remains the most contentious principle in the history and development of international law,⁷⁹ and according to Oppenheim, 'it is doubtful whether any single word has caused so much intellectual confusion.'⁸⁰ The historical origin of the term dates almost as far back as the beginning of the development of the Law of Nations.⁸¹ Consequently, discerning its meaning, scope and contents requires a periodisation of the various evolutionary contexts in which it was conceived, interpreted and applied.⁸² Sovereignty has meant different things to different people since the time of Aristotle.⁸³ The Aristotelian conception of sovereignty was in absolute terms in that he regarded sovereignty as the supreme authority held by an individual or group of individuals in the state.⁸⁴ To ancient Romans, sovereignty meant the unqualified powers of the Emperor and his unrestrained right to rule over the people who had transferred their rights to him.⁸⁵ By the Middle Ages the notion of absolute sovereignty had gone into oblivion and it was only

⁷⁶ Potter 'The equality of states' op cit note 70 at 288.

⁷⁷ Wright 'The equality of states' op cit note 66 at 6.

⁷⁸ James Crawford *The Creation of States in International Law* (1979) at 26.

⁷⁹ Helmut Steinberger 'Sovereignty' in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* Vol. IV (2000) 500 at 500 (hereafter Steinberger 'Sovereignty').

⁸⁰ Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 24 quoting Oppenheim *International Law* Vol I (1905) 103.

⁸¹ Steinberger 'Sovereignty' op cit note 79 at 501.

⁸² Id.

⁸³ Michael Reisman 'Sovereignty and human rights in contemporary international law' (1990) 84 *AJIL* 866 at 866 (hereafter Reisman 'Sovereignty and human rights').

⁸⁴ Aristotle *Politics* Book III Chapter 7 at 61 (1999) Benjamin Jowett transl.

⁸⁵ Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 26.

after the after 1648 that the concept was revisited in order to provide legitimacy for the emerging secular nation state.⁸⁶

It was however, Jean Bodin who first presented a comprehensive conceptualisation of the term. According to him sovereignty is the extraordinary, unconditional and perpetual authority conferred on the state over its citizens.⁸⁷ Sovereignty was unlimited by any other form of authority except divine law and the law of nature.⁸⁸ The Sovereign could do no wrong and was neither subject to the law of nature nor the Law of God.⁸⁹ From the moment the people, through mutual covenant amongst themselves coalesced their will, rights and strengths and conferred it upon one man or group of men, the Leviathan or 'Mortal God' was established.⁹⁰ The authority of the Leviathan was totally absolute and based on the free 'irrevocable' contract that thus conferred unqualified freedom of action on the sovereign as the ultimate political authority whose freedom of action was not subject to any constraints whatsoever legal or moral.⁹¹

At a time Europe was engulfed by political crisis, Hobbes and Bodin elevated sovereignty to the status of a legal principle to provide a theoretical defence for the actions of European monarchs.⁹² Though there were those who resisted the view of absolute sovereignty, the concept was nonetheless accorded pre-eminence with the crystallisation of nation-states in Europe in the Treaty of Westphalia in 1648.⁹³ John Locke's social contract theory conceptualised sovereignty as residing in the constituted legislature.⁹⁴ He argued that a state's claim to sovereign authority was preconditioned on the state's fulfilment of the obligation to respect the rights of the citizens with whom it had entered into a social contract.⁹⁵ To the extent that the government respected the rights of its citizens, sovereignty

⁸⁶ Ibid at 27.

⁸⁷ See Jean Bodin *Six Books of the Commonwealth* (1606) abridged transl by M.J Tooley (1962) Bk 1 Chapter 8 at 24-5 Oxford: Alden Press. Available at http://www.arts.yorku.ca/politics/comminel/3020pdf/six_books.pdf (accessed on 20 October 2012).

⁸⁸ Id

⁸⁹ See Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 28.

⁹⁰ Steinberger 'Sovereignty' op cit note 79 at 506.

⁹¹ Id.

⁹² J H Morgenthau 'The problem of sovereignty reconsidered' (1948) 48 *Colorado Law Review* 341 at 341; see also J L Brierly 'The shortcomings of international law' (1924) 5 *British Yearbook of International Law* 4 at 12.

⁹³ But even then, there were limitations imposed on the states' sovereignty because a state was not permitted to compel its subjects to change their religion. See Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 28.

⁹⁴ John Locke *Two Treatise of Government and a Letter Concerning Toleration* Thomas I Cook (ed) (1966) 174, 184.

⁹⁵ Helen Stacy 'Relational sovereignty' (2003) 55:5 *Stanford Law Review* 2029 at 2034. Quoting Hugo Grotius, Abiew Kofi states that the sovereign is one 'power whose acts are not subject to another, so that they may be made void by the act of any other human will.' But this ultimate will of the sovereign was still limited by the

vests in the government, but when it violates the rights of its citizens, then sovereignty reverts back to the citizens. Hence sovereignty to Locke ultimately resides in the people. This is more akin to the notion of popular sovereignty and provides the theoretical argument for the emergence of the doctrine of the responsibility to protect discussed. But suffice it to mention here that the scope and contents of sovereignty has continued to vary greatly in different legal epochs.

Sovereignty is a state attribute and in its classical sense, has both an internal and external aspect.⁹⁶ Territory has always shaped the understanding of sovereignty and the limits to which a state would claim sovereignty has in part been determined by geographical boundaries.⁹⁷ In this sense, we speak of territorial sovereignty and it implies that a political community vested with public power enjoys complete and exclusive jurisdiction over a defined territory (including land, airspace, maritime) and thus exercises freedom of action to determine the social, economic, cultural and political organisation of that territory to the exclusion of any foreign authority.⁹⁸ It is therefore a question of exercise of internal juridical sovereignty and the right to rule for a state to exercise internal control over its subjects.⁹⁹ This internal sovereignty is demonstrated by the unchallenged supremacy of a state over all persons, groups and property within its domestic jurisdiction or territory.¹⁰⁰ Several UN General Assembly resolutions restate the content of sovereignty in this sense.¹⁰¹

The exercise of this supremacy in practice has often pitched the state against its citizens. Citizens challenge the unlimited powers of the state to determine their fate because the state often violates their rights and liberties in the course of performing state functions. This raises the question of the basis of legitimacy of a government and the scope of external aspect of its sovereignty vis-à-vis the basis of international concern with how a state treats its citizens and the argument for external intervention in cases of abuses of human rights. These

law of nature, natural law and the law of nations. See Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 27.

⁹⁶ Helene Ruiz Fabri 'Human rights and state sovereignty: Have the boundaries been significantly redrawn?' in Philip Alston & Euan MacDonalds (eds) *Human Rights, Intervention and the Use of Force* (2008) 33 at 35. (hereafter Fabri 'Human rights and state sovereignty').

⁹⁷ Walter B Wriston 'The twilight of sovereignty: How the information revolution is transforming our world' (1993) 17 *Fletcher F. World Affairs* 119 at 119.

⁹⁸ Steinberger 'Sovereignty' op cit note 79 at 501.

⁹⁹ Mohammed Ayoob 'Humanitarian intervention and state sovereignty' (2002) 6:1 *International Journal of Human Rights* 81 at 82 (hereafter Ayoob 'Humanitarian intervention').

¹⁰⁰ Abiew Kofi 'The Evolution of the Doctrine' op cit note 8 at 25.

¹⁰¹ See for example Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. G.A. Res 2625 (XXV) 25, U.N. G.A.O.R., Supp. No. 28, U.N. Doc. A/8028 (1970).

questions border on the limits of the external aspects of sovereignty. As will be seen in subsequent chapters, legal frameworks have been designed by the AU and ECOWAS to deal with this problem by codifying legal norms of how African regional organisations should respond to demands for the protection of human rights. These legal instruments apparently impinge on the sovereignty of member states and other fundamental norms of international law leading to a challenge of their legal validity, but this thesis will demonstrate that this is hardly the case. I will argue that accession to these legal instruments is in fact an exercise of sovereignty even though the effects of the treaties are such that they constrain the sovereignty of member states.¹⁰²

Legally speaking, sovereignty in its external manifestation is a corollary of the principle of juridical equality of states already discussed above and it refers to the independence and external autonomy of a state in how it conducts its foreign relations.¹⁰³ It derives from the recognition conferred upon a state by other states in the international system and it is critical to the maintenance of minimum world public order in an international system characterised by de facto state inequalities.¹⁰⁴ Sovereignty in this sense thus serves as a shield that protects weak states from the excesses of strong states by defining and protecting their legal status in international law as affected by their factual relations.¹⁰⁵ In such inter-state relations, the state not owing allegiance to any outside authority cannot be bound by commitments it has not consented to and even where it has assumed treaty obligations, it still retains its sovereignty which is then only circumscribed to the extent of the obligations it has assumed under the treaty.¹⁰⁶ Save for restrictions imposed by public international law, a state in exercise of its sovereignty is at liberty to enter into a treaty which may severely constrain its freedom of choice.¹⁰⁷

¹⁰² See *Case of the S.S. "Wimbledon"* (1923) PCIJ Series A No 1 at 25, where the Court stated that when a state undertakes a treaty obligation to do or refrain from doing an act it does not mean that state has abandoned its sovereignty.

¹⁰³ See *Island of Palmas Case (Netherlands, USA)* (1928) Permanent Court of Arbitration 4 April 1928, UN Reports of International Arbitral Awards Vol. 2 p 829 at 838, where it was held that sovereignty connotes the independence to perform the roles of a state to the exclusion of all other states in relation to a geographical territory.

¹⁰⁴ Benedict Kingsbury 'Sovereignty and inequality' in Andrew Hurrell & Ngair Woods (eds) *Inequality, Globalization and World Politics* (1999) 86.

¹⁰⁵ Steinberger 'Sovereignty' op cit note 79 at 501.

¹⁰⁶ Fabri Human rights and state sovereignty op cit note 96 at 43. The freedom to enter into binding treaty obligations is itself a manifestation of sovereignty.

¹⁰⁷ Id. See also the *S.S Wimbledon Case* supra note 102 at 25 where the Court said that sovereignty means a sovereign state 'is subject to no other state and has full and exclusive powers within its jurisdiction without prejudice to the limits set by applicable law.' For more on this, see chapter seven discussing the right of the AU and ECOWAS states to enter into treaties authorising the use of force in their territories.

The international law concept of sovereignty as discussed above implies an internal omnipotence and external independence and it has been enshrined in article 2(7) of the UN Charter which provides:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁰⁸

This principle of non-interference in the internal affairs of states was devised to safeguard the sovereignty of states and maintain peace and stability in the international legal order. Though there is no similar express provision in the Charter regarding state-state relations, it is generally conceded that an expanded interpretation this rule also applies to inter-state relations.¹⁰⁹ The omission has been attributed to the imprecision associated with what constitutes 'interference' under the Charter.¹¹⁰ That notwithstanding, non-interference is regarded as a fundamental norm constitutive of the international legal order and is actually a constraint on the independence conferred by sovereignty, since it imposes a 'duty and obligation not to intervene in the domestic affairs of other states.'¹¹¹ The UN has confirmed this in several General Assembly resolutions, most of which now constitute norms of customary international law.¹¹²

However construed, the notion of sovereignty is both constitutive of a heterogenous society as well as an individualistic one at the same time.¹¹³ But '[I]f particular manifestation of sovereignty in contemporary international affairs is at issue, its accurate interpretations is likely to depend largely on an adequate assessment of its social environmental, that is to say present-day world society.'¹¹⁴ The scope of sovereignty in contemporary international law has been largely determined by the internationalisation of human rights.¹¹⁵ Traditionally,

¹⁰⁸ See Article 2 (7) Charter of the United Nations.

¹⁰⁹ Oliver Ramsbotham & Tom Woodhouse *Humanitarian Intervention in Contemporary Conflicts: A Reconceptualization* (1996) 34 (hereafter Ramsbotham & Woodhouse 'Humanitarian Intervention'). See article 1(2), 35 and 55 of the UN Charter.

¹¹⁰ Ramsbotham & Woodhouse 'Humanitarian Intervention' op cit note 109 at 40.

¹¹¹ Caroline Thomas *New States, Sovereignty and Intervention* (1985) 15.

¹¹² See Declaration on the Inadmissibility of Intervention in the Internal Affairs of States and Protection of their Independence and Sovereignty, G.A. Res 2131, U.N. G.A.O.R. 20th Sess. 1408th Plen. Mtg. Suppl. No. 14 (1965); The Declaration on the Principles of International Law Concerning Friendly Relations supra note 102.

¹¹³ Fabri Human rights and state sovereignty op cit note 96 at 35.

¹¹⁴ Georg Schwarzenberger 'The forms of sovereignty: an essay in comparative jurisprudence' (1957) 10 *Current Legal Problems* 264 at 266.

¹¹⁵ Fabri 'Human rights and state sovereignty' op cit note 96 at 41.

ascertaining what falls within the domestic jurisdiction of a state depends on, and to what extent, the subject matter is covered by international law.¹¹⁶

One of the achievements of the human rights movement of the 60s and 70s was the ‘transfer’ of human rights from the exclusive domestic jurisdiction list to the ‘matters for international concern’ list. The experiences of World War I and the atrocities of World War II effectively placed concern for human protection on the international agenda. By making it one of its ‘Purposes’, the UN Charter opened the floodgates to international human rights legal instruments under which states assumed different degrees of commitments. A survey of this is outside the scope of this work.¹¹⁷ But suffice it to mention that the combined effect of the International Bill of Rights and decolonisation in the post-World War world was a gradual move that sought to place emphasis on the protection of human rights. This development was however truncated by the Cold War rivalry which saw sovereignty prioritised over human rights as an inviolable cornerstone of the international legal order. Sovereignty was mainly viewed through geostrategic lenses and human right was of little importance.¹¹⁸ The few instances—particularly in Africa—where external interventions were undertaken to protect human rights were isolated cases that were exceptions rather than the norm. Even so, the motives and legality of such humanitarian intervention was mired in controversy. I will discuss some of the instances and interventions and the role they played in setting the stage for the new interventionism of AU and ECOWAS in the next chapter.

However, with the end of the Cold War, the UNSC became more active in tackling human rights violations by states. Human rights made some advances leading to a redefinition of sovereignty and its scope. Thus, the 1990s saw a further narrowing of the scope of sovereignty and the expansion of human rights by placing the human being at the centre of protection of international law.¹¹⁹ In this respect, Reisman states:

¹¹⁶ There are two schools of thought regarding how domestic jurisdiction is determined. The essentialist school posit that for purposes of sovereignty, certain matters (e.g. political and constitutional) by their very nature must remain within the domestic jurisdiction of states and this is immutable. The legalist argue that the limits of domestic jurisdiction is determined by international law and once a matter is covered by international law, it ceases to be under domestic jurisdiction, hence it is relative. See Fernando Teson ‘Law and Morality op cit note 11 at 137, 140.

¹¹⁷ For a detailed discussion of the evolution of the theory and practice of international human rights, see Louis B Sohn & Thomas Buergenthal *International Protection of Human Rights* (1973).

Richard B Lillich & Frank C Newman (eds) *International Human Rights: Problems of Law and Policy* (1979); Henry Steiner & Philip Alston *International Human Rights in Context: Law, Politics, Morals* (2007).

¹¹⁸ Ayoob ‘Humanitarian intervention’ op cit note 99 at 83.

¹¹⁹ Jarat Chopra & Thomas G Weiss ‘Sovereignty is no longer sacrosanct’ (2003) *Humanitarianism War Project* available at http://www.project.tufts.edu/publications/electronic_sinls.html (accessed on 25 February 2011).

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.¹²⁰

It was contended that there is no conflict between the Charter principles (protection of human rights and non-intervention) because as members of the UN, states have assumed obligations to protect human rights and as such the principle of non-intervention was inapplicable when they breached this duty.¹²¹ Sovereignty now means an internal responsibility to protect the citizens and an external obligation to the international community to that effect.

Although the term ‘sovereignty’ is still used in international law but its referent has since changed –it is the people’s sovereignty rather than the sovereign’s sovereignty that is today protected by international law. The UN Charter maintains the ‘domestic jurisdiction-international concern’ dichotomy, but no serious scholar still supports the contention that internal human rights are “essentially within the domestic jurisdiction of any state” and hence insulated from international scrutiny.¹²²

This assertion has found expressions in the humanitarian intervention legal regime of the AU and ECOWAS. Third World states during the Cold War were staunch champions of the principle of sovereignty and non-intervention and regarded any breach as a violation of international law, irrespective of the justifications for such intervention. It is therefore an irony of history that the first regional organisations to codify the doctrine of humanitarian intervention and the right to democracy should be the AU and ECOWAS respectively, traditional pro-absolute sovereignty and non-intervention organisations. This is apart from being some of the strongest advocates of the doctrine of the responsibility to protect. The principle of sovereignty and its shifting contextual meaning means that African states had at one time been beneficiaries and at another victims of its application. The inviolability of sovereignty offered post-colonial African states some degree of protection as they struggled to maintain internal cohesion, control over natural resources and consolidate their status as independent states autonomous in their external engagements. At another level, it became the shield for despotic and brutal regimes like Idi Amin and Mobutu Sese Seko. Sovereignty and what it meant to African states in the past and its future must be understood in this context. Why did African states decide to embrace a new conception of sovereignty in the AU/ECOWAS treaty and how does their new legal regime fit in to the existing international

¹²⁰ Reisman ‘Sovereignty and human rights’ op cit note 83 at 872.

¹²¹ Christine Ellerman ‘Command of sovereignty gives way to concern of humanity’ (1993-4) 26 *Vanderbilt Journal of Transnational Law* 346 at 352.

¹²² Reisman ‘Sovereignty and human rights’ op cit note 83 at 89.

legal order? Before attempting to answer this question in the next chapters, I briefly consider the norm of non-use of force since the provisions of the AU/ECOWAS treaties apparently conflict with this international law norm.

2.5.3 *Prohibition of the Use of Force*

The prohibition of the use of force is discussed here in the context of the humanitarian intervention debate.¹²³ Through the 1899-1907 Hague Conventions, the Locarno Treaty, the Kellogg-Briand Pact, the League of Nations Covenant, series of efforts were made to ban recourse to war as an instrument of state policy in the Law of Nations. In principle, this goal was only achieved by the UN Charter, article 2(4) of which provides that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations Charter.'

This provision, it is argued, outlaws not just war for whatever purpose, but also the use of force short of war and the threat to use such force.¹²⁴ The prohibition in article 2(4) relates to inter-state rather than intra-state use of force.¹²⁵ From the beginning, the continued relevance of article 2(4) was questioned in view of its failure to prevent states from actually resorting to the use of force in practice.¹²⁶ No sooner was the UN Charter adopted than it was realised that 'there was tension between the UN's primary purpose—the maintenance of international peace and security and a secondary purpose that was fast becoming important—promotion and protection of human rights ...'.¹²⁷ The prohibition of the use of force is generally regarded as a norm of jus cogens and one of the pillars of international law.

The debate about humanitarian intervention since 1945 essentially turns on how to reconcile the prohibition of the use of force by article 2(4) with the moral imperatives to protect people who are victims of massive human rights violations at the hands of their own

¹²³ For a detailed discussion of the subject see Brownlie 'Use of Force' op cit note 26; Yoram Dinstein *War, Aggression and Self-Defence* (2005) (hereafter Dinstein 'Aggression and Self-Defence').

¹²⁴ See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 8 July 1996 ICJ Reports 226 at 246. But this excludes economic sanctions.

¹²⁵ Dinstein 'Aggression and Self-Defence' op cit note 123 at 85; See also Albrecht Randelzhofer 'Use of Force' in Bernhardt *Encyclopedia of Public International Law* at (2000) 12-46-1258 at 1250 (hereafter Randelzhofer 'Use of Force')

¹²⁶ Thomas Franck 'Who killed article 2(4)? Or: Changing norms governing the use of force by states' (1970) 64:5 *AJIL* 809.

¹²⁷ Richard B Lillich, 'Kant and the current debate over humanitarian intervention' (1997) 6 *Journal of Transnational Law and Policy* 397 at 399. Cf. The preambles and articles 1(1), (3), 2(4), 2(7), 55 and 56 of the UN Charter.

government. It is not surprising that treaty provisions like article 4(h) of the AU Constitutive Act and article 25 of the ECOWAS Protocol on MCPMRPS should meet with their first opposition for conflicting with article 2(4) in this regard. This is addressed in detail in subsequent chapters. The aim here is to show that though mainly observed in the breach by powerful states, within the context of the humanitarian debate, there is support for the view that article 2(4) was never an absolute prohibition because it was an obligation undertaken on the premise of certain assumptions that never materialised under the Charter; and if that is so, a regional treaty providing for a right of humanitarian intervention can only be viewed as fulfilling the objectives of the Charter.

Within international relations, the debate about the use of force is basically between pluralists and solidarists. To pluralists, states, and not individuals are the rights holders in international law, and as such, attempts to use force to enforce individual rights violate the principles of sovereignty, non-interference and non-use of force and endangers inter-state relations and international order and stability.¹²⁸ The society of states depends on a rules-based system that allows states to protect ‘the values of individual life and communal liberty’ within their territories.¹²⁹ Pluralists prioritise order over justice because the protection of individual rights within states depends on the existence of a minimum level of harmony and stability in international society and to permit the use of force even for human rights protection negates this arrangement.¹³⁰ Consequently, Bull concludes that states are wary of recognising a right of unilateral humanitarian intervention since there is no regulatory legal regime or consensus on what human rights entails a right of unilateral intervention could undermine the international system.¹³¹ This is the reason, he argues, why states have refused to embrace the practice and it is in the best interest of all that humanitarian intervention should remain prohibited.¹³²

¹²⁸ Nicholas J Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2000) 11 (hereafter Wheeler ‘Saving Strangers’).

¹²⁹ Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1978) 108. (hereafter Walzer ‘Just and Unjust Wars’).

¹³⁰ See Wheeler ‘Saving Strangers’ op cit note 125 at 29.

¹³¹ Hedley Bull ‘Conclusion’ in Hedley Bull (ed) *Intervention in World Politics* (1984) 181-95 at 193. Realists advance the following main arguments against humanitarian intervention. First they argue that it will always be open to abuse. Second, relying on examples of selective intervention, they argue that intervention by states will always be driven by national interests and never wholly by humanitarian motives and at best by a convergence of purposes. Third, they submit that states have no right to risk the lives of their soldiers to protect strangers in foreign lands from human rights abuse.

¹³² Ibid.

Solidarists contend that sovereignty is not absolute and that states must meet a minimum standard of human rights to be eligible for the protection accruing from sovereignty and nonintervention. Michael J Smith argues that because states' rights derive from individual rights, when a state violates the rights of individuals it loses its legitimacy and moral right to 'full sovereignty.'¹³³ In such cases, intervention by other states is not only allowed,¹³⁴ it is also a moral duty.¹³⁵ This argument is based on the ground that national boundaries are mere artificial constructs that do not have the authority to limit our moral responsibility to fellow human beings, hence states not only have a domestic responsibility to observe human rights but also an international responsibility to protect it even at the risk of their own soldiers.¹³⁶

Various classifications have been adopted to distinguish theorists on humanitarian intervention and the use of force in international law.¹³⁷ However, the debate is generally between two main schools of thought: restrictionists and counter-restrictionists. Restrictionists argue that article 2(4) prohibits the use of force by states except in the case of the exceptions provided in article 51 and Chapter VII of the Charter.¹³⁸ To these writers, the use of force to protect human rights is illegal under current international law.¹³⁹ As Ronzitti puts it, 'unlike intervention for protecting citizens abroad, humanitarian intervention has no unquestionable 'historic titles' supporting its legality; it is radically contrary to Article 2(4) of the United Nations Charter and no precedent supporting the opposite view can be quoted.'¹⁴⁰

Chesterman argues that article 2 (4) prohibits the use of force even for humanitarian purposes and he cites several UN General Assembly declarations to buttress his point.¹⁴¹ Save for the exceptions recognised in the Charter, this prohibition does not admit of any exception and the use of force to secure a legal right¹⁴² or to assist in the administration of

¹³³ Michael J Smith 'Humanitarian intervention: An overview of the ethical issues' (1998) 12:1 *Ethics and International Affairs* 63 at 76. See also Teson 'Law and Morality' op cit note 11 at 174.

¹³⁴ Walzer 'Just and Unjust Wars' op cit note 129 at 107.

¹³⁵ R J Vincent & Peter Wilson 'Beyond non-intervention' in Ian Forbes & Mark Hoffman (eds) *Political Theory, International Relations and the Ethics of Intervention* (1993) 122-30 at 123, 128.

¹³⁶ Wheeler 'Saving Strangers' op cit note 125 at 39.

¹³⁷ J L Holzgrefe 'The Humanitarian intervention debate' in J L Holzgrefe & Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 15-52 at 18-19 distinguishing between naturalist, consensualist, collectivist and individualist theorists.

¹³⁸ Michael Akehurst 'Humanitarian intervention' in Hedley Bull (ed) *Intervention in World Politics* (1984) 95-118 at 99.

¹³⁹ See Brownlie 'Use of Force' op cit note 26 at 267; Brownlie 'Humanitarian intervention' op cit note 7 at 217.

¹⁴⁰ Natalino Ronzitti 'Rescuing Nationals Abroad' op cit note 12 at 108.

¹⁴¹ See Simon Chesterman *Just War or Unjust Peace? Humanitarian Intervention and International Law* (2001) 32 (hereafter Chesterman 'Just War or Unjust Peace').

¹⁴² Oscar Schachter *International Law in Theory and Practice* (1991) at 112.

justice is a violation of article 2(4) and illegal.¹⁴³ In the *Corfu Channel Case* the ICJ held that it could

only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot find a place in international law. It is still less admissible in the particular form it would take here—it would be reserved for the most powerful states.¹⁴⁴

This view was also confirmed by the ICJ in the *Nicaragua Case* where the Court held that article 2(4) not only prohibits the use of force but that the provision is now a norm of *jus cogens* from which no derogation is permitted.¹⁴⁵ To these writers, the internationalisation of human rights norms and the growing international concerns with human rights does not translate to a modification of the prohibition of force in article 2(4). It is argued that even if human rights have achieved the status of *jus cogens*, it still does not mean that force can be used for its protection.¹⁴⁶ This school rejects the view that article 2(4) only prohibits the use of force when directed against the political independence or territorial integrity of a state. In their view, to interpret the provision in such a way as to come to this conclusion would require an ‘Orwellian construction’.¹⁴⁷ Article 2(4) is a total ban on the use of force and the inclusion of the words ‘... in any other manner inconsistent with the purposes of the Charter’ was not intended to create an exception to the rule but to stress the totality of the prohibition.¹⁴⁸ Thus, Gray asks rather rhetorically, ‘[i]f Article 2(4) of the UN Charter is a dynamic provision opened to changing interpretation over time, what developments in fact justified a new interpretation?’¹⁴⁹

However, this thesis contends that, besides the failure to develop an effective collective security mechanism and the ineffectiveness of the UNSC, state practice as it relates to the use of force since 1945, as well as intervention treaties and obligations of member states under articles 53 and 103 must be given a contextual rather than a textual interpretation—at least, in view of developments in regional and general customary international law, such as the interventions by NATO and ECOWAS and the AU/ECOWAS

¹⁴³ *The Corfu Channel Case* (United Kingdom of Great Britain v Albania) (Merits) Judgment of 9 April 1949 ICJ Rep 4 at 35.

¹⁴⁴ *Ibid* at 34-5.

¹⁴⁵ *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), (Merits) Judgment of June 27, 1986 ICJ Rep 14 par 190.

¹⁴⁶ Christine Gray *International Law and the Use of Force* 2 ed (2004) 46 (hereafter Gray ‘International Law’).

¹⁴⁷ Oscar Schachter ‘The legality of pro-democratic invasion’ (1984) 645 at 649.

¹⁴⁸ Bruno Simma ‘The UN, NATO and the use of force: Legal aspects’ (1999) 10 *EJIL* 1 at 2.

¹⁴⁹ Gray ‘International Law’ op cit note 146 at 35. See also Dinstein ‘Aggression and Self-Defense’ op cit note 123 at 38, 86-90.

intervention treaties. The literature indicates that subsequent state practice can modify a treaty and a treaty is to be interpreted in the light of such practice.¹⁵⁰ It is my opinion that on the principle of *rebus sic stantibus* the role of regional organisations in the use of force vis-à-vis the UNSC needs a re-examination. The compromise between the regionalists and the universalists at the time of drafting the Charter in the distribution of authority in the use of force between them has since been overtaken by the failures of the other institutions the UNSC was supposed to create and the responsibility it should have assumed.

The Counter-Restrictionists' argument turns on the approach to be adopted in the interpretation of the Charter and the views here are split between the Classicists and the Realists. Classicists opine that the parties to a treaty have intentions that are discoverable from an analysis of the text of the treaty and which provisions should be respected until varied or expired.¹⁵¹ Realists assert that article 2(4) prohibits humanitarian intervention only to the extent that it is directed 'against the territorial integrity or political independence of any State.'¹⁵² Fernando Teson argues that unless one reads these words outside the Charter, the implication is a qualification of the prohibition in article 2(4).¹⁵³ Importantly too, article 2(4) would not preclude the use of force where it is aimed at protecting human rights which is just as important as any other purpose of the UN.¹⁵⁴ From a classicist view, unauthorised humanitarian intervention is illegal, but from a realist standpoint, its legality or otherwise depends on the attitude of the contemporary international community.¹⁵⁵

The second argument of the Realists claims that since the UN failed in one of its purposes—to establish a mechanism of collective security—the basic assumption upon which states surrendered their right of use of force was not fulfilled and states reverted back to their customary international law status on the use of force, and if the UN fails to halt violations of

¹⁵⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)* (1971) ICJ Reports 22. See also article 62(1) of the Vienna Convention on the Law of Treaties 1969 which permits states to suspend, terminate or even withdraw from treaty obligations due to a fundamental change of circumstances upon which the treaty obligations were assumed. See Teson 'Law and Morality' op cit note 11 at 35. But see Chesterman *Just War or Just Peace* op cit note 141 at 56.

¹⁵¹ Tom J Farer 'An inquiry into the legitimacy of humanitarian intervention' in Lori Fisler Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 185-201 at 186.

¹⁵² Teson 'Law and Morality' op cit note 11 at 151; Reisman & McDougal 'Humanitarian intervention to protect the Ibos' op cit note 27 at 177. Realists assert that 'explicit and implicit agreements, formal texts, and state behaviour as being in a condition of effervescent interaction, unceasingly creating, modifying and replacing norms. Texts themselves are but one among a large number of means of ascertaining original intention...' see Farer 'An inquiry into the legitimacy of humanitarian intervention' op cit note 151 at 185.

¹⁵³ Teson 'Law and Morality' op cit note 11 at 150.

¹⁵⁴ *Ibid* at 151

¹⁵⁵ See J L Holzgrefe & Robert O Keohane 'Humanitarian Intervention' op cit note 137 at 39.

human rights, states have a right to do so.¹⁵⁶ Their third argument seeks to give article 39 an expanded interpretation under which the UNSC is said to have the authority to approve the use of force to halt humanitarian crises even where such crises lack cross-boundary effects.¹⁵⁷ The ban on the use of force in article 2(4) is one that could swing either way depending on the context. If a state violates the rights of its citizens so egregiously, it loses the protection offered by article 2(4) and the use of force is not prohibited in those circumstances.¹⁵⁸ In striking a balance between these two purposes of the UN, Reisman and McDougal observe state:

The continuing authority of community expectations about the lawfulness of humanitarian intervention is greatly confirmed by all the contemporary developments associated with the United Nations. The repeated, insistent emphasis upon its underlying policies can be regarded as strengthening not weakening the historic remedy.¹⁵⁹

Over the past decades, the view that article 2(4) is not a total ban on the use of force has rallied supporters. More writers now concede that use of force for humanitarian purposes is admissible as an exception to the general rule of non-use of force under article 2(4).¹⁶⁰ Moreover, since a treaty can be modified by subsequent state practice, events and state practice since 1945 have modified article 2(4) to such an extent that there is today under customary international law, a recognised exception to the ban on the use of force.¹⁶¹

From the very outset, the rule was never really going to be followed and according to Franck '[p]erhaps the world of Article 2(4) never did and never could exist.'¹⁶² The use of force by the US in the Dominican Republic, Panama, Grenada and Guatemala; the USSR in Czechoslovakia, Hungary and Afghanistan; Tanzania in Uganda, India in East Pakistan. if anything were indications that article 2(4) was in fact, pronounced dead on arrival. There is a

¹⁵⁶ Reisman 'Criteria for the lawful use of force' op cit note 69 at 279-80; Reisman 'Sovereignty and human rights' op cit note 83 at 869.

¹⁵⁷ Jost Delbruck 'A fresh look at humanitarian intervention under the authority of the United Nations' (1992) 67 *Indiana Law Journal* 887 at 898-99. Cf Lori Fisler Damrosch 'Commentary on Collective Military Intervention to Enforce Human Rights' in Damrosch & Scheffer (eds) *Law and Force in the New International Order* (1991) 186 at 219. See generally, Richard B Lillich 'Humanitarian intervention: A reply to Ian Brownlie and a plea for constructive alternatives' in *Law and Civil War in the Modern World* J N Moore (ed) (1974) 229. J N Moore 'Toward an applied theory for the regulation of intervention' in J N Moore (ed) *Law and Civil War in the Modern World* (1974) 3.

¹⁵⁸ Byron F Burmester 'On humanitarian intervention, the new world order and wars to preserve human rights' (1994) *Utah Law Review* 269 at 300.

¹⁵⁹ See Richard B Lillich *International Human Rights: Problem of Law Policy and Practice* 2 ed (1991) 586.

¹⁶⁰ Richard Falk 'What future for the Charter system of UN war prevention?' (2003) 97 *AJIL* 590 at 597.

¹⁶¹ Teson 'Law and Morality' op cit note 11 at 161.

¹⁶² Thomas M Franck 'Who killed Article 2(4)? Or changing the rules governing the use of force' (1970) 64 *AJIL* 809 at 835 (hereafter Franck 'Who killed art 2(4)?').

lack of congruence between the ideals espoused by Article 2(4) and the attitude of states and the way they pursue their perceived national interests.¹⁶³ As a commentator puts it,

[w]hat killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest. So long as there are nations-which is likely to be for a very long time-their pursuit of the national interest will continue; and where that interest habitually runs counter to a stated international legal norm, it is the latter which will bend and break.¹⁶⁴

To what extent States obey the rule of non-use of force was always going to depend on a convergence of a variety of national interests rather than any normative restraint by international law. It is possible that once in a while such national interests converge with existing or emerging international normative standards such as human rights protection. This is reflected even in recent state practice notably NATO intervention in Kosovo and ECOWAS interventions in Liberia and Sierra Leone.

Article 2(4) was an integral part of a war prevention mechanism designed by the Charter that encompassed Chapters VI and VII dealing with the pacific settlement of disputes and collective security respectively.¹⁶⁵ The Charter and the system which article 2(4) is a part of recognise the inevitability of the use of force and it was in that context rather than as an independent normative standard legal or moral imperative that article 2(4) derived its potency.¹⁶⁶ Summing up Thomas Franck's Realist argument, David Wippman remarks that for realists, article 2(4) had never had an independent life of its own and was just a mere 'coincidence of interests among powerful states, to be used by them when convenient and ignored, violated or explained away when inconvenient'.¹⁶⁷

2.6 THE EMERGING NORM OF RESPONSIBILITY TO PROTECT

The debate surrounding the legality of humanitarian intervention under the UN Charter continued even after the Cold War and though the UNSC was able to take action to maintain international peace and security and made attempts to protect human rights under its new-found activism, this did not translate to a transformation of the normative contradictions

¹⁶³ Id. But for a contrary view, see Louis Henkin 'The reports of the death of article 2(4) are greatly exaggerated' (1971) 65 *AJIL* 544.

¹⁶⁴ Franck 'Who killed art 2(4)?' op cit note 162 at 837.

¹⁶⁵ Reisman W Michael 'Coercion and self-determination: construing Charter Article 2(4)' (1984) 78 *AJIL* 642 at 642.

¹⁶⁶ Id.

¹⁶⁷ David Wippman 'The nine lives of Article 2(4)' (2007) 16 *Minnesota Journal of International Law* 387 at 388.

inherent in the Charter and which often stood in the way of international protection of human rights. This dilemma is the tension between two important norms of the Charter: the principle of sovereignty and non-use of force on the one hand and the protection of human rights on the other.

The objections to the legality of humanitarian intervention meant that either the UN would have to uphold the principle of state sovereignty and non-intervention at all times and standby while intra-state conflicts lead to mass atrocity crimes, or it would have to find a way of protecting an imperiled population while at the same time respecting the norm of state sovereignty and non-interference. This dilemma came to sharp focus following the series of atrocities that characterised the 1990s, culminating in the Rwandan genocide. Then UN Secretary General Kofi Annan, in an address to the UN General Assembly posed this dilemma thus ‘... if humanitarian intervention is indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?’¹⁶⁸ The task of resolving this dilemma fell on the International Commission on Intervention and State Sovereignty set up by the Canadian Government, which published its report in 2001.¹⁶⁹

The Report gave birth to the emerging doctrine of the Responsibility to Protect (R2P). It seeks to resolve the tension between sovereignty and human rights protection by re-conceptualising sovereignty as responsibility. The emerging norm of R2P refers to the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophes such as genocides, mass murders, war crimes and crimes against humanity but when the state is unable or unwilling to do so, this responsibility shifts to the international community.¹⁷⁰ By reconceptualising sovereignty as responsibility rather than control, the ICISS adopted a rights-based approach that shifts emphasis from the right to intervene to the security need of victims of human rights violations and moved the focus of the debate from the right to intervene—the dominant theme under humanitarian intervention debate—to the need to protect victims of mass atrocities.¹⁷¹ Focus has moved from territorial security to human security and the protection of citizens is now the defining factor of both internal and

¹⁶⁸ Kofi Annan *We The Peoples: the Role of the United Nations in the Twenty-first Century Report of the Secretary General* (2000) A/54/2000 para 217.

¹⁶⁹ International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001). (hereafter ICISS Report).

¹⁷⁰ Ibid para 2.29, 2.30.

¹⁷¹ Ibid para 2.14, 2.19. See also Carsten Stahn ‘Responsibility to protect: political rhetoric or emerging legal norm?’ (2007) 101 *AJIL* 99 at 102-103 (hereafter Stahn ‘Political rhetoric or emerging legal norm’).

international legitimacy of states.¹⁷² Since then the norm has evolved rapidly but more as a political rather than a legal principle. Its contours remain unclear, its contents undefined and its reach inherently controversial.¹⁷³ As we shall see, this norm, like its predecessor, has quickly fallen into disrepute in application. But what does this principle entails? What is its legal characterisation and which actors bear what right and responsibility under the norm? How has the norm been impacted by the controversies that often surrounds international law it is now called upon to serve? And what prospects exists for its operationalisation in Africa and what framework will be required?

The view that the international community has a responsibility to protect the citizens of a country where the territorial state is unable or has failed to do so was also expressed by the UN High Level Panel on Threats and Challenges (HLP) when it stated that though states have the primary responsibility to protect their populations from mass atrocities, when they fail that responsibility should fall on the broader international community.¹⁷⁴ According to the HLP,

[t]he Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorise military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a “threat to international peace and security. ...”¹⁷⁵

Perhaps in response to this and other criticisms, states unanimously embraced the R2P norm, declaring:

[w]e endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising 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.¹⁷⁶

¹⁷² ICISS Report op cit note 169 para 2.15.

¹⁷³ See for example J Wong ‘Reconstructing the responsibility to protect in the wake of cyclones and separatism’ (2009) 84:2 *Tulane Law Review* 219 at 246-7 (hereafter Wong ‘Reconstructing the responsibility to protect’). See generally Jennifer Welsh, Carolin Thielking & Neil S MacFarlane ‘The responsibility to protect: assessing the report of the International Commission on Intervention and State Sovereignty’ (2002) 57:4 *International Journal* 489; Carlo Focarelli ‘The responsibility to protect: Too many ambiguities for a working doctrine’ (2008) 13:2 *Journal of Conflict & Security Law* 191.

¹⁷⁴ United Nations *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on Threats, Challenges and Change* (2004) U.N. Doc A/59/565 at 56-7 para 201 (hereafter ‘A More Secure World’) available at <http://www.un.org/secureworld/report2.pdf> (accessed on 12 September 2010).

¹⁷⁵ Ibid para 202.

¹⁷⁶ Ibid para 203.

In his report, the UN Secretary General stressed the importance of the relationship between internal strife arising from violations of human rights and mass atrocities, underdevelopment, poverty and insecurity international crimes.¹⁷⁷ In paragraph 21, he stressed the important role of regional organisations in mobilising and coordinating collective action in pursuit of this common objective.¹⁷⁸ While calling on states to accept and act on the R2P norm, the UN Secretary General stated

[t]his responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.¹⁷⁹

The first attempt to outline the legal contours of R2P is in paragraph 138 and 139 of the 2005 World Summit Outcome Document (WSOD) where each state accepted the 'responsibility to protect its populations from *genocide, war crimes, ethnic cleansing and crimes against humanity*... The international community should, as appropriate, encourage and help States to exercise this responsibility...' ¹⁸⁰ This means that there would be international assistance to help states build capacity to meet these challenges and help states under stress to address root causes of conflicts before crises break out.¹⁸¹ More importantly, states resolved in paragraph 139 to act collectively through the UNSC and use peaceful measures in line with Chapters VI and VIII to protect populations from these four crimes.¹⁸² States further affirmed that they

... 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, should peaceful means be inadequate and national authorities manifestly fail to protect their populations...¹⁸³

¹⁷⁷ Kofi Annan *In Larger Freedom, Towards Development, Security and Human Rights for All, Report of the Secretary General* UN Doc. A/59/2005, 21 March 2005 United Nations (2005) para 16-17 available at <http://www.un.org/largerfreedom/contents.htm>.> (accessed on 23 May 2010).

¹⁷⁸ Ibid para 21

¹⁷⁹ Ibid para 135.

¹⁸⁰ Paragraph 138 WSOD.

¹⁸¹ WSOD para 139, ICISS Report op cit note 169 para 8.5; International Centre for the Responsibility to Protect 'Clarifying the Third Pillar of the Responsibility to Protect: Timely and decisive response' available at: [http://www.responsibilitytoprotect.org/Clarifying%20the%20Third%20Pillar%20of%20the%20Responsibility%20to%20Protect%20Timely%20and%20Decisive%20Response\(1\).pdf](http://www.responsibilitytoprotect.org/Clarifying%20the%20Third%20Pillar%20of%20the%20Responsibility%20to%20Protect%20Timely%20and%20Decisive%20Response(1).pdf) (accessed 26 May 2012) (hereafter ICRtop 'Clarifying Third Pillar').

¹⁸² WSOD para 139.

¹⁸³ Id.

R2P quickly garnered global political support culminating after the adoption of the WSOD in 2005. The UNSC itself first affirmed R2P as adopted in paragraph 138 and 139 of the WSOD in Resolution 1674 relating to the protection of civilians.¹⁸⁴ Since then it has made reference to the principle severally in different resolutions.¹⁸⁵ Significant in all these resolutions is the fact that the UNSC seems to acknowledge that it has a responsibility to protect civilians from grave crimes, and this is evident in the shift in the debate, from questions about *whether* to act to protect civilians, to questions about *how* to engage.¹⁸⁶

From inception, R2P has attracted controversy from states as to its essential normative characterisation, its scope, contents and relationship with other long-standing norms and doctrines in international law such as sovereignty and non-interference and humanitarian intervention.¹⁸⁷ It imposes obligations at three levels: first, the state owes a duty to protect its citizens; secondly, there is a duty on the international community to assist the state to discharge this responsibility; thirdly, when the state fails this responsibility shifts to the international community.¹⁸⁸ At all times, the primary responsibility to protect lies with states and they owe this responsibility at two levels: first, there is domestic responsibility to the citizens and secondly, there is an external responsibility owed to the international community to fulfill that responsibility.¹⁸⁹ Though the extent to which R2P is radically different from the doctrine of humanitarian intervention it seeks to replace remains debatable but as an emerging norm, it is agreed that it has certain unique features: the responsibility to prevent and the responsibility to rebuild. The UNSC however remains cautious in embracing the norm and has done little to clarify its legal status in international law.¹⁹⁰

So what is new about R2P? It is different from humanitarian intervention because, first, it focuses on the needs of victims rather than the right of the intervener; secondly, under

¹⁸⁴ See UNSC resolution on the protection of civilians, S/RES/1674(2006); and UNSC on the Darfur crisis S/RES/1706 (2006).

¹⁸⁵ See Resolution 1769 authorising UNAMID; Resolution 1894 of 2009; Resolution 1970 of 2011, Resolution 1973 of 2011; Resolution 1975 of 2011 etc. Other documents have since emerged seeking to clarify the principle. See for example 'Implementing the Responsibility to Protect: Report of the Secretary General' A/63/677. See also the Report of the UN Secretary General on Early Warning Assessment; Report of the United Nations General Assembly on the Role of Regional Organisation in the Implementation of the Responsibility to Protect 2011 etc.

¹⁸⁶ Alex Bellamy 'Libya and the responsibility to protect: The exception and the norm' (2011) 25:3 *Ethics & International Affairs* 263 at 265.

¹⁸⁷ See Global Centre for the Responsibility to Protect 'State by State position on the Responsibility to Protect at the 2005 World Summit' available at: http://www.reponsibilitytoprotect.org/files/Chart_R2P_11August.pdf (accessed on 20 April 2012). (Hereafter *State by State Position*).

¹⁸⁸ ICISS Report op cit note 169 para 2.29, 2.30.

¹⁸⁹ ICISS Report op cit note 169 para 2.29, 2.30; WSOD Paragraph 139.

¹⁹⁰ See for example S/RES/1769 (2007), S/RES/1970 (2011), S/RES/1973 (2011), S/RES/1975 (2011).

R2P, sovereignty is not control but responsibility, and finally, R2P incorporates other concepts like prevention and reconstruction.¹⁹¹ For its normative authority in law, R2P draws on natural law principles, human rights provisions in the UN Charter, Universal Declaration of Human Rights and international humanitarian law.¹⁹² Both humanitarian intervention (at least whenever it is well intentioned) and R2P seek to protect human rights. However, the susceptibility of the former to abuse necessitated the latter. R2P is an attempt at the revival of the old doctrine of collective security. The scope of R2P covers genocide, war crimes, ethnic cleansing and crimes against humanity. Basically, R2P is limited to these four crimes even though attempt has been made by some to extend it to natural disasters, such as Cyclone Nargis in Burma in 2008 and the earthquake in Haiti.¹⁹³ The overextension of the norm could make it lose its meaning and relevance at a time when much discussion and normative clarity is needed.¹⁹⁴

The ICISS elaborated the three phases of R2P to include the responsibility to prevent, the responsibility to react and the responsibility to rebuild.¹⁹⁵ Of these, the responsibility to prevent is the single most important component.¹⁹⁶ According to the Report of the UN Secretary General, there are three pillars in the R2P implementation framework.¹⁹⁷ Pillar I consists of the responsibility of the territorial state, Pillar II consists of the responsibility of the international community to assist the state in this respect to build the capacity to fulfill its responsibility to protect, while Pillar III consists of timely and decisive response including deploying the range of tools available in the R2P tool box.¹⁹⁸

Arguably, the most contentious of its components is the ‘responsibility to react’ particularly the use of military force to protect people from mass atrocity crimes. How do we ensure that when necessary, military force can be used without abusing the principle? It is not clear whether R2P is a legal or moral duty or a right on the part of the international community. If we say it is a ‘responsibility’ to protect, this suggests a moral obligation rather

¹⁹¹ See Spencer Zifcak ‘The responsibility to protect’ in Malcolm D Evans (ed) *International Law* 3 ed (2010) 504 at 511-2.

¹⁹² Ibid at 522-3.

¹⁹³ Wong ‘Reconstructing the responsibility to protect’ op cit note 173 at 246-7.

¹⁹⁴ Jennifer Welsh ‘Civilian protection in Libya: Putting coercion and controversy back into Rtop’ (2011) 25 *Ethics & International Affairs* 1 at 1-2.

¹⁹⁵ See Gareth Evans *The Responsibility to Protect* (2008) 87, 107.

¹⁹⁶ ICISS Report at xi; see also Sheri P Rosenberg ‘Responsibility to protect: A framework for prevention’ (2009) 1 *Global Responsibility to Protect* 442 at 443.

¹⁹⁷ Ban Ki Moon ‘Implementing the responsibility to protect’ Report of the Secretary General A/63/677 (12 January 2009) para 11.

¹⁹⁸ Evans *The Responsibility to Protect* op cit note 195 at 87, 107.

than a legal duty. This played out at the debate of the WSOD, in 2005 when certain pro-R2P countries pushed for an outright codification of the norm establishing firm and pre-determined principles imposing a duty on the international community to intervene in given circumstances.¹⁹⁹ However, certain states, particularly the US insisted that they would only support an ad hoc approach.²⁰⁰ The UN was expected to work out a legal framework for the use of force when necessary for the implementation of R2P but the WSOD which is the most authoritative document on R2P, unfortunately did not produce one. It is one of the reasons my thesis recommends the AU/ECOWAS framework for R2P implementation.

The recurrent theme at the various R2P debates has been how to operationalise R2P to ensure that the international community delivers on R2P when the need arises. This will definitely require something more than the WSOD. By reaffirming their commitment to the Charter provisions on the use of force, it is apparent that it will take a while to build consensus on the need to have a legal framework for use of force under R2P. Part of the problem of R2P implementation is the politics of international law be it the classification of conflicts or the decision to intervene. The reason even powerful states rejected R2P being made an international obligation which was intended to avoid selective intervention is because they did not want to incur any obligation to have to intervene in some obscure country solely on humanitarian purposes where they have no national interest.²⁰¹ The US insisted that the UNSC should be at liberty to act in one case and not act in another arguing that there should be no legal obligation on the UNSC to intervene anywhere and everywhere the set conditions are met.²⁰² The Non-Aligned Movement objected that R2P has been framed in a way that it empowers the powerful states of the North to decide when and where to intervene thus strengthening their sovereignty while weakening that of the South.²⁰³ These and other issues continue to hinder the implementation of R2P through the UN framework.

¹⁹⁹ Global Centre for the Responsibility to Protect 'State by State position on the Responsibility to Protect at the 2005 World Summit' available at http://www.reponsibilitytoprotect.org/files/Chart_R2P_11August.pdf (accessed 25 June 2010)

²⁰⁰ See Letter from Ambassador John Bolton to UN Member States conveying U.S. amendments to the Draft Outcome Document being prepared for the High Level Event on Responsibility to Protect' available at [http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05\[1\].pdf](http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf) p. 2 (accessed 15 May 2010).

²⁰¹ Carsten Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm' (2007) 99 *AJIL* 101 at 209.

²⁰² Ibid.

²⁰³ Ibid at 203.

2.7 CONCLUSION

The subject of humanitarian intervention has strong basis in customary international law though its limit was not always clearly delineated. But the experiences of two World Wars helped create an international solidarity for the prohibition on recourse to the use of force by states. However, the efforts to create a New World Order that guarantees human rights and maintains international peace and security was undermined from the on-set by the ambiguities and apparent contradictions in the UN Charter. These contradictions, the inability to create the institutions envisaged for its effectiveness were exploited during the Cold War with the legacy of a weakened international normative order and a UN lacking the capacity to protect human rights or maintain international peace and security as envisaged by its founding fathers. Neither the principle of equality of states, sovereignty or non-use of force has been able to create anything near the kind of world envisaged by the drafters of the Charter.

Since the 1990s, the international community has progressively moved away from the notion that article 2(4) is an airtight prohibition of the use of force towards a more responsive interpretation that recognises that force could be used to protect human rights. The UN has gone about this by re-interpretation of sovereignty as responsibility to protect and by broadening the scope of what constitutes ‘threat to international peace and security’ as part of its enforcement powers under article 39 of the Charter. Yet, it has not stopped ethnic cleansing, genocides, war crimes and crimes against humanity. In fact, the apparent inability of the international community to provide an effective system and legal framework has led some to seek alternatives outside the Charter paradigm. More than ever before, the poor and weak states (especially in Africa) have realised that unless they look out for themselves, the lessons of history is that they might be abandoned to their fate as was the case in Rwanda.

The effort to prevent genocides and man-made humanitarian disasters on the continent has produced the R2P principle and the AU/ECOWAS humanitarian intervention legal framework both unprecedented in scope and unsurpassed in their normative aspirations. These developments shaped by historical experiences are bound to conflict with existing international legal norms on the basis of which some have challenged the African initiative. But before I consider the question of validity of the AU/ECOWAS treaty provisions, it is

imperative to survey the conditions that made them necessary in the first place. As the next chapter shows, in many cases when Africa had had to depend on the UN to intervene in the two decades of the so-called 'UNSC activism' they were disappointed.

CHAPTER 3: POST-COLD WAR INTERVENTIONS IN AFRICA AND THE ORIGIN OF THE AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIMES

3.1 INTRODUCTION

The end of the Cold War ushered in a new opportunity for East-West cooperation, especially within the United Nations Security Council (UNSC) to build a truly global organisation capable of meeting the aspirations of the founding fathers of the UN.¹ This ‘new’ UNSC would be able to respond to the challenges of the twenty-first. This enthusiasm was particularly so in the case of Africa which had had more than its fair share as a theatre of Super Power proxy wars for the most part of its post-colonial history. The legacies bequeathed to Africa by that era—weak and fragile states, proliferation of small arms and light weapons across the continent, declining revenue, and heightened ethnic rivalry, were to exacerbate conflicts in the continent in subsequent decades. The consequence was a sharp increase in the number of intra-state conflicts in Africa. At the beginning of the 1989-1998 decade, there were 110 armed conflicts in the world 14, of which were in Africa second only to Asia.² But by the end of the 1990s, the number of armed conflicts in Africa rose to 16 while it declined to 14 in Asia.³

Given the devaluation of the geostrategic stocks of Africa in a bipolar world, these African states found themselves unprepared to deal with these challenges.⁴ This resulted in protracted civil wars in some states such as Liberia and Sierra Leone, the disintegration of others Eritrea/Ethiopia, the anaemia of others like Rwanda, and the outright collapse of others like Somalia. All these happened with the resultant massive violations of human rights and international humanitarian law. What was the response of the ‘new’ proactive, UNSC crises? What was the impact of such response on African humanitarian intervention legal regime? What has been the legal response of the OAU/AU and ECOWAS to these developments? How do these legal responses sit with existing international law norms on humanitarian

¹ Max A Sesay ‘Civil war and collective intervention in Liberia’ (1996) 23:67 *Review of African Political Economy* 35 at 36 (hereafter Sessay ‘Civil war and collective intervention in Liberia’).

² Peter Wallensteen & Margaret Sollenger ‘Armed Conflict, 1989-99’ (Sep 2000) 37:5 *Journal of Peace Research* 635 at 637 (hereafter Wallensteen & Sollenberg ‘Armed conflict’).

³ Id.

⁴ Margaret A Vogt ‘An Introduction’ in Margaret A Vogt (ed) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peace Keeping* (1992) 1 at 2 (hereafter Vogt ‘The Liberian Crisis and ECOMOG’).

intervention? The last question will be engaged in the next chapter. The current chapter sets out to achieve two main objectives.

It analyses the attitude of the UN to crises in Africa. In particular, it examines the degree of responsiveness of the UNSC to crises in Africa where the national self-interest of major powers are not at stake and how this weakened the UNSC and laid the foundation for the emergence of the AU/ECOWAS new interventionist regime. Secondly, it demonstrates that the new AU/ECOWAS humanitarian intervention legal framework seeks to create a humanitarian intervention legal regime outside the Charter framework and that this was borne out of necessity arising from the failures of the UNSC to respond to crises in Africa in the 1990s. It does so by drawing on some of the interventions or non-interventions in Liberia, Somalia, Sierra Leone, Rwanda and Darfur. While references would be made to cases of intervention generally, the focus is on post-Cold War interventions in Africa.

3.2 LIBERIA: A BRIEF HISTORICAL BACKGROUND AND GENESIS OF THE CONFLICT

Modern day Liberia was established when freed American slaves were resettled in the territory already inhabited by indigenous African populations in 1821. These new settlers were called Americo-Liberians and in 1847 proclaimed the Liberian Declaration of Independence even though technically speaking, Liberia was never colonised.⁵ From then on, its economic, social and political life was dominated by the Americo-Liberians and their True Whig Party was in power from 1878 to 1980 even though by 1980 estimates, they only constituted five per cent of the population.⁶ Liberia prospered economically and by the 1970s was regarded by the World Bank as a middle income country.⁷ However, this prosperity was unevenly distributed with the Ameico-Liberians controlling more than 60 per cent while the majority indigenous population lived in poverty.⁸

On 12 April 1980, Master Sergeant Samuel Kanyon Doe led a team of non-commissioned officers to topple the government of President Tolbert in a coup. The President was killed and several members of his government publicly executed. Though initially popular Doe's government eventually assumed ethnic character as it became dominated by

⁵ Gabriel E Umoden 'Brief history of Liberia' in Margaret A Vogt (ed) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peace Keeping* (1992) 16 (hereafter Umoden *Brief history of Liberia*).

⁶ Ibid at 35.

⁷ Ibid at 36.

⁸ Ibid at 37.

members of his Khran tribe. Under intense domestic and international pressure to transit to democracy, Doe conducted elections in 1985 which he manipulated and emerged as winner and President.⁹ Frustrated, some soldiers led by General Thomas Quinwokpa, a member of Doe's government, tried to topple Doe in a coup but failed and he was executed.¹⁰

Charles Taylor who had served in Doe's government escaped to the US after he was accused of corruption.¹¹ While in jail in the US awaiting extradition to Liberia, Taylor escaped and managed to land in Ivory Coast where he started recruiting young Liberians, mainly from the Nimba County, into the National Patriotic Front of Liberia.¹² On 24 December 1989, he launched an attack against Doe's forces at Nimba County near the Ivorian border which the ill-trained and ill-equipped Liberian government forces could not be repelled.¹³ Within six months, the NPFL had control of about ninety per cent of the country and pressed towards Monrovia.¹⁴ The war soon assumed an ethnic dimension as the different tribes took sides in the conflict and there were widespread atrocities committed against civilians.¹⁵

3.2.1 *The Humanitarian Crisis*

The carnage and savagery that characterised the conflict was mostly felt by civilians both nationals and foreigners alike. Taylor instigated a 'relentless campaign of sadistic, wanton violence unimaginable to those unfamiliar with the details of man's capacity to visit the abyss.'¹⁶ It is estimated that 200,000 people lost their lives, 750,000 internally displaced persons and 1.2 million refugees fled to neighbouring countries.¹⁷ Following the ethnic

⁹ Ibid at 46-7.

¹⁰ Sesay 'Civil war and collective intervention' op cit note 1 at 37.

¹¹ Amadu Sesay 'Historical background to the Liberian crisis' in Margaret A Vogt (ed) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peace Keeping* (1992) 47 (hereafter Sesay 'Historical background to the Liberian crisis').

¹² Id.

¹³ Sesay 'Civil war and collective intervention' op cit note 1 at 37.

¹⁴ Id.

¹⁵ Ibid at 48. Liberia was literally carved up among the following factions who splintered from the original rebel groups: The Armed Forces of Liberia; The Independent National Patriotic Front of Liberia led by Prince Yeduo Johnson; the Liberian Peace Council (LPC) led by George Boley; the United Liberation Movement for Democracy in Liberia (ULIMO-K) led by Alhaji Kromah; the United Liberation Movement for Democracy in Liberia (ULIMO-J) led by Prince Roosevelt Johnson; the Lofa Defese Force (LDF) led by Francois Massaquoi. See Quentin Outram 'Cruel wars and safe havens: humanitarian aid in Liberia 1989-1996' (1997) 21:3 *Disasters* 189 at 191.

¹⁶ Kenneth L Cain 'The rape of Dinah: Human rights, civil war in Liberia and evil triumph' (1999) 21:2 *Human Rights Quarterly* 265 at 268 (hereafter Cain 'The rape of Dinah').

¹⁷ Id.

dimension the war assumed, a reign of terror was unleashed on Khran and Mandingos. Recounting his experience, Obed, a Krahn student, stated:

The rebels were killing us. They killed my father; they killed three women; they killed my uncle. My father was killed on June 11. It was about 6:30 in the morning. Some rebels came from Harper to Putu, some came from Sino and from Zwedru. They went from village to village, killing whoever they could find. When they got to my village, Tumbo, they started firing and everyone began to run. They grabbed my father and asked if he was a Krahn; when he said 'yes, I'm a Krahn man,' they shot him. A woman I knew, Betty Pine, ran when the rebels came, and the rebels took her baby. They called to her in the bush and told her to come and get her baby. They shot her as she was coming, then used a cutlass and cut the baby in half. I was also shot, in my left leg, but hid in the grass.¹⁸

Ordinarily, ethnic differences are not very apparent among the different tribes of Liberia and language was therefore deployed as the test that meant life or death as determined by the insurgents.¹⁹ On 27 June the rebels invaded the district of Grand Gedeh and killed literally everyone in sight—Krahn, Mandingo and Bassa—in the mistaken belief that everyone there was a Krahn.²⁰ This was graphically demonstrated by a 30-year old survivor, Jackson thus 'I was captured by the rebels last September in Kaweaken. I could speak Gola, so I told them I was Gola. If I had told them I was Mandingo, they would have killed me. I said I wanted to join them, it was the only way to rescue myself.'²¹

Common Article 3 of the Geneva Conventions was violated by all sides to the conflict with impunity. According to the account of another survivor, the perpetrators indiscriminately executed captured soldiers, non-combatants and combatants who had laid down their arms, in violation of the Geneva Conventions.²² According to her:

In July, we went to harvest the rice. When we got to the fields, we saw rebels with guns around the farm. They started shooting at us. Five people were killed: a woman, Manta Tweh; an old woman, Klay Zor; and three men—Palu Nyonbior, Josiah Beh and Bestman Sayde. The rest of us ran into the bush and fled to the Ivory Coast.²³

¹⁸ Africa Watch 'Liberia: The cycle of abuse: human rights violations since the November cease-fire' (21 October 1991) available at <http://www.hrw.org/legacy/reports/1991/liberia/#_ftn17> (accessed on 1 August 2011) (hereafter Africa Watch 'Liberia: The cycle of abuse').

¹⁹ Id.

²⁰ Africa Watch 'Liberia: A human rights disaster: violations of the laws of war by all parties to the conflict' (1990) at 4 available at <<http://www.hrw.org/sites/default/files/reports/liberia1990.pdf>> (accessed on 23 August 2011) (hereafter Africa Watch 'Liberia: A human rights disaster').

²¹ Africa Watch 'Liberia: The cycle of abuse' op cit note 18.

²² Africa Watch 'Liberia: A human rights disaster' op cit note 20.

²³ Africa Watch *Liberia*: 'The cycle of abuse' op cit note 18

The NPFL practice of searching for Krahn and Mandingo was discussed by Jackson, a 30-year-old Mandingo who had been recruited by the NPFL after his capture in September 1990.

[When the NPFL arrived] they told the residents they were there to free the people. After a few days, however, they began taking people from their homes, stripping them naked and carrying them down to the water. They moved from house to house, looking for Krahn, Mandingos and Government officials. [Once], an NPFL vehicle arrived, NPFL soldiers opened the trunk and pulled a man out. The man began to beg, “don’t kill me, I’m not a Krahn man.” The soldiers pushed him into a ditch and shot him. Later, a dumptruck arrived from Monrovia loaded with men, women and children. ... [T]he truck dumped people in the water, [rebels were] shooting them as they fell in the water.²⁴

In a confidential report to the Monrovia Headquarters in 1995, the Chief Security Officer of the United Nations Mission in Liberia (UNOMIL) wrote:

There are numerous reports of fighters moving among the displaced of various areas looking for pregnant women. When they find them they gamble on the sex of the unborn baby. They then cut the woman’s womb open to see who won the bet. The mother and the baby are then thrown to the side of the road as the fighters go looking for their next victim.²⁵

Child soldiers recruited, trained, armed by senior rebels were let loose on civilians and they went into a frenzy of atrocities raping, maiming, killing, burning and looting.²⁶ People were set ablaze and whole villages were burned down in what could only pass for an orgy of the macabre.²⁷ Accounts of the sexual abuses were just as barbaric and it is estimated that over 168,000 girls and women were raped during the conflict.²⁸ In the town of Buchanan alone, UNICEF registered 652 women who had been raped.²⁹ Unlawful killings were widespread and the use of torture was routinely employed by all sides to the conflict.³⁰ Sometime in July 1990, about six hundred defenseless civilians taking refuge in the Lutheran church were massacred by the Armed Forces of Liberia soldiers.³¹ According to a victim’s account of her ordeal:

The LPC fighters entered my village in the bush and [tortured my neighbour] and many others ... there were about eighteen armed men. I was raped along with my two younger sisters in the village by ten LPC armed men. After the acts of raping, our wearings and properties were looted.³²

²⁴ Eye witness account quoted by Cain ‘The rape of Dinah’ op cit note 16 at 271.

²⁵ Id.

²⁶ Ibid at 268.

²⁷ Id.

²⁸ See Cain ‘The rape of Dinah’ op cit note 16 at 276.

²⁹ Amnesty International ‘Liberia: A new peace agreement: An opportunity to introduce human rights’ (20 September 1995) 8 AI Index: AFR 34/01/95.

³⁰ Ibid 10-11.

³¹ Sesay ‘Civil war and collective intervention’ op cit note at 44.

³² Cain ‘The rape of Dinah’ op cit note 16 at 277 quoting World Health Organisation Office Monrovia Liberia ‘Rape: A silent scourge of the Liberian conflict’ (April – June 1995).

Another rape victim narrates her ordeal thus:

I was forcibly taken into the bush with my three children and husband by the LPC fighters under the accusation of [trying to kill] “General War Boss” and “General kill the Bitch.” We have always been accused and tortured by these rebels because many of us are Bassa by tribe. My husband was tied to a thorny tree, black drivers ants were put all over his body while I was raped as a pregnant woman in front of my three children by four LPC fighters. Later an order was given that my husband should be beheaded in front of my children. My husband cried for mercy, but the LPC did not listen and cut his esophagus and my husband finally died.³³

In a recent report published by the ICRC on the impact of the Liberian civil war, it was revealed that 74 per cent of the population had their property damaged and seven in every ten persons had a member of immediate family killed in the war.³⁴ Two in every five said they were wounded in the conflict and a significant number reported being victims of sexual violence themselves or somebody they know. Torture, rapes, executions and cannibalism were widespread and most of the victims were civilians.³⁵ By March 1993, casualties had reached approximately 150,000 and about 700,000 refugees scattered across the region.³⁶ By the end of 1994, 1,100,000 Liberians were internally displaced 420,000 refugees in Guinea, 320,000 in Ivory Coast, 20,000 in Ghana and 20,000 in Sierra Leone, and 5,000 in Nigeria and other countries.³⁷ Put together, these figures represent 85 per cent of the pre-war estimated 2.5 million population of Liberia.³⁸ It is therefore important to inquire about the role of the international community and in particular the global body saddled with the responsibility to address such situations –the United Nations and its principal political organ, the UNSC.

3.2.2 *The International Response*

As the carnage continued in Liberia with widespread indiscriminate killing of citizens and foreign nationals alike, prominent Liberians began to appeal for foreign intervention.³⁹ For example, on 30 May 1990, Senator David Toweh, speaking in the Liberian Senate, called on the UN, OAU and ECOWAS to help Liberia put a stop to the conflict but the plea got no

³³ Cain ‘The rape of Dinah’ op cit note 16 at 277.

³⁴ Our World. Views from the field Liberia: Opinion Survey and In-depth Research 2009 at 20 available at <<http://www.icrc.org/eng/assets/files/other/liberia.pdf>> (accessed on 22 August 2011).

³⁵ Cain ‘The rape of Dinah’ op cit note 16 at 268.

³⁶ United Nations Secretary General Report, U.N. Doc. S/25402 (1993) para 8.

³⁷ Sean D Murphy *Humanitarian Intervention: The United Nations in an Evolving World* (1996) 158 (hereafter Murphy ‘Humanitarian Intervention’).

³⁸ Id.

³⁹ President Samuel Doe himself had requested UN intervention but this did not happen. See Christine Gray *International Law and the Use of Force* (2000) 211. (hereafter Gray ‘International Law’).

response.⁴⁰ In June 1990, Samuel Doe himself requested the UN to intervene in the conflict but the UN declined.⁴¹ Even when the UN Mission in Monrovia was attacked by the NPFL in a bid to kill civilians taking refuge there, all the UN did was to condemn the attacks, evacuate its staff and close the Mission.⁴² Not surprisingly, many countries followed suit and evacuated their citizens.⁴³ Meanwhile the international community's preoccupation was the conflict in the Gulf, the former Yugoslavia and Somalia (abandoning the latter mid-way). Hence it was always unlikely that anyone outside Liberia's contiguous zone or immediate neighbours would come to its rescue.⁴⁴

No one doubted that the Liberian crisis was a humanitarian catastrophe or that it posed a threat to the West African subregion. Roughly 200,000 people perished in the conflict about the same casualties recorded in the Former Yugoslavia, yet '[t]he international community ... responded to human rights in Liberia with unqualified neglect.'⁴⁵ The US observed that '... the current [Liberian] conflict holds great danger for the sub-region. Escalating tensions could cause additional refugees and conflict to spill over to Liberia's borders, widening the war and leading to more arms proliferation.'⁴⁶ Based on this assessment and against the background of its historical ties with Liberia, many within and without Liberia expected the US to intervene or at least, mobilise major powers within the UNSC for such intervention.⁴⁷ But the US made clear there would be no intervention.⁴⁸ The US was of the view that Liberia was best suited to work out a Liberian solution to the crisis and that this was the only viable route to peace.⁴⁹ At the peak of the war '... the United States refused requests for military intervention insisting that an 'African problem' required an 'African Solution.'⁵⁰ The above response contrasts sharply with the international

⁴⁰ Osisioma B. C. Nwolise 'The internationalisation of the Liberian crisis and its effect on West Africa' in Vogt *The Liberian Crisis and ECOMOG* op cit note 3 at 56.

⁴¹ Gray 'The Use of Force' op cit note 39 at 211.

⁴² Id. Osisioma B. C. Nwolisa 'The internationalisation of the Liberian crisis and its effect on West Africa' in Vogts *The Liberian Crisis and ECOMOG* op cit note 2 at 56.

⁴³ Id. In June 1990, the US sent six ships and Marines to evacuate its embassy staff and nationals as well as other foreign nationals. Sessay 'Civil war and collective intervention' op cit note at 40.

⁴⁴ Comfort Ero 'ECOWAS and the subregional peacekeeping in Liberia' (1995) *The Journal of Humanitarian Assistance* available at <<http://jha.ac/1995/09/25/ecowas-and-subregional-peacekepin-in-liberia/>> (accessed on 20 August 2011). (hereafter Ero 'ECOWAS and the subregional peacekeeping').

⁴⁵ Cain 'The rape of Dinah' op cit note 16 at 267.

⁴⁶ Sessay 'Civil war and collective intervention in Liberia' op cit note 1 at 41.

⁴⁷ Gani J Yoroms 'ECOMOG and West African regional security: A Nigerian perspective' (1993) 21:1/2 *Issue: A Journal of Opinion* 84 at 87(hereafter Yoroms 'ECOMOG and West African security').

⁴⁸ Gray 'The Use of Force' op cit note 39 at 211.

⁴⁹ Ero 'ECOWAS and the subregional peacekeeping' op cit note 44.

⁵⁰ David Wippman 'Enforcing the peace: ECOWAS and the Liberian civil war' in Lori Fisler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 159 (hereafter Wippman 'ECOWAS and the Liberian Civil War')

community's commitments elsewhere outside Africa such as the Balkans at the time. In fact, casualties in Bosnia and Liberia had hovered comparatively around the same levels yet Liberia did not attract any compassion to warrant intervention.

Thus, when the ECOWAS intervention in Liberia is assessed, often times it is forgotten that ECOWAS was set up originally as a subregional body solely to promote economic integration and development within the region rather than a collective security organisation.⁵¹ ECOWAS therefore assumed the responsibility of intervention in the Liberian civil war only by default.⁵² For, according to one commentator '[i]f the world had abandoned Africa because the Cold War had ended, the prescription was clear: Africa must act in the spirit of pan-Africanism to save one of its own from self-destruction.'⁵³ It marked the first time an effort to halt intra-state conflict would inadvertently produce a regional humanitarian intervention mechanism in Africa.⁵⁴

The main culprit in the abandonment of Liberians to their fate in the wake of the conflict is the UNSC. For whatever reason, the UNSC only got involved in the Liberian crisis 'after the fact'.⁵⁵ For a conflict that began in 1989, it took over a year before the UNSC could even place the matter on its agenda for discussion.⁵⁶ Thereafter, the UNSC made its first statement on the conflict in January 1991 over a year after the conflict began and five months after ECOWAS had intervened and a ceasefire had been brokered and the national reconciliation process was well underway.⁵⁷ Throughout the conflict, UN involvement did not go beyond condemnations, calls for ceasefires, and at its best, the co-deployment of UNOMIL with ECOMOG.

⁵¹ While it could be argued that ECOWAS may have contemplated the maintenance of subregional peace and security as part of its overall aspirations, there is nothing to suggest that this was a priority in 1975 when ECOWAS was established, the maintenance of regional peace and security only became a concern as a reaction to other developments at the global level reflected in the ECOWAS Protocol on Non-Aggression 1978 and the Protocol on Mutual Defense Assistance of 1981. See Gray 'Use of Force' op cit note 39 at 213.

⁵² Wippman 'ECOWAS and the Liberian Civil War' op cit note 50.

⁵³ Clement E Adibe 'The Liberian conflict and the ECOWAS-UN partnership' (1997) 18:3 *Third World Quarterly* 471 at 472.

⁵⁴ Yoroms 'ECOMOG and West African regional security' op cit note 47 at 84.

⁵⁵ Simon Chesterman *Just War or Just Peace?: Humanitarian Intervention and International Law* (2002) 133 (hereafter Chesterman 'Just War or Just Peace').

⁵⁶ For an analysis of the peace process, see generally Kofi Oteng Kufuor 'Developments in the resolution of the Liberian conflict' (1994) 10:1 *American University Journal of International Law and Policy* 373.

⁵⁷ Murphy 'Humanitarian Intervention' op cit note 37 at 162.

ECOWAS intervention in Liberia was in recognition of the fact that if Africans failed to solve their problems then no one would.⁵⁸ This buttresses the view expressed when some assessed the impact of the end of the Cold War on Africa: that a bipolar world would deepen the general disinterestedness in African crises, or at least, for those states without scarce natural resources like oil.⁵⁹ So, clearly, the ECOWAS intervention was a reaction to the failure of the international community in general and the UNSC in particular.⁶⁰ Were the UNSC minded to intervene in the Liberian crisis, there were several valid legal grounds on which it could have acted. First, there was an international dimension to the conflict. The refugee outflows into neighbouring countries like Guinea, Sierra Leone, Ghana and Nigeria had a cross-border effect on these countries as it threatened regional peace, security and stability. This should have been sufficient to constitute a ‘threat to international peace and security’ worthy of a Chapter VII action by the UNSC. Secondly, there were clear cases of targeting foreign nationals who were either captured or wantonly killed by the warring factions. Third, was the role of external actors like Libya, Burkina Faso, Cote d’Ivoire, who ostensibly aided the rebels to destabilise the Doe government with the risk that these neighbours could have been sucked into the conflict themselves, creating a regional conflagration. Again, this was sufficient ground for a Chapter VII intervention by the UNSC but it refused to act.

Despite the shortcomings of the ECOWAS mission, the intervention was groundbreaking with some legal significance. It marked the first time a regional organisation would undertake humanitarian intervention in an internal conflict.⁶¹ Secondly, the intervention marked the first time the UN would co-deploy troops in a mission with a regional organisation.⁶² Thirdly, it suggests the existence, or at least the emergence of a new model for humanitarian intervention and international law whereby a regional organisation could undertake humanitarian intervention in urgent cases without UNSC authorisation and could thereafter secure ex post facto ratification.⁶³ Apparently wanting to avoid the question of legality raised by its unauthorised intervention in Liberia and Sierra Leone, ECOWAS subsequently decided to adopt a legal framework that recognises the right of the organisation to undertake humanitarian intervention in prescribed circumstances in member states. Of

⁵⁸ Murphy ‘Humanitarian Intervention’ op cit note 37 at 164.

⁵⁹ Wippman ‘ECOWAS and the Liberian Civil War’ op cit note 50 at 159.

⁶⁰ Sessay ‘Civil war and collective intervention’ op cit note 1 at 42.

⁶¹ Herbert Howe ‘Lessons of Liberia: ECOMOG and regional peacekeeping’ (Winter 1996/7) 21:3 *International Security* 145 at 146.

⁶² Id.

⁶³ Wippman ‘ECOWAS and the Liberian Civil War’ op cit note 50 at 186.

course this has raised further normative issues but it also holds a great potential for advancing international law norms that protect human rights. This is discussed in subsequent chapters but it should be mentioned here that ECOWAS received commendation both from the UN and the international community in general thus suggesting that it might well be time to revisit the redistribution of authority on the use of force between the UN and regional organisations. As will be shown below, the universalism-subsidiarity approach to international peace and security enshrined in the Charter at San Francisco in 1945 has been ineffective because the prerequisites for its implementation never materialised.

The main arguments against the intervention were two-fold: first, it is argued that nothing in ECOWAS constitutive document authorised it to undertake such intervention.⁶⁴ Secondly it is contended that since ECOWAS did not obtain the approval of the UNSC before the intervention, it was illegal.⁶⁵ Taking these arguments into account, ECOWAS adopted the ECOWAS Revised Treaty and the Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (MCPMRPS), the compatibility with the UN Charter regime on humanitarian intervention and norms of international law have been questioned. By implication, the legal validity of these provisions has been questioned and this is taken up in the next chapter.

3.3 SOMALIA: A BRIEF HISTORICAL BACKGROUND AND GENESIS OF THE CONFLICT

Somalia has been without an effective government since January 1991 and it is often cited as the textbook example of a failed state.⁶⁶ Somalia is a clan-based society and one of the most homogenous states in Africa both linguistically and religiously.⁶⁷ At independence in 1960, British Somaliland and Italian Somalia were amalgamated to create the Somali state.⁶⁸ In 1969 Mohammed Siad Barre seized power in a military coup and established an authoritarian

⁶⁴ Gray 'The Use of Force' op cit note 39 at 213.

⁶⁵ Id.

⁶⁶ Ken Menkhause 'Governance without government in Somalia: spoilers, state building and the politics of coping' (Winter 2003) 31:3 *International Security* 74 at 74 (hereafter Menkhause 'Governance without government in Somalia').

⁶⁷ Gerard Prunier 'Somalia, civil war, intervention and withdrawal (1990-1995)' (1996) 15:1 *Refugee Survey Quarterly* 35 (hereafter Prunier 'Somalia'). Almost the entire country speaks Somali and practice Islam See Oliver Ramsbotham & Tom Goodhouse *Humanitarian Intervention in Contemporary Conflicts* (1996) 193 (hereafter Ramsbotham & Goodhouse 'Humanitarian Intervention').

⁶⁸ Ioans Lewis & James Mayhall 'Somalia' in James Mayhall (ed) *The New Interventionism 199-1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (1996) 95 (hereafter Lewis & Mayhall 'Somalia').

regime that lasted until 1991.⁶⁹ Throughout his reign, Barre exploited the geostrategic opportunities offered by the Horn of Africa state by alternately courting the Soviets and the US during the Cold War.⁷⁰ He initiated a despotic rule that thrived on the manipulation of clan loyalties, patronage and brutal repression.⁷¹ Menkhaus captures the decline and descent of the Somali state into the abyss of failure thus:

Evidence suggests that by the mid-1980s Somalia was already a failed state. With the partial exception of the security sector, most government institutions began to atrophy in the years following the disastrous Ogaden War with Ethiopia in 1977–78. Fierce government repression, heightened clan cleavages and animosities, gross levels of corruption, and low salaries all combined to accelerate the state's decline. The public school system, a source of pride and progress in the 1970s, crumbled. Production on state-run farms and in factories plummeted. Government ministries were almost entirely dysfunctional despite a bloated civil service, due in part to chronic absenteeism and cronyism; effective and committed civil servants were seen as a threat and removed.⁷²

But with the aid of the Super Powers who funneled financial aid, arms and ammunition to him, Barre was able to maintain a firm grip on power until his support base began to erode in the 1980s owing to threats of insurgencies from several fronts.⁷³ A combination of declining foreign aid from the US, corruption and inter-clan rivalry further weakened the Somali state as it became an institution of ‘... repression, and expropriation, a tool to dominate political opponents and rival clans, expropriate resources, and above all serve as a catchment point for foreign aid that was then diverted into the pockets of civil servants clever, powerful, or well-connected enough to place themselves at strategic spigots in the foreign aid pipeline.’⁷⁴

It was therefore no surprise when the Barre regime collapsed at about the same time the Cold War drew to a close. The nature of this relationship that characterised the last half of the 20th Century undermined African states creative ability to evolve effective statehood and nation-building capacity such that states like Somalia ‘existed for 30 years and fell apart when the foreign resources which had held it together disappeared at the same time that clan-based ... non-state opposition was growing.’⁷⁵ It is widely agreed that the proliferation of

⁶⁹ Ibid at 97.

⁷⁰ Ved P Nanda, Thomas F Muther Jr. & Amy E Eckert ‘Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – revisiting the validity of humanitarian intervention under international law’ Part II (1997/98) 26 *Denver Journal of International Law and Policy* 827 at 831.

⁷¹ Menkhaus ‘Governance without government in Somalia’ op cit note 66.

⁷² Ibid at 80.

⁷³ Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 42-5.

⁷⁴ Menkhaus ‘Governance without government in Somalia’ op cit note 66 at 80.

⁷⁵ Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 84.

weapons left behind by the Super Powers was the major source of destabilization in Somalia.⁷⁶

Who is to blame? ... Those who kill and loot are to blame. ... We too are to blame, we who call ourselves "the international community." ... There are more arms than food in Somalia. ... They were given by the outside world to serve outside interests. Those who provide arms are partners in the crime.⁷⁷

In fact, according to an author, purchasing military tanks were as cheap as purchasing used-cars.⁷⁸ This easy and almost unlimited access to sophisticated weapons laid the foundation for Somalia's long-term final ruin.⁷⁹ So pervasive was this proliferation that by January 1991, General Mohamed Farah Aideed and other different clan-based factions easily joined ranks in armed insurrection to topple the already weakened government of Siad Barre.⁸⁰ Unfortunately, this unity of purpose however proved insufficient to sustain the alliance and maintain political stability in post Siad Barre Somalia.⁸¹ Since then absence of a central government, unending civil war, chaos and anarchy have characterised the life of Somalis.⁸²

Attempts at state reconstruction in Somalia have proved abortive so far as it seems to have sunk beyond redemption. More than twenty years later, notwithstanding the fiction of statehood attached to Somalia, it still lacks 'substantial and credible statehood by the empirical criteria of classical positive international law'⁸³ and as I have argued elsewhere, it is just as well if the international community would rethink its approach to the Somali

⁷⁶ Thomas G Weiss *Military-Civilian Interaction: Humanitarian Crises and the Responsibility to Protect* 2ed (2005) 59 (hereafter Weiss 'Military-Civilian Interaction').

⁷⁷ See Rejendra Ramlogan 'Towards a new vision of world security: the United Nations Security Council and the lessons of Somalia' (1993-4) 16 *Houston Journal of International Law* 213 at 222 quoting UN Secretary General Perez de Cueller (hereafter Ramlogan 'The U NSC and the lessons of Somalia').

⁷⁸ Lewis & Mayhall 'Somalia' op cit note 68 at 106.

⁷⁹ Ibid at 97.

⁸⁰ Ibid at 100. By late 1990, Siad Barre controlled less than 15 per cent of Somalia with the rest under clans-based warlords so much so that Barre was cynically referred to as the 'Mayor of Mogadishu' because that was the only region over which he exercised effective control. See Clapham 'Degrees of statehood' infra note 83 at 151. The Somali National Movement operated in the Northwest, the Somali Salvation Democratic Front operated in the Northeast, the United Somali Congress operated in the Centre while the Somali Patriotic Movement held sway in the South. See Prunier 'Somalia, civil war, intervention and withdrawal' op cit note 67 at 47-52.

⁸¹ Mohammed Sahnoun *Somalia: The Missed Opportunities* (1994) 9 (hereafter Sahnoun 'Somalia: The Missed Opportunities').

⁸² Ken Menkhaus 'State collapse in Somalia: second thoughts' (September 2003) 30:97 *Review of African Political Economy* 405 at 407.

⁸³ Christopher Clapham 'Degrees of statehood' (1998) 24:2 *Review of International Studies* 143 at 144. For a detailed analysis of the manifestation of state failure, see Robert I Rotberg 'The new nature of nation-state failure' (Summer 2002) 25:3 *Washington Quarterly* 85 (hereafter Clapham 'Degrees of statehood').

crisis.⁸⁴ Like all the other problems that had sprung up since the UN dumped UNOSOM in 1995, the present humanitarian crisis arising from drought cannot be explained and addressed outside the context of the unresolved broader Somali conflict. It is just another chapter in an unfolding humanitarian tragedy that began over two decades ago but to which the UNSC had largely ignored or paid lip service at best.

3.3.1 *The Humanitarian Crisis*

The scale of human misery, human rights violations and violations of international humanitarian law that gripped Somalia since the commencement of the civil war will defy attempt at accurate assessment. Nor is it possible to come to a precise figure of the casualties of the conflict since 1991. What however is clear that the degree of atrocities committed and the suffering it foisted on the civilian population is unimaginable. Speaking at the height of the crisis in 1992, the former director of the US Office of Foreign Disaster Assistance described the situation as the ‘worst humanitarian disaster in the world.’⁸⁵ And according to another commentator, ‘[t]he tragic events in Mogadishu since the defeat of Siyad Barre's regime, and the ... fighting in Burao and Berbera in the northern region, are clear manifestations of the bottomless nature of the hell into which millions of Somalis have fallen.’⁸⁶ The fight between the different insurgent groups and the Barre regime before it fell claimed about 4000 lives.⁸⁷ It is estimated that at the height of the conflict, about 3,000 people comprising mainly women and children were dying every day.⁸⁸ Between 17 November 1991 and 27 February 1992, it is estimated that between 30,000 and 50,000 people died and no fewer than 14,000 of them were killed around Mogadishu alone.⁸⁹ Recounting what he saw in Somalia, then United Nations Special Representative to Somalia Mohamed Sahnoun writes:

⁸⁴See John-Mark Iyi ‘Somalia piracy, UNSC Resolutions 1816-1851 and the dilemma of state failure: The burden of legitimacy’ (2011) *African Yearbook on International Humanitarian Law* 47 at 75 (hereafter Iyi ‘The dilemma of state failure’).

⁸⁵ See Africa Watch ‘Somalia, no mercy in Mogadishu: The human cost of the conflict and the struggle for relief’ (26 March 1992) available at <<http://www.cja.org/downloads/No%20Mercy%for%20Mogadishu.pdf>> (accessed on 20 August 2011). (Hereafter Africa Watch ‘No mercy in Mogadishu’).

⁸⁶ Abdil Ismail Samatar ‘Destruction of state and society in Somalia: Beyond the tribal convention’ (1992) 30:4 *The Journal of Modern African Studies* 625 at 640 (hereafter Samatar ‘Destruction of state and society in Somalia’).

⁸⁷Weiss ‘Military-Civilian Interaction’ op cit note 76 at 60.

⁸⁸Sahnoun ‘Somalia: The Missed Opportunities’ op cit note 81 at 16.

⁸⁹Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 53.

When I arrived in Mogadishu in March 1992 on a fact-finding mission, the city was nearly deserted. Most people had fled to surrounding areas where they lived in the worst of conditions and many faced death by starvation ... at least 300, 0000 people had died of hunger and hunger-related disease, and thousands more were casualties of the repression and the civil war.⁹⁰

At the same time, there was acute shortage of food particularly in the Bay and Lower Shebelle provinces which recorded 90 per cent malnutrition rate and 16.5 per cent death rates by June 1992.⁹¹ It is no accident therefore that throughout the conflict and the subsequent drought-related famine, these same regions remains most affected and vulnerable.⁹² ‘The carnage inflicted upon the civilian population by indiscriminate use of weapons of extraordinary force and by the failure on all sides to abide by minimum standards of international humanitarian law ... has already earned Mogadishu a special place in the annals of human cruelty.’⁹³

By the summer of 1992, more than one-third of the Somali population had either been killed by the war or was on the verge of starving to death.⁹⁴ Although there is no accurate data on the exact figures, it is estimated that about 900,000 Somalis fled into neighbouring countries—Kenya, Djibouti, Ethiopia etc. Together, the number of refugees and internally displaced persons (IDPs) stood at a staggering 1.5 million, representing 29 percent of the total Somali population before the outbreak of conflict.⁹⁵ Sadly, recent statistics still reveal that by the end of 2010, the number of IDPs in Somalia stood at 1.5 million, among the highest in the world and 3.7 million Somalis are at risk of starving to death.⁹⁶

3.3.2 *The International Response*

As usual, the international community prevaricated on the Somali crisis and did not respond with the urgency demanded by the situation or with the swiftness with which troops were

⁹⁰Sahnoun ‘Somalia: The Missed Opportunities’ op cit note 81 at15.

⁹¹Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 54.

⁹² Elizabeth Ferris ‘Famine in Somalia once again’ (22 July 2011) *Brookings Institution* available at <http://www.brookings.edu/opinions/2011/0722_somamliam_famine_ferris.aspx> (accessed on 24 August 2011) (Ferris *Famine in Somalia once again*).

⁹³Africa Watch ‘No mercy in Mogadishu’ op cit note 85.

⁹⁴Samatar ‘Destruction of state and society in Somalia’ op cit note 86 at 625.

⁹⁵ Weiss ‘Military-Civilian Interaction’ op cit note 76 at 60.

⁹⁶Ferris ‘Famine in Somalia once again’ op cit note 92.

mobilized for, and dispatched to Kuwait for example.⁹⁷ ‘Their greatest crime was their absence in 1991 ... The factions were crying out for someone to, broker the peace. If the world had made an effort to mediate, much could have been saved.’⁹⁸ As the world focused on the Gulf crisis, Somalia did not attract international attention until the intensive fighting spanning the period November 1991 to February 1992.⁹⁹ The US, which had no use for the strategic alliance with Somalia anymore, worked to undermine any effort to get the UN involved in the crisis.¹⁰⁰ This attitude by the global North (championed by the US) was fiercely challenged by African states, particularly those who fortuitously were non-permanent members of the UNSC at the time by publicly alleging that the US was biased against Africa, blocking intervention in Somali, while at the same time championing intervention in Yugoslavia.¹⁰¹ For example,

[t]he heated debate on the resolution highlighted the determination of the United States to limit U.N. involvement in Somalia to humanitarian concerns, and to tone down any commitment to work towards a political resolution. African members of the Security Council and other African representatives who participated in the debate accused the U.S. of applying double standards with regard to Somalia and Yugoslavia. According to press reports and to diplomatic sources, the U.S. and African members clashed on the issue during the Security Council debate. The Nigerian Foreign Minister, Maj. Gen. Nwachukwu, commented that "Africa must receive the same qualitative and quantitative attention paid to other regions."¹⁰²

In the ensuing bloody conflict, foreign countries and humanitarian agencies evacuated their embassies, nationals, and staff respectively while abandoning Somalis to their ‘gruesome fate’.¹⁰³ By 1991 the specialised agencies of the UN—the UNDP, WHO, UNICEF and the WFP—complained that the operational environment in Somalia had become too risky for them to continue their work and so withdrew.¹⁰⁴ Just as in Liberia, this created a bitter feeling in the people who felt that they had been abandoned by the world body in their hour of need.¹⁰⁵ Save for the unsuccessful attempt by a few governments in the region, no committed effort was forthcoming on the part of the international community to push for a resolution of the conflict and the UN actually started pulling out its personnel as early as 1988.¹⁰⁶ A few

⁹⁷ Wippman ‘ECOWAS and the Liberian Civil War’ op cit note 50 at 175.

⁹⁸ Terry Atlas ‘New activism underscores UN’s failures’ (January 10 1993) Chicago Tribune available at <http://www.articles.chicagotribune.com/1993-01-10/news/9303160798_1_bosnia-muslims-serb-bosnia-president-alija-izetbegovic> (accessed on 25 September 2011).

⁹⁹ Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 53.

¹⁰⁰ Africa Watch ‘No mercy in Mogadishu’ op cit note 93.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Lewis & Mayhall ‘Somalia’ op cit note 68 at 107.

¹⁰⁴ Africa Watch ‘No mercy in Mogadishu’ op cit note 93.

¹⁰⁵ Id.

¹⁰⁶ Sahnoun ‘Somalia: The Missed Opportunities’ op cit note 81 at 16.

humanitarian agencies, such as the International Committee of the Red Cross (ICRC) and Medecins San Frontieres (MSF) and so on braved the odds to provide humanitarian reliefs to the people despite the great danger of working in the environment. As a human right body puts it, '[t]he complete absence of the UN since January 1991 when the government of Somalia collapsed ... put the entire burden of meeting the basic needs of the people for survival on the ICRC and NGOs.'¹⁰⁷ The NGOs severely criticized the UN and its specialised agencies because while these NGOs continued to foray deeper into the country to provide assistance to desperate civilians, the UN literally abdicated its responsibilities.¹⁰⁸ Somalis were confounded as to why they would be abandoned by the UN in such critical times despite the obvious desperate situation they faced.¹⁰⁹

It is important to understand this background because following the events of 'Black Hawk Down' the view often presented is that Somalis did not want external intervention in their conflict. On the contrary, most Somalis actually desired and waited anxiously for the UN to intervene in their crisis. In fact, as concluded by Trevor Page who was head of the UN World Food Programme during the conflict, the tragedy in Somalia happened 'because we've let things simmer without paying attention.'¹¹⁰ The delay in providing humanitarian assistance let alone intervening to halt the conflict significantly contributed to the staggering casualties recorded.

Had the UN's assistance, both military and humanitarian, been forthcoming in the way and at the level expected by relief workers and Somalis, it would have greatly contributed to an atmosphere propitious to dialogue and compromise. ... The provision of humanitarian assistance and the maintenance of the cease-fire are closely linked. We need both at the same time.¹¹¹

By the time the UNSC finally passed its first resolution to enter the conflict, Somalia had slipped into a 'black hole' irretrievably.¹¹² The US was very unwilling to support a peacekeeping operation in Somalia for various reasons ranging from financial to domestic politics back in Washington.¹¹³ So, as Somalis waited on the UN and the UN in turn waited on a reluctant US, the situation grew from bad to worse. Finally, after so much criticism and based on the report of the UN Secretary General, the UNSC passed resolution 733 on 23

¹⁰⁷ Africa Watch 'No mercy in Mogadishu' op cit note 85.

¹⁰⁸ Sahnoun 'Somalia: The Missed Opportunities' op cit note 81 at 9.

¹⁰⁹ Id.

¹¹⁰ Ibid at 18 quoting Jane Perlez 'UN let the Somali famine get out of hand, Aid says' *New York Times* 16 August 1992 at 12.

¹¹¹ Sahnoun 'Somalia: The Missed Opportunities' op cit note 81 at 18.

¹¹² Id at 15.

¹¹³ Lewis & Mayhall 'Somalia' op cit note 68 at 108.

January 1992 in which it recognised the situation in Somalia as constituting a threat to international peace and security.¹¹⁴ The resolution imposed arms embargo on Somalia, approved the appointment of a humanitarian relief coordinator and requested the Secretary General to take necessary action to provide humanitarian assistance to the population in all parts of Somalia.¹¹⁵ This resolution was unlikely to impact on the supply of arms because Somalia, and the entire region, as already mentioned above, was awash with arms left behind by the superpowers at the end of the Cold War.¹¹⁶

On 17 March 1992, the UNSC unanimously adopted resolution 746 in which it pledged its support for the UN Secretary General's decision to dispatch a technical observer mission to Somalia.¹¹⁷ Following the continued deterioration of the situation in Somalia, the UNSC unanimously adopted resolution 751 to establish the United Nations Mission in Somalia (UNOSOM I) on 24 April 1992.¹¹⁸ This resolution directed the UN Secretary General to commence the airlift of humanitarian aid and to deploy a unit of 50 United Nations Observers to monitor the ceasefire in Somalia.¹¹⁹ The UNSC adopted several other resolutions in this regard in an attempt to bring the situation in Somalia under control but it proved difficult. As Ken Menkhaus observed years later, the impediments faced in state reconstruction efforts in Somalia ever since '... serves as a cautionary note that delayed external action to revive and support failing states only compounds the difficulty of state building later on.'¹²⁰

On 25 November 1992, the US volunteered 20,000 troops and on 3 December 1992 the UNSC unanimously adopted resolution 794 under Chapter VII authorising the deployment of a US-led multinational Unified Task Force (UNITAF) consisting mainly of US troops.¹²¹ By January 1993, the total UNITAF troops in Somalia stood at a record 38,300 and the operation recorded some remarkable results in that it was able to secure the environment for delivery of humanitarian relief.¹²² However, the operation was short-lived and the lack of commitment to stay the course was apparent from the very beginning. For

¹¹⁴ See S.C. Res. 733, U.N. S.C.O.R., 48th Sess., 3188th mtg. at 80, U.N. Doc S/INF/49 (1993).

¹¹⁵ Ibid.

¹¹⁶ Lewis & Mayhall *Somalia* op cit note 68 at 97.

¹¹⁷ See S/RES/746 (1992) para 6.

¹¹⁸ S.C. Res 751, U.N. S.C.O.R. 47th Sess., 3069th mtg. at 57, U.N. Doc. S/INF/48 (1993).

¹¹⁹ Id para 6.

¹²⁰ Menkhaus 'Governance without government in Somalia' op cit note 66 at 77.

¹²¹ S.C. Res 794, U.N. S.C.O.R. 47th Sess., 3145th mtg. at 63, U.N. Doc. S/INF/48. See Murphy 'Humanitarian Intervention' op cit note 37 at 322-23.

¹²² S.C. Res 794, U.N. S.C.O.R., 47th Sess., 3145th mtg at 63 UN. Doc. S/INF/48 (1993).

example, although US troops arrived in Somalia on 8 December 1992, the US had made it clear that by the time President Clinton was inaugurated in January 1993, it should have pulled out of Somalia, indicating that the U.S. had no long term-strategy of commitment to the operation.¹²³ During its short stay, UNITAF was able to restore some level of normalcy and create the enabling environment for aid agencies to deliver humanitarian reliefs.¹²⁴ On 26 March 1993, the UNSC unanimously adopted resolution 814 authorising UNITAF to transfer command authority to UNOSOM II and expanded the mandate of the new mission.¹²⁵ The US had already begun a unilateral withdrawal of its troops and by March 1993 when resolution 814 was adopted for UNOSOM II to take over from UNITAF, it had cut its troops down to about 1,400 from 26,000 at the commencement of Operation Restore Hope.¹²⁶

Though largely regarded as a success at the time, the sudden and premature withdrawal of UNITAF eventually proved decisive in reversing the relative stability achieved by the operation and pushing Somalia into total anarchy, which UNOSOM II could not handle.¹²⁷ By the time UNOSOM II withdrew in February 2005, the death toll was over 300,000 and it is generally agreed that the intervention was a failure.¹²⁸ Notwithstanding the failure of UNOSOM II, resolution 794 was celebrated at the time by scholars and practitioners alike as a normative breakthrough on two grounds: first, it set the precedent that the use of force within the territory of a sovereign state could be justified on humanitarian grounds because it constitutes a ‘threat to international peace and security’.¹²⁹ Secondly, it affirmed the existence of a moral obligation on the UNSC to rescue populations imperilled by famine and civil war.¹³⁰ However, as events in Rwanda would prove subsequently, such euphoria was rather premature.

¹²³Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67 at 61.

¹²⁴Murphy ‘Humanitarian Intervention’ op cit note 37 at 225.

¹²⁵S.C. Res 794, U.N. S.C.O.R., 47th Sess., 3145th mtg at 63 U.N. Doc. S/INF/48 (1993).

¹²⁶Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 99 at 63.

¹²⁷For a detailed account of these events see generally Murphy ‘Humanitarian Intervention’ op cit note 121 at 217-243; Mohammed Sahnoun ‘Somalia: The Missed Opportunities’ op cit note 81; Lewis & Mayhall ‘Somalia’ op cit note 103 at 94-124; Prunier ‘Somalia, civil war, intervention and withdrawal’ op cit note 67; Nicholas Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (2002) 172-297 (hereafter Wheeler ‘Saving Strangers’).

¹²⁸Nanda, Nanda et al ‘Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia’ op cit note 70 at 836.

¹²⁹Wheeler ‘Saving Strangers’ op cit note 127 at 185.

¹³⁰Id. Even the precedential value of the resolution was greatly weakened by the qualification that the Somali situation was to be construed as a unique and exceptional case for many reasons including the absence of an effective government. See Wheeler ‘Saving Strangers’ op cit note 127 at 186-7.

3.4 RWANDA: A BRIEF HISTORICAL BACKGROUND AND GENESIS OF THE CONFLICT

‘Nations with a long history of conflict—whether Yugoslavia, Haiti, Liberia, Sierra Leone, Congo or Rwanda will never know peace unless they address the underlying historical social causes of conflict. They cannot do that alone; there must be concerted effort and mutual reinforcement on the part of multiple regional and global bodies.’¹³¹ This assessment of the nature of African conflicts both in their origin, contemporary manifestations and the prospects for panacea serves a useful purpose in putting the Rwandan genocide in perspective. At the height of the conflict in Rwanda, many dismissed it as just another instance of inter-ethnic bloodletting characteristic of African societies for which the international press was later criticised.¹³² This rather simplistic view of the causes of the Rwandan genocide has been discredited as lacking any anthropological or historical basis, for long before the advent of the modern Rwandan state, the three ethnic compositions of Twa (hunters and gatherers), Hutu (peasant farmers) and Tutsi (herdsmen), lived side by side, spoke the same language, and shared other common cultural values without a clear distinction along racial identity.¹³³

The power structure in pre-colonial Rwanda was in four levels—provincial, district, hill and neighbourhood—with the Tutsis controlling power at the provincial, district and hill levels while the Hutus led at the neighbourhood level.¹³⁴ This social arrangement of harmonious co-existence changed with colonialism, particularly after Rwanda became a Belgium-administered mandated territory. Relying on distorted history, the Belgians propagated a theory of racial superiority that regarded the Tutsis as having features similar to Europeans and thus probably being of European descent and so of superior race to the Hutus and the Twas.¹³⁵ The Tutsis took this falsification of history and furnished the Belgians with

¹³¹ Strobe Talbott ‘The crisis in Africa: Local war and regional peace’ (Summer 2000) 17:2 *World Policy Journal* 21 at 23.

¹³² Wheeler ‘Saving Strangers’ op cit note 127 at 209.

¹³³ Linda Melvern *A People Betrayed: The Role of the West in Rwanda’s Genocide* (2000) 8 (hereafter Melvern ‘A People Betrayed’). Although there is no agreement on when racial division first appeared in Rwandan society, it is argued that the earliest contact with European explorers introduced this dimension to social relations in Rwanda.

¹³⁴ *Ibid* at 9.

¹³⁵ Philip Gourevitch *We Wish to Inform you that Tomorrow We will be Killed with Our Families: Stories from Rwanda* (1998) 55 (hereafter Gourevitch ‘We Wish to Inform you’). See also Stella-Night Candiru, Candice More, Tumaini Minja, John-Mark Iyi & Derese Gatschew ‘The Rwandan Genocide and the ethnicity question’ (unpublished Peace Research Course thesis, University of Oslo, August 2003) 21 (hereafter Iyi et al ‘The Rwandan Genocide and the ethnicity question’). Citing John Han Speke, Melvern writes ‘[i]t became widely believed that so superior was the culture in central Africa that it must have come from somewhere else; it was

materials that purported to validate it.¹³⁶ In 1933, the Belgians issued identification cards based on ethnic origin determined by physical features such as height, shape of nose. thus, institutionalising ethnic division by casting the ethnic distinction between Tutsis and Hutus in more concrete social forms.¹³⁷ This policy afforded the Tutsis who dominated the colonial bureaucracy social and economic privileges to the exclusion of the Hutus who also quietly resented such systemic and systematic discrimination.¹³⁸ Belgium's colonial policies of promoting ethnic division heightened the cycle of ethnic tension and violence right up to the eve of Rwandan independence and continued throughout much of its post-colonial history to 1994.¹³⁹

The Hutus published a manifesto in 1957 demanding majority rule and in 1959, the Tutsi monarchy that had ruled Rwanda over centuries died in controversial circumstances sparking the first wave of genocide.¹⁴⁰ The Hutus assumed power at independence in 1961 and when attempts to reclaim power by Tutsis in 1963 failed, the Hutu majority embarked on a killing spree that left about 14,000 dead.¹⁴¹ The UN blamed the Belgians and the Rwandan government for the massacre.¹⁴² Both the 1959 and 1963 incidents resulted in thousands of Tutsis fleeing Rwanda for neighbouring countries and these refugees were to form the bulk of the Rwandan Patriotic Front rebel group that later waged a guerrilla war against the Rwandan government in the 1990s. In 1973, Juvenal Habyarimana seized power in a coup and his government maintained a strangle hold on power until he was killed in the 6 April 1994 plane crash igniting decades-old ethnic animosities and culminating in the decimation of a tenth of Rwanda's population—mostly Tutsis.

impossible that "savage negroes" could have attained such levels of political and religious sophistication. The Tutsi ruling classes were thought to have come from further north, perhaps Ethiopia, and were more closely related to the "noble Europeans." They were superior and too fine to be "common negroes"; they were taller and their noses were thinner. They had an intelligent and a refinement of feelings which was "rare among primitive people." See Melvern 'A People Betrayed' op cit note 133 at 8.

¹³⁶ Iyi et al 'The Rwandan Genocide and the ethnicity question' op cit note 135 at 21.

¹³⁷ Before this policy, ethnic classification in Rwandan society was more nuanced and though Tutsis were wealthier and regarded as the upper class, it was actually possible for a Hutu to become a Tutsi based on the number of cattle he had and inter-marriage was common such that the South was dominated by people of mixed Hutu-Tutsi ancestry and making strict classification difficult. Yet such people were classified as Hutu by Belgian bureaucrats despite having striking Tutsi physical features. See Melvern 'A People Betrayed' op cit note 133 at 10-11.

¹³⁸ Id.

¹³⁹ Linda Melvern *Conspiracy to Murder: the Rwandan Genocide* (2004) 6 (hereafter Melvern 'Conspiracy to Murder').

¹⁴⁰ Ibid at 9.

¹⁴¹ Id. See also Murphy 'Humanitarian Intervention' op cit note 121 at 243.

¹⁴² Ibid at 10.

3.4.1 *The Genocide and the Ensuing Humanitarian Crisis*

The Rwandan genocide was total in every respect. The clinical meticulousness that went into its planning, the military precision with which it was executed, the cruel efficiency of the strategies and instruments deployed and the diversity of the background of perpetrators all combined to produce the most efficient extermination of a group since Nazi Holocaust. An estimated one million people, mostly Tutsis and moderate Hutus were slaughtered within one hundred days. Within a short time after President Habyarimana's death, the would-be genocidaires comprising members of the Presidential Guard, the Interahamwe, soldiers, and other militias descended on Kigali with lists of opposition political leaders, human right activists, journalists and other professionals considered as 'enemies' of the government all marked for elimination.¹⁴³ There were different sides to the organisation and execution of the massacres but they all shared a common goal—the extermination of the Tutsi minority.

Given the scale of the genocide, it is obvious that it did not begin in April 1994. In fact, planning and preparations had started as early as January 1991.¹⁴⁴ When the RPF attacked a local prison in January 1991 setting the prisoners free, the government's response was to instigate and mobilise the local Hutu population to attack Tutsis resulting in the death of over 300 people.¹⁴⁵ From then on, the ruling party, using the army, began to recruit and train 'civil defense' teams.¹⁴⁶ In 1992, as negotiations between the RPF and the government for a political solution progressed at Arusha, Hutu extremists within the government began to work to subvert the peace process and in no time another cycle of violence broke out, again claiming scores of lives.¹⁴⁷ Government officials and local community leaders actively participated by inciting Hutus at meetings to defend their country by burning the houses and killing the 'inyenzi'—a derogatory name that means cockroaches and used to describe the Tutsis.¹⁴⁸ Within two days, more than 550 houses had been burnt and 248 people killed.¹⁴⁹ Huge refugee camps sprang up as Tutsis fled their homes and this continued into 1993 with an average of five people being killed daily.¹⁵⁰ In a 1993 report by Bacre Waly Ndiaye, the

¹⁴³ Timothy Longman *Christianity and the Genocide in Rwanda* (2010) 3 (hereafter Longman 'Christianity and the Genocide in Rwanda').

¹⁴⁴ Melvern 'Conspiracy to Murder' op cit note 139 at 17.

¹⁴⁵ Id.

¹⁴⁶ Id at 17-18.

¹⁴⁷ Ibid at 35.

¹⁴⁸ Id at 15.

¹⁴⁹ Id.

¹⁵⁰ Ibid at 45.

Special Rapporteur for the Commission on Human Rights for Extrajudicial, Summary or Arbitrary Executions, it was established that within the two previous years, over two thousand people, mainly Tutsis, had been targeted and killed purely on the basis of their ethnic identity.¹⁵¹ Ordinarily, this borders on genocide.¹⁵²

Another dimension was added to the preparation for the genocide when Radio-Television Libre des Mille Collines (RTLM) was established. Together with the government owned Radio Rwanda, and the Kangura Newspaper, this triumvirate constituted the media propaganda wing of the genocidaires.¹⁵³ RTLM preached hate message relentlessly on the airwaves portraying Tutsis as enemies and often using crude metaphorical aphorisms such as '[A] cockroach cannot give birth to a butterfly.'¹⁵⁴ Throughout the genocide the RTLM waged a relentless media war of spreading hate, first against the Tutsis, then against the Belgians, and finally against the UNAMIR troops. RTLM would broadcast wherever Tutsis were believed to have taken refuge and call on the perpetrators to finish the 'work' (killing of Tutsis) as part of their duty to defend Rwanda.¹⁵⁵ A Belgian journalist with RTLM later narrated how 129 Tutsis were killed in a field one after the other.¹⁵⁶ In overall assessment, the creation and operation of RTLM was decisive in the genocide by spreading hate and inciting violence.¹⁵⁷ Unfortunately, there was no contrary news channel to counter the propagandists whether within Rwanda itself or in the international press and as observed by the UNAMIR Commander, General Daillaire '[H]ad the international press been interested they would have made a difference but they simply were not interested.'¹⁵⁸

Roadblocks sprang up all over Kigali and hundreds of Presidential Guards armed militias were on the streets.¹⁵⁹ 'At roadblocks in Kigali, the militia asked for identification cards, at first kicking all those with designation Tutsi, but this took too much time and became an irritation so militia singled out those who were tall, with straight noses and long fingers. And they killed those who looked educated and more wealthy [*sic*] than others.'¹⁶⁰

¹⁵¹ E/CN.4/1993/46 para 502-9.

¹⁵² Melvern 'Conspiracy to Murder' op cit note 139 at 64.

¹⁵³ Iyi et al 'The Rwandan Genocide and the ethnicity question' op cit note 135 at 23.

¹⁵⁴ Id.

¹⁵⁵ Ibid at 206.

¹⁵⁶ Id.

¹⁵⁷ Ibid at 57.

¹⁵⁸ Ibid at 101.

¹⁵⁹ Melvern 'A People Betrayed' op cit note 133 at 116.

¹⁶⁰ Ibid at 128.

Within the first week, more than 20000 people had been massacred.¹⁶¹ On 7 April 1994 in Gikongoro prefecture, militia members embarked on a house-to-house killing and refused to spare the eighteen Gikongoro orphans whose parents had been killed in February but who were being catered for by the local school.¹⁶² The killings were very often grotesque. On 8 April, the militia took their killing mission to hospitals and even mortuaries cut people with machetes and left the bodies where they fell.¹⁶³ At the hospitals, they killed the sick and wounded and even health workers identified as Tutsis were taken away and killed.¹⁶⁴ On 9 April at Gikondo, members of the Presidential Guards stormed the Catholic Church and massacred the more than 500 people who had taken refuge in the Catholic Church after separating the Hutus from the Tutsis by checking their identity cards.¹⁶⁵ Not even babies were spared and when the ICRC arrived in search of survivors, they estimated that over 10,000 people had been killed at Gikondo within two days.¹⁶⁶ In other sub-prefectures, roadblocks were first set up to control movements of those targeted, then Tutsi homes were attacked while local leaders and authorities like burgomasters encouraged the terrified Tutsis to gather at designated location for protection.¹⁶⁷ But once they were gathered, the same local leaders surreptitiously mobilised and armed the militia directing them to attack the refuge sites.¹⁶⁸ This had the great advantage of facilitating the killings by reducing the time spent on hunting down every Tutsi through a house-to-house search.¹⁶⁹ Narrating how one such ambush was put together by a leader in Mwendo, a survivor recounts '[t]here was so much blood that the burgomaster's car slid on the road when he drove by later.'¹⁷⁰ Another survivor recounts:

I remember that already on April 10 there was a communiqué on the radio from the provincial administrator calling all the drivers with big trucks, because only four days after the genocide started there were such a lot of dead people here that it was necessary to bring the big trucks.¹⁷¹

At the Gatwaro local stadium in the commune of Gitesi, about 20,000 people took refuge there on the advice of a local leader. But as soon as a lot of people had taken shelter there, the militia attacked the stadium using grenades and shooting at the multitudes. The Interahamwe

¹⁶¹ Weiss 'Military-Civilian Interactions' op cit note 76 at 100.

¹⁶² Melvern 'Conspiracy to Murder' op cit note 139 at 169.

¹⁶³ Ibid at 173.

¹⁶⁴ Id.

¹⁶⁵ Ibid at 182-3.

¹⁶⁶ Id.

¹⁶⁷ Longman 'Christianity and the Genocide in Rwanda' op cit note 143 at 284.

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Longman 'Christianity and the Genocide in Rwanda' op cit note 143 at 289.

¹⁷¹ Gourevitch 'We Wish to inform you' op cit note 135 at 124.

kept vigil outside the stadium and killed anyone lucky enough to get out of the stadium alive.¹⁷² Another survivor from Bissero recounts what happened there in the following words ‘[W]hen we saw the attack coming we fled ... they followed us, killing people, especially children, old men and women who could not run.’ Over 50,000 people were killed that day at Bissero.¹⁷³ So alarming were the atrocities that the ICRC had to issue a rare strongly worded statement on 29 April 1994 stating ‘[w]hole families are exterminated, babies, children, old people, women are massacred in the most atrocious conditions, often cut with a machete or a knife, or blown apart by grenades, or burned or buried alive. The cruelty knows no limits.’¹⁷⁴

Even students were not spared so long as their ethnic origin was Tutsi. At Butare, university students who were Tutsis organised themselves into groups to keep watch for the attackers at night. This was of no effect because soldiers soon rounded up all Tutsi students and led them to where they were shot.¹⁷⁵ Over 40,000 people were massacred in Runyinya in Butare prefecture and witnesses narrate how soldiers and gendarmes shot about 70,000 people who had taken shelter in a church watching children weeping over their dead parents.¹⁷⁶ At some stage in the genocide, the genocidaires moved around with lists of Tutsis and moderate Hutus marked for extermination. ‘Every journalist, every lawyer, every professor, every teacher, every civil servant, every priest, every doctor, every clerk, every student, every civil rights activist were hunted down in a house-to-house operation.’¹⁷⁷ As the killing spread, marauders moved slashing throats, cracking skulls and cutting people in halves. In Kibuye, out of a pre-genocide census figure of over 200,000 resident Tutsis, only about 8,000 were left at the end of the genocide in June 1994.¹⁷⁸ Today, several churches, schools, markets, seminaries, are genocide sites all over the country.¹⁷⁹ In its first letter to officially notify the UN of the genocide, the RPF stated:

A crime of genocide has been committed against the Rwandese people in the presence of a UN international force, and the international community has stood by and watched. Efforts have been mobilized to rescue foreign nationals from the horrifying events in Rwanda, but there has been no concrete action on the part of the international community to protect innocent Rwandese children, women, and men who have been crying for help.¹⁸⁰

¹⁷² Melvern ‘Conspiracy to Murder’ op cit note 139 at 223.

¹⁷³ Ibid at 224.

¹⁷⁴ Ibid at 221.

¹⁷⁵ Ibid at 210.

¹⁷⁶ Ibid at 211.

¹⁷⁷ Ibid at 127.

¹⁷⁸ Ibid at 224.

¹⁷⁹ Ibid at 210.

¹⁸⁰ Ibid at 199.

The humanitarian statistics are staggering. In the heat of the crisis, 50,000 Rwandan IDPs settled in the central part of the country while another 200,000 mainly Tutsis fled to RPF-held areas of the north.¹⁸¹ Then as the RPF advanced up north, Hutus feared retaliation and within a day, about 250,000 had fled across the border into Tanzania and another 47,000 fled into Burundi while Uganda and Zaire all recorded thousands of refugee influx into their countries.¹⁸² Sexual violence was also deployed as a tool in the genocide and it is estimated that there were about 250,000 and 500,000 rape cases though a paltry figure of 15,700 was reported.¹⁸³ Children suffered most in the conflict as many of them were orphaned and there are about 300,000 child victims.¹⁸⁴ In the midst of all these, the UN and the international community barely lifted a finger and it is instructive to briefly examine the degree of responsiveness of the international community in general and the UNSC in particular to the events of April – June 1994 in Rwanda.

3.4.2 *The International Response*

For some inexplicable reason, the Rwandan genocide can be said to have been malevolently ‘opportunistic’. Though it was predictable and preventable, yet it happened on a continent that has been condemned to international marginalisation—Africa— at a time when global attention was focused on other countries whose human rights were, perhaps more worthy of protection than those of Rwandese. In this scenario, there was just two alternatives that could have averted or halted the genocide: either the genocidaires had a change of heart or the OAU rose up to the challenge and both were remote possibilities at the time, hence the Rwandan genocide successfully entered the history books. A useful starting point for assessing the degree of responsiveness of the UN to the genocide would be to ascertain what the UN knew and what it did not know as a way of judging its attitude, first, to the imminent genocide and its obligations to halt it once it started, and, secondly, to crises in Africa generally.

As mentioned above, the international media was severely criticised for not giving necessary publicity to the events leading up to the genocide and the massive killings that

¹⁸¹ Weiss ‘Military-Civilian Interactions’ op cit note 76 at 101.

¹⁸² Id.

¹⁸³ Id.

¹⁸⁴ Id. It is estimated that between 88 and 96 per cent children witnessed massacres and 87 per cent lost one parent in the genocide. Another 66 per cent witnessed the death of a family member. 70 percent of all refugees from the genocide were children and 100000 of the refugees were unaccompanied minors. See Weiss ‘Military-Civilian Interactions’ op cit note 76 at 100-101.

characterised the month of April when the genocide began.¹⁸⁵ Had this been done, it is argued, it would have created public awareness thereby generating public pressure for political leaders and governments to act.¹⁸⁶ While not denying the impact of the so-called ‘CNN effect’, but this conclusion is questionable on the ground that the major forces at work within the UNSC that paralysed it from taking action had different agendas they pursued at the time. While France worked to prevent intervention on account of its long and messy involvement in the internal politics of Rwanda and its role in the run up to the genocide, the US had refocused its foreign policy thrust relating to humanitarian intervention as a result of the Somali debacle. It had stated that by Presidential Decision Directive 25, the US interventions would thenceforth be determined by national interest, and the extent to which it constitutes a threat to international peace and security.¹⁸⁷ Even this latter condition would, it appears, also be interpreted in the light of direct or indirect US national interests or those of its allies. Rwanda did not meet any of these conditions and it is doubtful that any amount of media coverage would have persuaded the US to act or allow the UNSC to do so.

In the case of Belgium and the UK, the two other major actors in the genocide, the motives were less benign except that they were a reflection of conflicting priorities where national interests were not at stake but there seemingly existed a moral obligation to act and the human and material resources such commitments entailed. In the end, it was an act of balancing between what material, human and financial resources should be made to satisfy the ‘consciences’ and the demands of the gravity of the situation at hand. In Rwanda, it was the former that prevailed over the latter. The same rational probably explains the initial reluctance to label the atrocities genocide despite the overwhelming evidence because this would have given rise to a legal obligation to act under the Genocide Convention.¹⁸⁸ Perhaps, the same reason also explains why the UK, for example, leased derelict armoured personnel carriers to the UN for UNAMIR at ludicrous fees only to withdraw the demand for money in embarrassment, when it became clear that the equipment were relics only fit for the museum.¹⁸⁹ Finally, subsequent events in Darfur for example would lend credence to this. As will be shown below, Darfur received wide media coverage, but that did not necessarily lead

¹⁸⁵ Melvern ‘A People Betrayed’ op cit note 133 at 116.

¹⁸⁶ Melvern ‘Conspiracy to Murder’ op cit note 139 at 231.

¹⁸⁷ Presidential Decision Directive NSC-25, The White House, Washington D.C. May 3 1993 available at <<http://www.fas.org/irp/offdocs/pdd/pdd-25.pdf>> (accessed on 28 September 2011).

¹⁸⁸ See article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9th December 1948, A/RES/260.

¹⁸⁹ Melvern ‘Conspiracy to Murder’ op cit note 139 at 240.

to intervention on the part of the UNSC even though the scale of atrocities arguably bordered on genocide.

UNAMIR was always intended to be a small mission irrespective of the demands of the situation on the ground in Rwanda and this is evidenced by the opposition of prominent states within the UNSC to its creation and also reflected in its final size and mandate.¹⁹⁰ Out of the minimum 4,500 troops requested by General Romeo Dallaire (UNAMIR Commander), just 2,548 were approved.¹⁹¹ Its mandate stipulated that it was to advance the ceasefire, help other UN agencies in the coordination of humanitarian assistance and facilitate the political process; and as a peacekeeping mission the traditional rules of engagement applied—that it could only use force in self-defense.¹⁹² There was no mention of civilian protection or collection of illegal arms or if it was to deal with armed gangs.¹⁹³ As it turned out during the genocide, these defects and weaknesses in the mandate were decisive and handicapped UNAMIR and severely constrained its ability to prevent or halt the atrocities it witnessed. In fact, it did not take long for Dallaire to realise the inadequacies of the Mission in its mandate, equipment and personnel.¹⁹⁴ Writing in his report of the atrocities observed by UNAMIR after arrival, Dallaire stated ‘[T]he swiftness, the callous efficiency and the ruthless number of men, women and children, murdered principally by machetes and bayonets was obvious in this well-orchestrated operation.’¹⁹⁵ The report states further that:

The terms indiscriminate and ruthless are certainly not exaggerated as in these circumstances ... the manner in which they were conducted in their execution, in their co-ordination, in their cover-ups and in their political motives lead us to firmly believe that the perpetrators of these evil deeds were well organised, well informed, well motivated and prepared to commit pre-meditated murder. We have no reason to believe that such occurrences could not and will not be repeated again in any part of this country where arms are prolific and political and ethnic tensions are prevalent.¹⁹⁶

This was to be followed by series of similar reports to the UN Headquarters in New York as the Commander kept the Department of Peacekeeping Operations (DPKO) abreast of the mission and the operational difficulties it faced in the face of the gravity of the humanitarian crisis it confronted on arrival in Rwanda. The final size of UNAMIR and its mandate approved by resolution 872 was a compromise made to the US and the UK who were

¹⁹⁰ Ibid at 67.

¹⁹¹ Id. See also Melvern ‘A People Betrayed’ op cit note 133 at 85.

¹⁹² Weiss ‘Military-Civilian Interactions’ op cit note 76 at 102.

¹⁹³ Melvern ‘Conspiracy to Murder’ op cit note 139 at 99.

¹⁹⁴ Melvern ‘A People Betrayed’ op cit note 133 at 86.

¹⁹⁵ Melvern ‘Conspiracy to Murder’ op cit note 139 at 75.

¹⁹⁶ Ibid at 76.

vehemently opposed to any intervention in Rwanda.¹⁹⁷ Coupled with this is the fact that long before the inception of the genocide, the US government had intelligence report warning that up to 500,000 people would die in Rwanda in the violence that would result should the peace process fail.¹⁹⁸ There were reports detailing evidence of preparation for genocide, such as importation of arms and ammunition, machetes; recruitment, training and arming of militia; preparation of hit lists of targeted people. were presented to the US and the UK, yet they blocked attempts to expand UNAMIR's mandate and the resources available to it to respond effectively in the event of a massacre.¹⁹⁹ According to a Belgian official of UNAMIR, '[e]veryone knew, even in Belgium what was going to happen for the plan of genocide was in place for a long time.'²⁰⁰

The international community and the UN in particular, had been informed of the preparations for genocide and everybody had been warned and so it was up to the UN to have responded appropriately through the right force and mandate, and for obvious reasons, it failed miserably.²⁰¹ The evidence from both the US intelligence and US Ambassador to Rwanda at the time explaining that there was an unfolding genocide in Rwanda upon which the US acted and evacuated its citizens was sufficient proof of knowledge of the imminent genocide and refutes the ignorance feigned by US officials including then Secretary of State Madeline Albright and President Clinton.²⁰² The explanation for the failure to intervene to prevent or halt the genocide was because Rwanda was not considered as worthy of the resources intervention would require.²⁰³

The clearest evidence of the above assertion was the view by the UNSC to either withdraw UNAMIR completely when the genocide started or to scale down operations.²⁰⁴ UNAMIR Commander had requested for a stronger mandate and reinforcements to respond to the spreading massacres but based on a United Nations Secretary General (UNSG)

¹⁹⁷ Melvern 'A People Betrayed' op cit note 133 at 99.

¹⁹⁸ Melvern 'Conspiracy to Murder' op cit note 139 at 128. This explains why US official emerged in Rwanda on a mission to evacuate US citizens why UNSC was deliberating on UNAMIR in New York.

¹⁹⁹ Melvern 'Conspiracy to Murder' op cit note 139 at 260.

²⁰⁰ Ibid at 126.

²⁰¹ Ibid at 187.

²⁰² Ibid at 261.

²⁰³ This sentiment was expressed by Robert Dole, Senate Republican Leader of the US thus: 'I don't think we have any national interest here... I hope we don't get involved there. I don't think we will. Americans are out. As far as I am concerned in Rwanda, that ought to be the end.' Quoted in Melvern 'A People Betrayed' op cit note 133 at 148.

²⁰⁴ This was part of the recommendations by the UNSG in Special Report of the Secretary General on UNAMIR, S/1994/470, 20 Apr 1994.

recommendation to the UNSC, what he got at the end was the reduction of the troops to 270 via resolution 912.²⁰⁵ The Nigerian representative had queried the wisdom of the recommendations of the UNSG on the ground that it did not provide for civilian protection.²⁰⁶ In fact, during the debates on the initial intervention, African states maintained that the West could not reasonably and justifiably oppose the creation of UNAMIR on grounds of lack of resources while cornering resources to the mission in Yugoslavia.²⁰⁷ In the end,

[h]ow half-hearted was the UN's effort for Rwanda was plain to see. Dallaire lacked the barest essentials. He was reduced to borrowing petty cash from another UN agency. He lacked everything from communication to sandbags, fuel and barbed wire. The mission lacked essential personnel.' Dallaire had originally requested for 4,500 troops but in the end he got only 2548 with US insisting that the mission must not cost above 10m dollars a month.²⁰⁸

Perhaps, the most ignoble aspect of the role of foreign powers in the genocide is attributed to France for its participation in both the training and arming of the perpetrators of the genocide.²⁰⁹ Though the true extent of the French complicity in the genocide may never be known, very few doubt that the desperate efforts it made to secure UNSC authorisation for its 'dubious' Operation Turquoise has more to do with obfuscating the extent it is implicated in the genocide than protecting Rwandan civilians in a genocide that had effectively ended by then.²¹⁰ In the words of a French journalist '[i]n the far hills of Rwanda, France is supporting a regime which for two years with a militia and death squads, has been trying to organise the extermination of the minority Tutsi ...'²¹¹ In the end, the operation mainly succeeded in facilitating the escape of the genocidaires who then syndicated along the borders of neighbouring countries, especially Zaire, thus sparking a conflict that would eventually suck in two-thirds of the countries on the African continent.²¹²

²⁰⁵ See S.C. Res U.N. S.C.O.R., 49th Sess., 3368th mtg., U.N. Doc. S/RES/912 (1994); See Wheeler 'Saving Strangers' op cit note 127 at 219.

²⁰⁶ Melvern 'A People Betrayed' op cit note 133 at 154. A draft resolution by Nigeria proposing that peacekeepers should maintain public order and protect civilians in Rwanda was not even table because it did not stand any chance. Ibid at 159.

²⁰⁷ Melvern 'Conspiracy to Murder' op cit note 139 at 67.

²⁰⁸ Melvern 'A People Betrayed' op cit note 133 at 85.

²⁰⁹ Melvern 'Conspiracy to Murder' op cit note 139 at 58.

²¹⁰ See paragraph 13 of the Report of the International Panel of Eminent Personalities set up by the OAU to investigate the immediate causes and surrounding circumstances of the 1994 Rwandan Genocide.

²¹¹ Melvern 'Conspiracy to Murder' op cit note 139 at 41.

²¹² Jean Allain 'The true challenge to the United Nations System of the use of force: the failure of Kosovo and Iraq and the Emergence of the African Union' (2004) *Max Planck United Nations Yearbook* 237 at 263 (hereafter Allain 'The true challenge to the United Nations System').

3.5 DARFUR: A BRIEF HISTORICAL BACKGROUND AND GENESIS OF THE CRISIS

The origin and nature of the Darfur conflict is so convoluted that it is difficult to fully comprehend it without situating the conflict in the broader historical context of the North-South Sudan civil war which is outside the scope of this thesis.²¹³ Sudan as a country is religiously and linguistically dissected into Arabic-speaking North and the indigenous African languages of the South.²¹⁴ Approximately 70 per cent of the population is Muslims, 25 per cent practice indigenous beliefs while 5 per cent follow Christianity.²¹⁵ The root of the present Darfur conflict is traceable to the colonial era when Britain amalgamated Darfur with Anglo-Egyptian Sudan in 1916 and the resurgence of violence in Darfur in 2003 was actually more of a product of these and other historical realities than a cause of it.²¹⁶ Darfur is basically inhabited by the Fur, Zaghawi and Massaleit and though not necessarily a harmonious relationship, the history of Darfur shows that despite its diversity, Darfurians did not experience systematic conflict that pitched different races against one another and racial labelling such as 'Arab' and 'African' that now characterise modern Darfurian societies were virtually absent.²¹⁷

Throughout much of the colonial period, Darfur existed marginally in the social, political and economic periphery of Sudan and it was Khartoum and the Blue Nile Provinces that attracted investment and development while Darfur was neglected.²¹⁸ At independence, the predominantly Arab North held political power and continued with the same system of governance they inherited from the British by marginalising Darfur and the South hence the North was cynically referred to as the 'colonial successor' of Britain.²¹⁹ There has therefore been a tension between those trying to reorder this relationship and create an inclusive system

²¹³ Ruth Iyob & Gilbert Khadiagala *Sudan: The Elusive Quest for Peace* (2006) 133 (hereafter Iyob & Khadiagala 'The Elusive Quest for Peace'). For a detailed analysis of the origin of the North-South Sudan conflict as a broader context of the Darfur conflict. See generally Francis M Deng *War of Visions: Conflict of Identities in the Sudan* (1995) (hereafter Deng 'War of Visions'); Ann Mosely Lesch *The Sudan: Contested National Identities* (1998) (hereafter Lesch 'Sudan's Civil Wars'); Douglas H Johnson *The Root Causes of Sudan's Civil Wars* (2003).

²¹⁴ Lesch 'Sudan's Civil Wars' op cit note 213 at 19.

²¹⁵ Ibid at 20.

²¹⁶ Iyob & Khadiagala 'The Elusive Quest for Peace' op cit note 213 at 134.

²¹⁷ Gerard Prunier *Darfur: The Ambiguous Genocide* (2005) 22 (hereafter Prunier 'The Ambiguous Genocide').

²¹⁸ Ibid at 30. For example, as at 1929, Khartoum had 311 registered students while Darfur had none. By 1952, out of the 23 middle schools in Sudan, eight were in Khartoum and only one was in Darfur.

²¹⁹ See Deng 'War of Visions' op cit note 213 at 135.

that guarantees equal rights for minorities and a common political identity for the country.²²⁰

According to Lesch,

[b]ut the ruling ethnic nationalists have insisted and imposed a model that the majority of religion and widespread language should define the country's identity and be expressed in its legal and political system. In their view, minority groups who speak indigenous languages or subscribe to Christianity must either assimilate culturally to the Arab-Islamic majority or remain in separate territorial enclaves in which they can be exempted from the application of certain religious laws or linguistic requirements. They therefore see any compromise of Arab-Islamic identity as impossible since that would mean relinquishing the image of a country that seeks to be homogenous in language and religion and intrinsically linked to Arab-Islamic civilization.²²¹

Against this background and situated in the context of the North-South civil war that has lasted for several decades, Darfur became militarized from the 1980s through to 2000s producing two parallel wings—the one advocating a restructuring of the Sudanese state for a more equitable distribution of political power and economic resources and the other a ‘neo-Islamic revivalist movement that defines Darfur’s role within a Sharia ruled-Sudan’.²²² However, it was a combination of the policy of Arabisation pursued by both the Islamist government in Khartoum and Libya that sought to reinforce the ‘Arabness’ or ‘Africaness’ identities as a way of supporting Darfur’s Arab communities against the indigenous African tribes in Darfur that finally threw Darfur into the abyss of genocide that it plunged into in 2003.²²³ Libyan troops had been stationed in Darfur and flooded it with arms in aid of the Murahleen which the Sudanese government was purportedly putting together to fight the SPLA but who were in actual fact coercing Darfurians to accept Libya’s ambition of annexation of Darfur.²²⁴ The anonymous publication of the ‘Black Book’ gave expression to the historical dominance of the Arab North and the injustices and alienation suffered by Darfur and other parts of Sudan.²²⁵ At the same time, Chadian rebels were constantly raiding Darfur and it was in response to this that the Darfur Development Front decided to arm the

²²⁰ Iyob & Khadiagala ‘The Elusive Quest for Peace’ op cit note 213 at 136; Lesch ‘Sudan’s Civil Wars’ op cit note 213 at 21.

²²¹ Lesch ‘Sudan’s Civil Wars’ op cit note 213 at 21.

²²² Iyob & Khadiagala ‘The Elusive Quest for Peace’ op cit note 213 at 136.

²²³ Id The main rebel groups in Darfur are the Darfur Development Front which later became Sudan Liberation Movement/Army, and the Justice and Equality Movement (JEM).

²²⁴ Prunier ‘The Ambiguous Genocide’ op cit note 217 at 62. Libya had the ambition of unifying Sudan and Libya as part of its ‘Arab Belt’ policy and it hoped to achieve that objective first by annexing Darfur and it started to train and arm Arabs from Sudan. See Juliet Flint and Alex de Wall *Darfur: A Short History of a Long War* (2005) 50 (hereafter Flint & de Wall ‘A Short History of a Long War’).

²²⁵ Ibid at 85.

tribes in order to defend Darfur.²²⁶ It was in the midst of these dynamics that the Darfur conflict took on an ethnic dimension and the name Janjaweed first appeared.²²⁷ The supposed democracy in Sudan wreaked havoc in Darfur and all of these dovetailed with the expansionist ambitions of Libya in Darfur and the irresponsible politics of Chad in Darfur. Since then, the Darfur genocide was just waiting to happen.²²⁸

In early 2003 skirmishes ensued between government forces and the rebel groups but this was not seen as constituting any serious threat by Khartoum until on 26 February 2003 when about 300 men attacked the town of Golu, killing about 200 government soldiers.²²⁹ Again, on 25 April 2003, the group killed another 30 government soldiers and captured the commander of an Air Force Base causing a major setback and embarrassment to the government.²³⁰ In May and June of 2003, they killed another 500 and 250 soldiers respectively and captured the town of Kutun and its garrison. Thus, the Justice and Equality Movement became a force to reckon with as it waged a guerrilla war against the government of Sudan in defense of Darfur.²³¹ The Sudanese government panicked and one way it responded was to begin to reconstitute the Arab militia, its composition and its relationship with the Sudanese government.²³² Several Janjaweed camps were established across Darfur where they were supplied with arms and from where they launched attacks against civilians in Darfur villages.²³³

3.5.1 *The Humanitarian Crisis and Ambiguous Genocide*²³⁴

The mere fact that there is a debate on whether ‘genocide’ is the proper term to describe the atrocities that occurred in Darfur is enough testimony to the magnitude of that tragedy. The exact date of the first attacks is not clear but sometime in April 2002 Arab raiders attacked Darfur killing 17 people, wounded many others, stole more than 2000 cattle and burnt over

²²⁶ Ibid at 61.

²²⁷ Ibid at 65.

²²⁸ Ibid at 86.

²²⁹ Prunier ‘The Ambiguous Genocide’ op cit note 217 at 92.

²³⁰ Ibid at 95.

²³¹ Ibid at 96.

²³² The Janjaweed was made up of former bandits, ex-servicemen from the state armed forces, disaffected Arab youths, ex-convicts released from jail on condition of joining the militia, members of the Tajammul-Arab and young unemployed Arabs. They were camped and paid by the government and worked closely with the regular army. Ibid at 98.

²³³ Id.

²³⁴ This term is taken from the title of Gerard Prunier’s book *Darfur: The Ambiguous Genocide* (2005).

600 houses.²³⁵ As the insurrection intensified in Western Darfur, the government of Sudan began to arm proxy Arab militias and mobilised them to attack Darfur.²³⁶ The 'Janjaweed' as they became known, unleashed a reign of terror on Fur civilians in pre-dawn attacks in which they would kill and mutilate men, rape women and abduct children.²³⁷ These became the defining features of the lives of Darfurians in the huge province throughout early and late 2000. The objective of the government-backed Janjaweed was a total destruction and annihilation of the non-Arab Fur, Massaleit and Zaghawa tribes of Darfur.

As 2003 set in, more than 160 civilians had been killed and hundreds of villages razed while their livestock were stolen and it was clear the Arab militias were government sponsored and enjoyed immunity.²³⁸ According to a government official coordinating one of such attacks, 'I have orders from the government. All our orders come from the government. We are here so no-one can point a finger at the government.'²³⁹ By the time that attack ended, there were more than 1000 Masaliet dead and thirty villages burned.²⁴⁰ As the villagers took up arms in defense of their villages the attacks intensified and so did the casualties and the humanitarian crisis. These attacks were usually planned using certain tactics and their barbarity was indescribable. An aircraft could fly over a target village and later followed by another aircraft that would start dropping off improvised cluster bombs targeting mainly civilian objects.²⁴¹ This is then followed by helicopters that fire rockets and machine guns at any standing object. When the air raids end, the Janjaweed 'ground troops' move in for the final onslaught and would begin their operation by encircling the village and then launching an operation of killing, raping and burning of houses. Children are simply tossed into the burning houses.²⁴² Attacks are usually well coordinated with the regular army providing reconnaissance with military aircraft and forerunner Jeeps. Describing the modus operandi of the Janjaweed, Flint and de Waal quote a report thus:

Most attacks took place at night, when villagers were sleeping. Upon reaching a village, the attackers typically began by setting fire to all houses. Villagers who managed to escape the flames were then shot by the Arab militias as they fled their homes. The timing of most attacks coincided with the agricultural harvest. By burning the fields just before they were

²³⁵ Prunier 'The Ambiguous Genocide' op cit note 217 at 89.

²³⁶ Flint & de Wall 'A Short History of a Long War' op cit note 224 at 59.

²³⁷ Ibid at 64.

²³⁸ Id These crimes were often not investigated by the authorities when victims lodged complaints but when minor incidents occurred involving an Arab victim, the police responded by killing Fur and Zaghawa civilians fuelling the belief that the Janjaweed were proxies of the Sudanese authorities. Ibid at 65.

²³⁹ Ibid at 61.

²⁴⁰ Id.

²⁴¹ Prunier 'The Ambiguous Genocide' op cit note 217 at 99-100.

²⁴² Id.

ready to be harvested, or while the crop lay on the ground after first being cut, the militias destroyed the year's crop and exposed Masaleit farmers to starvation. ... The atrocities were well planned and directed by the Sudanese military governor of the area.²⁴³

The resulting humanitarian crisis was monumental. By May 2004 when US officials began mooting the word 'genocide' in reference to Darfur, the conflict had already resulted in over 80,000 deaths, 100,000 refugees and a million Internally Displaced Persons (IDPs).²⁴⁴ In one incident, a huge number of IDP had gathered at the village of Habila and without warning, the government air force started bombing them (though there was no evidence of rebels there), killing scores of civilians and wounding others.²⁴⁵ In a similar operation carried out by the Janjaweed and the Sudan armed forces, Wadi Saleh, where thousands of Fur IDPs had taken refuge, was attacked and 332 villages were burned within a fortnight, leaving about 172 people dead.²⁴⁶ The operation was extended to Wadi Debarei, where soldiers and Janjaweed took away over 100 men and executed 71 of them. In the end, more than 200 civilians were killed in that manner. Thus terrorized in this manner, the villagers would flee and the Arabs could then follow taking possession of the area.²⁴⁷

There was pervasive violation of human rights and international humanitarian law by the Janjaweed militia. They would attack defenseless civilian communities and shoot, stab, burn alive, hang by the feet, decapitate or mutilate men and women while torturing others before killing them execution-style.²⁴⁸ Rape also featured prominently as an instrument of the Janjaweed in Darfur. According to Flint and de Waal,

[r]ape was so ubiquitous that it appeared to be an instrument of policy to destroy the targeted communities and perhaps even to create a new generation with 'Arab' paternity. ... These rapes are ... orchestrated to create a dynamic where African tribal groups are destroyed ... it's hard to believe that they tell them they want to make Arab babies, but it's true. It's systematic.²⁴⁹

The tendency of the Sudanese authorities had always bordered on the adoption of genocide as an official policy of the Arab-Islamic government so it ought not to have taken the world a long time to discern that genocide was being orchestrated in Darfur.²⁵⁰ As early as December 2003, Jan Egeland observed that the 'humanitarian situation in Darfur has quickly become

²⁴³ Flint & de Wall 'A Short History of a Long War' op cit note 224 at 59.

²⁴⁴ Prunier 'The Ambiguous Genocide' op cit note 217 at 91.

²⁴⁵ Flint & de Wall 'A Short History of a Long War' op cit note 224 at 106-7.

²⁴⁶ Ibid at 110.

²⁴⁷ Id.

²⁴⁸ Ibid at 107.

²⁴⁹ Ibid at 108.

²⁵⁰ Prunier 'The Ambiguous Genocide' op cit note 217 at 105.

one of the worst in the world.’²⁵¹ In 2005, the number of Darfurian refugees in Chad rose to 200,000, while IDPs stood at 2 million.²⁵² The Sudanese authorities then added another tool to their genocide tactics by deploying starvation as a weapon. Food shipments by humanitarian agencies were blocked often using an array of administrative bottlenecks deliberately designed to emasculate humanitarian assistance efforts.²⁵³ It was estimated that at least 10,000 people were dying every month and the government of Sudan was implicated in the systematic creation of starvation camps.²⁵⁴ In his assessment, Mukesh Kapila described the Darfur crisis as a ‘tragedy’ observing that Khartoum was making peace with the South on the one hand and producing refugees in Darfur on the other.²⁵⁵ The alarming rate at which war-affected people were dying was exposed when a UN team visited an IDP camp and discovered that the mortality rate was 147 times higher than the accepted benchmark for an emergency.²⁵⁶ What was the attitude of the UN Security Council to what then UN Secretary General described as the ‘world’s worst humanitarian crisis?’²⁵⁷

3.5.2 *The International Response*

Arguably, Darfur goes down in history as the first case of genocide in the twenty-first century and may well be the clearest example of the failure of the UNSC in Africa in the new millennium.²⁵⁸ The scale of the tragedy started emerging when Darfur refugees in Chad narrated their experiences to foreign journalists and aid workers.²⁵⁹ When the grotesque pictures of the genocide filtered into the international media, the international community

²⁵¹ The Norwegian was then Head of the UN Emergency Relief Coordinator. Ibid at 91.

²⁵² Ibid at 112.

²⁵³ For example, movement of aid workers was severely curtailed by the Sudanese government through the use of visas, travel permits etc so much so that many aid workers found it difficult leaving the capitals to access the villages in desperate need of food and assistance.

²⁵⁴ Ibid at 112. See USAID ‘Darfur: humanitarian Emergency’ USAID Fact Sheet 15 23 July 2004, US Agency for International Development Bureau for Democracy, Conflict and Humanitarian Assistance, Office of U.S. Foreign Assistance available at http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/sudan/fy2004/DARFUR_HE_FS15_07-23-2004.pdf.> (accessed on 3 October 2011).

²⁵⁵ Prunier *The Ambiguous Genocide* op cit note 217 at 131.

²⁵⁶ Ibid at 113.

²⁵⁷ ‘Annan calls Darfur world’s worst humanitarian crisis’ Radio Free Europe May 69 2006. Available at <http://www.rferl.org/content/article/1068270.html>.> (accessed on 3 October 2011).

²⁵⁸ Nsongurua J Udombana ‘Still playing dice with lives: Darfur and Security Council resolution 1706’ (2007) 28:1 *Third World Quarterly* 97 (hereafter Udombana ‘Still playing dice with lives’). I am mindful of the controversy surrounding this description which I discuss further here.

²⁵⁹ See ‘Michael Clough Darfur: Whose responsibility to protect?’ available at http://www.responsibilitytoprotect.org/file/HRW_Darfur-WhoseResponsibilitytoprotect.pdf (accessed on 3 September 2011) (hereafter Clough ‘Darfur: Whose responsibility to protect?’)

was still focused mainly on the North-South peace talks at Naivasha.²⁶⁰ The UN was in a dilemma because it feared the North-South talks could derail if too much pressure was put on Khartoum, a situation that only served to embolden Khartoum.²⁶¹ As rightly observed by a commentator, '[o]ne of the most horrible aspect of the situation was that the genocide violence was by then unfolding in full view, on the orders of people whose names were known and who were still being received in international forums.'²⁶² The UNSG was under pressure from the West for a solution but it kept resisting the urge to call it 'genocide' or launch an intervention knowing that those clamouring for intervention were also responsible for undermining it by denying the UN the political and military resources needed to undertake a humanitarian intervention in Darfur.²⁶³

In many ways, this situation came to demonstrate the UN's practical limitations in crisis over which the heavyweight member states do not want to act. Blaming the UN was easy for those who were responsible for its inaction, and passing the buck to the African Union was another resort to sophistry.²⁶⁴

The UNSC passed several resolutions which it clearly had no intention of enforcing whatsoever and Khartoum was just as glad to discountenance them.²⁶⁵ The international media initially failed to give the Darfur genocide publicity, preferring instead to focus on the North-South peace talks.²⁶⁶ But with the increasing awareness through the activities of NGOs, the scale of the atrocities was able to attract international concern though not enough to lead to a military intervention.²⁶⁷ It was unanimously agreed that mass killing was occurring in Darfur, except that diplomats and politicians procrastinating and trying to evade whatever responsibility there is to act, could not agree on a name for it.²⁶⁸ Jan Egeland observed 'The same tribes are represented both among those who are cleansed and those who

²⁶⁰ Prunier 'The Ambiguous Genocide' op cit note 217 at 108-10.

²⁶¹ Ibid at 142.

²⁶² Ibid at 114. According to one aid worker 'We have seen at first hand what has gone on in Darfur. We have watched government planes and helicopters passing overhead to bomb villages, hours before the Janjaweed militias moved in to burn them. We have seen *Janjaweed* and government officials working together... .' Ibid at 130. Italics in original.

²⁶³ Ibid at 142-143.

²⁶⁴ Id. This perhaps explains the efforts to treat the tragedy as a humanitarian problem asserting that once humanitarian assistance was allowed the atrocities would stop. Ibid at 117.

²⁶⁵ Ibid at 118-9. See the following UNSC resolutions: S/RES/1556 (2004) giving the Sudanese government an ultimatum to disarm the Janjaweed militia; S/RES/1564(2004) requesting the AU to increase the troops in Darfur and establishing a Commission of Inquiry to determine whether genocide occurred in Darfur; S/RES/1574(2004) demanding an end to all offensives; S/RES/1590(2005); S/RES/1591(2005); S/RES/1593/(2005); S/RES/1663(2006); S/RES/1665(2006); S/RES/1679(2006); S/RES/1663(2006); S/RES/1706(2006).

²⁶⁶ Prunier 'The Ambiguous Genocide' op cit note 217 at 125.

²⁶⁷ Ibid at 129.

²⁶⁸ Id.

are cleansing’.²⁶⁹ The European Parliament recognised the atrocities as genocide but beyond the disparate approach of individual member countries, it demonstrated a lack of resolve and interest to press for humanitarian intervention.²⁷⁰ This was captured in the words of Alan Goulty the British Special Envoy for Sudan, ‘[h]umanitarian intervention in Darfur would be very expensive and, fraught with difficulties and hard to set up in a hurry.’²⁷¹ Although the US was the first country to officially recognise the atrocities in Darfur as genocide, it ruled out military intervention, apparently for fear of a backlash on the heels of the Iraqi and Afghan war.²⁷²

Once again, as in Liberia and Somalia, after the UNSC has abdicated its responsibility in Darfur, the buck was passed to the AU under the guise of ‘African solution to African problems’.²⁷³ With the consent of the Sudanese government, a small force of African Mission in Sudan (AMIS) landed in Darfur in 2004 with a rather weak mandate and plagued by all sorts of handicaps ranging from finance to logistics and equipment.²⁷⁴ It was the first major operation for the new AU and as it tried to grapple with the deteriorating situation major powers within the UNSC opposed any major military humanitarian intervention.²⁷⁵ In the end, the UN managed to set up a Commission of Inquiry to ascertain whether genocide had occurred in Darfur and its findings was just as controversial as the UN response to the entire conflict.²⁷⁶ The Commission concluded that though the Government of Sudan committed crimes against humanity, it lacked the necessary intent to destroy in whole or in part, the African tribes of Darfur and since these crucial elements were missing, genocide did not occur.²⁷⁷ Despite this finding, many observers agree that there was strong proof of

²⁶⁹ Ibid at 117.

²⁷⁰ Ibid at 141. Some European countries provided financial assistance but none was willing to risk the lives of its soldiers in Africa yet again.

²⁷¹ Id.

²⁷² Ibid at 140.

²⁷³ Iyob & Khadiagala ‘The Elusive Quest for Peace’ op cit note 213 at 154.

²⁷⁴ Flint & de Wall ‘A Short History of a Long War’ op cit note 224 at 122. Its mandate was to protect the 60 monitors stationed in Darfur and AU’s proposal to covert the Mission to a full-scale peacekeeping operation was rejected by Sudan. See Iyob & Khadiagala ‘The Elusive Quest for Peace’ op cit note 213 at 154.

²⁷⁵ Ibid at 153.

²⁷⁶ See Resolution 1564 op cit note 265.

²⁷⁷ ‘Generally speaking, the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organised attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.’ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva (25 January 2005) at 132. Prunier is critical of the logic behind the Commission’s finding that there were violations of human rights by ‘people who might have acted with genocidal intentions’ yet deny that there was a genocide. See Prunier *The Ambiguous Genocide* op cit note 217 at 143.

genocidal intent and upon which one could conclude that genocide occurred in Darfur.²⁷⁸ The atrocities may have occurred in the context of competition for resources and ‘contested identities’ but ‘the ultimate goal of maintaining and consolidating power does not rule out genocide as a means to that end’.²⁷⁹ As of 2006, the genocide in Darfur had claimed 400,000 and left 1.9 million IDPs behind.²⁸⁰ Finally in 2008, the AU and the UN co-deployed the United Nations African Mission in Sudan (UNAMID), a hybrid peacekeeping force, but ‘[a]s the world has learned in the decade since Rwanda, political will is crucial to giving life to protestations of “never again”’.²⁸¹

3.6 LIBYA: BRIEF HISTORICAL BACKGROUND

For a long time, the Maghreb region of North Africa has been a bastion of political stability with strong dictators and only a few upheavals which were few and far between, such that none of the major international early-warning watchdogs and conflict prevention mechanisms captured the Arab Uprising or the Libyan conflict.²⁸² Muammar Gaddafi came to power in Libya in 1969 via a military coup and maintained power in the former Italian colony through populist social and economic policies and political repression. Though predominantly Muslims, Libya has deep tribal divisions which were exacerbated by Gaddafi’s long rule and accusations of marginalisation. Gaddafi fashioned a foreign policy of aggression and meddling in the affairs of its poor neighbouring countries such as Chad and Sudan where it sponsored or supported different insurgencies oscillating between Arabisation of the Sahel Savannah and Pan Africanism.²⁸³ Whether in pursuit of his self-glorification or his ambition for a United States of Africa and the spirit of Pax Africana, Gaddafi championed the formation of the African Union and was its major financier until the events of 2011. While this earned him praises from admirers, particularly poor African states who benefitted from his largesse, it alienated his Arab neighbours and the West who saw Gaddafi as a sponsor of terrorism with a penchant for acquiring weapons of mass destruction. It was in this context that Gaddafi’s Libya was sucked into the flames of the Arab Uprising in February 2011.

²⁷⁸ Susan E Cook & Charles K Mironko ‘Darfur: Understanding a complicated tragedy’ in Brian Raftopoulos & Karin Alexander (eds) *Peace in the Balance: The Crisis in Sudan* (2006) 123 at 123, 137.

²⁷⁹ Ibid at 138.

²⁸⁰ Ibid at 123.

²⁸¹ Iyob & Khadiagala ‘The Elusive Quest for Peace’ op cit note 213 at 161.

²⁸² The Mass Atrocities Crime Watch 2011 did not include Libya as one of the potential flashpoints. See <http://www.preventorprotect.org/overview/watch-list.html> (accessed on 18 February 2012).

²⁸³ Prunier ‘The Ambiguous Genocide’ (2005) 53.

3.6.1 *A Humanitarian Crisis?*

The uprising which began as mere protests in Benghazi on 16 February 2011, resonating events in neighbouring Tunisia and Egypt where popular uprising had toppled the regimes of Ben Ali and Hosni Mubarak respectively, quickly escalated and spread to other parts of Libya within weeks and the demands changed from calls for better socio-economic conditions to political reforms. Gaddafi's response was swift, unleashing his apparatus of coercion on protesters and killing about 200 people in the first 3 days.²⁸⁴ On 20 February 2011, Human Rights Watch reports that the death toll had reached 233.²⁸⁵ In another report, it was estimated that about 1000 were killed within the first two weeks as Gaddafi vowed to crush the uprising.²⁸⁶ But rather than deter the protesters, the crackdown escalated the violence after every funeral procession and soon Libya was engulfed by a full-scale civil war.²⁸⁷

3.6.2 *The International Response*

The international response to the Libyan crisis involved several actors: the UN, the League of Arab States, NATO and the African Union. France, Britain, Bahrain, UAE, the US and Qatar also played prominent roles within and without these organisations. The Libyan situation highlights the pitfalls inherent in the implementation of R2P and reinforces the argument of those who fear that R2P would be abused by powerful states. As mentioned in the preceding chapter, the most contentious aspect of the implementation of R2P is the responsibility to react.²⁸⁸ At the 2005 World Summit, the most heated debate was on the use of force to enforce R2P. Since then there have been issues of clarifying the scope of the principle and the implications in relation to the use of force with differing views and the Libyan crisis highlights how problematic these normative issues could become in practice.²⁸⁹ It is ironic

²⁸⁴ Global Centre for the Responsibility to Protect 'Open statement on the situation in Libya' (22 February 2011) Available at <http://www.globalr2p.org/mediapdf/Open_Statement_on_the_Situation_in_Libya.pdf> (accessed on 20 February 2012).

²⁸⁵ Human Rights Watch 'Libya: Governments should demand end to unlawful killing' (20 February 2011) available at <<http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>> (accessed on 20 February 2012).

²⁸⁶ BBC News 'Libya uprising: anti-Gaddafi forces control Zawiya' 27 February 2011 available at <<http://www.bbcnews.co.uk/world-africa-12591025>> (accessed 23 May 2011).

²⁸⁷ Ramesh Thakur 'We have a duty to stop Libyan slaughter' *The Star* Monday February 28, 2011 available at <<http://www.thestar.com/opinion/editorialopinion/article/946306-we-have-a-duty-to-stop-Libyan-slaughter>> (accessed on 17 May 2012).

²⁸⁸ See Chapter 2.

²⁸⁹ As was mentioned in Chapter 2, there are significant differences of opinions on important aspects of the norm ranging from where authority lay for the use of force to the threshold triggers for military intervention.

that in the past, whereas the argument of African States has been too little intervention and indifference to African humanitarian crises by the UN as we saw in Rwanda and Darfur, the contention in the case of Libya has been one of ‘over-intervention’. Did the Libyan case meet the R2P threshold to trigger intervention? What prompted the intervention and how was it implemented? What is the implication of the Libyan intervention for the future of R2P and humanitarian intervention in general especially in Africa? How will it affect the tenuous UN-AU cooperation or apparent rivalry in the maintenance of peace and security in Africa? The following analyses attempts to provide answers to these questions.

The Libyan crisis was significant in many ways. For one, many Arab states known for their long-standing pro-sovereignty and non-interference stance actively supported external intervention, perhaps owing to personal resentment for Colonel Gaddafi or to deflect attention from their own internal crisis.²⁹⁰ For example, the League of Arab States issued a particularly strongly-worded communique calling on the UNSC to:

impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighbouring States’, and to ‘cooperate and communicate with the Transitional National Council of Libya and to provide the Libyan people with urgent and continuing support as well as the necessary protection from the serious violations and grave crimes committed by the Libyan authorities, which have consequently lost their legitimacy.’²⁹¹

The Organisation of Islamic Conference also issued a statement calling on the UNSC to consider imposing a no-fly zone aimed at protecting civilians in Libya.²⁹² The AU condemned Gaddafi’s use of excessive force and sued for peace between the warring factions

The ICISS Report, the World Summit Outcome Document, the High Level Panel Report and the UNSG report, and the AU have different positions.

²⁹⁰ See Alex J Bellamy & Paul D Williams ‘The new politics of protection? Cote d’Ivoire, Libya and the responsibility to protect’ (2011) 87:4 *International Affairs* 825 at 843 (hereafter Bellamy & Williams ‘The new politics of protection’). Qatar and the United Arab Emirates contributed to the military operation led by NATO. See BBC News ‘Libya: where do NATO countries stand?’ 21 April, 2011 available at <<http://www.bbc.co.uk/news/world-africa-13092451>> (accessed on 15 July 2011). However, it seems this was just to give the impression of a broad-based coalition in order to give a sense of legitimacy.

²⁹¹ Council of the League of Arab States, Res. No. 7360, 12 March 2011, para 1-2. It has been argued that the League was ambushed by the Pro-US Gulf Council member within its ranks as only 12 countries were at the meeting that issued the communique. There were calls by top Libyan officials and diplomats for the international community to protect Libyan civilians, for example, the Deputy Ambassador to the UN, Ibrahim Dabbashi asked the international community to protect the Libyan people from the genocide they faced. See Suzanne Presto ‘Arab League: Violence Against Protesters Must Come to an End’ VOA News February 22, 2011 available at <<http://www.voanews.com/english/news/Libyas-Gaddafi-Vows-to-Not-to-Leave-116663264.html>> (accessed on 21 February /2012).

²⁹² See the Final Communique issued by the Emergency Meeting of Permanent Representatives to the Organisation of the Islamic Conference on the Alarming developments in Libyan Jamahiriya, 8 March 2011.

while it promised to dispatch a committee to Libya to broker peace.²⁹³ The United Nations General Assembly (UNGA) suspended Libya from the Human Rights Council on 1 March 2011 and the League of Arab States also suspended Libya's membership.²⁹⁴ As the crisis escalated, the UNSC adopted resolution 1970 on 26 February 2011 under Chapter VII of the UN Charter calling on the Libyan regime to stop the violent crackdown on protesters and discharge its responsibility to protect its citizens.²⁹⁵ The resolution stated that the situation in Libya could constitute crimes against humanity and it imposed assets freeze and travel bans on top-Libyan officials, imposed arms embargo on Libya and also referred the case to the ICC.²⁹⁶ The African Union (AU) High-Level Committee, set up to find a peaceful solution to the conflict, invited the parties for peace talks but the National Transitional Council (NTC) failed to attend, though the Libyan government accepted the roadmap proposed by the Committee.²⁹⁷ On 17 March 2011, the UNSC adopted resolution 1973 recalling that Gaddafi had failed to comply with resolution 1970 and so imposed a no-fly zone on Libya.²⁹⁸

Resolution 1973 recognised that the parties to armed conflicts have an obligation to protect civilians and reaffirmed Libya's responsibility to protect while deploring its failure to comply with resolution 1970.²⁹⁹ As it turned out, it appears both resolutions 1970 and 1973 were only enforced against the regime of Gaddafi rather than both parties to the conflict. Both resolutions 1970 and 1973 invoked the responsibility to protect (R2P) principle, though not expressly stating that it was the basis of its decision to use force; resolution 1973 opted for civilian protection as the basis for the resolution. Yet, from the wording of the resolution, it is clear that the 'spirit' of R2P was prominent though the UNSC failed to mention it as the legal basis for its Chapter VII action, perhaps because the norm is still being challenged by some

²⁹³ In the Communique of the 261st Meeting of the Peace and Security Council on 23 February 2011, PSC/PR/COMM (CCLXI) the AU said it 'strongly condemns the indiscriminate and excessive use of lethal weapons against peaceful protesters. ...'

²⁹⁴ BBC News 'UN Votes to Suspend Libya from Human Rights Council' 1 March 2011 available at <<http://www.bbc.co.uk..world-12616219>> (accessed on 20 February 2012).

²⁹⁵ See S/RES/1970 (2011).

²⁹⁶ Ibid at 2.

²⁹⁷ See African Union Press Release 'African Union ad hoc High-Level Committee on Libya convenes its second meeting in Addis Ababa' Addis Ababa, 25 March 2011 available at <http://www.ps.au.int/en/sites/default/files/Press_release_Libya_eng_0.pdf> (accessed 21 June 2012).

²⁹⁸ See S/RES/1973(2011) para 4 of the operative part 'Authorises Member States that have notified the Secretary-General, acting nationally or through regional organisations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, ...to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory. ...'

²⁹⁹ Id.

as a legal norm.³⁰⁰ Nevertheless, the concept of civilian protection and R2P seems to have been conflated, so Libya is thus generally regarded as the first case where the UN authorised the use of military force to enforce R2P to halt human rights violations, protect civilians and prevent mass atrocities.³⁰¹ However, the intervention raises several legal issues with implications for the R2P norm and international law in general.

First, in the so-called R2P implementation ‘tool-box, there are several non-coercive measures meant to be applied progressively (though by no means in an inflexible order), but a progressive application that makes use of force as a last resort.³⁰² Just like normal UNSC Chapter VII practice, non-military measures should have been explored and recourse to force adopted when such measures proved unable or unlikely to halt the violence and prevent mass atrocities.³⁰³ But in Libya, non-forcible means were tried but not given the time to take effect by the UNSC—travel bans and assets freeze were at best pursued half-heartedly suggesting that the decision to use force to topple Gaddafi was the motive from the outset; nor was Libya given the opportunity to even comply with resolution 1973 before enforcement action by NATO jet-fighters invaded Libyan airspace. In fact, some states actually worked covertly to undermine the AU initiatives that would have resolved the conflict but would have also seen Gaddafi remain in power. For example, President Jacob Zuma of South Africa, who led the AU Committee on the Libyan crisis, reportedly told reporters ‘I think that the point we have been making is that those who have a lot of capacity, even the capacity to bombard the countries, really undermined the AU’s (African Union’s) initiatives and effort to deal with the matter in Libya’.³⁰⁴

³⁰⁰ Lloyd Axworth & Allan Rock ‘A victory for the Responsibility to Protect: Ten years on we have seen an important advance in the evolution of ‘R2P’ principle, and learned valuable lessons for the future *Ottawa Citizen* 25 October 2011 available at <http://www.ottawacitizen.com/news.victory+responsibility+Protect/5600183/story.htm> (accessed on 2 April 2012).

³⁰¹ Ramesh Thakur ‘UN breathes life into ‘responsibility to protect’ *The Star* 21 March 2011 available at <http://www.thestar.com/opinion/editorialopinion/article/957664--un-breathes-life-into-responsibility-to-protect> (accessed on 17 March 2012). See preamble to Resolution 1973 op cit note 301.

³⁰² See Chapter 2 *supra*. See generally Gareth Evans, *The Responsibility to Protect* (2008) (hereafter Evans, ‘The Responsibility to Protect’).

³⁰³ It is important to point out however, that once the UNSC has made a determination that a threat to the peace exists in terms of article 39, it not bound to adopt provisional measures under article 40 before resorting to enforcement measures under article 41 and 42 of the UN Charter, although in practice, it often adopts such provisional measures and warns of its preparedness to resort enforcement measures in the event of non-compliance. See Nico Krisch ‘Article 40’ in Bruno Simma et al (eds) *Charter of the United Nations: A Commentary* 3 ed (2012) 1303.

³⁰⁴ Deccan Herald ‘War Crimes Court should probe NATO role in Libya: South Africa’ 25 August 2011 Available at <http://www.deccanherald.com/content/186211/war-crimes-court-should-probe.html> (accessed on

Second, it is also significant to note that whereas resolution 1973 was adopted on 19 March 2011, by 22 March 2011, French jets had already invaded Libyan airspace barely 48 hours later.³⁰⁵ This calls into question the motive behind the resolution itself and its implementation because NATO did not give room for a nonmilitary option to work. This does not however derogate from the wide discretionary powers of the UNSC to determine what measures to take once it had made a determination under article 39 that a threat to the peace exists. As Krisch argues

[m]ilitary enforcement is not an automatic consequence of non-military measures. It is up to the [UN]SC to decide which Chapter VII measures are to be taken, and member States are not entitled to use unilateral measures to enforce resolutions unless the [UN]SC has clearly authorized them to do so.³⁰⁶

Even though it is not bound to do so, UNSC practice shows that it had always preferred to pursue non-military measures and given them adequate room to take effect before resorting to enforcement measures. This is why the intervention in Libya has proved very controversial. In effect, it seems Libya was handed a set of instructions but denied the opportunity to even comply and avert the consequences by those who issued the instructions. Thus, NATO obviously overstepped the boundaries of the authorisation in resolution 1973.

Third, one of the requirements of R2P before the responsibility to react by military force can be invoked is that there must be a likelihood that the atrocities would be prevented and that it would do less harm and result in less casualties.³⁰⁷ In Libya, it cannot be said that the intervention met this threshold because, for one, it apparently protracted the conflict to a

12 February 2012). The view should however be balanced with the urgent need to protect threatened civilians from mass atrocities.

³⁰⁵ Coalition launches military action *against* <<http://www.france24.com/en/20110319-coalition-takes-military-action-against-libya>> (accessed on 20 February 2012).

³⁰⁶ See Nico Krisch 'Article 41' in Bruno Simma et al (eds) *Charter of the United Nations: A Commentary* 3 ed (2012) 1329. BBC News 'Libya: Gaddafi government accepts truce plan, say Zuma' 11 April 2011. Available at <<http://www.bbc.co.uk/news/world-africa-13029165>> (accessed on 17 August 2011). See also BBC News 'Libya to halt military action' 18 March 2011. Available at <<http://www.bbc.co.uk/news/world-africa-12787739>> (accessed 20 February 2012).

³⁰⁷ Other criteria for legitimacy of use of force to enforce R2P include seriousness of the harm, proper purpose, last resort, proportional means and balance of consequences. See Evans, 'The Responsibility to Protect' op cit note 302 at 141. However, it should be noted that article 42 empowers the UNSC to resort to military action if it believes that non-military action would be inadequate in the circumstance, though it is not necessary that non-military measures need actually prove to be ineffective. As Krisch puts it, since article 42 aims to 'limit the use of military force to exceptional cases, the Council's exercise of its discretion should be guided by the principle of proportionality.' See Nico Krisch 'Article 42' in Bruno Simma et al (eds) *Charter of the United Nations: A Commentary* 3 ed (2012) 1341.

point when even NATO and its allies began to entertain fears of a ‘mission creep.’³⁰⁸ The result of this was that the conflict lasted longer and, perhaps, there were more casualties than would otherwise have been. It is submitted that rather than an enforcement mission, a peacekeeping operation, which in my opinion was what 1973 was meant to work towards, should have been a better approach to the conflict.

Fourth, NATO is a defense alliance-cum regional organisation whose status is not at all clear. From the discussion in chapter 2, UNSC is vested with the responsibility to take any action it deems necessary to remove any threat to international peace and security. It is interesting to note that in Libya, the UNSC chose to appeal to both ‘threat to international peace and security’ and the R2P principle rather than its long-standing practice of just categorising the situation as a ‘threat to international peace and security.’ The reason for this is not clear but it would seem that it is because the bar for authorising the use of force on grounds of ‘threat to international peace and security’ is higher and would have been more difficult to satisfy in Libya. Writing about the just cause threshold in the Libyan case, Michael Walzer asserts, ‘a military attack of the sort now in progress is defensible only in the most extreme cases.’³⁰⁹ It is unlikely that the Libyan situation would have satisfied this just cause threshold.

Fifth and a corollary of the above is the issue of motive. Under R2P criteria, the primary motive of the intervener should be to protect civilians even though other motives may exist.³¹⁰ An intervention aimed at tilting the balance of power in favour of one of the belligerents in a civil war cannot meet this condition. NATO’s intervention was calculated to swing the outcome of the war in the rebel’s favour.³¹¹ Besides, in a civil war, it is illegal for a foreign state or organisation to enter the war on the side of either of the parties to the conflict, hence, though resolution 1973 authorised a no-fly zone and protection of civilians, it is doubtful whether it can be relied upon for the regime change that ultimately became the primary objective of NATO in Libya.³¹² In Libya, some countries of the West from the outset

³⁰⁸ James Pattison ‘The ethics of humanitarian intervention in Libya’ (2011) 25:3 *Ethics & International Affairs* 1 at 4-5.

³⁰⁹ See Michael Walzer ‘The case against our attack on Libya’ <<http://www.tnr.com/article/world/85509/the-case-against-our-attack-libya>> (accessed on 7 February 2012).

³¹⁰ Evans ‘The Responsibility to Protect’ op cit note 302 at 141.

³¹¹ Jonathan Marcus ‘French arming of rebels ‘strategic’ 29 June 2011 available at <<http://www.bbc.co.uk/news/world-africa-13966976>> (accessed on 21 February 2012).

³¹² Michael Doyle The folly of protection: is intervention against Qaddafi’s regime legal and legitimate? (20 March 2011) *Foreign Affairs* Available at <<http://www.foreignaffairs.com/articles/67666/michael-w-doyle/the-folly-of-protection>> (accessed on 7 February 2012) (hereafter Doyle ‘The folly of protection’).

offered support to the rebels both overtly and covertly.³¹³ Besides diplomatic pressures aimed at removing Gadhafi from power as against resolving the conflict per se, (both objectives are not necessarily coterminous), France, was the first to recognise the rebels as the legitimate government of Libya even though, at the time, the rebels hardly controlled more than just Benghazi in the entire Libya.³¹⁴ The legal arguments for and against this cannot be addressed here but it suffices to mention that it demonstrates the priorities of France, the US, the UK and NATO as ‘enforcers’ of UNSC resolutions. By supplying arms to the rebels, France and Britain violated the same UNSC resolution 1970 which imposed an arms embargo on all of Libya and which NATO claimed to be enforcing. It is a violation of international law for NATO or its members to *enter* the war on the side of the rebels or supply arms to them when they took up arms against the de facto and de jure government in place in Libya.³¹⁵

Sixth, there was an effective government in control in Libya constituting both the de facto and de jure authority and its consent was not sought or obtained before the intervention, contrary to UNSC practice.³¹⁶ Libya therefore marked the first time the UNSC would authorise the use of force against a state with an effective government and a sitting President.³¹⁷ As mentioned above, nothing in the scale of violence or threat explains this break from practice by the UNSC except the political motives of the US, Britain and France to effect regime change in Libya. Does this mean that we are gradually shifting away from the international law norm that state consent is required for use of force in internal conflicts by an outside force?³¹⁸ Whereas for several years after the Darfur genocide began the UNSC insisted it needed Al Bashir’s consent to intervene, it appears the UNSC has become inconsistent and selective in its practice. While it may be true that no two cases of

³¹³ See for example Michael O’Hanlon ‘Winning ugly in Libya: What the United States should learn from its war in Kosovo’ (30 March 2011) *Foreign Affairs* available at <<http://www.foreignaffairs.com/articles/67684/michael-ohanlon/winning-ugly-in-libya>> (accessed on 17 May 2011) arguing that since the US had started to aid the rebels, it should go all the hog.

³¹⁴ See Rebel Benghazi to get Ambassador France24 11 March 2011 available at <<http://www.france24.com/en/20110310-France-NTC-national-council-embassy-Libya>> (accessed on 22 February 2012).

³¹⁵ See Richard Falk ‘International law and the United States role in the Vietnam War’ (1966) 75 *Yale Law Journal* 1122 at 1127; See also GA Res. 2625, U.N. G.A.O.R 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970).

³¹⁶ In adopting resolution 947 on Somalia, the UNSC said it authorised the use of force because there was no government in Somalia. And subsequent Chapter VII measures resolution by the UNSC was based, in principle, if not in reality, on the consent of the Transitional Federal Government. Until the Libyan intervention, there was nothing to suggest that the UNSC had changed its attitude in this respect not even in the clear case of genocide like Darfur would the UNSC authorise intervention without the consent of the effective government.

³¹⁷ Bellamy & Williams ‘The new politics of protection’ op cit note 293 at 825.

³¹⁸ For more on intervention by consent, see chapter 7 infra.

intervention are exactly the same, nor is it possible for intervention to be launched in all deserving cases, but a principle that does not respond to the most deserving situation opens itself to abuse and ridicule.

Seventh, it is also debatable whether resolution 1973 authorised the use of force in Libya in the manner subsequently pursued by NATO. The aim of the resolution was to protect civilians and halt the violence. This is further buttressed by subsequent statements by African and Arab countries that voted for Resolution 1973, to the effect that NATO's action was not contemplated by resolution 1973.³¹⁹ Besides resolution 1973 leaving much to be desired in its vagueness, it creates further ambiguity surrounding the phrase 'all necessary measures' that has become a dominant feature of UNSC practice under Chapter VII of the Charter. For example, from the moment the resolution was passed, there were divergent views on its interpretation with some countries saying it permitted use of force,³²⁰ arming the rebels³²¹ and even targeting and killing Ghaddafi.³²² The resolution itself was so amorphous that it was amenable to manipulation by those who would want to take it and the R2P norm to achieve less than humanitarian objectives. It is reminiscent of resolution 688 that was also manipulated to invade Iraq in 2003. It was in reaction to this manipulation that countries like South Africa promptly recanted on resolution 1973.³²³

Furthermore, it is very doubtful whether aerial bombardment is a measure that protects civilians by any stretch of the imagination. The NATO intervention in Kosovo has proved the danger of such operations and the only rationale for NATO adopting it again in Libya would be the ultimate motive to topple Gaddafi.³²⁴ While the imposition of a 'no-fly-zone' over Libyan airspace by UNSC is characteristic of enforcing such resolution and seems to have been legal, the same cannot be said of aerial bombings that targeted civilian residences such as the Presidential Palace of Gaddafi. Assuming NATO was even a party to the conflict (which it ought not to be), such bombings are not dictated by military necessity

³¹⁹ Doyle 'The folly of protection' op cit note 312; Evans, 'When intervening in a conflict' op cit note 312.

³²⁰ Bellamy & Williams 'The new politics of protection' op cit note 293 at 845.

³²¹ BBC NEWS 'Obama not ruling out Libya arms' 30 March 2011 available at <<http://www.bbc.co.uk/news/world-africa-12902450>> (accessed on 20/01/2012).

³²² UK Defense Secretary, Liam Fox is reported to have told the BBC that targeting Gaddafi was 'potentially a possibility'. See Patrick Wintour & Owen Bowcott Libya: the legal case for deployment *The Guardian* 21 March 2011 available at <<http://www.guardian.co.uk/world/2011/mar/21/libya-arab-and-middle-east-protest>> (accessed on 21 February 2012).

³²³ South Africa, 'War Crimes Court should probe NATO' op cit note 304.

³²⁴ See generally, Ivor H. Daalder & Michael E. O'Hanlon *NATO's War to Save Kosovo* (2000).

and violate international humanitarian law—evidence of this exist in the number of civilian casualties (members of Gadaffi's immediate family including women and children) either killed or injured by NATO raiding civilian objects.³²⁵ The extent to which Gadaffi's position as Commander-in-Chief made his civilian residence housing his civilian family a legitimate target remains debatable, a situation compounded by allegations that Gadaffi used the residence for tactical coordination and other military operations.

Finally, was NATO the proper organisation to enforce resolution 1973? The intervention of NATO in Libya brings to the fore once again the capacity of the UN to give effectiveness of the UN in enforcing its own resolutions and the question of sub-contracting such enforcement action to capable sub-regional organisations, states or group of states almost always in the global North against the global South. It highlights the consequences of the failures of the UN to create its own military command as envisaged by article 43 of the UN Charter and at San Francisco when the UN was formed. It exposes the system to abuse and demonstrates the urgent need for a reform of the UN to review the practice of delegating enforcement measures to 'the willing and able.' Otherwise, the world would continue to see a situation where a powerful state in pursuit of political and economic national self-interest simply pushes a Chapter VII resolution through a UNSC where it wields a veto, and armed with the resolution, it begins to enforce UNSC resolution by 'all necessary measures'. An alternative framework therefore becomes imperative.

Could the Libyan crisis have been resolved under the AU framework? The AU was not proactive and was more or less lackluster in its handling of the crisis. While this may be attributable to several factors such as the larger-than-life personality of Gaddafi on the African continent, the overweening attitude of the NATO P5 members of the UNSC, it however highlights the challenges facing the AU in the effective utilisation of the humanitarian intervention legal framework provided in its Constitutive Act especially article 4(h) which I engage in chapter 4. This can be contrasted with the ECOWAS handling of Cote d'Ivoire which in the characteristic manner of the organisation, took and maintained a firm position throughout the crisis.³²⁶ Unlike the AU, ECOWAS made it clear to Laurent Gbagbo

³²⁵BBC News 'NATO strike kills Saif al-Arab Gaddafi, Libya Says' 1 May 2011 available at <<http://www.bbc.co.uk/news/world-africa-13251570>> (accessed on 20 January 2012).

³²⁶ According to Gambia President Yahya Jammeh 'It is a big surprise, but a shocking reality that in all the happenings, with the crisis in Tunisia to that in Egypt and now Libya and countries in North Africa, the

that it would not hesitate to use legitimate force should it become necessary and should diplomacy fail.³²⁷ Libya and Cote d'Ivoire were different and the approaches of the AU and ECOWAS were markedly different too, apparently in keeping terms with the practice and precedents set by both organisations. Since the Cote d'Ivoire crisis was resolved largely by domestic actors with minimal external involvement it would not be addressed here and a few comments would suffice.

It is important to note that whereas the AU Constitutive Act provides for 'unconstitutional change' of government, the ECOWAS MCPMRPS actually talks about overthrow of a democratically elected government.³²⁸ The Arab Spring brings to the fore the significance of this distinction and the lacuna in the AU Act compared to ECOWAS. A popular revolution is not a constitutional change of government and should ordinarily be illegal under the AU Act. However, to hold this would fly in the face of sovereignty residing in the people and the objectives and principles of the AU.³²⁹ While it is advisable for the AU to amend its laws in this respect to reflect the ECOWAS example, it is unlikely that there would be a need for a popular revolution in a democratic setting since government could be changed through periodic elections.

However, the Arab Spring would have been legal under the ECOWAS regime because what is provided for is the overthrow of a 'democratically elected' government and none of Ben Ali, Mubarak and Gaddafi was democratically elected. The situation in Libya and Tunisia and Egypt are different for the three reasons: Tunisia and Egypt never reached the level of non-international armed conflict like Libya. Second, there were no external forces involved in Tunisia and Egypt as NATO was involved in Libya. Third, no UNSC resolution was needed in Tunisia and Egypt like Libya.

As we shall see in the next chapter the AU and ECOWAS regimes offer alternative frameworks for addressing similar problems in the future and avoid the issues of legitimacy a

leadership of the African Union neither made a statement nor took action, despite the fact that these were uprisings affecting member states of the African Union...The fact that the AU has not even called up an emergency meeting of ministers of Foreign Affairs, since the crisis started in Cote d'Ivoire, Tunisia, Egypt, Algeria and Libya, is very worrisome for an institution that is supposed to secure and defend Africa's interest.' See Gaddafi row in the Gambia Afro News 25 February 2011 available at <http://www.afrol.com/articles/37440> (accessed on 22 February 2012).

³²⁷ ECOWAS was relying on its humanitarian intervention legal framework which is discussed in the next chapter.

³²⁸ See chapter 4 *infra*.

³²⁹ See articles 3 and 4 of the AU Act for the Objectives and Principles of the AU.

NATO-style intervention, though UNSC-sanctioned, introduces to the normative arena that undermines R2P and international law. As pointed out above, the question of consent was crucial to the intervention. If there was going to be any legal ground for a regional body to intervene it should have been the AU because not only is it the relevant regional organisation as contemplated by Chapter VIII of the UN Charter, but also because the issue of consent, and by extension, legality of the intervention would have been settled already because Libya had already consented to such intervention in article 4(h) of the AU Act. It must also be stated that it is doubtful whether the AU would have invoked article 4(h) in Libya had NATO not intervened. It is clear, however, that whenever there has been a conflict between competing priorities of national self-interest and humanitarian intervention in Africa, the former has always prevailed. Often, when there has been intervention, it has been to serve the economic or political interests of the intervener and it is doubtful that R2P will change this. Libya is just the latest example and it portends danger for the future of R2P.

3.7 A CONTINENT LET DOWN AND THE SEARCH FOR A NEW LEGAL FRAMEWORK

African leaders will not forget in a hurry the many conflicts that plagued the continent at the end of the Cold War, the atrocities occasioned by them and the untold hardship and human misery brought upon millions of people on the continent. Nor will Africans forget very easily the failure of the UN to prevent or halt these atrocities and the indifference of the international community in the midst of those tragedies.³³⁰ For the careful observer of the degree of responsiveness of the UNSC to crises in Africa, this should not come as a surprise.

The UNSC discussed Darfur for the first time five months after the UN Humanitarian Coordinator for Sudan, Mukesh Kapila described the atrocities in an interview as ‘the world’s greatest humanitarian crisis’ maintaining that the only difference between Darfur and Rwanda was the numbers involved.³³¹ The question of what name to call the Darfur atrocities had little to do with Darfurians themselves who could not care less, but it was of significance to the UNSC because it defines the threshold of its legal obligation.³³² When the West and the UNSC dumped the Darfur conflict on the AU, their justification was the Brahimi Report

³³⁰ United Nations Secretariat, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Doc. S/1999/1257(1999) 16 December 1999 at 3.

³³¹ Flint & de Wall ‘A Short History of a Long War’ op cit note 224 at 126; Prunier ‘The Ambiguous Genocide’ op cit note 217 at 114.

³³² Prunier ‘The Ambiguous Genocide’ op cit note 217 at 104.

which recommended that the UNSC should allow regional organisations take primary responsibility for crises in their zones.³³³ This should not be a surprise either because the North-South war in Sudan had lasted for 21 years without ever being tabled by the UNSC. According to Gerard Prunier,

[f]or the world at large Darfur was and remained the quintessential “African crisis”: distant, esoteric, extremely violent, rooted in complex ethnic and historical factors which few understood, and devoid of any identifiable practical interest to the rich countries.” The media viewed it as a humanitarian crisis which are usually passed on to the UN and that the West would expect it to act without being given the means to do so. As it became clear that it was another genocide, the UN passed the job it would not handle to the new AU. For the West “African solution to African problems” had become the politically correct way of saying “We do not really care.”³³⁴

It is to the credit of the AU that notwithstanding the shortcomings of AMIS, it managed to reduce the scale of atrocities and even the UNSC admitted that the situation would have been far worse without AMIS presence.³³⁵ If the attacks were sponsored by the government as was the case in Rwanda, if the government armed the Janjaweed; if the Janjaweed was given orders by those the political leaders in Sudan; if the idea was conceived by those in Khartoum; if the attacks were directed at ‘changing the demography of Darfur to empty it of African tribes’; then the only difference between Darfur and Rwanda seems to be, as mentioned above, in the numbers. And if it is accepted that the figure is not the essential criteria for determining genocide what happened in Darfur was a case of genocide, even though the UNSC, in order to abdicate its moral responsibility, and for fear of incurring legal obligation under the Genocide Convention, chose to call it by some other name. In fact, it does injustice to the memory of the victims to allow this ‘legal spin’ to stay. The responses of the UNSC to the three cases of genocides in Africa—prevaricate, deny, obfuscate, and when the killings are over, give it a label and say ‘Never Again.’

Admitting failure of the UNSC in Rwanda, then UNSG Boutros Boutros-Ghali stated ‘We are all to be held accountable for this failure, all of us, the great powers, African countries, the NGOs, the international community. It is a genocide. ... I have failed. ... It is a scandal.’³³⁶ Similarly, the International Panel of Eminent Personalities blamed the UNSC for the genocide in Rwanda and recommended that the defunct OAU set up its own security

³³³ Flint & de Wall ‘A Short History of a Long War’ op cit note 224 at 127. But when it came to oil-rich Libya, NATO blazed the trail.

³³⁴ Ibid at 124.

³³⁵ Udombana ‘Still playing dice with lives’ op cit note 258 at 103.

³³⁶ Statement by Boutros Boutros-Ghali UN Secretary General May 27th 1994 quoted in Edward A Kolodziej ‘The Great powers and genocide: lessons from Rwanda’ (2000) citing Gerard Prunier *The Rwanda Crisis: History of a Genocide* (1995) 277.

mechanism to avoid a recurrence and the AU and ECOWAS heeded this call by adopting a new humanitarian intervention framework modeled on that of ECOWAS.³³⁷ As we saw in the case of Liberia, ECOWAS intervention prevented the humanitarian crisis from worsening and brought the situation under control, thus averting Rwanda-style genocide. Wippman observes, '[f]or the most part, ECOMOG was welcomed throughout Liberia while the Liberian people continue to be bitter against the international community and the US for abandoning Liberia in sharp contrast with the swift response to the invasion of Kuwait.'³³⁸

On the other hand, there was no such competent regional organisation in East Africa to come to the aid of Somalia. The OAU was incompetent and still tied to its principle of non-interference in its Charter. An indifferent UNSC and a disinterested international community all made Somalia what it eventually became. Even the intervention that could be described as nothing more than a half-hearted attempt only stemmed from a feeling of moral guilt by those who helped create the volatile situation in the Horn of Africa in the first place. For nothing but '[t]he low priority of that region in the strategic calculations of the dominant coalition as compared to Europe or the Middle East explains the relative indifference of the "international community" to humanitarian crisis in Africa.'³³⁹

For far too long the UN procrastinated on intervening in Somalia basically because of the financial and human resources it would entail and Africa was not viewed as significant enough to warrant such commitments. And when the intervention finally happened, financial considerations motivated the US to terminate UNITAF and transfer the mission to UNOSOM II, which proved disastrous. Having been abandoned by the international community as a basket case for over two decades, Somalia now presents the world with its own dangers. It is now a threat to its neighbours and the international community with resurgence in piracy, pictures of starving and dying children, as well as becoming a breeding ground for transnational criminality and international terrorism. In the end, the world is paying much more than it would have cost to sustain a robust humanitarian intervention in Somalia in the 1990s, both in terms of human and material resources.³⁴⁰

³³⁷ Jean Allain 'The true challenge to the United Nations System of the use of force: the failures of Kosovo and Iraq and the emergence of the African Union' (2004) *Max Planck UN Yearbook* 237 at 263.

³³⁸ Wippman *ECOWAS and the Liberian Civil War* op cit note 50 at 175.

³³⁹ Mohammed Ayoob 'Humanitarian intervention and state sovereignty' (2002) 6:1 *International Journal of Human Rights* 81 at 99.

³⁴⁰ See for example Iyi 'The dilemma of state failure' op cit note 84 at 77.

3.8 CONCLUSION

Since the Rwandan genocide, there has been buck-passing within the UN and the international community forcing African leaders to re-assess the present Charter arrangements on the maintenance of peace and security in Africa, the role of regional organisations and its implications for Africa in the New World Order with a view to fashioning how Africa should respond appropriately to protect the continent and its peoples.

The UNSC's response to the Darfur conflict is significant for two major reasons: first for its failure to prevent or halt the genocide, and secondly, it is the only genocide to have occurred post-R2P, and so provides a useful tool of analysis of the effectiveness of the UNSC and the Charter framework for humanitarian intervention to be adapted for the operationalisation of the doctrine. As will be shown in subsequent chapters, it highlights not the weaknesses of R2P as a principle as some have argued, but underscores the fact that the Charter had never been able to function as intended by the drafters in 1945. This is particularly so in the area of human rights protection and the maintenance of international peace and security. There is reason to believe that unless properly implemented, R2P would probably meet the same fate if a complementary or alternative framework is not sought.³⁴¹

In Rwanda, and later in Darfur, there were several opportunities for the UN to have prevented the cycle of violence and bloodbaths that eventually enveloped these African countries, but being African crises no one, beyond the rhetoric of diplomatic niceties, was willing to make the sacrifices a humanitarian intervention in these conflicts would have entailed. As the cases reviewed above show, it is the failures of the UN in Africa that finally paved the way for a new Regional Order in Africa at the beginning of this century. This has taken the form of extra-Charter humanitarian intervention treaties by African states to which I now turn.

³⁴¹ Clough 'Darfur: Whose responsibility to protect?' op cit note 259.

CHAPTER 4: THE AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIMES AND THE UN CHARTER

International law makes sense only in the context of the lived history of the peoples of the Third World. ... The experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations amongst states and to the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples.¹

Africa cannot count on the world outside to solve its crises. It is largely on its own. This is at least as true in ending human rights abuses as in ending conflicts.²

4.1 INTRODUCTION

The previous chapter discussed some cases of humanitarian crises in Africa, the disinterestedness and the degree of responsiveness of the international community in general and the United Nations Security Council (UNSC) in particular to crises in Africa compared to other regions of the world such as the Middle East and Europe. It underscored the ineffectiveness of the UNSC and how the experiences of Africa are increasingly pushing Africa towards designing its own coping mechanisms and competences for humanitarian intervention, such as the adoption by ECOWAS and the AU of a humanitarian intervention framework outside the UN Charter system. The objective of the present chapter is threefold: first, it outlines specific provisions of AU/ECOWAS instruments relating to humanitarian intervention in order to deconstruct their normative contents. Secondly, the chapter considers the relationship between these provisions and relevant provisions of the UN Charter and outlines the arenas of *apparent* normative conflict or ambiguities. Thirdly, it examines the justifications and possibility of normative compatibility between the regimes. Both the AU and ECOWAS instruments are examined simultaneously. The term ‘unilateral humanitarian intervention’ as used here means humanitarian interventions not authorised by the UNSC.

I argue here that there are three main arenas of normative clash between the AU/ECOWAS regimes and the UN Charter: first, the Charter prohibits the use of force

¹ Anthony Anghie & B S Chimni ‘Third World approaches to international law and individual responsibility in internal conflicts’ (2003) 2:1 *Chinese Journal of International Law* 77 at 78.

² Rwanda: The Preventable Genocide, International Panel of Eminent Personalities Report on the Genocide in Rwanda July 2000, chapter 21 para 12 available at http://www.africa-union.org/official_documents/reports/Report_rwanda_genocide.pdf Last visited 25/07/10> (accessed on 20 March 2010) (hereafter IPEP Report).

except in self-defense under article 51 and enforcement action under Chapter VII.³ By providing for new legal grounds on which force could be used outside these two grounds, article 4(h) of the AU Act and article 10 of the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (MCPMRPS) Protocol are in conflict with article 2(4) of the Charter. A second arena of normative ambiguity arises from the question of which agency, between the UN, AU and ECOWAS has primary responsibility for the maintenance of peace and security in Africa (in the case of the AU), and West Africa (in the case of ECOWAS), in view of the following provisions: article 24 of the UN Charter, article 16 and 17 of the African Union Peace and Security Council (AUPSC) Protocol, and articles 10(c), (d), 22 and 25 of the ECOWAS MCPMRPS Protocol. The third arena of normative clash arises from the question of which agency between the AU/ECOWAS and the UN authorises the use of force in Africa in view of the following provisions: articles 16 and 17 of the AUPSC, article 10(c) and 25 of the ECOWAS MCPMRPS, all suggesting that the AU and ECOWAS do not require United Nations Security Council (UNSC) authorisation to use force in their regions, contrary to article 53(1) of the UN Charter which requires regional organisations to obtain UNSC authorisation for enforcement actions. This is then situated in the context of the supremacy clause in article 103 of the Charter, which prohibits UN member states from entering into treaties whose obligations are inconsistent with their Charter obligations. Finally, the attempt at normative compatibility by scholars is considered in the context of the global search for a framework for the implementation of the military intervention component of R2P and the utility of the African initiatives. It should however be borne in mind that these arenas of normative incompatibility remain in the realm of theory and are yet to be borne out by state or organisational practice.

4.2 BACKGROUND TO THE AU/ECOWAS REGIONAL HUMANITARIAN INTERVENTION LEGAL REGIMES

The sudden end of the Cold War and the consequent neglect of Africa presented African leaders with a set of new challenges, the foremost being how to manage the increasing intra-state conflicts on the continent.⁴ African leaders' efforts to deal with these challenges have required innovation and creativity and, ironically, have resulted in novel norm-creation

³ See the discussions on normative considerations in Chapter 2.

⁴ Max Sesay 'Civil war and collective intervention in Liberia' (1996) 23:67 *Review of African Political Economy* 35 at 50.

described as some of the ‘most important post-Cold War developments in international law.’⁵ For example, as at the time of the intervention in Liberia, there was no extant legal instrument specifically dealing with such situations under ECOWAS law, but ECOWAS created ECOMOG in response, and the resulting legal quandary led to the unprecedented provisions in the 1993 ECOWAS Revised Treaty and the 1998 MCPMRPS Protocol.⁶ Taking a cue from ECOWAS interventions in Liberia and Sierra Leone and its subsequent efforts to create a legal framework for future interventions, the defunct Organisation of African Unity (OAU) sought to create an interventionist legal regime for the continent as a whole. Beginning with the Kampala Document, the OAU took a comprehensive assessment of the precarious peace and security condition of Africa, and proposed a new approach to the new challenges facing the Continent.⁷ This was followed by the adoption of the OAU Mechanism for Conflict Prevention, Management and Resolution in 1993, which built on the Kampala Document. Against the backdrop of the numerous challenges faced by Africa, particularly in the area of peace and security and the debilitating impact they were having on socio-economic development in the context of the major changes taking place in the world, the OAU set out the framework that would later underpin the major transition from the OAU principle of non-interference to the future AU’s doctrine of non-indifference.⁸ From 1994, the OAU started re-thinking its position on nonintervention in internal affairs but ECOWAS was the pacesetter for an interventionist legal regime on the continent.

⁵ Henry J Richardson III, Gay McDougal, Hugo Caminos, Gwendolyn Mikell & Berta Esperanza Hernadez ‘Effects of the new world order on the Third World’ (31 March – 13 April, 1993) 87 *ASIL Proceedings* 37 at 38.

⁶ David Wippman ‘Enforcing the peace: ECOWAS and the Liberian Civil War’ in Lori Fisler Damrosch (ed) *Enforcing Restraints: Collective Intervention in Internal Conflicts* (1993) 157 at 189. ECOWAS has adopted several protocols dealing with defense and security in the sub-region. It signed the Protocol on Non-Aggression on 22 April, 1978 in Lagos, Nigeria, and the Protocol Relating to Mutual Assistance in Defense, signed in Freetown, Sierra Leone, on 29 May, 1981, A/SP3/S/81. Apparently, given the lessons learnt from the intervention in Liberia, in 1992 ECOWAS commissioned a review of its founding treaty and the result was the ECOWAS Revised Treaty of 1993 and the subsequent peace and security protocols which built on the lessons of Liberia and shifted the focus of the Organisation from regime-security to a people-oriented policy of human security as supranational organisation. See Muhammed Tawfiq Ladan *Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security* (2009) 1. (hereafter Ladan Introduction to ECOWAS Law).

⁷ See Draft Kampala Document for a Proposed Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), Kampala, Uganda, 22 May, 1991.

⁸ See Declaration of the Assembly of Heads of State and Government on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution (1993) AHG/Decl. 3/(XXIX) adopted by the 29th Session of the Assembly of Heads of State and Government at Cairo, Egypt, from 28-30 June, 1993.

This paradigm shift should be understood in its historical context. At inception in 1963, the cardinal objective of the OAU was the decolonisation of Africa.⁹ The OAU mobilised for this objective using the platform of the UN and employing the instrumentality of international law.¹⁰ It was important at that stage to guard the newly won independence, hence the principle of sovereignty and non-interference was viewed as central to OAU's objectives and was enshrined in article 3(2) and (3) of its Charter.¹¹ The emphasis was on consolidation of sovereignty, promotion of unity and solidarity in Africa. However, the OAU was sometimes confronted with a contradiction in its avowed principles of sovereignty, domestic jurisdiction and non-interference on the one hand, and its condemnation of the racist domestic policies of Apartheid South Africa, for example,¹² on the other.

By the 1980s, as the last vestiges of colonialism were broken and most African countries achieved self-rule, Africa entered a new phase and found itself confronted by a new set of challenges—internal armed conflicts and secessionist armed struggles. Many factors, both internal and external combined to produce a continent replete with states struggling to build national unity from the arbitrary assemblage of peoples that became the dominant characteristic of the inherited colonial borders of post-colonial African states. The result has been unending civil wars, genocides, state failures and state collapse. This colonial legacy partially explains the 1994 Rwanda genocide in which almost one million Tutsis and moderate Hutus were massacred within 100 days as the world stood by and watched. In the aftermath of the genocide, the OAU set up the International Panel of Eminent Personalities (IPEP) to investigate the immediate and remote causes of the genocide and recommend how Africa could avert a recurrence in future. In its recommendations, the Panel stated:

‘Since Africa recognises its own *primary responsibility* to protect the lives of its citizens, we call on:

- (a) the OAU to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations; and

⁹ See Article 2(d) of the Charter of the Organisation of African Unity adopted at Addis Ababa on 25 May 1963 (479, U.N.T.S. 39) which came into force on 13 September 1963. To this end it sought to promote the consolidation of independence already won and solidarity with those still under the yoke of colonial domination.

¹⁰ For example, the OAU was at the vanguard of pushing for the UN Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly Resolution 1514 (XV) of 14 December 1960; the International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly Resolution 3068 (XXVIII) of 30 November 1973 which entered into force on 18 July 1976.

¹¹ Which provides ‘The Member States in pursuit of the purposes stated in article II, solemnly affirm and declare their adherence to the following principles (1) the sovereign equality of all Member States; (2) non-interference in the internal affairs of states; (3) respect for the sovereignty and territorial integrity of each states and its inalienable right to independent existence.’

¹² Claude E Welch Jr. ‘The O.A.U. and human rights: towards a new dawn definition’ (1981) 19:3 *The Journal of Modern African Studies* 401 at 401.

(b) the international community to assist such endeavours by the OAU through financial, logistic, and capacity support¹³

These recommendations were implemented in the AU Constitutive Act examined below. Thus, the new humanitarian intervention regimes of AU and ECOWAS were spawned by the failures of the UN and its lack of interest and commitment to African crises and it was therefore up to African regional organisations to develop their own capacity in that respect.¹⁴ As Jean Allain puts it, whatever legal debate the AU/ECOWAS humanitarian intervention may generate among scholars,

One cannot over emphasize [sic] the effects the 1994 Rwandan Genocide had in moving African states in establishing a mechanism to ensure that such mass killing would not happen again. The memory of African leaders and the Continent as a whole remains scared by the mass slaughter which transpired in its midst and the indifference to it manifest by the international community as demonstrated by the United Nations own acknowledgement of its “failure [...] to prevent, and subsequently to stop the genocide”.¹⁵

Africa's experiences as a battle ground for proxy wars during the Cold War and the humanitarian catastrophes of the 1990s reaffirmed the OAU's belief that African issues are more likely to be resolved amicably if pursued within Africa sheathed from external meddling and the politics of the UNSC.¹⁶ This provided the impetus and justifications for the new AU and ECOWAS humanitarian intervention regime.

¹³ See IPEP Report 'Recommendation' para 22, (emphasis added), echoing similar views, the OAU Secretary-General's report had recommended that the OAU mechanism for peace and security should be made to include the deployment for peace enforcement forces under the control and authorisation of Africa. See, Organisation of African Unity, Background Document on the Review Structures, Procedures and Working Methods of the Central Organ (2002) 1-42, cited in Jeremy Levitt 'The Peace and Security Council of the African Union: the known unknowns' (2003) 13 *Transnational Law and Contemporary Problems* 109 at 115 (hereafter, Levitt 'The AUPSC') See also Kuwali 'The end of humanitarian intervention' infra note 40 at 45, underscoring the self-recriminations and indignation felt by Africans for their failures to act on their own in Rwanda and prevent the genocide.

¹⁴ Lee F Berger 'State practice evidence of the humanitarian intervention doctrine: the ECOWAS intervention in Sierra Leone' (2001) 11 *Indiana International and Comparative Law Review* 605 at 613 (hereafter Berger 'ECOWAS intervention in Sierra Leone').

¹⁵ Jean Allain 'The true challenge to the United Nations System of the use of force: The failures of Kosovo and Iraq and the Emergence of the African Union' (2004) *Max Planck United Nations Yearbook* 237 at 263 (hereafter Allain 'The true challenge to the United Nations'). See further, United Nations Secretariat, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Doc. S/1998/1257 (1999) 16 December, 1999 at 3.

¹⁶ Paul D Williams 'From non-intervention to non-indifference: The origins and development of the African Union's security culture' (2007) 106: 423 *African Affairs* 253 at 264 (hereafter Williams 'From non-intervention to non-indifference').

4.3 DECONSTRUCTING THE AU/ECOWAS HUMANITARIAN INTERVENTION LEGAL REGIME

The relevant provisions I am concerned with here under ECOWAS law are article 58 of the ECOWAS Revised Treaty, Paragraph 46 of the Framework for the Establishment of the MCPMRPS, articles 10 and 25 of the ECOWAS MCPMRPS Protocol. For the AU, I consider article 4(h) and (j) of the AU Constitutive Act, article 4(j), 16 and 17 of the AUPSC Protocol. These provisions seek to construct an extra-Charter humanitarian intervention legal framework. To implement article 58 of the Revised Treaty, article 25 of the MCPMRPS of ECOWAS provides that the Protocol is to be invoked:

- (a) In cases of aggression or conflict in any Member State or threat thereof;
- (b) In case of conflict between two or several Member States;
- (c) In case of internal conflict:
 - (i) that threatens to trigger a humanitarian disaster, or
 - (ii) that poses a serious threat to peace and security in the sub-region;
 - (iii) In event of serious and massive violation of human rights and the rule of law.
- (d) In event of massive and serious violation of human rights and the rule of law
- (e) Any other situation as may be decided by the Mediation and Security Council.¹⁷

By the same token, article 10 of the MCPMRPS empowers the Mediation and Security Council to: ‘(a) decide on all matters relating to peace and security; (b) decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security; (c) authorise all forms of intervention and decide particularly on the deployment of political and military missions; (d) approve mandates and terms of reference for such missions; (e) review the mandates and terms of reference periodically, on the basis of evolving situations.’¹⁸ ECOMOG is appointed as the military wing of ECOWAS and responsible for all its military operations.¹⁹ Under the AU regime, article 4 of the AU Constitutive Act provides that ‘the Union shall function in accordance with the following principles:

- (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

¹⁷ Protocol Relating to the ECOWAS Mechanism for Conflict Prevention Management, Resolution, Peace-keeping and Security, signed at Lome, Togo on 10 December 1999 and entered into force upon adoption (hereafter the ‘ECOWAS MCPMRPS Protocol’). See also Paragraphs 17 and 46 of the Framework Establishing the ECOWAS Mechanism for Conflict Prevention Management, Resolution, Peace-keeping and Security, Abuja, 31 October, 1998 (hereafter ‘ECOWAS MCPMRPS Framework’).

¹⁸ See article 10 of the ‘ECOWAS MCPMRPS Protocol’.

¹⁹ ECOMOG is created by article 17 of the ECOWAS MCPMRPS Protocol as one of the supporting Organs of the MCPMRPS and it is authorised to carry out all military interventions of ECOWAS including ‘Humanitarian intervention in support of humanitarian disasters, enforcement of sanctions and embargo, preventive deployment, Peacebuilding operations, disarmament and demobilization...’ See article 22 of the ECOWAS MCPMRPS Protocol. See also the MCPMRPS Framework para. 51-52.

(j) the right of Member States to request intervention from the Union in order to restore peace and security’

Similarly, the Protocol of the African Union Peace and Security Council provides that in discharging its duties, the AUPSC shall inter alia be guided by ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity in accordance with article 4(h) of the Constitutive Act.’²⁰ It also provides for ‘the right of Member States to request intervention from the Union in order to restore peace and security in accordance with article 4(j) of the Constitutive Act.’²¹ The relationship between the AU and sub-regional

²⁰ See article 4(j) of Protocol Relating to the Establishment of the Peace and Security Council of the African Union signed on 9 July, 2002 at Durban, South Africa, and came into force on 26 December, 2003 (hereafter ‘AUPSC Protocol’).

²¹ Supra note 20 article 4(k). The question of whether article 4(h) can be seen as intervention by a priori invitation is addressed in Chapter 7. However, for purposes of deconstructing the relevant provisions of the AU/ECOWAS RHMI regimes, the legal validity of which this thesis explores, it is pertinent to distinguish between article 4 (h) and article 4(j) of the AU Constitutive Act. Unlike article 4(h), article 4(j) codifies the right of a member state to request intervention from the AU. It provides for the ‘right of Member States to request intervention from the Union in order to restore peace and security’. Some commentators argue that given the AU’s intervention history, the AU intervention regime is more likely to be implemented Relying on article 4(j) rather than article 4(h) as legal basis for future interventions on the continent. See Erika de Wet ‘Regional Organisation and Arrangement and their relationship with the United Nations: The case of the African Union’ in Marc Weller (ed) ‘Oxford Handbook of the Use of Force (2014); Erika de Wet ‘The evolving role of ECOWAS and SADC in peacekeeping-operations: A challenge to the primacy of the United Nations Security Council? (2014) 27 *Leiden Journal of International Law* (forthcoming). De Wet further argues that article 4(j)’ derives from the practice of AU member states to request intervention from the Union to maintain internal stability and order. Other commentators argue that article 4(j) could be abused and used by a member state to seek AU intervention to help a government suppress legitimate aspirations for political reforms or democratic change. See A Parker & Donald Rukare ‘The new African Union and its Constitutive Act’ (April 2002) 96: *American Journal of International Law* 365. First, it is conceded that article 4(j) of the AU Constitutive Act is a codification of the right to request intervention. However, article 4(h) on the other hand relates to the right of the AU to re intervene in a member state to prevent genocide, war crime and crimes against humanity. The issue then is: when the AU decides to intervene on the basis of article 4(h) or 4(j) does it need the contemporaneous consent of the target state? In my opinion, when the AU intervenes on the basis of article 4(h), the contemporaneous consent of the target state is not necessary because article 4(h) effectively amounts to intervention by invitation a priori. See Dan Kuwali ‘Persuasive prevention: Towards a principle for implementing article 4(h) and R2P by the African Union’ (2009) 42 *Current African Issues* 1 at 17. On the other hand, article 4(j) is only invoked upon a request made to the AU to intervene in a state. The crucial question then becomes: request by whom? Thus, the way article 4(j) would be invoked is likely to be determined by who can legally make the request for intervention. Who is entitled to request the intervention provided for under article 4(j)—the territorial state or a third (member) state of the AU? If it is the territorial state that is entitled to request intervention, then what happens if such territorial state is the perpetrator of the massive violations of human rights to be prevented or halted? Certainly, such state would be unlikely to request intervention except it is aimed at stabilizing its government in power. It is important to underscore that when an AU member state requests intervention on the basis of article 4(j), first, the question of contemporaneous consent does not even arise. Secondly, UNSC authorisation to intervene in such state is not necessary since the right to request intervention is part of the exercise of sovereignty by a state. But it is not clear from a literal reading of article 4(j) who should request the intervention or whether a third state can lawfully make such request. Relying on the rule 4(f) of the Rules of Procedure of the AU Assembly of Heads of State and Government, Cilliers and Sturman contend that article 4(j) was intended to be given a narrow interpretation in which case only the territorial AU member state (as against third AU member states) can lawfully request intervention on the basis of article 4(j). See Jakckie Cilliers & Kathryn Sturman ‘The right intervention’ (2002)

groups like ECOWAS, on the one hand, and other organisations, particularly the UN, on the other hand, is set out thus:

16. (1) The Regional Mechanisms are part of the overall security architecture of the Union, which has the *primary responsibility for promoting* peace, security and stability in Africa. ...

17 (1) In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa the Peace and Security Council shall *cooperate and work closely* with the United Nations Security Council, which has the primary responsibility for the *maintenance* of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.

(2) Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions' activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organisations in the maintenance of international peace and security.²²

These provisions have serious implications for the Charter System and international law. At the drafting of the Charter in San Francisco, the relationship between regional organisations and the UN was hotly debated with some advocating the principle of universalism and others, like the Latin American states, preferring regionalism.²³ The provisions in Chapter VIII of the UN Charter reflects the compromises by the groups that anchored the relationship between the UN and regional organisations like AU and ECOWAS on the principle of subsidiarity but also left some issues unresolved.²⁴ Enforcement action by regional organisation not in

11 African Security Review 29 at 36-37. The rule in question provides that 'the [A]ssembly shall decide on intervention in a Member State at the request of that Member State in order to restore peace and security' This makes it clear that the request contemplated in article 4(j) is request by the territorial state rather than a third state. On the other hand, the AUPSC Protocol provides that based on article 4(k), the AUPSC would be guided by the 'right of Member States to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act'. Jean Allain therefore argues that since the Rules of Procedure of the AU Assembly of Heads of State and Government is merely a subsidiary legislation which does not require state consent, compared to the AUPSC Protocol which requires state consent for its creation, the AU might not necessarily follow the narrow construction of article 4(j) implied in rule 4(f) of the Rules of Procedure mentioned above, and an AU member state might be able to request intervention in a third AU state. See Jean Allain 'The true challenge to the United Nations System of the use of force: The failures of Kosovo and Iraq and the Emergence of the African Union' (2004) *Max Planck United Nations Yearbook* 237 at 283-4. However, Kunschak argues that it is more probable that only the target state can request intervention from the AU under article 4(j) See Martin Kunschak 'The African Union and the right to intervention' (2006) 31 *South African Yearbook of International Law* 195 at 201. In my view,, it appears more persuasive to argue that intervention in terms of article 4(j) would be at the request of the target state and not a third state since article 4(h) already provides a basis for states within the AU (that think intervention is necessary) to mobilise the Organisation to take a decision suo motu to intervene in a member state. In view of this, further provision in article 4(j) for an AU member state to be able to request the AU to intervene in another member state would not only be superfluous but also counterproductive.

²² See 'AUPSC Protocol' (emphasis added).

²³ See S Neil MacFarlane & Thomas G Weiss 'The United Nations, regional organisations and human security: building theory in Central America' (1994) 15:2 *Third World Quarterly* 277 at 280.

²⁴ See Michael Pugh The World Order Politics of Regionalization in Michael Pugh & Waheguru Pal Singh Sidhu (eds) *The United Nations and Regional Security: Europe and Beyond* (2003) 31 at 35 (hereafter Pugh &

collective self-defense must be authorised by the UNSC and any provision in a regional agreement that permits a regional organisation to take enforcement action against a member state without UNSC authorisation is inconsistent with article 53 of the Charter.²⁵ The unilateral action provisions contained in the AU/ECOWAS framework apparently amounts to a subtle attempt to renegotiate the provisions of Chapter VIII. It has therefore been argued that the AU and ECOWAS legal regimes of unilateral humanitarian intervention are incompatible with the UN Charter and thus, invalid.²⁶ The validity question is engaged in subsequent chapters, but I set out the frame of the apparent normative incompatibility between the regimes below.

4.4 ARENAS OF NORMATIVE INCOMPATIBILITY BETWEEN AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIME AND THE UN CHARTER

From the provisions surveyed above, there are three main arenas of normative incompatibility between the AU and ECOWAS regime of unilateral humanitarian intervention and the Charter: the prohibition of the use of force in inter-state relations, the lawful agency with primary responsibility for the maintenance of peace and security in Africa, and the lawful agency to authorise the use of force in Africa.

4.4.1 *Article 2(4) of UN Charter and the AU and ECOWAS Right of Unilateral Use of Force*

Article 2(4) prohibits the use of force in inter-state relations and it has been argued that this is a peremptory norm of international law which does not permit any derogation.²⁷ The provisions of article 4(h) of the AU Act, article 4(j) of AUPSC Protocol, and article 25 of the ECOWAS MCPMRPS Protocol are in conflict with article 2(4) of the UN Charter. By providing for the right of the AU and ECOWAS to use force within member states on grounds not provided for in the UN Charter, these laws *apparently* violate the international

Sigh Sidhu 'The United Nations and Regional Security'). See article 52 and 53, Charter of the United Nations signed on 26 June 1945 at San Francisco and entered into force on 24 October 1945 (hereafter the 'Charter').

²⁵ See Natalino Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Necessity* (1985) at 130 (hereafter Ronzitti 'Rescuing Nationals Abroad').

²⁶ See Frederik Harhoff 'Unauthorised humanitarian intervention – armed violence in the name of humanity?' (2001) 70 *Nordic Journal of International Law* 65 at 102. (hereafter Harhoff, 'Unauthorised humanitarian intervention').

²⁷ This would also extend to the principle of non-interference in matters essentially within the domestic jurisdiction of a state contained in article 2(7) of the UN Charter. See Ronzitti *Rescuing Nationals Abroad*, op cit note 25 at 87. See Chapter 2 above. Although article 4(f) of the AU Act prohibits the use of force by member states against one another, this does not apply to the AU itself.

law norm of non-use of force and would thus be invalid.²⁸ These provisions have introduced and codified new exceptions to the rule on the use of force besides those of self-defense and Chapter VII enforcement actions and thus pose a ‘fundamental challenge’ to the UN System as they seek to supersede the provisions in article 2(4) and Chapter VII of the Charter.²⁹ These grounds under the AU Act are war crimes, crimes against humanity and genocide; and with reference to the proposed amendment to the AU Act includes threat to legitimate order.³⁰

Under ECOWAS, new grounds as exceptions to the prohibition of the use of force rule now include internal conflict threatening humanitarian disasters or sub-regional peace and security, massive violation of human rights and overthrow or attempted overthrow of democratically elected governments. The ECOWAS framework has an omnibus clause the scope of which is not defined in the Protocol but will perhaps be determined through pragmatism and regional practice by ECOWAS. In the past, the UNSC has had to develop the Charter provisions through a reinterpretation and expansion of what constitutes ‘threat to international peace and security’ in order to be able to respond to the challenges arising from massive violations of human rights in internal conflicts which was not covered by the UN Charter or was hitherto deemed prohibited by article 2(7) of the Charter.³¹ This approach by the UNSC has not been devoid of controversy and has largely remained problematic in its relationship with sovereignty, hence the emergence of the R2P norm. Though the AU/ECOWAS framework attempts to remedy this, their provisions present a unique challenge to the UN system. Allain rightly put it thus:

The coming into force of the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, which operationalise the Constitutive Act of the African Union, is the first true blow to the international framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council.³²

²⁸ See Dan Kuwali ‘Persuasive prevention: Towards a principle for implementing article 4(h) and R2P by the African Union’ (2009) 42 *Current African Issues* 1 at 17 (hereafter Kuwali ‘Persuasive prevention’).

²⁹ Allain The true challenge to the United Nations op cit note 15 at 238.

³⁰ Protocol on the Amendments to the Constitutive Act of the African Union Adopted by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July, 2003, amending article 4(h) of the AU Act.

³¹ See S/RES/788 (1992) determining that the ‘deterioration of the situation in Liberia constitutes a threat to international peace and security.’ See S/RES/1132 where the UNSC also determined that the ‘situation in Sierra Leone constitutes a threat to international peace and security.’ See also Helene Rui Fabri ‘Human rights and state sovereignty: Have the boundaries been significantly redrawn?’ in Philip Alston & Euan McDonald (eds) (2008) 33 at 49. See generally Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

³² Allain ‘The true challenge to the United Nations’ op cit note 15 at 238 (Italics in original).

Perhaps the most important evidence yet of the AU's resolve to create an extra-Charter humanitarian intervention legal regime is the Common African Position on the Proposed UN Reform—the Ezulwini Consensus. It states the position of the AU on its relationship with the UNSC, and article 4(h) of the AU Act vis-a-vis article 2(4) of the UN Charter. The Ezulwini Consensus maintains that self-defense remains the principal ground of exception to the prohibition of use of force. However, the AU insists at the same time that:

[T]he Constitutive Act of the African Union, in its Article 4 (h), authorises intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act should be prohibited.³³

Three inferences can be drawn from the above excerpt. First, the AU construes the rule on the use of force in article 2(4), and the exceptions in article 51 and Chapter VII of the Charter as the applicable law between the AU, its members and other states outside Africa as well as the UN. The AU asserts a second rule encapsulated in article 4(h) of the AU Constitutive Act which it deems to be applicable between the AU and its member states only. A third inference is that the AU insists that article 4(h) and the grounds recognised therein as additional exceptions to the general rule prohibiting the use of force in the UN Charter. ECOWAS has not advanced similar arguments in defense of its use of force law but since ECOWAS member states are also members of the AU and did not express contrary opinion on the Ezulwini Consensus principle, it is more than likely that ECOWAS shares this view.

However, it has been argued that a regional organisation would be violating international law if it uses force against any state without UNSC authorisation, except in collective self-defense.³⁴ The same rule applies where a treaty gives a regional organisation a right of unilateral intervention in a state without requiring the 'contemporaneous consent' of the target state, such treaty is void for violating article 2(4) and 103.³⁵ The argument of Paulus and Leiß that 'subsequent agreements between States allowing for unilateral armed intervention cannot supersede the prohibition on the use of force under the Charter, but can be regarded as permissible if upholding rather than diminishing or abrogating the territorial

³³ The Common African Position on the Proposed Reform of the United Nations: The 'Ezulwini Consensus', Executive Council 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia. Ext./EX. CL/2 (VII) p 6 (hereafter the Ezulwini Consensus). Available at <<http://www.cfr.org/africa/common-african-position-proposed-reform-united-nations-ezulwini-consensus/p25444>> (accessed on 10 July 2011).

³⁴ Domingo E Acevedo 'Collective self-defense and the use of regional or sub-regional authority as justification for the use of force' (1984) 78 *ASIL* 69 at 73 (hereafter 'Acevedo Collective self-defense').

³⁵ Wippman 'Treaty-based intervention: who can say no?' (1995) 62 *University of Chicago Law Review* 607 at 620; David Wippman 'Pro-democratic intervention in Africa' (March 13-16, 2002) 96 *ASIL Proceedings* 143-45 at 145.

integrity and political independence of a State', is far more nuanced than Bernhardt's views on the same Article 103 in the third edition of Simma's Commentary on the Charter, where he puts it more vividly:

If the members of a regional arrangement, ... agree that in case of internal disturbances or other events within one of the States concerned, the other States can intervene with military forces without the consent of the *de jure* or *de facto* government, the compatibility of such a special agreement with the Charter becomes *doubtful* and must, in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force is at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103.³⁶

In general terms, the prohibition of use of force has, as some of its contentious dimensions, the characterisation and ambit of the ban, the limiting circumstances and the repercussions of any possible breach.³⁷ The debate about the legality of humanitarian intervention under international law centres on the use of force to halt mass atrocities in the territory of a state by third states or group of states. The codification of the right of humanitarian intervention by the AU and ECOWAS introduces a new dimension to this debate.

It is unclear what this will entail in practice, but as a starting point, it should be emphasised that given the immense changes that have taken place since 1945, the efficacy of the Charter in particular and international law in general can only be achieved if they are 'interpreted and applied in a manner commensurate with the requirements of an evolving international community'.³⁸ Though unsettled for a long time, the trends in the development of international law norms in relation to the international protection of human rights, including the evolution of the R2P norm, support the view that the use of force by external actors to prevent or halt massive violations of human rights does not fall within the purview of the prohibition in article 2(4).³⁹ The principle of non-use of force must be juxtaposed with

³⁶ See Andreas Paulus & Johann Ruben Leiß 'Article 103' in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary* 3 ed (2012) 2128, (hereafter Paulus & Leiß 'Article 103'), Cf Rudolf Bernhardt 'Article 103' in Simma Bruno et al (eds) *The Charter of the United Nations: A Commentary* 3 ed (2002) 1121-2 (hereafter Bernhardt 'Article 103'). As the ICJ stated: '... all regional, bilateral and even multilateral arrangements that the Parties to this case may have made touching on the issue of settlement of disputes ... must be made always subject to the provisions of article 103 of the Charter ...' See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Jurisdiction and Admissibility Judgment, ICJ Rep 1984, 392 at 440.

³⁷ See Acevedo, 'Collective self-defense' op cit note 34 at 69.

³⁸ Ibid at 70.

³⁹ See Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* 2ed (1997) 150; Francis Kofi Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (1999) 43; Richard B Lillich *International Human Rights: Problems of Law, Policy and Practice* (1973) at 586; Hedly Bull

the community needs for collective intervention deployed in defense of human rights to halt mass atrocities.⁴⁰ The normative evolution pioneered by the instruments surveyed above have certainly brought about a shift in the ‘international legal paradigm’ (at least in the African context for the time being),⁴¹ and this calls for further legal elucidation rather than casual dismissal. Even under general international law, it is a long standing argument that interventions conducted on certain grounds (like those codified in the AU and ECOWAS laws) actually enhances the implementation of the principles and purposes of the UN and cannot be viewed as violating article 2(4) since neither the AU nor ECOWAS seeks to assail the territorial integrity or political independence of Member States.⁴² To the extent that the AU and ECOWAS norms deal with intra-state cases, it is arguably outside the scope of article 2(4) of the Charter which only regulates the use or threat of force in inter-state relations by UN member states.⁴³ Arguably, both the AU and ECOWAS can lawfully use force within the territory of member states in the circumstances outlined in their respective laws and this would not violate article 2(4).⁴⁴

4.4.2 *Primary Responsibility for the Maintenance of Peace and Security in Africa*

A second arena of normative clash between the Charter law and the AU/ECOWAS humanitarian intervention regimes is in the authoritative agency with primary responsibility for the maintenance of peace and security in Africa. In view of the provisions surveyed above, the question becomes which organisation, between the UN, AU and ECOWAS has the primary responsibility for the maintenance of peace and security in Africa in the case of the AU, and West Africa in the case of ECOWAS? The answer to this question may not be as straightforward as might first appear. Article 16(1) of the AUPSC gives this authority to the AU and article 10(a) of the ECOWAS MCPMRPS Protocol gives the authority (in the case of West Africa), to the Mediation and Security Council. Both provisions *apparently* conflict with article 24(1) of the UN Charter which provides:

‘Introduction’ in Hedley Bull (ed) *Intervention in World Politics* (1984) 1-6 at 3; W Michael Reisman ‘Criteria for lawful use of force in international law’ (1984-85) 10 *Yale Journal of International Law* 279 at 281; Anthony D’Amato ‘The invasion of Panama was a lawful response to tyranny’ (1990) 84 *AJIL* 516. See Generally Gareth Evans *The Responsibility to Protect* (2005).

⁴⁰ Dan Kuwali ‘The end of humanitarian intervention: Evaluation of the African Union’s right of intervention’ (March 2012) 9:1 *African Journal of Conflict Resolution* 41 at 44 (hereafter Kuwali, ‘The end of humanitarian intervention’).

⁴¹ Nsongurua Udombana ‘When neutrality is a sin: The Darfur crisis and the crisis of humanitarian intervention in Sudan’ (2007) 7 *Human Rights Quarterly* 1150 at 1167.

⁴² Kuwali Persuasive Prevention op cit note 28 at 19.

⁴³ See Yoram Dinstein *War, Aggression and Self-Defense* 4ed (2005) 80.

⁴⁴ Levitt, ‘The Peace and Security Council of the African Union’ op cit note 13 at 130.

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The AU recognises its status as a Chapter VIII regional organisation under the UN Charter in relation to the maintenance of international peace and security.⁴⁵ But that is where the conformity with the Charter ends. In other material respects, the AU and ECOWAS provisions seek to dislodge the UNSC as the authoritative agency having primary responsibility for the maintenance of peace and security in Africa. Article 17(1) AUPSC Protocol recognises the primary responsibility of the UNSC in the maintenance of international peace and security but at the same time, article 16(1) allocates exactly the same role to the AUPSC.⁴⁶ This view is shared by AU member states (even if not often expressed). Although the AU recognises that the UN has primacy in the maintenance of international peace and security, the AU reserves a right of unilateral action in Africa which only ‘reverts to the UN where necessary.’⁴⁷ It is understandable if the AU insists that the Organisation will intervene in Africa with or without UNSC authorisation.⁴⁸ This is essentially because the AU Act and the AUPSC Protocol have arrogated to the AU the primary responsibility for ‘promoting peace, security and stability in Africa’ by vesting the powers in its decision-making organ—the AUPSC.⁴⁹ As Allain asserts, and in my view rightly so too:

By recourse to a treaty, the African Union has appropriated for itself the role which the UN Security Council is meant to play on a universal basis; in essence denying the Council its “primary responsibility” for the maintenance of international peace and security in relation to the African Continent.⁵⁰

Contrary to what is envisaged by Chapter VIII of the UN Charter, article 17(2) of the AUPSC Protocol implies that the AU will only seek assistance from the UN when necessary and that it is not obliged to defer to the UNSC on peace and security matters in Africa.⁵¹

For its part, ECOWAS is not so explicit in its provisions in its relationship with the UN in this respect but by virtue of the powers conferred on the Mediation and Security

⁴⁵ Kuwali ‘The end of humanitarian intervention’ op cit note 40 at 57.

⁴⁶ Kwesi Anning ‘The UN and the African Union’s security architecture: Defining an emerging partnership’ in *The United Nations, Security and Peacekeeping in Africa: Lessons and Prospects* (2008) 5 *Critical Currents* 9 at 17 (hereafter Aning ‘The UN and the African Union’s security architecture’).

⁴⁷ Id.

⁴⁸ Kuwali ‘The end of humanitarian intervention’ op cit note 40 at 45.

⁴⁹ Aning ‘The UN and the African Union’s security architecture’ op cit note 46 at 17. (The AUPSC Protocol came into force on 26 December 2003).

⁵⁰ Allain ‘The true challenge to the United Nations op’ cit note 15 at 266.

⁵¹ Ibid at 287.

Council to perform the role reserved for the UNSC under the Charter, the ECOWAS regime arguably has the same effect.⁵² Even prior to its adopting its humanitarian intervention instruments, ECOWAS has launched unilateral humanitarian interventions without the backing of any legal instrument in its peace and security or human rights corpus. It was such interventions that apparently influenced the AU. Within a few years of initiating the legal mechanism for unilateral action by ECOWAS, the system which was originally created for the subregion alone was adopted for all of Africa, underscoring the failure of the UNSC to prevent or halt genocide in Africa.⁵³ Wippman also corroborates Allain's view that ECOWAS intervention and the right to unilateral intervention it claims for itself was due to the failure of the UNSC to respond to crises in Africa and the frustrations faced by African leaders when they tried to make the UN take any meaningful action in African crises.⁵⁴ The AU and ECOWAS mechanisms therefore evolved as a buffer to UNSC veto paralysis and in the case of ECOWAS, they have been more proactive and successful in responding to the peace and security demands of Members and the sub-region compared to the UNSC.⁵⁵

Notwithstanding several proposals for UN reform so far, the fact that ECOWAS had to resort to unilateral action to initiate military interventions in Liberia and Sierra Leone is itself indicative of three points: first, that the Brahimi Report was either not being implemented or the implementation side-lined Africa; second, it underscored the failures of the UN to take the initiative to intervene; third, the rejection of a 'colonial-policy' approach underpinned by a lack of commitment to African crises.⁵⁶ From discussions in chapter 3, it is clear that during the Liberian crisis, it was after ECOWAS had unsuccessfully tried to get the UNSC to even discuss the matter let alone intervene, that ECOWAS proceeded to intervene and left the UNSC in an awkward situation to either condone the intervention or condemn it and risk global opprobrium for its legal inertia and moral paralysis.⁵⁷ Understandably, the UNSC chose the former granting what some have variously described as *ex post facto*

⁵² See ECOWAS MCPMRPS Protocol, article 10 *op cit* note 17.

⁵³ Allain 'The true challenge to the United Nations' *op cit* note 15 at 262.

⁵⁴ David Wippman 'The nine lives of article 2(4)' (2007) 16 *Minnesota Journal of International Law* 387 at 405 (hereafter Wippman 'The nine lives of Article 2(4)').

⁵⁵ Christopher J Borgen 'The theory and practice of regional organisation intervention in civil wars' (1993-1994) *New York University Journal of International Law and Policy* 797 at 821 (hereafter Borgen 'The theory and practice of regional organisation').

⁵⁶ Tghierry Tardy 'The Brahimi Report: Four years on' (20 – 21 June 2004) *Proceedings of a workshop held at the Geneva Centre for Security Policy* 12 (hereafter Tardy The Brahimi Report: Four years on).

⁵⁷ Borgen 'The theory and practice of regional organisation' *op cit* note 55 at 823.

ratification, condonation or acquiescence to the interventions.⁵⁸ There is lack of normative clarity here.

Compared to other regional organisations, the provision for humanitarian intervention in their constitutive documents has helped ECOWAS and AU to avert the dilemma the OAS faced when it had to deal with the Haiti crisis by imposing sanctions contrary to the OAS Charter.⁵⁹ Though few regional organisation's policy makers and even fewer UN staff would admit it, there is a subtle competition for relevance between the UN and the AU and ECOWAS, particularly with regards to maintenance of peace and security in Africa as the UNSC's attempts and failures in intervening in civil wars have pushed these regional organisations to clamour for more autonomy in the same arena.⁶⁰ What has been the response to this development, particularly by Africa?

The failure of this collective security system, in addition to state practice in this respect since 1945, has inexorably led regional organisations to either redefine themselves in terms of article 51 of the Charter or to call for a reinterpretation of Chapter VIII and a redistribution of authority.⁶¹ But it does not bode well for the international system or any world order based on law constantly to call for re-interpretation of its basic norms (such as the Charter provisions under consideration here) to suit the changing circumstance when in fact, what is actually wrong is not so much the changes that have rendered the formal text obsolete, but failures to implement the provisions of the text. In such situation, the choice, it would seem is either to amend the relevant text of the Charter to take account of changing state practice or to allow such change through the gradual development of customary international law including regional state practices. To this end, it is important for regional organisations to codify their constitutive documents in order to clarify their relationship with the UN and the legal position of humanitarian intervention. This is one aspect the AU/ECOWAS regimes are also significant.⁶² The current international mechanism for

⁵⁸ *Id.*

⁵⁹ See article 19 of the OAS Charter signed at Bogota on 30 April 1948 and entered into force on 13 December 1951.

⁶⁰ See Borgen 'The theory and practice of regional organisation intervention' *op cit* note 55 at 827.

⁶¹ *Ibid* at 829. NATO is an example, oscillating between characterizing itself as an article 51 defense alliance during the Cold War and more recently defining its twenty-first century role as a Chapter VIII regional Organisation.

⁶² See Borgen 'The theory and practice of regional organisation intervention' *op cit* note 55 at 831.

maintenance of international peace and security was not meant to regulate the current type of global order.⁶³ As a commentator put it,

[t]he text of Chapter VIII has become separated from state practice. Given the changes taking place in the world, the spectre of divorce is not out of the question. However, for a reconciliation to occur, theory and practice will have to change somewhat, and state practice is notoriously stubborn.⁶⁴

With regard to state practice, unilateral action by states and organisations like ECOWAS in Liberia, and Sierra Leone, and NATO in Kosovo indicate that the construction of the Charter rule on the use of force is beginning to relax.⁶⁵ But it is also being replaced by rules the scope and contents of which are not at all clear at the moment.⁶⁶ The emerging doctrine of R2P and its implementation in Libya demonstrates this point.⁶⁷ For example, the role of the UNSC in Libya and Darfur underscores the significance of the AU/ECOWAS frameworks advanced as paradigm shifts in the authoritative agency saddled with the responsibility for maintenance of international peace and security.⁶⁸ Since the UN has demonstrated a lack of interest in crises in Africa, the AU and ECOWAS have to develop a regional humanitarian intervention mechanism and build the legal and institutional framework to respond to mass atrocities.⁶⁹ How will this impact the UN? Allain puts it thus:

The diffusion of the primary role of the Security Council over issues of international peace and security as developed in Article 17, in essence, turns the United Nations system on its head, as the United Nations Security Council is meant to assist the African Union Peace and Security Council not *vice versa*. As a result of the fact that the Protocol, while paying lip-service to the primacy of the United Nations Security Council seeks, at every turn, to dissipate its pre-eminence, makes clear that intervention as envisioned by the Constitutive Act of the African Union usurps the ultimate control vested in the United Nations System over the use of force.⁷⁰

In an attempt to resolve this normative clash, some authors have adopted an interpretive method that maintains that the UN retains primary responsibility for the maintenance of

⁶³ Richard Jackson 'The dangers of regionalizing conflict management: The African experience' (2000) 52:1 *Political Science* 41 at 43-4.

⁶⁴ See Borgen 'The theory and practice of regional organisation intervention' op cit note 55 at 845.

⁶⁵ David Wippman 'Kosovo and the limits of international law' (2001) 25: *Fordham International Law Journal* 127 (hereafter Wippman 'Kosovo and the limits of international law').

⁶⁶ See Michael J Glennon 'The new interventionism: the search for a just international law' (May-June 1999) 78: 3 *Foreign Affairs* 2 at 3.

⁶⁷ See the discussion of the NATO-led intervention in Libya in chapter 3 above.

⁶⁸ This paradigm shift is featuring with more frequency than ever before in discourses. For example, though the ICISS says the UNSC should be the right agency to authorise military intervention, it does not exclude the possibility of regional organisations taking unilateral actions where the UNSC fails to act. See International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) para 6.37 (hereafter ICISS Report).

⁶⁹ Berger 'ECOWAS intervention in Sierra Leone' op cit note 14 at 632.

⁷⁰ Allain 'The true challenge to the United Nations' op cit note 15 at 287.

peace and security in Africa and that these provisions remain subordinated to article 24 of the Charter.⁷¹ The AU (and ECOWAS) provisions in this respect could co-exist with the Charter law *mutantis mutanda*.⁷² Besides oversimplifying the conundrum, it is not possible to come to such conclusion without declaring the AU and ECOWAS provisions invalid one way or the other and the attempt at legal manoeuvring without necessarily establishing the validity of the provisions vis-à-vis article 24 end up imputing to the said provisions the exact opposite of what they sought to achieve—establish a framework for independence of action on the use of force to halt atrocities in Africa through the adoption of legal framework granting pre-eminent role and rights of unilateral action to the AU and ECOWAS on the primary responsibility for the maintenance of peace and security in Africa and West Africa respectively. However, to what extent they could do so through an extra-Charter legal framework adopted by them is what requires some inquiry.

Dan Kuwali for example, does not explain the import of articles 16(1) and 17(1) & (2) of the AUPSC Protocol, the two fundamental provisions that define AU-UN relationship in the area of maintenance of peace and security in Africa. It is noteworthy that article 16 uses the word ‘promote’ when it stipulates the relationship between the AU and other regional organisations on the continent; whereas in article 17(1), where it defines the relationship between the AU and the UN, it uses the word ‘maintenance’, the exact word used in article 24 of the UN Charter which allocates that role to the UNSC. According to Black’s Law Dictionary, ‘maintenance’ means ‘the continuation of something ... the assertion of a position or opinion.’⁷³ This appears stronger than the word ‘promoting’ which connotes encouraging or fostering an act and thus of less coercive character.⁷⁴ It is unclear whether the deliberate choice of the word ‘promoting’ was intended to suggest that the relationship between the AU and other regional organisations in Africa is vertical because the word ‘maintenance’ used in article 17(1) seems to suggest that the AU and UN are in a vertical relationship in which case the distribution of authority would be hierarchical with the UN at the apex. But when read together with article 17(2), it seems to suggest that the relationship between the AU and UN is horizontal and the AU is not required to defer to the UNSC in exercising the primary responsibility for the maintenance of peace and security in Africa

⁷¹ See Kuwali ‘The end of humanitarian intervention’ op cit note 40 at 57.

⁷² *Id.*

⁷³ Black’s Law Dictionary 8 ed. (2004) 973.

⁷⁴ *Ibid* at 1250.

whether involving the use of force or otherwise.⁷⁵ The right of humanitarian intervention as conceived under these frameworks is exercisable by the AU/ECOWAS which occupy pre-eminent positions in this respect which ‘... usurps the ultimate control vested in the United Nations System over the use of force.’⁷⁶

It could also mean that the words were intended to convey a less formalized relationship between the AU and other regional organisations whereas ‘maintenance’ implies a more formalized relationship with the UN. Perhaps it is intended that in its relationship with other regional organisations in Africa, the AU would function in more or less advisory or coordinating role (not likely to use force). It is therefore important that the future legal relationship between the UN and the AU/ECOWAS be clarified, more so when these regional bodies have acquired legal capacity and are building military, and logistics capacity for humanitarian intervention.⁷⁷

The call for a greater role for regional organisations in conflict resolution and closer partnership and cooperation with the UN cannot take place outside the context of a redistribution of authority and competency and that in itself is also tied to UNSC reform which is unlikely to happen any time soon. Nor is it at all agreed what the terms of such cooperation and collaboration should be. While the UN insists that cooperation with regional organisations should be pursued within the framework of Chapter VIII,⁷⁸ the AU, ECOWAS and other regional organisations think otherwise. The OAS for example, has made clear that it rejects any collaboration framework with the UN built on the ‘basis of prescription by one organisation to another’ or the superintendence of the UN over regional organisations.⁷⁹ And that is exactly what Chapter VIII does. The AU’s primary responsibility to promote peace, security and stability in *Africa* aims at utilising its unique position as a regional organisation in areas of prompt response to peacekeeping and peace enforcement (something not even the staunchest universalist could fault), in Africa and this is not inconsistent with the primacy of the UNSC which is responsible for the maintenance of *international* peace and security.

⁷⁵ Allain ‘The true challenge to the United Nations’ op cit note 15 at 286.

⁷⁶ Ibid at 287.

⁷⁷ Tardy ‘The Brahimi Report: Four years’ on op cit note 56 at 15.

⁷⁸ Lessons Learned Unit, Department of Peacekeeping Operations, United Nations ‘Cooperation between the United Nations and regional organisations/arrangements in a peacekeeping environment: suggested principles and mechanisms’ (1999) 7.

⁷⁹ See Boutros-Ghali *Agenda for peace: Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary General*, U.N. Doc. S/25996(1993) 13, 14, 18. See also Borgen, ‘The theory and practice of regional organisation intervention’ op cit note 55 at 822-3.

4.4.3. *Who Authorises the Use of Force in Africa?*

The third arena of normative conflict between the AU/ECOWAS framework and UN Charter regime is the question of who should authorise the use of force in Africa. The three regimes locate authority in different agencies. By virtue of article 52 of the Charter, ECOWAS and the AU have the authority to settle disputes amicably without reference to the UNSC. Under article 53(1) of the UN Charter only the UNSC can authorise AU to use force for the maintenance of international peace and security in Africa. However, a combined reading of article 4(j), 16 and 17 of the AUPSC Protocol gives the power to authorise the use of force in Africa to the AU. These provisions are in conflict with article 53(1) of the UN Charter which states:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council. ...

However, under article 17(1), the AUPSC is expected to ‘cooperate’ with other agencies one of which is the UNSC. Rather than prescribe that the AUPSC obtain authorisation from the UNSC, article 17(2) provides that the UN should provide assistance and support to the AUPSC.⁸⁰ Allain has observed thus:

The African Union ... has, by way of regional instruments, overridden the multilateral control over the use of force which has been vested in the United Nations Security Council since 1945. In so doing, African States have decided that they will, henceforth, not require Security Council authorisation to act on the Continent, and in fact, they have given themselves the prerogative to intervene militarily, not only beyond the authority of the UN Security Council, but by widening the scope of permissible use of force in Africa, by acting in “respect to grave circumstances” such as war crimes, genocide, and crimes against humanity.⁸¹

The implication of this is that both the AUPSC and the UNSC seem to enjoy coordinate jurisdiction with respect to authorisation of use of force to maintain peace and security in Africa.⁸² The AUPSC Protocol pays allegiance to the primacy of the UNSC on the one hand and on the other hand espouses a new role that would see African states take control of processes that deal with enforcement measures in Africa.⁸³ What could have influenced this

⁸⁰ Allain ‘The true challenge to the United Nations’ op cit note 15 at 286. See the recommendations of the IPEP op cit note 2 para 24.22, calling on the UN to provide financial, logistic and capacity assistance to the OAU (AU). In the wake of the Libya intervention, there is renewed talk of increased partnership between the UN and regional organisations but without a reform of the UN to make it more representative this remains a dim hope.

⁸¹ Allain ‘The true challenge to the United Nations’ op cit note 15 at 259.

⁸² Ibid at 286. See article 16(1) and 17(1) of the AUPSC Protocol op cit note 20.

⁸³ Allain ‘The true challenge to the United Nations’ op cit note 15 at 286.

propensity for unilateral action? It could not have been inadvertent because UN staff served as support personnel during the drafting and would have brought the normative clash this provision would create under article 53 of the UN Charter to the attention of the AU.⁸⁴ Secondly, the AU/ECOWAS also rejected the examples of the constitutive documents of NATO and the OAS expressly requiring UNSC authorisation for enforcement action.⁸⁵ The logical conclusion therefore, is that the AU/ECOWAS determined to create a legal framework for unilateral action for humanitarian intervention in Africa. Further evidence of this exists in the Ezulwini Consensus, where, the AU stated that:

The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted “after the fact” in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations. ...⁸⁶

Thus, although the AU agreed in principle that its intervention should be with UNSC approval, it however attached a condition—that such approval would be sought [*only*] where the UN accepts to fund the operation.⁸⁷ The UN Charter does not provide for such condition and though there has been cooperation between the UN and ECOWAS in the past, nothing in practice suggests how this AU condition would be implemented and the normative impact on UN-AU relationship.

There are several questions and normative ambiguities involved, because whereas the AU purports to recognise the primacy of the UN to authorise the use of force, the AU did not subordinate the AUPSC to the UNSC.⁸⁸ Will the AU feel itself bound to obtain UNSC authorisation (whether prior or after) if the UN refuses to fund such intervention? The answer is likely negative because UN funding is now a condition for the AU seeking UNSC authorisation for enforcement action. In the Elzuwini Consensus, the AU demonstrated an unwillingness to continue to subject itself to the principle of subsidiarity enshrined in Chapter

⁸⁴ Kioko also observes that when the issue of normative incompatibility between the AU Act and UN Charter was raised, ‘they were dismissed out of hand.’ See Ben Kioko ‘The right of intervention under the African Union’s Constitutive Act’ (2003) 85:852 *Review of the International Committee of the Red Cross* 807 at 821.

⁸⁵ See Martin Kunschak ‘The African Union and the right to intervention’ (2006) 31 *South African Yearbook of International Law* 195 at 205-6 (hereafter Kunschak ‘The African Union and the right to intervention’). See article 7 of the Treaty of the North Atlantic Treaty Organisation signed at Washington D.C. on 4 April 1949; and article 131 of the OAS Charter *supra* note 59 which provides that the rights and obligations of OAS Members under the UN Charter is not impaired by the provisions of the OAS Charter. More specifically, article 3(6) of the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance adopted at San Jose, Costa Rica on 26 July 1975, subjects the inherent right of individual and collective self-defense to the conditions laid down in the UN Charter.

⁸⁶ Emphasis mine.

⁸⁷ See ‘Ezulwini Consensus’ *supra* note 33.

⁸⁸ Allain ‘The true challenge to the United Nations’ *op cit* note 15 at 286.

VIII of the Charter particularly, article 53(1). Based on its framework, it is arguable that the AU/ECOWAS appears not to be under obligation to obtain authorisation from, or to defer to the UNSC on the use of force in Africa thus raising questions about the legal validity of such provisions under the Charter.⁸⁹

Further to the above, the AU seems to suggest that there could be cases where it would not be bound to obtain UNSC authorisation at all. The phrase ‘in such cases’ in the above excerpt presupposes the existence, or at least the possibility of other circumstances where the prescribed UNSC authorisation (whether before or after intervention) would be inapplicable. Under this provision, there seems to be some residual powers under which the AU has reserved for itself the latitude for unilateral action.

A third point to be made here is the *ex post facto* approval proposed in the Elzuwini Consensus. There is no doubt about the efficacy of this approach as a compromise with the UNSC as the authoritative decision making agency under the Charter system. However, there is the inherent danger of blurring the allocation of competences and further eroding the legitimacy of the UNSC.⁹⁰ In this sense, the intervention in Libya was a potentially volatile case where there was a likelihood of the practical manifestation of this normative ambiguity and incompatibility between the AU and the UNSC as both agencies pursued different approaches to the resolution of the crisis beyond the initial consensus on no-fly-zone resolutions.⁹¹ It was a threat, though subtle, to the practice by both the UN and AU to differ to one another and preferring to avoid any intervention where the other agency was already involved. Nevertheless, the crisis still underscores the need for normative clarification and as President Jacob Zuma of South Africa stated, there is an urgent need to clarify the legal

⁸⁹ See Wippman ‘Pro-Democratic intervention’ *op cit* note 35 at 145. Cf. Kithure Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: a critical appraisal’ (2003) 3 *African Human Rights Law Journal* 97 at 114, contending that the drafters of the Protocol made ‘sustained effort’ to make the AU mechanism ‘subservient’ to the UNSC. This conclusion is far-fetched and is neither supported by a textual nor contextual reading of the provisions.

⁹⁰ Moore supports the view for an *ex post facto* ratification. Since the Charter does not explicitly state whether the authorisation should be prior or *ex post facto*, some have argued for *ex post facto* ratification in urgent cases as a way of circumventing delays occasioned by UNSC. See John Norton Moore ‘The role of regional arrangements in the maintenance of world order’ in Cyril E Black & Richard A Falk (eds) *The Future of the International Legal Order* Vol III (1971) 122-64 at 159 (hereafter Moore ‘The role of regional arrangements’). It has been used at least in two instances. First in Liberia, see S/RES/788(1992) 19 November, 1992; and subsequently in Sierra Leone. See S/RES/1132(1997). For a critique of this practice, See Deen-Racsmány Zsuzsanna ‘A redistribution of authority between the UN and regional organisations in the field of the maintenance of peace and security’ (2000) 13 *Leiden Journal of International Law* 297 at 307 (hereinafter, Deen-Racsmány ‘A redistribution of authority’).

⁹¹ The 3 African states members of the UNSC (Gabon, Nigeria and South Africa) voted for Resolution 1973.

framework for partnership and cooperation between the UN and the AU/ECOWAS and the future role the former should play in conflicts in Africa.⁹²

If the AU's provision for unilateral action is audacious, then the ECOWAS framework is even more so. With an unassailable precedent in unilateral action in regional humanitarian intervention, ECOWAS has located the right to authorise the use of force in West Africa in its Mediation and Security Council by virtue of article 10(c) of the ECOWAS MCPMRPS. The provision does not require the Mediation and Security Council to obtain UNSC authorisation. Again, this is in conflict with article 53(1) which requires all regional organisations to obtain UNSC authorisation for use of force deployments and as an observer rightly opines, 'ECOWAS had institutionalized a mechanism that allows it to opt out of the UN Security System.'⁹³ ECOWAS has created for itself, a 'micro Security Council' modelled after the UNSC to which it gave the power to unilaterally authorise and initiate regional military intervention in the territory of ECOWAS members.⁹⁴ According to Allain:

With tacit consent having been given to the ECOWAS interventions in both Liberia and Sierra Leone, it should not come as a surprise that this West African organisation moved to institutionalize the power it had appropriated from the UN Security Council in the domain of peace and security. By its 1999 Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, ECOWAS decided that its newly established Mediation and Security Council could 'authorise all forms of intervention and decide particularly on the deployment of political and military missions.'⁹⁵

The AU and ECOWAS laws suggest a paradigm shift in regional practice by asserting a right to unilateral enforcement action without the prior authorisation of the UNSC.⁹⁶ Unlike the case of NATO, which, though, has undertaken unilateral action, still retains prior UNSC authorisation in its constitutive document, the AU and ECOWAS laws introduce a right of unilateral action by regional organisations.

⁹² See 'Zuma proposes closer ties between UN and AU *Mail & Guardian* 12 January 2012 available at <<http://www.mg.co.za/article/2012-01-12-zuma-sets-proposals-for-better-au-un-cooperation>> (accessed on 9 April 2012).

⁹³ This normative ambiguity is still present and was mildly put by the AU Commission Chairperson thus 'The challenge for the AU and the UN is how to apply the spirit of Chapter VIII without prejudicing the role of the UNSC, on one hand, and without undermining or otherwise curtailing the efforts of the AU to develop its own capacity to provide adequate responses to the security challenges in Africa, on the other'. See 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, Peace and Security Council 307th Meeting, Addis Ababa, Ethiopia, 9 January 2012, PSC/PR/2.(CCCVII) at 23, 25.

⁹⁴ Wippman 'The nine lives of article 2(4)' op cit note 54 at 40-5.

⁹⁵ Allain 'The true challenge to the United Nations' op cit note 15 at 262.

⁹⁶ Wippman 'The nine lives of article 2(4)' at 150.

The source of the legal validity of this norm has been disputed and it is argued that there is as yet no right of unilateral regional humanitarian intervention.⁹⁷ This author points out that since the prohibition of the unilateral use of force both by states and regional organisations was a collective decision of the entire international community, it would take the same procedure to abolish it.⁹⁸ But this can hardly be the case because states intervene in crises for different reasons and only few on strictly humanitarian grounds. NATO intervention in Libya once again demonstrates that the reason the US and its allies refused to intervene in Darfur was not so much because they respected article 2(4) but because there was not sufficient national interest at stake. This, most likely explains why a finding by the US that genocide occurred in Darfur was not sufficient motive to persuade intervention compared to Libya where the scale of violations of human rights was not even close to the threshold for intervention whether under traditional humanitarian intervention or under the emerging R2P norm.⁹⁹

It is hard not to conclude that the unilateral actions by NATO and ECOWAS indicate a shift in how the legality of humanitarian intervention in general¹⁰⁰ and unilateral action by regional organisations in particular is viewed. NATO's intervention in Kosovo was described as 'illegal but legitimate'¹⁰¹ and ECOWAS was applauded for its interventions even by the UNSC that failed in its duty.¹⁰² AU/ECOWAS legal regimes seek to bring clarity and consistency to the normative arena of unilateral humanitarian intervention by regional organisations by codifying both the substantive and procedural criteria for their legal validity. It seems that the NATO and ECOWAS interventions marked the gradual erosion of the old system and the beginning of an evolving new normative regime of humanitarian intervention by regional organisations and international law.¹⁰³ This point is discussed further in chapter 7.

⁹⁷ Nigel D White 'Regional organisations and humanitarian intervention' (2007-8) 24 *Merkourios-Utrecht Journal of International & European Law* 24 at 31 (hereafter White 'Regional organisations and humanitarian intervention').

⁹⁸ Ibid at 30.

⁹⁹ See Michael Walzer 'The case against our attack on Libya' *The New Republic* 20 March 2011 available at <http://www.trn.com/article/world/85509/the-case-against-our-attack-on-libya> (accessed on 7 February 2012).

¹⁰⁰ Kiho Cha 'Humanitarian intervention under the Charter of the United Nations' (Summer/Fall 2002) *Seton Hall Journal of International Relations and Diplomacy* 134 at 137 (hereafter Cha 'Humanitarian intervention under the Charter').

¹⁰¹ See Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 164.

¹⁰² See S/RES/788 (1992) 19 November, 1992 on Liberia; and S/RES/1132/(1997) on Sierra Leone.

¹⁰³ See Antonio Cassese 'Ex Injuria, jus oritur: are we moving towards the international legitimization of forcible humanitarian countermeasures in the world community?' (1999) 10 *EJIL* 23 at 27; Jeremy Levitt 'Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International & Comparative Law Journal* 333 at 335. Cf. Bruno Simma 'The UN, NATO and the use of force: legal aspects' (1999) 10:1 *EJIL* 1 at 4 (hereafter Simma 'The UN, NATO and the use of force');

It suffices here to mention that the utility of this regime at a time the world is searching for a legal framework for the implementation of R2P cannot be over-emphasised and a partnership of cooperation rather than one of subsidiarity and competition between the UN and AU/ECOWAS is to be preferred. This should avoid the Ivory Coast and Libya situation where Africa becomes the testing ground for newly-minted military hardware in pursuit of diverse interests under the guise of civilian protection.¹⁰⁴

Notwithstanding any pretensions to the contrary, the AU Act and the AUPSC Protocol all reveal the determination of African States to take control of the use of force and humanitarian intervention in Africa.¹⁰⁵ The ambiguous situation created by this in terms of the relationship between the AU and the UN on the authorisation of the use of force in Africa has attracted criticisms from commentators who have dismissed the AU provisions.¹⁰⁶ But to dismiss these provisions based on the legal inconsistencies alone without a theoretical inquiry into its legal validity ignores the circumstances and context in which they were adopted.¹⁰⁷ It is the peripheral roles of Africa in the international system and the reluctance to commit troops and resources to Africa that is leading African leaders down the path of unilateral action 'without concern for international endorsement.'¹⁰⁸ The rule deducible from the AU provision and arguably ECOWAS as well, is that the agencies are prepared to obtain UNSC authorisation for the use of force where possible but to also be able to act without it when necessary.¹⁰⁹ The aim is to retain the right to unilateral action in Africa. As succinctly put by former President Thabo Mbeki of South Africa:

Our view has been that it's critically important that the African continent [deals] with these conflict situations on the continent ... we have not asked for anybody outside of

White 'Regional organisations and humanitarian intervention' op cit note 24 at 31; Wippman 'Kosovo and international law' op cit note 65 at 129.

¹⁰⁴ For a critique of NATO's failure to protect civilians in Libya, see John-Mark Iyi 'The duty of an intervention force to protect civilians: A critical analysis of NATO's intervention in Libya' (2012) 2 *Conflict Trends* 41 at 43-7.

¹⁰⁵ Allain 'The true challenge to the United Nations' op cit note 15 at 286.

¹⁰⁶ Clement Adibe 'The Liberian conflict and the ECOWAS-UN partnership' in Thomas G Weis (ed) *Beyond UN Subcontracting: Task Sharing with Regional Security Arrangements and Service-Providing NGOS* (1998) 84.

¹⁰⁷ Louise Fawcett 'The evolving architecture of regionalization' in Michael Pugh & Waheguru Pal Singh Sidhu (eds) *The United Nations and Regional Security: Europe and Beyond* (2003) 11 at 20 (hereafter 'Fawcett 'The evolving architecture of regionalization').

¹⁰⁸ Richard Jackson 'The dangers of regionalizing conflict management: the African experience' (2000) 52:1 *Political Science* 41 at 48.

¹⁰⁹ Anning 'The UN and the African Union's security architecture' op cit note 46 at 17.

the African continent to deploy troops to Darfur. It's an African responsibility, and we can do it.¹¹⁰

Though the vesting of authority to intervene in the UNSC created problems, this is not sufficient justification for AU/ECOWAS right of intervention without UNSC authorisation or to suggest that such authorisation could be obtained after the fact.¹¹¹ Yet the UN Charter is silent on whether the authorisations should be prior or post.¹¹² So, it is argued that it is legal if the regional organisation obtains the authorisation ex-post facto.¹¹³ The main argument against treaties like the AU/ECOWAS is that if unilateral enforcement actions were allowed, the UNSC will lose its primacy in the maintenance of international peace and security and the regulation of the use of force.¹¹⁴

4.5 THE SITUATION INVOLVING NON-MEMBERS LIKE MOROCCO (AU) AND MAURITANIA (ECOWAS)

The fourth arena of apparent normative conflict between the AU/ECOWAS regimes involves states who are non-members of these Organisations but who are nevertheless situated within the geographical areas of operation of the AU and ECOWAS respectively. The question is which legal regime would be applicable in the relationship between such non-member states and the relevant regional organisation? For example, Morocco is not a member of the AU and Mauritania is not a member of ECOWAS. The question arises therefore whether the respective organisations can legally intervene should any of these countries give rise to the circumstances warranting intervention according to the constitutive document of these organisations? The answer, it seems, would be in the negative because as non-members the legal regime regulating their relationship with the AU and ECOWAS respectively would be the Charter law and general international law rather than the humanitarian intervention regimes of the AU and ECOWAS.¹¹⁵ Thus, articles 2(4), 24, 53(1) and Chapter VII of the Charter and rules of general international law will apply. The same could be said of states that might subsequently withdraw their membership from the AU and ECOWAS in terms of these provisions. However, such norms of intervention may also bind non-members since

¹¹⁰See 'Bush discusses mutual goals with NATO, South African leaders' Available at <http://www.eucom.mil/article/21619/Bush-discusses-mutual-goals-Nato-South-African> (accessed on 11 May 2012).

¹¹¹Cha 'Humanitarian intervention under the charter' op cit note at 140-1.

¹¹²Simon Chesterman *Just War or Unjust Peace* (2001) 123 (hereafter Chesterman 'Just War or Unjust Peace').

¹¹³Moore 'The role of regional arrangements' op cit note 90 at 153.

¹¹⁴Monika Hakimi 'To condone or condemn? Regional enforcement actions in the absence of Security Council authorisation' (2007) 40 *Vanderbilt Journal of International Law* 643 at 645.

¹¹⁵It is trite that a state cannot be bound by a treaty to which it is not a party.

they derive from regional customary international law and in that regard, the AU and ECOWAS norms may apply to Morocco and Mauritania respectively even though they are not members of the AU and ECOWAS.¹¹⁶ In the case of AU/ECOWAS and countries outside Africa, arguably, the UN Charter and general international law regulates their relationship in terms of humanitarian intervention.

4.6 IMPLICATIONS OF ARTICLE 103 OF THE UN CHARTER

Article 103 of the UN Charter is described as the supremacy provision and it provides that ‘[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.’ However, the scope of this provision is not clear and has been disputed. For example, does article 103 invalidate the entire inconsistent treaty or only voids the specific provisions which are inconsistent with the UN Charter? In our context, does article 103 invalidate the entire AU/ECOWAS treaties or merely void article 4(h) of the AU Act, articles 16 and 17 of the AUPSC and article 10(a), (c), and article 25 of the ECOWAS MCPRMPS Protocol? Are the provisions void ab initio or are they merely voidable?¹¹⁷ The attitude of some commentators has been to regard only the specific provisions that violate the Charter as invalid rather than the entire treaty.¹¹⁸ Where the obligations under the entire treaty conflicts with the Charter, then the entire treaty may be void ab initio but where it is only specific provisions that are inconsistent with the Charter, then only those specific provisions may be void depending on whether the norm in question is a jus cogens norm.¹¹⁹ As put by Cha ‘[i]t is understood that the provisions in a regional Charter could not, under any circumstances, contravene the UN Charter; if so, article 103

¹¹⁶ This argument is developed further in chapter 8.

¹¹⁷ See Rain Liivoja ‘The scope of the supremacy clause of the United Nations Charter’ (2008) 57 *International & Comparative Law Quarterly* 583 at 583 (hereafter Liivoja ‘The scope of the supremacy clause’). Simma ‘The UN, NATO and the use of force’ op cit note 103 at 4. Some authors have distinguished between what they term ‘apparent’ and ‘genuine’ normative conflict. While ‘apparent’ can be ‘explained away’ without the use of a rule of normative conflict, a genuine normative conflict requires a normative conflict principle to resolve it. See Antonios Tzanakopoulos ‘Collective security and human rights’ in Erika de Wet & Jure Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (2012) 51. Obviously, the normative incompatibility that exists between the AU and ECOWAS RHMI highlighted above are not merely apparent but real. See Chapter 7 *infra*.

¹¹⁸ Cha ‘Humanitarian intervention under the Charter’ op cit note 100 at 136. States are bound to carry out the binding decisions of the UN but it is agreed that UN and state practice could change the obligations state originally assumed under the Charter. It is possible that new obligations emerge overtime not caught by article 103. See Paulus & Leiß ‘Article 103’ op cit note 36 at 2135. See generally Liivoja ‘The scope of the supremacy clause’ op cit note 117.

¹¹⁹ See Paulus & Leiß ‘Article 103’ op cit note 36 at 2135.

would make UN rights and obligations preeminent should they come into conflict with the provisions of a regional Charter.’¹²⁰

It is not however clear what the position is concerning certain provisions of a treaty which though are themselves not inconsistent with the Charter but are connected to other provisions which are.¹²¹ Bernhardt submits that these should be dealt with under the general law of treaties.¹²² These inconsistencies in the obligations of AU/ECOWAS States extend to both substantive and procedural matters. At the substantive level, the scope of the circumstances under which force may be used under the Charter has been substantially expanded by both the AU and ECOWAS frameworks. Under the AU/ECOWAS regimes force can now be used by the AU/ECOWAS not only in accordance with article 51 and Chapter VII of the UN Charter, but in other situations including in both intra and inter-state conflicts as provided in their respective legal instruments.¹²³ ECOWAS even expands the legal and normative basis for the use of force within its member states to a new height by introducing the novel right of pro-democratic intervention in its legal regime.¹²⁴

There is no doubt these provisions create obligations for member states which are inconsistent with the UN Charter provisions already highlighted above but it has also been argued that the AU/ECOWAS provisions derive from state consent which falls outside the ambit of article 2(4) and 53 and so not open to the application of article 103.¹²⁵ This argument is explored further in chapter 7 but it suffices to state here that the provisions introduce far-reaching norms to the law of use of force and humanitarian intervention in particular and international law in general; such that even if the AU/ECOWAS accepts the principle of subsidiarity and only intervenes in their member states with UNSC authorisation, the impact of these regional norms on general international law will be profound nonetheless.¹²⁶ It will not be too much to expect that should the Charter be amended as part of a proposed UN

¹²⁰ Cha ‘Humanitarian intervention under the Charter’ op cit note 100 at 136.

¹²¹ Bernhardt ‘Article 103’ op cit note 36 at 1122. This has implications for such several provisions in the AUPSC Protocol some of which presuppose the legal validity of article 4(h) of the AU Act. In the case of ECOWAS, it seems this would invalidate such provisions as article 22(d) that empower ECOMOG to carry out enforcement operations in a member states presupposing the legal validity of the ECOWAS humanitarian intervention legal regime.

¹²² Bernhardt ‘Article 103’ op cit note 36 at 1122. The tendency

¹²³ See Allain ‘The true challenge to the United Nations’ op cit note 15 at 239. Under the proposed amendment to article 4(h) the AU can also use force where a situation constitutes a ‘threat to legitimate order’.

¹²⁴ See ECOWAS MCPMRPS Protocol op cit note 17.

¹²⁵ Kuwali ‘The end of humanitarian intervention’ op cit note 40 at 46.

¹²⁶ Allain ‘The true challenge to the United Nations’ op cit note 15 at 284.

reform agenda, these AU/ECOWAS norms would be some of the issues to be considered for incorporation into the Charter taking into account current developments in international law.

4.7 TOWARDS NORMATIVE COMPATIBILITY OF AU/ECOWAS AND UN CHARTER REGIMES

Given the arenas of normative ambiguities discussed above, the immediate task for legal theorists then becomes how to design a regime of compatibility between the regimes. In this regard, it is important to bear in mind the circumstances that led to the present situation in the first place. The increase in the number of intra-state conflicts in the post-Cold-War world demanded more interventions than had hitherto been possible and effective response from the international community would have required a re-structured UN and a shift in the global governance paradigm—a change that was unlikely to happen then or any time soon.¹²⁷ These failures of the UN have eroded the credibility and legitimacy of the organisation thereby bolstering the call for higher degree of independence and positive roles by African states in the exercise of sovereignty at the regional level.¹²⁸ As a conflict-prone region, this led Africa to the pro-interventionist legal framework of the AU/ECOWAS through which they seek to obviate the UN structure which many developing countries feel marginalised them. These countries and organisations hope to bring about change in the international legal order by taking the initiative to expand the legal discourse and creating new norms.¹²⁹ Given the changing pattern of global relations, regional organisations (not the least the AU and ECOWAS) have realised that major power would be disinclined to intervene abroad lest of all Africa, as they become more and more consumed by their own domestic problems, thus, they would have to take the challenge of intervening in their own regions.¹³⁰ David Wippman puts it succinctly thus:

ECOWAS has concluded that humanitarian emergencies in member States invariably spill over into neighbouring States and jeopardize regional security generally. ECOWAS has also concluded that it cannot rely on the U.N. to intervene effectively in such cases, and so it must be prepared to shoulder much of the burden itself.¹³¹

¹²⁷ Fawcett 'The evolving architecture of regionalisation' op cit note 111 at 16.

¹²⁸ Ibid at 16-17.

¹²⁹ Tiyana Maluwa 'The OAU/African Union and international law: Mapping new boundaries or revisiting old terrain?' (March-April 3, 2004) 98 *ASIL Proceedings* 232 at 238 (hereafter Maluwa 'The OAU/African Union and international law').

¹³⁰ Cha 'Humanitarian intervention under the Charter' op cit note 100 at 136.

¹³¹ Wippman 'Kosovo and the limits of international law' op cit note 65 at 145.

The question of how best to deal with the problem of unilateral actions of humanitarian intervention—whether by states, coalition of the willing or regional organisations has produced varied responses with some advocating for ‘tolerable breaches’,¹³² ex post facto ratification,¹³³ equation of non-condemnation to authorisation,¹³⁴ acquiescence and so on.¹³⁵ Whatever approach is adopted, the failure of the Charter system to prevent the atrocities in Rwanda, Liberia, Sierra Leone, Somalia and Darfur all in Africa are perhaps reasons for arguing that the current system has been transformed by the consequences of these failures, leading to a system that now finds expression in the AU/ECOWAS legal regimes. This is an important achievement for the AU, which translates to the legal capacity to bypass the UNSC deadlock and evolve an independent humanitarian intervention mechanism for Africa.¹³⁶ There is little utility both for the object of humanitarian intervention and the Purposes and Principles of the UN to set up international criminal tribunals to prosecute perpetrators of mass atrocity crimes spending huge sums of money it claimed not to have had when there was yet opportunity to intervene and rescue the victims.¹³⁷

Obviously, African states are trying to chart a new course by creating new norms, or, at best, re-interpret existing international law principles.¹³⁸ Therefore, they have been less than perturbed by the existing normative conflict between their regional legal framework and the UN Charter system. It would seem for the moment that the actors have been content to allow the ambiguities to remain, perhaps to be resolved through future practice and developments.

Some of the few scholars who have written on the AU/ECOWAS humanitarian intervention legal regimes have attempted to resolve this normative ambiguity differently.¹³⁹

¹³² ‘Tolerable breaches’ here means ‘an action contrary to formal treaty rules but desirable on humanitarian grounds and accepted, or even approved, by most States; an action that necessarily loosens somewhat the rules governing the use of force, but only modestly, given the unique circumstances and the purposes for which force was used’. See David Wippman ‘Kosovo and the limits of international law’ (2001) 25:1 *Fordham International Law Journal* 127 at 135-36.

¹³³ See Chesterman ‘Just War or Just Peace?’ op cit note 112 at 123; David Wippman ‘The nine lives of Article 2(4)’ (2007) 16 *Minnesota Journal of International Law* 387 at 403. Scholars who hold this view rely on several UNSC resolutions such as those that did not condemn but ‘commended’ the unilateral interventions of ECOWAS in Liberia S/RES 788/ (1992), 19 November 1992, para 1; and Sierra Leone S/RES/1270 (1999) 22 October 1999, para 11.

¹³⁴ Monica Hakimi ‘To condone or condemn? Regional enforcement actions in the absence of Security Council authorisation’ (2007) 40 *Vanderbilt Journal of International Law* 643 at 656.

¹³⁵ White ‘Regional organisations and humanitarian intervention’ op cit note 24 at 26.

¹³⁶ Kuwali ‘The end of humanitarian intervention’ op cit note 40 at 45.

¹³⁷ Ibid at 42.

¹³⁸ Maluwa ‘The OAU/African Union and international law’ op cit note 129 at 236.

¹³⁹ See generally Ademola Abbas *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004); Kuthire Kundiki *Humanitarian Intervention in Africa: The Role of*

But most, if not all, agree that there is a conflict between these regimes and the AU/ECOWAS with some taking moderate positions between two extremes.¹⁴⁰ Others have attempted to construct a basis for normative compatibility between the regimes with reference to the AU. Kuwali, for example, adopts a utilitarian approach, stating that article 4(h) is an ‘a priori invitation to intervene’ which complements but does not supplant existing UN structures for the implementation of R2P, and thus, should exist side by side with the UN framework.¹⁴¹ Kuwali advocates the implementation of article 4(h) through the pacific settlement framework in article 53(1) of the Charter so as to make it compatible with the UN Charter since in that case, the AU would not require UNSC authorisation.¹⁴² He concludes that in any case, should the AU desire intervention it would require UN authorisation.¹⁴³

While this may be a useful approach to reconciling the normative ambiguities it is however doubtful whether this was what the African leaders set out to achieve when they created a normative framework outside of the UN Charter system on use of force and humanitarian intervention. The shortcoming of this approach is that by focusing primarily on the utility of the AU norms as a basis for reconciling the normative incompatibility, it does not give due consideration to the normative, legal and structural defects in the current system. It therefore ignores part of the primary mischief the draftsman of the AU/ECOWAS treaties intended to cure and so risks compromising substance for form. The result is that the approach weakens the normative impact of the AU/ECOWAS treaties which is the prevention of another Rwanda. It sacrifices the progressive normative reform of the law of humanitarian intervention by the AU/ECOWAS on the altar of normative compatibility with UN Charter.

However, whether we adopt a textual or contextual reading of the provisions, it does not seem that is what a combined reading of article 4(h), (j) of the AU Act and article 16 and 17 of the AUPSC suggests. While the interpretation avoids the normative conflict conundrum, it does so at a considerable cost to the most fundamental and revolutionary achievement of the entire legal framework: providing a valid legal basis for unilateral action of humanitarian intervention by the AU notwithstanding the UN Charter system.

Intergovernmental Organisations (unpublished PhD thesis, University of Pretoria; (2005); Kindiki ‘The normative and institutional framework of the African Union’ op cit note 89; Kunschak, ‘The African Union and the right to intervention’ op cit note 85; Maluwa ‘The OAU/African Union and international law’ op cit note 129 at 238.

¹⁴⁰ Kindiki ‘The normative and institutional framework of the African Union’ op cit note 89 at 106-8, 114-5.

¹⁴¹ Kuwali ‘Persuasive prevention’ op cit note 28 at 17.

¹⁴² Kunwali ‘The end of humanitarian intervention’ op cit note 40 at 59.

¹⁴³ Ibid at 46.

The interpretation suggested by Kuwali takes the AU back into the invidious position of being faced by mass atrocities but not being able to act because UNSC authorisation has been blocked by a veto with the resulting consequence of failure to prevent genocides and other mass atrocity crimes which is exactly the mischief in the current legal order that the AU/ECOWAS laws were intended to cure. It is argued that under these regimes, the intention, modus and effect, of article 4(h), and 25 of the ECOWAS MCPMRPS Protocol were aimed as legal revolution to either push for a quicker reform of the UN Charter system along the lines suggested by the AU in its Ezulwini Consensus or to accept the AU/ECOWAS new principled stance on the law of humanitarian intervention in Africa.¹⁴⁴ This view draws its support from the Ezulwini Consensus, and more recently, some AU decisions and resolutions in 2012.¹⁴⁵

The argument for non-military implementation of article 4(h) by the AU, while welcomed, might not be effective in all cases. Certain degree of humanitarian catastrophes caused by armed conflict can only be halted by armed intervention. This means that diplomatic, economic, judicial and all other non-military strategies must be backed by real force though such force should always be a last resort.¹⁴⁶ This assertion was true under the doctrine of humanitarian intervention, it is true under the emerging norm of R2P calling for a new normative framework, and it is also true under the AU/ECOWAS framework.

Besides, the challenges the AU/ECOWAS RHMI are likely to face in implementation is not the same thing as the legal effect or impact the provisions would have. However, it is possible that such impact could be affected in practice by these challenges. The major practical implications of the AU/ECOWAS, at least for now, is that Africa has several policy

¹⁴⁴ See the Ezulwini Consensus supra note 33 stating the AU's position that it is opposed to the continued existence of veto power in the UNSC.

¹⁴⁵ See Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV), Assembly/AU/Dec.296(XV) para 5, adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda.

¹⁴⁶ Former UN Secretary General, Kofi Annan advocated this position severally in the face of the humanitarian catastrophes of the 1990s. According to him, 'If diplomacy is to succeed, it must be backed both by force and by fairness.' See United Nations Press Release 'Secretary General Reflects on 'Intervention' in thirty-fifth annual Ditchley Foundation Lecture' SG/SM/6613 26 June 1998. Annan had also observed that '[t]here are times when the use of force may be legitimate in the pursuit of peace.' See United Nations Press Release 'Secretary General Deeply Regrets Yugoslav rejection of political settlement; says Security Council should be involved in any decision to use force' SG/SM/6938, 24 March 1999. See Kofi Annan *We The Peoples: The Role of the United Nations in the Twenty-first Century* Report of the Secretary General A/54/2000(1999) at 217-19. 'The international community must be prepared to take appropriate action. By "action" in such situations I mean a continuum of steps which may include military action.' See 'The risk of genocide remains frighteningly real, Secretary-General tells Human Rights Commission as he launches action plan to prevent Genocide' United Nations SG/SM/9197/AFR 893 HR/CN/1077, April 7, 2004.

prescriptions from which to draw in the enforcement of human rights and prevention of atrocities through the legal framework they have laid down by which member states ceded away part of their sovereignty in return for the collective protection of community citizens.¹⁴⁷ The scheme creates a primary responsibility to protect legal obligations for AU members and a role for the AU should members fail.¹⁴⁸ The search for a legal foundation for normative compatibility may well be located in an inquiry into the nature and structure of the current global constitutive process and this is what we examine in our next chapter.

4.8 CONCLUSION

The failure of the collective security system created in 1945 under the UN Charter has produced new conditions in Africa. More and more reliance is being placed on regional organisations due to the failure and ineffectiveness of the UNSC in the maintenance of international peace and security and its unwillingness to commit material and resources to peace and security in Africa.¹⁴⁹ Africans entertain worries that in deciding to intervene in Africa, the West, through the UN would always be motivated by geostrategic considerations rather than humanitarian cause.

Africa's legal response poses new challenges for international law. The situation has led African states to withdraw from the world body in an attempt to exclude it from involvement in Africa's affairs.¹⁵⁰ The AU and ECOWAS have been forced to begin a gradual development of their own legal and institutional frameworks and capacity to undertake humanitarian intervention in the continent.¹⁵¹ These instruments are the first attempt by any regional organisation to codify the right of humanitarian intervention, and in the case of ECOWAS, the first to create and codify a right of intervention to restore democracy in a regional treaty.¹⁵² Yet, enforcement action taken by a regional organisation even if authorised by the UNSC must be compatible with its own constituent document and the UN Charter.¹⁵³

¹⁴⁷ Banda Maria 'The responsibility to protect: moving the agenda forward' (2007) *United Nations Association in Canada* at 21. Available at http://www.unac.org/eng/library/unacresearch/2007R2P_Banda.pdf (accessed on 12 May 2012).

¹⁴⁸ Kuwali 'The end of humanitarian intervention' op cit note 40 at 58.

¹⁴⁹ Jane Boulden 'United Nations Security Council policy on Africa' in Jane Boulden (ed) *Dealing with Conflict in Africa: The United Nations and Regional Organisations* (2003) 11 at 29.

¹⁵⁰ Ibid at 20.

¹⁵¹ Wippman 'Kosovo and the limits of international law' op cit note 65 at 145.

¹⁵² Williams 'From non-intervention to non-indifference' op cit note 16 at 23.

¹⁵³ Cha 'Humanitarian intervention under the Charter' op cit note 100 at 136.

The question of whether or not the AU/ECOWAS legal framework for unilateral action will open the door to a flurry of unilateral interventions and so weaken the Charter collective security system as argued by some is a matter for conjecture.¹⁵⁴ For now, the credibility of the UN and its claim to primary responsibility in the maintenance of international peace and security depends on the ability of the international community ‘consistently’ to apply and impartially to implement the collective security mechanism it lays claim to across regions and nations.¹⁵⁵ Something it has obviously failed to do in the last 60 years.

As a way of resolving the normative ambiguities, some have called for re-distribution of authority between the UNSC and regional actors;¹⁵⁶ others have called for an expansion of the scope of authority of regional actors as long as they further the principles and purposes of the UN Charter.¹⁵⁷ However, these and other proposals like them try to resolve the normative ambiguity problem without paying significant attention to the systemic changes in the global constitutive process since 1945 and the impact they have on the theoretical foundations of unilateral actions of humanitarian interventions by actors in the international arena. The next chapter therefore examines the AU and ECOWAS unilateral intervention legal frameworks through the prism of the transformations that have taken place in the global constitutive process in order to ascertain its validity under current international law.

¹⁵⁴ Jeremy Levitt ‘The new interventionist states and international law’ in Furley & Roy May (eds) *African Interventionist States: The New Conflict Resolution Brokers* (2001) 35.

¹⁵⁵ ‘Secretary-General highlights positive changes in Africa’ SG/SM/7153AFR/177 September 29, 1999.

¹⁵⁶ See generally, Deen-Racsmány ‘A redistribution of authority’ op cit note 90.

¹⁵⁷ See Borgen ‘The theory and practice of regional organisation intervention’ op cit note 55 at 831.

CHAPTER 5: THE LEGAL VALIDITY OF AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIMES IN A TRANSFORMED GLOBAL CONSTITUTIVE PROCESS

In a period of rapid change, no system of law can content itself with a pious, mechanical replication of the past, for the future may be quite different from the past. Replication may then be a formula, not for reachieving what was gained in the past, but for disaster. The challenge to international lawyers and scholars must be to clarify continuously the common interests of this ever-changing community, drawing on historic policies but bearing in mind that the constitutive and institutional arrangements that were devised to achieve them may no longer be pertinent or effective.¹

5.1 INTRODUCTION

In the previous chapter I examined the AU/ECOWAS humanitarian intervention legal regimes and examined specific provisions and their compatibility with the UN Charter. I argued that at the normative level, the key provisions in the AU/ECOWAS treaties reveal a deliberate departure from the UN Charter collective security system and pursue the protection of human rights, peace, security and stability in Africa outside the UN framework; cooperating with the UN when possible and necessary, but also retaining for the AU/ECOWAS a domain reserve—primary responsibility for the maintenance of peace and security in Africa and the authority to undertake enforcement actions without United Nations Security Council (UNSC) authorisation. Consequently, I established four arenas of normative incompatibility and ambiguities between the AU/ECOWAS regimes and the UN Charter and the challenge posed by these developments to the Charter system and international law on the use of force, raising the question of validity of the treaties. I argued that rather than dismiss the AU/ECOWAS regimes as invalid for imposing obligations on members which conflict with their Charter obligations, and thus, *apparently* incompatible with the Charter, the provisions should be seen as underscoring the need for a theoretical exploration to ascertain the legal validity or otherwise of these regimes in order to reconstruct a regime of normative compatibility between the UN Charter and the AU/ECOWAS regimes on humanitarian intervention and optimise their utility whether as instruments for traditional humanitarian intervention or for the operationalisation of R2P in Africa.

¹ W Michael Reisman 'International law after the Cold War' (1990) 84 *AJIL* 859 at 866.

In this chapter, I seek to test the legal validity of these regimes by asking three fundamental questions: is there a jurisprudential foundation underpinning the *apparent* normative incompatibility between the AU/ECOWAS unilateral humanitarian intervention framework and the UN Charter and is it legally justifiable? Put differently, is there a theoretical basis for the legal validity of the AU/ECOWAS regime of unilateral humanitarian intervention, despite the apparent normative incompatibility with the Charter regime? Under what circumstances are unilateral acts like the AU/ECOWAS considered valid? Do the AU/ECOWAS regimes meet those conditions? I will then conclude the chapter with a brief assessment of the normative and practical implications unilateral acts under the AU/ECOWAS regimes might have on the UN Charter law on nonuse of force and how they will affect the UN's capacity for humanitarian intervention, particularly in Africa.

In attempting to answer the above questions, I adopt the Transformations of World Constitutive Process theory developed and applied by Reisman of the New Haven School² to test the AU/ECOWAS regimes' claim to legal validity under international law.³ I find it useful to adopt this theoretical approach for three reasons: first, as a policy-oriented theory to the study of international law, it emphasises goals clarifications and therefore has the advantage of accounting for the different features, phases and policy consideration

² This theoretical approach is variously called the 'Policy-Oriented Jurisprudence', 'Configurative Jurisprudence' and 'New Haven School'. (Here, I use the term 'configurative jurisprudence'). The Classical work stating this theory is Harold D Lasswell & Myres S McDougal *Jurisprudence for a Free Society: Studies in Law, Science and Policy* Vol. I & II (1992) (hereafter Lasswell & McDougal 'Jurisprudence for a Free Society'); Harold D Lasswell & Myres S McDougal 'Legal education and public policy: Professional training in the public interest' (1943) 52 *Yale LJ* 203; Harold D Lasswell, Myres S McDougal & W Michael Reisman 'Theories about international law: Prologue to a configurative jurisprudence' in Myres S McDougal & W Michael Reisman *International Law Essays: A Supplement to International Law in Contemporary Perspective* (1981) 43-190 (hereafter Lasswell, McDougal & Reisman 'Theories about international law'); Myres S McDougal, Harold D Lasswell & W Michael Reisman 'The world constitutive process of authoritative decision' in Myres S McDougal & W Michael Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspective* (1981) 191-286 (hereafter McDougal, Lasswell & Reisman 'The world constitutive process of authoritative decision'); Myres S McDougal, Harold D Lasswell & Lung-chu Chen *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) particularly at 161-360 (hereafter McDougal, Lasswell & Chen 'Human Rights and World Public Order'); Myres S McDougal, W Michael Reisman & Andrew Willard 'The World Community: A planetary social process' (1988) 21 *University of California Davies Law Review* 807 (hereafter McDougal, Reisman & Willard 'The World Community'); W Michael Reisman, Siegfried Wiessner & Andrew Willard 'The New Haven School: A brief introduction' (2007) 32 *Yale JIL* 575 (hereafter Reisman, Wiessner & Willard 'The New Haven School'); Myres S McDougal & W Michael Reisman *International law essays: A supplement to international law in contemporary perspective* (1981) (hereafter McDougal & Reisman 'International Law Essays'); Siegfried Wiessner & Andrew R Willard 'Policy-oriented jurisprudence and human rights abuses in internal conflict: Toward a world public order of human dignity' (1999) 93 *AJIL* 316 (hereafter Wiessner & Willard 'Policy-oriented jurisprudence and human rights').

³ For a statement of the contours of this theory, see chapter 1 *supra*. The theory was applied to the question of the legality of unilateral humanitarian interventions by Reisman. See W Michael Reisman 'Unilateral Action and the Transformations of the world constitutive process: The special problem of humanitarian intervention' (2000) 11:1 *EJIL* 3 (hereafter Reisman 'Unilateral action').

components of the decision-making process. Secondly, it also provides a comprehensive evaluation of all possible actors, their various roles and how their interactions affect the process of authoritative decision-making in the global constitutive process. Finally, and more importantly, based on its interpretative methods and preference for what states actually do, it gives what I consider to be a fair assessment and projections of how state actors in the global constitutive process can be expected to behave in the future and this is particularly useful for purposes of our inquiry because it enhances the task of projecting the likely pattern of future state behaviour with respect to the legal characterisation of unilateral humanitarian intervention. Some of the common terminologies employed by this theory and useful to our inquiry are ‘constitutive process’, ‘authoritative decision’ ‘constitutive’ and ‘human dignity’.⁴ For our purposes, ‘human dignity’ as used by the New Haven School means human rights in its fullest dimension and the term global constitutive process of authoritative decision refers to international law.⁵

5.2 THE NEW HAVEN CONCEPTION OF THE GLOBAL CONSTITUTIVE PROCESS

Configurative jurisprudence has been developed and employed in the study of different problems in international law.⁶ Under the rubric, Transformations of World Constitutive Process model, this theory was applied to the question of the lawfulness of unilateral humanitarian intervention by Michael Reisman.⁷ It relies on a differentiation of periods of world constitutive process. Under this theoretical model, the evolution of the global constitutive process can be categorised into four: (a) a period when the constitutive process was without hierarchical institutions of decision-making; (b) a period when the constitutive process had ineffective hierarchical institutions of decision-making; (c) a period when the constitutive process had hierarchical institutions of decision-making that were generally effective, but proved to be ineffective in applying particular norms; and (d) a period when the

⁴ For an explanation of the meaning of these and other technical jargons used by the New Haven School, see Myres S McDougal & W Michael Reisman ‘International law in policy-oriented perspective’ in R St J Macdonald & Douglas M Johnston (eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 103-130 at 112-27 (hereafter McDougal & Reisman ‘International law in policy-oriented perspective’); McDougal, Lasswell & Chen ‘Human Rights and World Public Order’ op cit note 2 at 161-360.

⁵ See Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1997) 19 (hereafter Teson ‘Law and Morality’). In this chapter, for purposes of consistency as used in the theory applied here, we use the term ‘world constitutive process’ and ‘global constitutive process’ interchangeably.

⁶ See for example Robert Meade Chilstrom ‘Humanitarian intervention under contemporary international law: A policy-oriented approach’ (1974) 1 *Yale Studies of World Public Order* 93 (hereafter Chilstrom ‘A policy-oriented approach’).

⁷ Reisman ‘Unilateral action’ op cit note 3. I have set out the contours of this theory in chapter 1.

constitutive process has very effective hierarchical institutions of decision-making. Though not always an accurate operation, this type of periodisation allows for clarity in analysis.⁸ The legal validity of unilateral humanitarian intervention such as those provided for under the AU/ECOWAS framework is examined under these four periods of global constitutive process below.

5.2.1 *Unorganised or Non-Hierarchical Constitutive Process Structures (Pre-Global Community Constitutive Process) and the Legality of Unilateral Humanitarian Intervention*

In setting the stage for the analysis that follows it is pertinent to quote copiously from Reisman's graphic illustration:

The situation was reminiscent of the standard American morality play: a town in the "Wild West" in the 19th century without a sheriff, good people, perforce, carrying their own weapons and protecting their rights as they see fit. A sheriff comes to town, announcing that he brings with him law and order. As he will henceforth enforce the law, individuals no longer need carry weapons and the town need not tolerate individual resort to force to protect personal rights. Presumably, all good people would be delighted by this constitutional change and would accept the new norm prohibiting the unilateral use of force. Suppose, however, that within six months it becomes clear that the sheriff is utterly incapable of maintaining order. The rule against unilateral force that he has installed may continue on the books, but it is difficult to believe that even the best of citizens will refrain from the techniques of self-help that prevailed before the sheriff's arrival." This is what happened in the international system. ... Within 5 years of the creation of the UN, a pattern emerged that characterized the most of the life of the UN since in which unilateral violations of Art 2(4) might be condemned but literally validated and the violator allowed to enjoy the fruits of his wrong.⁹

The pre-global constitutive process refers to a constitutive process without hierarchical institutions of decision-making. This period can be divided into two for convenience purposes. The first period spans the pre-intercontinental contact era when there was neither global community nor international law. The second period covers the era between the Treaty of Westphalia and the League of Nations (1648-1918), during which general international law developed.¹⁰ The historical evolution of the global constitutive process can be compared to the growth of a world community and its diversity and far-reaching influence has also been very huge.¹¹ Most of the structures that underpin the current global constitutive process did

⁸ Antonio Cassese *International Law in a Divided World* (1986) 4 (hereafter Cassese 'International Law in a Divided World').

⁹ W Michael Reisman 'Coercion and self-determination: Construing Charter Article 2(4)' (1984) 78 *AJIL* 642 at 643 (hereafter Reisman 'Coercion and self-determination').

¹⁰ Cassese 'International Law in a Divided World' op cit note 8 at 14.

¹¹ McDougal, Lasswell & Reisman 'The world constitutive process of authoritative decision' op cit note 2 at 192.

not exist in earlier periods when there were no interactions between different regions of the world and these structures only emerged later as a result of such interactions.¹² From the Roman to the Chinese empires, there was very minimal contact between peoples by way of exchange of goods and services, trade and so on, that would justify any claim to a global community let alone an organisation like the League of Nations or a global constitutive process at that time.¹³ Nevertheless, there still existed a ‘functional equivalent of a universal system of public order’ wherever tribes and civilizations considered themselves as the only relevant groups.¹⁴

In the West, the basis of public order was sacred, but in the Chinese realm, it was more secular and the world was viewed as comprising the Chinese Empire or all peoples who embraced Chinese civilisation and lived under its Emperor.¹⁵ The sphere of effective control in this case did not actually correspond to the sphere of ‘pretended authority’.¹⁶ In the West, as well as China, a system of order and practices were devised prescribing rules for interactions harmonious or otherwise, among blocs.¹⁷ Since these societies had such features as being territorially delimited vis-à-vis other societies, they had common imposition, desire, and modus operandi, they can be classified as constituting a community.¹⁸ An infraction of the evolving rules of interactions in these societies met with vehement demand that the status quo be restored and sometimes attracted sanctions to the violator.¹⁹ As these interactions deepened and expanded, specialised institutional frameworks and etiquettes saddled with the responsibility of crafting decision processes that were able to maintain stable interaction and the restoration of relations emerged and eventually crystallised into numerous global practices.²⁰ It is pertinent to bear in mind that there were inter-group intercourse and relations amongst nations at this time though we could not speak of a global community or a global constitutive process.²¹

¹² Id.

¹³ Id.

¹⁴ Ibid at 193.

¹⁵ Ibid at 194.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ There were practices relating to consular and diplomatic exchanges, reprisals, treaties of peace and alliances and the regulation of armed conflicts which evolved in the Middle Ages. See Arthur Nussbaum *A Concise History of the Law of Nations* (1947) 7. See also Cassese ‘International Law in a Divided World’ op cit note 8 at 34.

The period and system of interactions ushered in by the Peace Treaty of Westphalia was radically different from the one described above in many respects. Although centralised structures emerged in Europe between 1100 and 1300, it was only after 1450 that they began to bear any resemblance to the modern state and was therefore quite different from the Westphalian nation-states.²² Prior to the ascendancy of Westphalia and the decline of the power of both the Church and the Emperor, ecclesiastical and imperial laws generated by them respectively prevailed and the constitutive process as we know it today could not emerge.²³ But the gradual decline in the influence, and the inability of the Pope and Emperor to call on a universal submission soon dislocated the idea of a universal empire and substituted the theory of society of states.²⁴ This new notion allowed the emerging nation-states to assert themselves, though often in fierce rivalry with one another, which necessitated the modification of former codes of behavior for nation states and the invention of new ones which in turn resulted in the transformation of the constitutive process and the development of modern international law.²⁵ Cassese puts it thus:

The Peace of Westphalia testified to the rapid decline of the Church ... and to the de facto disintegration of the Empire; by the same token it recorded the birth of an international system based on a plurality of independent States, recognising no superior authority over them.²⁶

Simultaneous with the above development, there was a corresponding preponderance of intellectual postulations seeking to justify these developments and transformation from a constitutive process of authoritative decision without hierarchical institutions of decision-making and it is upon them that modern international law now rests.²⁷ Meanwhile, in Western Europe, the scope, intensity and geographical reach of internal social, economic and political interactions had increased greatly and a global community with a single public order was beginning to emerge.²⁸

Naturally, in any community, whenever the volume of interactions amongst members intensify and extend to a certain level, leaders soon discover the need to devise some

²² See Joseph R Strayer *On the Medieval Origins of Modern Nation States* (1970) 10-12.

²³ Cassese 'International Law in a Divided World' op cit note 8 at 35.

²⁴ See Edwin Dickinson *The Equality of States in International Law* (1920) 32 (hereafter Dickinson 'The Equality of States').

²⁵ Ibid at 36. It is unsettled when international law actually evolved. For some views, see Roberto Ago 'The first international communities in the Mediterranean World' (1983) 53 *British Yearbook of International Law* 213 arguing that the notion of international community is not as new as many scholars claim.

²⁶ Cassese 'International Law in a Divided World' op cit note 8 at 37.

²⁷ Ibid at 36. Some of the most influential jurists of this era include Vitoria, Gentili, Suarez and Grotius.

²⁸ McDougal, Lasswell & Reisman 'The world constitutive process of authoritative decision' op cit note 2 at 194.

mechanism of regulating the different groups to enhance the ultimate benefits derived from such interactions by participants.²⁹ The usual response is to initiate practice which produces stable practice by prescribing ‘minimum contacts’.³⁰ Similarly, in the system that evolved out of Westphalia, nation-states began to see themselves as separate, independent and autonomous entities subject to no superior authority, Pope or Emperor.³¹ Again, jurists propounded legal concepts such as the concept of the ‘equality of states’ and ‘state sovereignty’ to validate these claims.³² Driven by the common desire to maximize their interests and net gain, nation-states were able to evolve common practices that now form rules of international law in the emergent global community.³³ Through this mechanism, actors expect to be better off by conforming to the rules than by breaking them and this explains the foundation and continuous evolution of international law to date.³⁴ According to Reisman:

The changing features of “world constitutional law” are to be understood by perceiving the intimacy of interplay between law and the entire social process of the world community. A world constitutive process of authoritative decision, thus, comes to include the establishment of an authoritative decision process on the world community, and its subsequent maintenance, modification, or even termination.³⁵

Having succeeded in the initial task of instituting an ‘authoritative decision process’ for the global community’, the enterprise of how to maintain, when and how to modify or terminate such rules has engaged jurists ever since. This is even more so with respect to collective security and the use of force for the protection of people facing massive violation of human rights at the hands of their own government. Even the Treaty of Westphalia itself attempted to regulate the use of force and create a collective security system but failed.³⁶ Hence, the normative framework that developed in this period was largely driven and shaped by Great Powers of Christian and European civilisation.³⁷ Many of the treaties centered on humanitarian concerns such as the prohibition of slave trade and the proscription of the use of

²⁹ Ibid at note 3.

³⁰ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 194.

³¹ Dickinson ‘The Equality of States’ op cit note 24 at 100, 113, 114-115.

³² Id. Chief amongst the theorists were Jean Bodin, Jean-Jacques Rousseau and John Locke.

³³ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 195.

³⁴ Id. See Sir Hersch Lauterpacht & C H M Waldock (eds) *The Basis of Obligation in International Law and other Papers by the Late James Leslie Brierly* (1958) 71, 72.

³⁵ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 195.

³⁶ Cassese ‘International Law in a Divided World’ op cit note 8 at 43.

³⁷ Ibid at 49. See also McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 193.

certain weapons like the Dum-Dum bullets.³⁸ Emphasis was on encouraging cooperation amongst nation-states as a way of maintaining the peace, drawing on the postulations of jurists like Hugo Grotius who stressed inter-state cooperation and regulated interaction as a way of maintaining peace.³⁹ This ‘pre-global’ era had a profound impact on subsequent global events and systems because the conception of comprehensive ‘institutions of authority and control’ developed in the different parts of the world at the time shaped the predilection carried into the larger global community and its subsequent constitutive process.⁴⁰ The relationships and attitudes formed in the inter-tribal era still shape man’s limitation for extensive and extraterritorial associations today.⁴¹

In the pre-global era, there was no need for intervention whether collective or unilateral because there was hardly any contact between the different peoples. But in the second era described above (also called the Just War era), when contacts had begun to take place amongst the different peoples of the world, unilateral intervention developed and was regarded as valid in its various dimensions.⁴² As we have seen, there was no global community in this period and the ‘legal system’ and constitutive process as it were, was without hierarchical institutions of decision-making.⁴³ Existence was similar to the Hobbesian state of nature and participants were in a ‘perpetual state of war of all against all’ and where life was ‘short, nasty and brutish’.⁴⁴ Under this paradigm of self-help, might was right and ‘the strong do what they will and the weak suffer what they must’.⁴⁵ Participants were at liberty to resort to force for the vindication of their rights and unilateral action and agreement in pursuit of such rights was the norm in the same way ‘unilateral action perforce is how law is created and applied’ and so lawful.⁴⁶ Under such international legal paradigm, the AU/ECOWAS unilateral humanitarian intervention framework would be valid.

³⁸ See Article IV(3) of the Hague Conference adopted on 18 May 1899. Available at <<http://www.icrc.org/ihl.nsf/WebART/145-90001?OPenDocument>> (accessed on 14 July 2012) Cassese ‘International Law in a Divided World’ op cit note 8 at 49.

³⁹ Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (1995) 27 (hereafter Bull ‘The Anarchical Society’); Cassese ‘International Law in a Divided World’ op cit note 8 at 31.

⁴⁰ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 193.

⁴¹ Id.

⁴² For a discussion of the various periods see Anthony Clark Arend & Robert J Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 11, 12-19 (hereafter Arend & Beck ‘International Law and the Use of Force’).

⁴³ Reisman ‘Unilateral action’ op cit note 3 at 11.

⁴⁴ Id. See Bull ‘The Anarchical Society’ op cit note 39 at 24.

⁴⁵ Reisman ‘Unilateral action’ op cit note 3 at 8.

⁴⁶ Id.

The global community that has emerged is such that nation-states are preoccupied with optimising their priorities while effective decisions are made in accordance with the community expectations. Yet, the world public order, though existent, remained largely incomplete in its formation and function and thus incapable of maintaining a global public order. The reason for this is obvious—it is due to the very nature of the international legal order itself—lacking a centralized or superior authority and no effective enforcement mechanism. Throughout the history of the global constitutive process, no single empire has succeeded in establishing a complete public order by imposing itself on the world and actors continue to make claims of diverse public orders while power has remained diffused and fragmented without a legitimating authority to validate new situations, leaving every state to its own devices of self-help.⁴⁷ States had an almost absolute right to go to war for whatever reason, or even without any reason because the exercise of such right was viewed as an attribute of sovereignty.⁴⁸ In this pre-global era, not only was there no global community, it was also characterised by lack of a constitutive document and hierarchical decision-making authority. The closest was the various treaties from the Treaty of Westphalia itself, the different military alliance treaties and the Concert of Europe. At the dawn of the twentieth century, the constitutive process still had no hierarchical decision-making institution and decision-making was often unilateral and state behaviour and international law was shaped by custom produced by unilateral acts that sometimes created new customs by breaking old ones.⁴⁹ ‘Self-help’ was the rule and states vindicated their rights according to their power and the weak often had to forgo their rights because there was no institution to vindicate them.⁵⁰

Hence there were several instances of unilateral humanitarian intervention in the eighteenth, nineteenth and early twentieth centuries and these were legal.⁵¹ In such constitutive configuration, because of the absence of hierarchical institutions of decision making and implementation of rules, unilateral action was the only way usually adopted by participants and the legality or otherwise of an act was not a function of its unilateral character.⁵² Expectedly, such situation would be unsatisfactory to participants and they would

⁴⁷ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 197; Cassese ‘International Law in a Divided World’ op cit note 8 at 27.

⁴⁸ Yoram Dinstein ‘War, Aggression and Self-Defense’ 4 ed (2005) 75 (hereafter Dinstein ‘War, Aggression and Self-Defense’).

⁴⁹ Reisman ‘Unilateral action’ op cit note 3 at 11.

⁵⁰ Ibid at 8.

⁵¹ See Chapter 2 above.

⁵² Reisman ‘Unilateral action’ op cit note 3 at 8.

act to establish a better system leading to a transformation to the second type of constitutive configuration.

5.2.2 *League of Nations Era Global Constitutive Process with Ineffective Hierarchical Structures and the Legal Validity of Unilateral Humanitarian Intervention*

This is the type 2 constitutive configuration. The evolution of a new constitutive configuration to replace the pre-global era was hastened by the atrocities of World War I. The magnitude of the horrors of war and the scale of loss of life persuaded statesmen and jurists to intensify efforts, which had begun in 1899 and 1907 on devising procedural checks on the resort to use of force by states because it was discovered that a major failing of the previous dispensation of defense alliances and self-help was the inability to impose a limitation on the rights of states to wage war.⁵³ Thus, a world constitutive process with hierarchical institution animated the early twentieth century, resulting in the creation of the League of Nations in 1919. From inception, the new organisation suffered from many defects—poor drafting of its Covenant characterised by gaps and the need for compromise and flexibility attenuated its contents, casting it as more of a political pact than a legal text.⁵⁴ However, as events later showed, the failure and eventual demise of the League of Nations resulted not from these weaknesses but from more compelling but inescapable factors emanating from the very nature of nation states and the global community.⁵⁵ Importantly, the refusal of the US (one of the de facto Powers of the global constitutive process) to accede to the new ‘global body’ made the League’s claim to universality more formal than real.⁵⁶

For our purposes the most important provisions of the League’s Covenant are articles 10-16. Many of the norms embodied in the Covenant had actually existed in the preceding pre-global era. Submission of dispute to arbitration, provision for a period of moratorium, recourse to war as last resort and so on were either already part of customary international law or were evolving as such.⁵⁷

⁵³ Arend & Beck ‘International Law and the Use of Force’ op cit note 42 at 20.

⁵⁴ Ian Brownlie *International Law and the Use of Force by States* (1963) 55 (hereafter Brownlie ‘Use of Force’).

⁵⁵ Id.

⁵⁶ Ibid at 55-6.

⁵⁷ Ibid at 56.

The Covenant introduced two significant principles: a commitment by members to explore the peaceful resolution procedures under the League of Nations.⁵⁸ Secondly, members undertook to apply both diplomatic and economic sanctions against any member state that waged war in violation of the Covenant.⁵⁹ The Covenant instituted a wide-ranging restraint on the right of states to wage war by declaring ‘any war or threat of war ... a matter of concern to the League’ and this arguably was its most important single contribution.⁶⁰ Articles 10, 11, 12, 13, 15 and 16 in this respect, significantly advanced the development of a normative system of *jus ad bellum* and the evolving architecture of collective security in the global community.⁶¹ Collectively they availed the observer a set of criteria for appraising the legality of a decision process determined by the degree of compliance with the Covenant’s procedural requirements on recourse to force.⁶² These provisions were quickly put to the test, revealing several institutional, substantive and procedural weaknesses in the new constitutive configuration despite the existence of a hierarchical decision-making organ with a constitutive document—League of Nations.

Three major incidents underscored the ineffectiveness of the League of Nations and eventually paved the way for the transformation of the constitutive process to the third type: the Manchuria Crisis, the Abyssinia Crisis and WW II. On 18 September 1931, Japanese forces invaded Manchuria under the pretext of protecting Japanese nationals and their businesses, but it was clear that this was a case of unbridled aggression in violation of the League of Nations Covenant.⁶³ Despite China’s appeal to the League to act under article 16 of the Covenant, the League of Nations declined to even investigate the incident because the US (a non-League Member) objected to any investigations.⁶⁴ Emboldened by this lack of consensus between the League of Nations and the US, Japan pursued its aggressive policy

⁵⁸ Ibid at 57. See also article 12, Covenant of the League of Nations available at http://www.avalon.law.yale.edu/20th_century/leagcov.asp (accessed on 23 February 2011) (hereafter the Covenant)

⁵⁹ Article 16 of the Covenant.

⁶⁰ Article 11 of the Covenant.

⁶¹ Members committed to: respect and preserve the territorial and existing political independence against external aggression; submit potentially disruptive dispute for arbitration; not wage war with a State complying with the outcome of arbitration of judicial decision; and to submit any dispute not submitted to arbitration to the Council of the League of Nations. See articles 10, 12, 13 and 15 respectively. See Dinstein ‘War, Aggression and Self-Defense’ op cit note 48 at 80.

⁶² Cassese ‘International Law in a Divided World’ op cit note 8 at 60.

⁶³ F P Walters *A History of the League of Nations* (1969) 465 (hereafter Walters ‘A History of the League of Nations’).

⁶⁴ Benjamin B Wallace ‘International affairs: How the United States “Led the League” in 1931’ (1945) 39:1 *American Political Science Review* 101-116 at 102 (hereafter Wallace ‘How the United States Led the League’).

and occupied Manchuria and eventually went to war with China.⁶⁵ The Manchuria incident exposed the inherent weaknesses and lack of potency by the League of Nations when it came to the enforcement of its most fundamental principle and provision.⁶⁶ As observed by one commentator, '[t]he net result of the Sino-Japanese crisis is that the system of collective responsibility in international disputes has received a severe shock, and the sanctity of international contracts is to-day [sic] at the lowest ebb for many years. To that extent the League has thus far failed.'⁶⁷

Similarly, in December 1934, Italian forces clashed with Abyssinia (now Ethiopia) under the pretext of freeing slaves from the authorities in Addis Ababa.⁶⁸ Again, the League of Nations acknowledged that this was an act of aggression in violation of the Covenant but the League could not take any coercive measure to compel Italy to withdraw from Abyssinia, and just like Japanese forces in Manchuria, Italian forces remained in Abyssinia until 1941.⁶⁹ The League attempted to impose sanctions on Italy in accordance with article 16 but such resolution required a unanimous vote which the League could not muster and it had to settle for voluntary sanctions by members which weakened the sanctions regime.⁷⁰ The primary concern of the Great Powers Members of the League of Nations was avoiding another World War rather than restoring Abyssinia's sovereignty.⁷¹ The League's inability to prevent the invasion coupled with the ineffective sanctions imposed, further undermined the legitimacy of the League of Nations and underscored the failure of collective security under that particular constitutive configuration.⁷²

⁶⁵ For a discussion of the Manchuria Crisis, see Walters 'A History of the League of Nations' op cit note 63 at 465-499.

⁶⁶ Raymond G Watt 'The League of Nations': Has it failed? What of its future' (1933) 5:20 *Australian Quarterly* 99-107 at 100 (hereafter Watt 'The League of Nations').

⁶⁷ Id.

⁶⁸ Sean D Murphy *Humanitarian Intervention in an Evolving World* (1996) at 61 (hereafter Murphy 'Humanitarian Intervention'). For a detailed account of the Italo-Ethiopian War, see Walters 'A History of the League of Nations' op cit note 63, 623-91.

⁶⁹ Murphy 'Humanitarian Intervention' op cit note 68 at 61.

⁷⁰ Alexandru Grigorescu 'Mapping the UN-League of Nations analogy: Are there still lessons to be learned from the League?' (2005) 11(1) *Global Governance* 25-42 at 29-30; Walters 'A History of the League of Nations' op cit note 63 at 654-59.

⁷¹ George W Baer 'The League of Nations and the Italian-Ethiopian War, 1935-36 (1971) 27:2 *International Organisation* 165 at 174 (hereafter Baer 'The League of Nations and the Italian-Ethiopian War'). See also Marquess of Lothian 'The world crisis of 1936' (1936) 15:1 *Foreign Affairs* 124 at 135 (hereafter Marquess 'The world crisis of 1936').

⁷² See C G Fenwick 'The "Failure" of the League of Nations' (1936) 30 *AJIL* 506-9 at 507; (hereafter Fenwick 'The Failure of the League of Nations'). See also Murphy 'Humanitarian Intervention' op cit note 68 at 61.

The expectations that the League of Nations would be able to serve as a collective security mechanism were quickly dashed by the Abyssinia and Manchuria incidents due to lack of enforcement mechanism.⁷³ The political will and means of enforcing coercive measures against Great Powers, or a small state supported by a Great Power, was absent.⁷⁴ Article 16 was only legally binding if it was unanimous and Japan was able to vote down a resolution calling for its withdrawal from Manchuria.⁷⁵ Hence, though Italy was vulnerable to sanctions due to its dependence on foreign supplies, no League member had the nerve to impose complete sanctions, giving Mussolini ample space to reap the fruits of his illegality.⁷⁶ In a global constitutive process such as existed under the League of Nations where effective decision-making depended on a consensus amongst member states, any disagreement would be catastrophic for such organisation's role and legitimacy, more so when its membership excluded key states that may refuse to support the policy direction of the organisation.⁷⁷ Furthermore, contrary to the expectations of League of Nations founders that the common objective of collective security would also yield collective action by states, in reality, states action or inaction was a function of their national interest calculus, which, though, sometimes converged with League of Nations objectives, nevertheless remained fundamentally a product of unilateral national interest perceptions.⁷⁸

Several other factors weakened the League of Nations as a decision-making hierarchical institution under this configurative constitutive process. The first was that there was no complete ban on the use of force, because by using the term 'war' in article 12, the Covenant opened the way for states to engage in the use of force and deny that a state of war existed because there had been no formal declaration of war.⁷⁹ Consequently, the effectiveness of the League of Nations was compromised because whatever action states decided to take depended on whether they individually characterised the situation as war or not.⁸⁰ In the Manchuria incident, states colluded to maintain the false impression that Japan and China were not at war because this was considered a useful political tool.⁸¹ Besides this,

⁷³ Marquess 'The world crisis of 1936' op cit note 71 at 135.

⁷⁴ Leland M Goodrich 'From League of Nations to United Nations' (1947) 1:1 *International Organisation* 3-21 at 10 (hereafter Leland 'From League of Nations to United Nations'). See also Brownlie 'Use of Force' op cit note 54 at 58.

⁷⁵ Wallace 'How the United States led the League' op cit note 64 at 107.

⁷⁶ Marquess 'The world crisis of 1936' op cit note 71 at 135.

⁷⁷ Fenwick 'The Failure of the League of Nations' op cit note 72 at 507-8

⁷⁸ Baer 'The League of Nations and the Italian-Ethiopian War' op cit note 71 at 165-6.

⁷⁹ Leland 'From League of Nations to United Nations' op cit note 74 at 11.

⁸⁰ Brownlie 'Use of Force' op cit note 54 at 60.

⁸¹ Id.

states reserved the right to take any action they deemed necessary to maintain peace and justice including going to war provided they fulfilled some conditions including first submitting the dispute for adjudication or arbitration and also allowing for a 3 month ‘cooling-period’.⁸² Furthermore, the League of Nations regarded human rights as a matter within the internal jurisdiction of states and left the question of the legality of humanitarian intervention open.⁸³ Aggressor states like Japan, Italy and Germany were able to argue that their actions were driven by humanitarian interventions.⁸⁴

The failure of the League of Nations to prevent the Manchuria and Abyssinia incidents and ultimately World War II revealed its ineffectiveness and the type 2 constitutive configuration. It was a constitutive process with hierarchical institutions but the institutions were manifestly ineffective. This type of legal system has a constitutive document with hierarchical decision-making institutions (for example, the League of Nations), but, in reality, *de jure* power is wielded by outside actors. Under this era, the existence of a formal constitutive process with all the substantive and procedural requirements well defined in a constitutive document is of no moment because *de jure* power lies with a ‘shadow authority’ operating outside the hierarchical institution of decision-making. So, even though it is sometimes possible for the objectives of the ‘formal authority’ and ‘shadow authority’ to coincide, they actually operate at different levels of value frequencies. Unilateral action is therefore legal and valid under such system.

As noted above, the US remained outside the League of Nations and at various points so, too, did the USSR, Germany and Japan. However, the US not only participated with ‘Observer Status’ in many of the League of Nations deliberations, it actually drove such processes, lending or withdrawing its support according to its national interest calculus. In the Manchuria incident, one major reason the Council could not impose sanctions on Japan was the refusal of the US to support the decision.⁸⁵ Similarly, Abyssinia could not secure any effective remedy against Italian aggression through the Council of the League of Nations. This systemic weakness is attributable, at least in part, to two legal conundrums: first is the practical difficulty of sustaining the legal equality of states concept when there is such substantial material inequality amongst states.⁸⁶ The consequence is that despite the efforts of

⁸² Id. See article 12 and 15(7) of the Covenant.

⁸³ Murphy ‘Humanitarian Intervention’ *op cit* note 68 at 59.

⁸⁴ Id at 62.

⁸⁵ See Wallace ‘How the United States led the League’ *op cit* note 64 at 111.

⁸⁶ See Quincy Wright ‘The equality of states’ (1970) 3 *Cornell International Law Journal* 1at 6.

the League of Nations, the system actually reverted to the previous constitutive configuration of self-help. The League of Nations decision process in the Manchurian and Abyssinia incidents demonstrates this point.

Secondly, too often, ‘formal authority is equated with actual controlling institutional structures and expectations of authority.’⁸⁷ But this is hardly the case in practice especially in the international legal system which lacks an important characteristic of effective constitutive configuration—central authority. Reisman therefore concludes that in such legal systems, ‘... [i]nsiders—operators who understand the ‘operational code’ know that it is fruitless to seek decision from the formal process if they had not first been certified by the actual power process.’⁸⁸ If the League-era constitutive configuration had an effective hierarchical institution—if diplomatic sanctions had been applied to Japan in 1931, if an oil embargo had been imposed on Italy in 1936, and if a comprehensive embargo had been imposed on Germany in 1939, these aggressor states would have abandoned their aggressor policies and the world would have been saved the catastrophe of World War II.⁸⁹ But this did not happen and we therefore conclude that the League of Nations era exemplified a type 2 constitutive configuration with an ineffective decision-making hierarchical institution.⁹⁰

In addition to the above, the League of Nations era, the potency of the League as a decision-making institution depended on the discretionary cooperation of members in taking action under the League’s auspices including the imposition and enforcement of sanctions.⁹¹ The consequence of non-performance of these actions by members invariably rendered the whole League system ineffective and the constitutive process reverted back to type 1 that operated in the pre-global era where unilateral action was the norm and legal.⁹² Though this transformation was less than obvious, it explains why states continued to claim a right of unilateral action deriving from the preceding pre-global constitutive configuration (of customary international law) in contrast to the succeeding League of Nations system that attempted to restrain that right by instituting a constitutive configuration with hierarchical

⁸⁷ McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 191.

⁸⁸ Reisman ‘Unilateral action’ op cit note 3 at 8. Reisman illustrates this point with a rather humorous example of the question asked by a visitor to a city who asks rather cynically, ‘who’s the mayor?’ and then ‘who’s the boss?’ Such legal system has been common in several domestic systems in the past.

⁸⁹ See George W Egerton ‘Collective security as political myth: Liberal internationalism and the League of Nations in politics and history’ (1983) 5:4 *The International History Review* 496-524 at 496.

⁹⁰ Ibid at 10.

⁹¹ Reisman ‘Unilateral action’ op cit note 3 at 11.

⁹² Reisman ‘Unilateral action’ op cit note 3 at 11.

decision-making institution to which states surrendered their rights to unilateral action.⁹³ Thus, this fusion of two constitutive processes, (one without hierarchical institutions of decision making where unilateral action is legal and the second where there is an ineffective hierarchical institution of decision making and where unilateral action will ordinarily be unnecessary and unlawful but for the ineffectiveness) the legal status of unilateral intervention became ambiguous and remains so to this day.⁹⁴ If it were understood that there had been a reversion from type 2 to type 1 constitutive configuration and both processes had been kept apart, perhaps the status of unilateral action would have been clearer than it is today and there would have been no basis for challenging its legal validity.⁹⁵

Nevertheless, as observed even in 1936, under any constitutive configuration, '[c]ollective security remains the most promising hope for an ordered world however that is arranged whether on a universal or regional basis and whether by a limited or general treaty is a matter of expediency'.⁹⁶ The lesson from the League of Nations era was that prohibiting the use of force, leaving enforcement to the discretion of states, was incapable of deterring violators in the system because states would usually be guided by national interest considerations.⁹⁷ A total ban on the rights of states to use force would therefore require the establishment of an effective international organisation, which, in turn, depends on a fundamental re-structuring of the constitutive configuration.⁹⁸ This led to the attempt to create a type 4 constitutive configuration by establishing the UN, but it is pertinent to describe the nature of a type 3 constitutive configuration which, as we shall see, eventually became the dominant system notwithstanding the attempt by the UN system to approximate a type 4 constitutive configuration.

5.2.3 *Constitutive Configuration with Hierarchical Institutions of Limited Effectiveness*

The third type of constitutive configuration is one with largely effective hierarchical decision-making institutions but such decision making structures are ineffective in the implementation of certain important norms like human rights.⁹⁹ An example is the UNSC in the protection of human rights. The UNSC has proved itself ineffective in the use of force to protect the human

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Fenwick 'The Failure of the League of Nations' op cit note 73 at 507.

⁹⁷ Cassese 'International Law in a Divided World' op cit note 8 at 62.

⁹⁸ Id

⁹⁹ Reisman 'Unilateral action' op cit note 3 at 7.

rights guaranteed under the UN Charter when needed.¹⁰⁰ The partial inefficacy of this constitutive configuration is partly explained by a lack of symmetry between authoritative power and controlling capacity and it occurs because ‘authoritative reach exceeds controlling grasps.’¹⁰¹ Thus, although the Charter confers broad authority on the UNSC to maintain international peace and security, and arguably to protect human rights, several subsequent developments ensured that the UNSC does not quite have the controlling capacity to match the exercise of this power and has been ineffective in the protection of human rights.¹⁰² It was in anticipation of this that when states surrendered their rights to use force to the UNSC in 1945 in exchange for an expected global collective security system, article 51 dealing with the inherent right of individual and collective self-defense was inserted in the Charter as a safety valve that permits unilateral action.¹⁰³

In a legal system with this defect, provision is made for unilateral acts to fill the lacuna, but such unilateral acts should comply with prescribed substantive and procedural requirements.¹⁰⁴ However, it is my view that under type 3 constitutive configuration, whether unilateral acts of humanitarian intervention taken under article 10(c) of ECOWAS MCPMRPS and article 4(h) of the AU Act and 4(h) (j) of the AUPSC Protocol are lawful would depend on their compliance with the relevant substantive rather than procedural requirements for such intervention. Non-compliance with procedural requirements under article 53(1) of the Charter by ECOWAS and AU would not render such unilateral humanitarian intervention illegal, because the prevailing global constitutive configuration fluctuates between type 2 and type 3 which permit unilateral action under certain

¹⁰⁰ Ibid at 10.

¹⁰¹ Id. Configurative jurisprudence conceives of law as a process of authoritative decision which outcomes must be ‘characterised both by expectations of authority and by effective control.’ Here, ‘authority’ means ‘a set of common expectations about who is authorised to prescribe community policy’ and ‘control’ denotes ‘a communication of the capacity and willingness to apply effective power to support putative prescriptions’. Simply put, the prescription must be made by those expected to make them (the appropriate authority), in accordance with established procedures and in compliance with the fundamental value expectations of community members, and the capacity to enforce them. See McDougal, Lasswell & Reisman ‘The world constitutive process of authoritative decision’ op cit note 2 at 276. For a prescription to qualify as a legal rule it must be ‘authoritative and controlling’ and if a norm loses either of them, its prescriptive character becomes questionable. See W Michael Reisman ‘International lawmaking: A process of communication’ (1981) 75 *ASIL Proceedings* 101 at 104, 108-110. However, as we shall demonstrate in the next chapter ‘decisions taken ... in apparent disregard of authority, may, however, acquire a retrospective authority if the degree of their effectiveness is such as to reshape community expectations; more importantly, a flow of comparable decisions through time, whatever their initial relation to authority, may under certain conditions perform a prescriptive function in creating new expectations of authority in regard to projected future decision.’

¹⁰² Reisman ‘Unilateral action’ op cit note 3 at 9.

¹⁰³ Ibid at 10.

¹⁰⁴ Id.

circumstances.¹⁰⁵ For such unilateral act to be valid, they must comply with the substantive requirements which, under the AU/ECOWAS regimes—to halt genocide, war crimes, crimes against humanity and ethnic cleansing (and in the case of ECOWAS, undemocratic change of government) —which is the same with what is required under general international law and the emerging responsibility to protect (R2P) principle. I will examine further whether and how the AU/ECOWAS frameworks meet these substantive requirements presently so as to make the provisions and the unilateral action taken under them valid.

5.2.4 *Constitutive Configuration with Highly Effective Constitutive Structures and the Validity of Unilateral Humanitarian Intervention*

Under the UN Charter, states attempted to create a constitutive configuration that approximates type 4 whereby states surrendered their right to use force to the UN in the understanding that matters of threats to international peace and security as well as aggression would be dealt with collectively by the global community through the UNSC, presumptively making unilateral action, including unilateral humanitarian intervention illegal.¹⁰⁶ This new constitutive configuration was founded on three pillars: the first pillar imposed legal obligation on states to refrain from use of force under article 2(4) of the Charter; the second created hierarchical institutions to enforce those obligations (particularly the UNSC); and the third created a hierarchy of norms as the philosophical foundation of the world public order which set the maintenance of international peace and security as the underpinning normative objective of the Charter and was to override other principles, including justice.¹⁰⁷ Other matters were located in the domain of essential domestic jurisdiction of states where states exercised exclusive jurisdiction.¹⁰⁸

Ideally, this constitutive configuration and its hierarchical institutions of decision making should be highly effective in achieving community goals; hence recourse to unilateral action is both unnecessary and unlawful.¹⁰⁹ In such system, if it had worked as envisaged when the Charter was drafted, the UNSC would have been highly effective in fulfilling its

¹⁰⁵ Quite unlike the domestic legal system where it is settled that states operate in a type 4 constitutive configuration with highly effective hierarchical institutions able to apply and enforce the legal rules, at the international level, the states swing between type 2 and 3 constitutive configuration. See Reisman 'Unilateral action' op cit note 3 at 11 at note 18.

¹⁰⁶ Reisman 'Unilateral action' op cit note 3 at 12.

¹⁰⁷ See Arend & Beck 'International Law and the Use of Force' op cit note 42 at 177-78.

¹⁰⁸ See Article 2(7) of the UN Charter. See Teson 'Law and Morality' op cit note 5 at 137.

¹⁰⁹ Reisman 'Unilateral action' op cit note 3 at 12.

obligations to maintain international peace and security and protect human rights as part of the purposes of the UN for which ‘The Peoples of the United Nations’ acting through their states founded the body and unilateral action (by AU/EOC WAS) would have been illegal today.¹¹⁰ But, as seen in Chapter 3, the constitutive process soon underwent tremendous changes that rendered its hierarchical institutions of decision-making, particularly the UNSC ineffective and the system reverted back to type 3 constitutive configuration where unilateral action is lawful.¹¹¹ I briefly examine some of these changes and their impact on the transformation of the constitutive process from type 4 that the UN system attempted to approximate to type 3 that now prevails.

5.3 STRUCTURAL AND NORMATIVE TRANSFORMATION OF THE CONSTITUTIVE PROCESS AND THE VALIDITY OF UNILATERAL ACTION

It is not only with respect to effective institutions that the transformation of the constitutive configuration occurred. It also occurred at the structural and normative level. First, the collective security arrangement in the Charter was based on certain fundamental assumptions including the continuous cooperation between the victorious Allied Powers led by the US and the USSR.¹¹² But the inception of the Cold War and indiscriminate use of the veto soon crippled the UNSC and rendered it incapable of maintaining international peace and security as guaranteed to member states when they transferred parts of their sovereign rights to use force to the UN.¹¹³ The first casualty was article 43(1) of the Charter which mandated the creation of a standing UN army based on agreement to be signed by the UNSC and states in order to accomplish UN objectives. This provision, intended to be at the heart of the sanction regimes and enforcement mechanism of the collective security arrangement under the Charter, and therefore, the core of the global constitutive process was never created due to the Cold War.¹¹⁴ The UN had been forced to rely on voluntary troop contributions by states or a coalition of the willing over which it has no control for enforcement of its resolutions. The

¹¹⁰ See W Michaael Reisman ‘Allocating competence to use force in the post-Cold War world: Practices, conditions and prospects’ in Lori Fisler F Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 22 at 28, 30; Teson ‘Humanitarian Intervention’ op cit note 5 at 142.

¹¹¹ Reisman ‘Unilateral action’ op cit note 3 at 12.

¹¹² Mats R Berdal ‘The Security Council, peacekeeping and internal conflicts after the Cold War’ (1996/7) 7 *Duke Journal of International Law* 71 at 74.

¹¹³ See Antonio Cassese ‘Return to Westphalia? Considerations on the gradual erosion of the Charter system’ in Antonio Cassese (ed) *The Current Regulation of the Use of Force* (1986) 505 at 506 (hereafter Cassese ‘Return to Westphalia’).

¹¹⁴ Thomas Franck ‘Collective security and UN reform: Between the necessary and the possible’ (2005-6) 6:2 *Chicago Journal of International Law* 597 at 599 (hereafter Franck ‘Collective security and UN reform’).

impact of this failure to establish a UN army on the Charter system is much debated;¹¹⁵ but when taken together with the paralysis occasioned by the veto, it appears that by providing for ‘organised cooperation’ rather than ‘institutionalized action’¹¹⁶ the Charter system of collective security was inadvertently programmed to fail and has thus been generally unable to fulfill its primary responsibility of maintaining international peace and security for most of its existence.¹¹⁷ With the failure of the Charter collective security system, the Charter paradigm on the use of force, and the collective security mechanism it set up, the type 4 constitutive configuration it sought to establish was effectively set aside by states and replaced by a type 3 constitutive configuration based on a balance of power system in which unilateral intervention is lawful.¹¹⁸ With this transformation states devised their own means of seeing to peace and security in order to fill the vacuum left by the wide prohibition of force and the ‘intervening ineffectiveness of the constitutive structure that had been assigned the exclusive competence to use force in support of public order’;¹¹⁹ such method includes

¹¹⁵ See Cassese ‘Return to Westphalia’ op cit note 113 at 506. Cf. Ademola Abass *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII Paradigm* (2004) 67-8. (hereafter Abass ‘Beyond Chapter VIII Paradigm’), arguing that what was contemplated by Article 43 was not a standing UN army but troops contribution by states as demanded by the UN. I do not subscribe to this contention and prefer the views of Cassese and Reisman. Abass’s view is hard to sustain because it seems to ignore the Charter provision which requires there to be a Military Agreement with states. Further, it is unlikely that given the nature and exigencies of war and problems associated with mobilization in times of conflict what the Charter envisaged was not a standing UN army. It seems more tenable to argue that what was contemplated was a UN force maintained and run by the UN based on the Military Agreement it has with states. Otherwise, of what purpose was the anticipated Military with states if states were not required to maintain UN contingent under their national army or under the UN? Further, the Charter provides for a Military Staff Committee, if a standing UN force was not contemplated as some contended, what was the use of a MSC? In addition, article 106 supports the view that a standing UN Special Force was contemplated by the Charter as the basis of its collective security architecture as a result of which the Charter provided that in the immediate post-war environment of 1944, it could take time to realise the Special Military Agreements under article 43 and 47, so it made ad hoc provisions to take care of the situation under Article 106. It was not to be a permanent solution. Although a time frame cannot be put on the expected application of Article 106, or lifespan of validity applied to it, however, it will require stretching the assumed intention of the drafters of the Charter too far to conclude that Article 106 was meant to continue in perpetuity so League of Nations as article 43 has not been realised. At best it should be seen as an improvising due to the failure of the fundamental assumptions of the Charter that underpinned its collective security arrangement. To this end, it cannot form the legal basis of UN ‘deciding’ as against ‘recommending’ under Article 42. Abass even appears to concede this point. See Abass ‘Beyond Chapter VIII Paradigm’ op cit note 114 at 69.

¹¹⁶ Cassese ‘Return to Westphalia’ op cit note 113 at 506. See also W Andy Knight ‘Towards a subsidiarity model for peacemaking and preventive diplomacy: Making Chapter VIII of the UN Charter operational’ (1996) 17 *Third World Quarterly* 31 at 32 (hereafter Knight ‘Towards a subsidiarity model’).

¹¹⁷ Knight ‘Towards a subsidiarity model’ op cit note 116 at 32.

¹¹⁸ See Michael J Bazzyler ‘Reexamining the doctrine of humanitarian intervention in light of the atrocities in Kampuchean and Ethiopia’ (1987) 23 *Stanford Journal of International Law* 547 at 579, 580-81. It is worthy of note that Bazzyler appears to recognise the right of unilateral intervention by regional organisations when he says: ‘In circumstances in which an authoritative organ of the United Nations or of a relevant regional organisation either cannot or will not act, many scholars would permit individual or coordinated non UN humanitarian intervention as a substitute.’ See also Martti Koskeniemi ‘The place of law in collective security’ (1995/6) 17 *Michigan Journal of International Law* 456 at 458 (hereafter Koskeniemi ‘The place of law in collective security’).

¹¹⁹ Reisman ‘Unilateral action’ op cit note 3 at 12.

sometimes resorting to unilateral action by states and extra-Charter arrangements by regional organisations. However, efforts were still made to graft these measures onto the Charter—through reinterpretations and the creation of new terminologies.¹²⁰ This ambiguity in the character of the extant constitutive configuration has persisted for a long time and is responsible for the controversy surrounding the legality of unilateral acts of humanitarian intervention by the AU/ECOWAS.¹²¹ This anomaly has hardly changed, notwithstanding the end of the Cold War and a few years of UNSC interventionism.¹²²

There were also changes of normative character. The drafters of the Charter's normative hierarchy were persuaded by the horrors of World War II to prioritise peace over justice, hence the express provisions in Chapter VII on the maintenance of international peace and security. However, the internationalisation of human rights brought other participants to the constitutive process, other than states, that began to make new demands of community goals on the constitutive process in respect of human rights.¹²³ As states recognised these human rights and the obligations they create, the view also emerged that rather than mere aspirations for progressive realisation, human rights were also worthy of international protection, by use of force if necessary.¹²⁴ For example, it was contended even during the Cold War that force could be used in furtherance of national liberation and self-determination of peoples as well as to correct previous injustices.¹²⁵ According to Arend and Beck, it is rather than prioritising peace over justice and 'believing that more injury to world order occurs when force is used to pursue just goals, states have come to believe that at certain times, it is better to break the peace in the name of justice, than to live with the injustice. At times justice must take precedence over peace.'¹²⁶

In particular, the international concern with human rights has flourished since the 1990s and through the practice of the UNSC, regional organisations and states have generated a norm of collective humanitarian intervention.¹²⁷ Such collective humanitarian intervention

¹²⁰ Id.

¹²¹ Reisman 'Unilateral action' op cit note 3 at 11, 15.

¹²² Kosskenniemi 'The place of law in collective security' op cit note 116 at 461.

¹²³ Reisman 'Unilateral action' op cit note 3 at 14-15; Franck 'Collective security and UN reform' op cit note 113 at 601-2.

¹²⁴ Thomas Buergenthal 'The evolving international human rights system' (2006) 100 *AJIL* 783 at 787 (hereafter Buergenthal 'The evolving international human rights system')

¹²⁵ Arend & Beck 'International Law and the Use of Force' op cit note 42 at 179.

¹²⁶ Id.

¹²⁷ Buergenthal 'The evolving international human rights system' op cit note 124 at 787.

could be by a group of states, the UN, or by states in joint operations with the UN.¹²⁸ Arguably, this includes regional organisations like the AU and ECOWAS. The cumulative effect of this is that, at the normative level, there have been such fundamental changes that the authoritative and controlling reach of article 2(4) and its restraints on the use of force has been relaxed to accommodate this reality.¹²⁹ So, challenging the legal validity of the provisions of article 4(h) of the AU Act, article 4(j) of the African Union Peace and Security Council (AUPSC) Protocol, and article 25 of the ECOWAS Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (MCPMRPS) for conflicting with article 2(4) of the UN Charter is unsustainable.

For its part, the UNSC has sought to deal with this change in normative hierarchy and its implications for the *jus ad bellum* by reinterpreting expansively the meaning and scope of ‘threat to peace and security’ and developing the concept of peacekeeping. As seen in chapter 3, this has been generally ineffective, especially in Africa. This is even more so, as the demands for the fulfillment of community goals of human dignity continue to rise. The legal implication of this ineffectiveness is that the constitutive process with effective hierarchical decision-making institutions established by the UN Charter in 1945, suffered atrophy and reverted back to type 3 constitutive configuration where unilateral action,¹³⁰ including unilateral humanitarian intervention by regional organisations like ECOWAS and the AU, is lawful. As Reisman puts it, ‘[w]ith the advent of the Cold War, the constitutive structures created by the Charter remained in place, but, in practice, it quickly degraded from what had been intended to be the fourth type of constitutive arrangement to the third.’¹³¹ However, some scholars doubt that these normative changes had such transformative impact on the UN Charter system, arguing that, at best, the modification and reordering of norms merely constitute a danger to the Charter framework.¹³² Henkin contends that critics focus on the number of times the Charter has failed rather than succeeded in restraining state behaviour—in other words whether the glass is half-full or half-empty depends on your observational standpoint.

¹²⁸ See Myres S McDougal & W Michael Reisman ‘Response’ (1969) 3 *International Lawyer* 438 at 444.

¹²⁹ Michael Glennon ‘The new interventionism: The search for a just international law’ (May-June 1999) 78:3 *Foreign Affairs* 2 at 2.

¹³⁰ Reisman ‘Unilateral action’ op cit note 3 at.

¹³¹ Reisman ‘Unilateral action’ op cit note 3 at 12.

¹³² See Louis Henkin ‘The reports of the death of Article 2(4)’ are greatly exaggerated’ (1971) 65 *AJIL* 544 at 544, 547.

Yet, the general trajectory of normative evolution in the international legal order since 1945 supports the conclusion that the Charter normative paradigm has been supplanted by a second paradigm of self-help, and, since the end of the Cold War, a third normative paradigm is gradually evolving.¹³³ A good example of this trend is the question of the right of pro-democratic intervention.¹³⁴ In relation to the transformation of the normative framework of the Charter in this respect, Arend and Beck speak of a ‘post-Charter self-help paradigm’,¹³⁵ and Thomas Franck asserts that when a political arrangement has degraded to a certain extent it becomes incapable of reforming itself and will require help from without to salvage it.¹³⁶ It is clear that the Charter paradigm of 1945 was not designed for the prevailing order and as Reisman rightly predicts, if the United Nations fails to adjust to the new challenges, authoritative decision-making is likely to move outside the UN system.¹³⁷

To this end, the world must think creatively of how to make international law responsive to the peace and security demands of the global community. It follows from the above that any rigorous analysis of the right of regional organisations to unilateral use of force since the end of the Cold War can no longer be sufficiently undertaken merely by relying on a textual construction of articles 2(4) and 53(1) of the Charter. Rather, such analysis must take account of other factors that the community of states has recognised through practice, as validating such unilateral resort to force and this includes the protection of human rights. By extension, any appraisal of the AU/ECOWAS right to intervene without UNSC authorisation will have to be undertaken through a substantive rather than procedural assessment of the purposive values pursued by the AU and ECOWAS. Where it is in fulfillment of the principles and purposes of the UN Charter, such as the AU/ECOWAS regimes under consideration, procedural irregularities in relation to the UNSC should not be allowed to stand in the way of the goal of rescuing a great number of people whose life and limb may be imperiled, provided such unilateral resort to force complies with the substantive requirements of the constitutive charter of the AU/ECOWAS and general international law. After all the Charter was made by the ‘Peoples of the United Nations’—the human beings

¹³³ Arend & Beck ‘International Law and the Use of Force’ op cit note 42 at 178, 193.

¹³⁴ See Article 25 of ECOWAS MCPMRPS Protocol and article 4(p) of the AU Act. See generally, Thomas M Franck ‘The emerging right to democratic governance’ (1992) 86 *AJIL* 46.

¹³⁵ Arend & Beck ‘International Law and the Use of Force’ op cit note 42 at 178, 193. Events in Latin America, Europe (Europe now makes democracy a condition for state recognition), the Middle East and North Africa lend credence to this view.

¹³⁶ Thomas Franck ‘Intervention against illegitimate regimes’ in Lori Fisler Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 159 at 165.

¹³⁷ W Michael Reisman ‘International law after the Cold War’ (1990) 84 *AJIL* 859 at 862.

and individuals, for themselves and not for the protection or pursuit of narrow national interests. The UNSC and other institutional framework and arrangements under the Charter were aimed at facilitating the realisation of this goal.

5.4 THE PERSISTENCE OF TYPE 3 GLOBAL CONSTITUTIVE CONFIGURATION AND THE VALIDITY OF AU/ECOWAS UNILATERAL INTERVENTION LEGAL FRAMEWORK IN THE POST-COLD WAR PARADIGM

The denial of the legality of unilateral action in the post-Charter constitutive configuration stems from the assumption that the Charter's attempt at replacing the League of Nations era constitutive process has been successful. Through the Charter's broad prohibition of use of force, establishment of intergovernmental and international organisations to remedy the weaknesses in a decentralised international legal system (lack of centralised law-making and enforcement mechanism) the Charter had attempted to replace a basically Grotian (or internationalist) with a Kantian (or universalist) world order.¹³⁸ Unfortunately, the state system is so well entrenched that from time to time it resurfaces especially during crises and destroys extant institutions.¹³⁹ 'It is like a human skeleton that can only be seen on an X-ray being covered by flesh and skin and clothes. Though momentarily concealed, it is still very much there, constituting the framework on which all the rest is based.'¹⁴⁰ It suffices to state here that, from the outset, in the attempt to fashion a system approximating the fourth constitutive configuration by the Charter, some scholars had pointed out that both the League

¹³⁸ The differences in the three main world order traditions of state system (Hobbesian or realist, Grotian or internationalist and the Kantian or universalist) was illustrated by Hedley Bull. According to him, the Hobbesian order conceive of relations amongst states as being in perpetual state of anarchy, a 'state of war of all against all' where a state is at liberty to pursue its interests and vindicate its rights without moral or legal restrictions except where prudence demands, since there is no universal sovereign. The law does not constrain but legitimates power. The Kantian view on the other extreme does not see relations amongst states as a state of perpetual war but sees a connection in a community of mankind between the individuals that make up the different states in the system to which the state system will eventually give way someday. The basis of relations is cooperation to achieving common interest of mankind in a cosmopolitan order regardless of the apparent tension often exhibited amongst states. The Grotian conception of world order does not see state relations as in perpetual war nor is the system composed of a community of mankind as argued by the Universalists. Rather, relations amongst states are based on cooperation on agreed rules of relationship. See Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (1977) 24-7; Hedley Bull 'Martin Wight and the theory of international relations' (1976) 2:2 *British Journal of International Studies* 101 at 104-12 where the author also elaborates on these traditions. However, as pointed out by Cassese and as we have argued here, it is difficult to avoid the conclusion that in its first stage of development the international community was shaped on the pattern of the Hobbesian and Grotian traditions.' But 'the new international legal institutions which appear to be largely patterned on the 'Kantian' model of thought, try to mitigate the most striking defects of the old system, by introducing certain improvements such as the creation of international organisations, the placing of sweeping restraints on the use of force and so on.' See Cassese 'International Law in a Divided World' op cit note 8 at 31-2.

¹³⁹ Ibid.

¹⁴⁰ Id.

of Nations and the Charter systems shared similar inbuilt weaknesses.¹⁴¹ It is pertinent to quote Goodrich copiously here:

It can, however, be queried whether the Charter system will be more effective than the League system, in view of the requirement of unanimity of the permanent members of the Security Council. If we imagine its application in situations such as the Italian-Ethiopian and Sino-Japanese affairs, it is difficult to see how the United Nations would achieve any better results than did the League. Like the League, but for somewhat different technical reasons, the United Nations, in so far as its enforcement activities are concerned, is an organisation for the enforcement of peace among the smaller states. If the permanent members of the Security Council are in agreement, it will be possible to take effective action under the Charter. It is not likely that such agreement will be reached to take measures against one of these great powers or against a protégé of such a great power. Consequently the sphere of effective enforcement action by the United Nations is restricted in advance, even more perhaps than was that of the League. Within the area of possible operation, the actual effectiveness of the United Nations system will depend upon political conditions which, if they had existed, would have also assured the success of the League of Nations.¹⁴²

This type 4 architecture is deeply flawed under the UN and problematic, hence the reversion to, and persistence of, type 3 constitutive configuration.¹⁴³ As pointed out above, the global constitutive process since 1945 has fluctuated between types 2 and 3, where the legal validity of unilateral action is contentious.¹⁴⁴ However, as Reisman points out, when confronted with questions of the legality of resort to unilateral action by states (and regional organisations), rather than dismiss such intervention as illegal, the task for the international lawyer is to undertake an assessment of such intervention by devising and using a set of parameters.¹⁴⁵ But before exploring what these criteria are and whether the AU/ECOWAS regimes satisfy them, it is pertinent to dispose of the procedural objections often raised to the legal validity of the AU/ECOWAS regimes.

5.5 PROCEDURAL OBJECTIONS TO THE AU/ECOWAS UNILATERAL RHMI REGIMES

The major objection to unilateral action is that the unilateral agent unlawfully arrogates to itself the authority to take an action that another appropriate and 'lawful' agency has been

¹⁴¹ Leland 'From League of Nations to United Nations' op cit note 74 at 10.

¹⁴² Ibid at 17-18.

¹⁴³ See Stanley Hoffman 'Delusions of World Order' (1992) *The New York Review of Books* 37 at 38 (hereafter Hoffman 'Delusions of world order').

¹⁴⁴ The determination of the prevailing constitutive configuration at any given time will require an appraisal of the constitutive process by the performance of seven intellectual tasks. See chapter 1. See Reisman 'Unilateral action' op cit note 3 at 4; McDougal, Lasswell & Reisman 'The world constitutive process of authoritative decision' op cit note 2 at 200-1.

¹⁴⁵ Reisman 'Coercion and self-determination' op cit note 9 at 643.

appointed to take.¹⁴⁶ In this case, the UNSC is the right authority appointed to authorise the use of force for whatever purpose outside self-defense. However, by article 10(c) and (d) of its MCPMRPSC Protocol, ECOWAS has arrogated that authority to itself and under article 52(3) of the same Protocol, ECOWAS merely provides that it will *inform* the UNSC of its enforcement actions. It does not provide that it will follow the procedure laid down in article 53(1) of the UN Charter.¹⁴⁷ Similarly, the AU has jettisoned the procedural requirement in article 53(1) of the Charter by virtue of the provisions in articles 16(1), 17(1) and (2) of the AUPSC Protocol.¹⁴⁸ As demonstrated in the previous chapter, these procedural irregularities and the resulting normative incompatibility with the Charter is the basis for the challenge to the legal validity of the AU/ECOWAS regional humanitarian military intervention (RHMI) regimes.

However, as I have already demonstrated in this chapter, such a conclusion is based on the mistaken assumption that the same constitutive process that was established in 1945 operates today. But we do know that the type 4 constitutive process that was envisaged in 1945 had for reasons discussed above, reverted to type 3. I will now consider whether the AU/ECOWAS RHMI regimes fulfill the substantive requirement for a claim to legal validity of unilateral action in the prevailing constitutive process. In this context, the substantive requirements for humanitarian intervention, though largely derived from the just war tradition, are essentially incorporated in the emerging norm of R2P. Since the ultimate utility of this research lies in providing a legal and theoretical framework for the operationalisation of R2P in Africa, I will assess how the AU/ECOWAS regimes meet these substantive requirements as framed in the ongoing R2P discourse.

¹⁴⁶ Reisman 'Unilateral action' op cit note 3 at 4.

¹⁴⁷ Musifiky Mwanasali 'From non-interference to non-indifference: The emerging doctrine of conflict prevention in Africa' in John-Akpokari, Angela Ndinga-Muvumba & Tim Murithi (eds) *The African Union and its Institutions* (2008) 41 at 55.

¹⁴⁸ Article 16(1) of the AUPSC Protocol gives the AU 'primary responsibility' to promote peace, security and stability in Africa which is in conflict with Article 24 of the Charter that reserved that role for the UNSC. Article 17 (1) AUPSC Protocol requires the AU to 'cooperate and work closely' with the UNSC. It does not require the AU to seek UNSC authorisation for its enforcement action. This is underscored by the fact that the UNSC is put in the same category as other international organisations in terms of how the AU stands in relation to them. According to Levitt, this "was a conscious decision by AU leaders due to the debacles in Somalia and Rwanda so the Assembly decided not to bind themselves to rules and systems that have failed Africa, or the policy prescriptions of certain powers." See Jeremy Levitt 'The Peace and Security Council of the African Union: The known unknowns' (2003) 13 *Transnational Law and Contemporary Problems* 109 at 125 (hereafter Levitt 'The Peace and Security Council of the African Union'). Whereas several provisions in the AU regime recognise the role of the UNSC in the maintenance of international peace and security such as Article 4(h) and (j) of the AU Act, Article 4(j), (k), 6(d), 7 (c), (g), 16(1), 17 (1) and (2) of the AUPSC Protocol, the AU carved a *domain reserve* on the right to authorise interventions on the continent without recourse to the UNSC 'except where necessary.' See Levitt 'The Peace and Security Council of the African Union' at 126.

5.6 CONDITIONS FOR THE LEGAL VALIDITY OF UNILATERAL ACTS IN A TRANSFORMED CONSTITUTIVE PROCESS

In the type 4 constitutive process discussed above, unilateral actions and regional treaty frameworks creating them would have been unnecessary and unlawful. However, since the UNSC which is the authoritative agency granted the power to use force or authorise the use of force when necessary, was unable to exercise it as occasion demands, resulting in the failure of the collective security arrangement, the AU/ECOWAS RHMI regimes for unilateral actions are legally valid provided they satisfied certain substantive requirements.¹⁴⁹

There are six such substantive criteria that must be satisfied under the doctrine of humanitarian intervention. It is important to note that essentially the same criteria are required for use of military force under Pillar Three, dealing with the responsibility to react under R2P.¹⁵⁰

The validity of unilateral action in a transformed constitutive process could rest on three pillars which are cumulative: (a) whether the legal system allows such unilateral act; (b) whether the circumstances were right; (c) whether the unilateral act meets the substantive criteria of legality.¹⁵¹ I have already disposed of the first condition above by arguing that with the reversion of the constitutive configuration from type 4 to type 3, unilateral action, and by extension treaty arrangements like the AU/ECOWAS regimes establishing them, are valid.¹⁵² By the same token, I had also dealt with (b) by arguing that the paralysis of the UNSC as a result of the veto with the consequence that it is unable to act to prevent or halt mass atrocities and genocides in Africa, provides the 'right circumstances' for unilateral actions and treaty arrangements by AU/ECOWAS to facilitate them. I now turn to condition (c).

¹⁴⁹ Reisman 'Unilateral action' op cit note 3 at 3-4. Abass cites the EU arrangements for Rapid Response to cater to its peace and security needs, ECOWAS and AU have their own framework already elaborated in chapter 4 above. Ordinarily, in the assessment of the lawfulness or otherwise of a decision (e.g. humanitarian intervention by AU/ECOWAS), both substantive (just cause, right intention, necessity, proportionality and so on) and procedural criteria (obtaining UNSC authorisation and reporting to the UNSC and generally complying with Chapter VIII) are used but in the case of unilateral action, procedural criteria are dispensed with because of urgency (such as threat of massive violation of human rights like genocide), likelihood of a veto (such as NATO in Kosovo), reluctance of the UNSC to act (such as ECOWAS in Liberia). See also Reisman 'Unilateral Action' op cit note 3 at 5.

¹⁵⁰ See chapter 7 *infra*.

¹⁵¹ Reisman 'Unilateral action' op cit note 3 at 3-4.

¹⁵² Even the UNSC seems to have tacitly acknowledged this transformation of the constitutive configuration and therefore the validity of unilateral action regimes like the AU/ECOWAS RHMI arrangement because the UNSC had always ratified such operations like the ECOWAS interventions in Liberia and Sierra Leone. See Chapter 3.

5.7 SUBSTANTIVE REQUIREMENTS FOR THE VALIDITY OF AU/ECOWAS RHMI REGIMES

These requirements were derived from the doctrine of humanitarian intervention and also reflected in the R2P rubric. They include right authority, last resort, necessity, proportionality, reasonable chance of success, just cause, right intention.¹⁵³ I briefly outline how the AU/ECOWAS frameworks meet these substantive requirements below.

5.7.1 *Right Intention*

This criterion has always been difficult to satisfy even in the best of circumstances. It is hard to imagine, let alone find any case of ‘pure’ humanitarian intervention because states hardly send their soldiers and resources to distant lands and risk domestic political costs at least in Western liberal democracies where national interest is not at stake.¹⁵⁴ In practice, humanitarian intervention is often driven by a combination of motives of different shades.¹⁵⁵ Whatever might be the case, a regional organisation engaging in unilateral intervention must be driven by humanitarian considerations.¹⁵⁶ To this end, there has always been a preference for multilateral force (preferably under the UN) or collective intervention under the auspices of a regional organisation such as the AU or ECOWAS, as this is less susceptible to abuse.¹⁵⁷

5.7.2 *Right Authority*

According to the major legal documents on the R2P norm, the UNSC is the appropriate agency to authorise any military intervention.¹⁵⁸ However, there are several grounds for arguing that such authority is not, and should not be, exclusive to the UNSC because, with

¹⁵³ See Antonio Cassese ‘Ex iniuria ius oritur: Are we moving towards international legitimization of forcible humanitarian countermeasures in the world community?’ (1999) 10 *EJIL* 23 at 27 listing some of these criteria. (hereafter Cassese ‘Countermeasures in the world community’). See also *Report of the International Commission on Intervention and State Sovereignty* (2001) para 4.18, 4.32 - 4.38 (hereafter ‘ICISS Report’).

¹⁵⁴ See Allen Buchanan ‘The internal legitimacy of humanitarian intervention’ (1999) 7:1 *The Journal of Political Philosophy* 71 at 86.

¹⁵⁵ Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4ed (2006) 101 (hereafter Walzer ‘Just and Unjust Wars’).

¹⁵⁶ Cassese ‘Countermeasures in the world community’ op cit note 153 at 26.

¹⁵⁷ See ‘ICISS Report’ op cit note 153 para 4.33 – 4.36.

¹⁵⁸ Ibid para 6.28; *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on Threats, Challenges and Change* U.N. Doc A/59/565 (2004) 56-57 para 201. But see para 272 where the Panel conceded that regional organisations (read AU/ECOWAS) could obtain UNSC authorisation ex post facto. This is in tandem with the AU position. See ‘The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”’ Executive Council Ext./EX. CL/2 (VII) 7th Extraordinary Session of the African Union, 7-8 March Addis Ababa Ethiopia (hereafter the ‘Ezulwini Consensus’).

¹⁵⁸ See *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General* U.N Doc A/59/2005 para 135; *World Summit Outcome Document* GA. Res. 60/1 para 139 (24 October 2005).

special reference to Africa, the AU/ECOWAS regimes provide a legal basis for the organisations to exercise lawful authority to approve intervention as stipulated in their treaties. The first reason is that as argued above, the constitutive process has been transformed to type 3. Second, as I will demonstrate in chapter 7, the legal basis for AU/ECOWAS authority also derives from the consent of their member states, which invariably means it is outside the scope of enforcement action contemplated by article 53(1) and is thus precluded because absence of consent is a distinguishing characteristic of humanitarian intervention.¹⁵⁹

The danger in insisting that the AU/ECOWAS seek UNSC authorisation despite the transformed constitutive process is that, where, for example, the UNSC had already refused to intervene in a situation in Africa, it would be disinclined to authorise intervention by a regional organisation. As seen in chapter 3, despite the request for intervention by the Liberian Government, the UNSC not only declined to intervene but also refused to discuss the matter at all until ECOWAS had gone far into its own operations in Liberia. In the ongoing crisis in Mali, it took more than one year for the UNSC to authorise ECOWAS to intervene in the crisis.¹⁶⁰ I will therefore argue that a regional organisation should be permitted to intervene without UNSC authorisation if the UNSC becomes paralysed.¹⁶¹ This will also avoid the normative ambiguity arising from UNSC ex post facto authorisations some scholars had ascribed to the UN reaction to ECOWAS interventions in Liberia and Sierra Leone, when in fact, ECOWAS was implementing its own mandate in both situations.¹⁶²

5.7.3 Last Resort

Quite often, unilateral action is the only sure way to protect an imperiled population and prevent mass atrocities like genocide. Kofi Annan pointed to this in the wake of the Rwanda

¹⁵⁹ See George Nolte 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 23 ZAoVR 53/3 603 at 622; Deen-Racsmany Zsuzsanna 'A Redistribution of authority between the UN and regional organisations in the field of the maintenance of peace and security' (2000) 13 *Leiden Journal of International Law* 297-231 at 305, 307; Frederik Harhoff 'Unilateral humanitarian interventions – Armed violence in the name of humanity?' (2001) 70 *Nordic Journal of International Law* 65 at 71.

¹⁶⁰ BBC News 'Mali Crisis: UN defers decision on ECOWAS Force' 5 July 2012. Available at <http://www.bbc.co.uk/news/world-africa-18728950> (accessed 11 September 2012). However, see UN S/RES/2085/2012 para 9, authorising the deployment of African-led International Support Mission in Mali (AFISMA).

¹⁶¹ See Abass 'Beyond Chapter VIII Paradigm' op cit note 114 at 160.

¹⁶² Ibid at 157-160 arguing that the so-called ex-post facto authorisation was in fact no authorisation at all as they merely referred to specific tasks to be carried out by ECOWAS and not the prior decision to intervene in the first place. Cf Simon Chesterman *Just War or Just Peace: Humanitarian Intervention and International Law* (2001) 137, 156.

genocide by asking ‘if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?’¹⁶³ However, such resort to force by AU/ECOWAS must be a last resort. It should subsequently be submitted to a process of appraisal by the global community and report back to the UNSC on what actions have been taken.¹⁶⁴ Both the AU and ECOWAS frameworks have provisions in their constitutive documents and relevant protocols for a graduated scheme of non-coercive measures.¹⁶⁵ Use of force is to be a last resort and this has been demonstrated by both the AU and ECOWAS in deserving instances such as Togo, Cote d’Ivoire, Liberia, and Sierra Leone.¹⁶⁶ Of course, it is not in all deserving cases that the AU/ECOWAS frameworks have been successful and Darfur and Zimbabwe are examples. However, the focus of this research is not an assessment of the effectiveness of these frameworks, this cannot be addressed here.

5.7.4 *Just Cause: War Crimes, Crimes against Humanity and Genocide*

These crimes are now *jus cogens* under customary international law and since 1948 states have assumed obligations to prevent and punish their commission.¹⁶⁷ As substantive criteria for humanitarian intervention in international law, they formed the core of the development of the traditional doctrine of humanitarian intervention in the classical sense of the word.¹⁶⁸ Their modern version was articulated by several jurists like Suarez, Grotius and Vattel so on even though the nomenclatures genocide, war crimes and crime against humanity did not emerge until after World War II.¹⁶⁹ These international crimes, besides invoking universal jurisdiction, form the threshold of intervention in a plethora of human rights and international humanitarian law instruments. The most recent restatement is in the R2P norm which

¹⁶³ United Nations *We the Peoples: The Role of the United Nations in the twenty-first century*, Report of the Secretary General (27 March 2000) A/54/2000 para 217.

¹⁶⁴ Leland ‘From League of Nations to United Nations’ op cit note 74 at 10.

¹⁶⁵ See for example Articles 3(f) and 4(e) of the AU Act; Article 3(a)-(e), 4(a) and 6(c) of the AUPSC Protocol; Article 58 (e) and (f) of the ECOWAS Revised Treaty, adopted on 24 July 1993 at Cotonou in Benin Republic. See <www.ecowas.int/sec/index.php?id=treaty&lang=en> (accessed on 31 May 2010); Article 3(a), (d), (g) of the Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management, and Resolution, and Peace-keeping and Security adopted at Lome, Togo on 10 December 1999. Available at <www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en> (accessed on 2 June 2010) (hereafter ‘ECOWAS MCPMRPS Protocol’)

¹⁶⁶ See Chapter 3.

¹⁶⁷ See for example article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 available at <<http://www.treaties.un.org/untc//Pages//doc/Publication?UNTS/Volume%2078/volume-78-I-1021-English.pdf>> (accessed on 12 June 2012).

¹⁶⁸ See Chapter 2 for a discussion of the doctrine of humanitarian intervention.

¹⁶⁹ See William A Schabas *An Introduction to the International Criminal Court* (3 ed 2008) 6.

stipulates that '[t]ough threshold conditions should be satisfied before military intervention is contemplated. For political, economic and judicial measures the barrier can be set lower, but for military intervention it must be high: for military action to be defensible the circumstances must be grave indeed.'¹⁷⁰

Under article 4(h) of the AU Act, the commission of any of these three crimes constitute 'grave circumstances' sufficient to activate the AU's right of intervention.¹⁷¹ The term is reminiscent of 'grave breaches' used in the ICC Rome Statute.¹⁷² However, it is only under the AU/ECOWAS frameworks that, apart from genocide, war crimes and crimes against humanity, can be grounds for intervention. The import of this is clear, where the level of violations fall below this threshold, it would appropriately be dealt with by the concerned state and other non-military measures could be deployed by the AU/ECOWAS. For purposes of ascertaining when the threshold has been crossed, which is a particularly difficult task for practical purposes, the AU/ECOWAS would have to rely on their Early Warning System to meet this criterion. By codifying these thresholds, both protocols bring clarity to the criteria for determining intervention unlike the somewhat nebulous terms often used to characterise the nature and scope of such atrocities—R2P uses 'large scale ethnic cleansing' 'large scale loss of life',¹⁷³ 'massive violations' 'gross violations' and the definitional baggage they carry.¹⁷⁴ Thus, they comply with the substantive requirement here.

5.8 R2P AND THE LEGAL IMPLICATIONS OF THE VALIDITY OF AU/ECOWAS RHMI REGIMES FOR THE UN CHARTER AND INTERNATIONAL LAW

One drawback in resolving the AU/ECOWAS RHMI regimes validity question is that upholding their validity in effect reverses the roles of major participants in the decision making arena of the constitutive process, the AUPSC and ECOWAS Mediation and Security Council effectively take the place of the UNSC. This has major implications. By sidelining the UNSC through unilateral action (first, through unauthorised interventions, and, later, through codification of same), the AU/ECOWAS RHMI regimes seem to superimpose their

¹⁷⁰ See 'ICISS Report' op cit note 153 para 4.2.

¹⁷¹ See Girmachew Alemu Aneme *A Study of the African Union's Right of Intervention Against Genocide, Crimes against Humanity and War Crimes* (2011) 129 (hereafter Girmachew Alemu Aneme 'A Study of the African Union').

¹⁷² It is likely that the AU/ECOWAS RHMI regimes have been influenced by developments in international human rights law, international humanitarian law and international criminal law.

¹⁷³ See 'ICISS Report' op cit note 153 para 4.19-4.20.

¹⁷⁴ See for example, *Prosecutor v Akayesu* (Judgment) ICTR-94-T 2 September 1998, para 170.

own normative articulation and change in the authoritative decision process and participants' roles on the UNSC.

A second consequence is that AU/ECOWAS states would be excused from article 103 obligations which were imposed by the Charter built on the assumption that with an effective UNSC collective security system, states would not need alternative arrangements whether by treaty or otherwise. Thirdly, a framework for unilateral intervention could be open to abuse and thus weaken the UN system for maintenance of international peace and security. As a decentralised system, institutionalised procedures are deemed crucial to orderly conduct of international law, and regardless of the moral objective, unilateral action that erodes this system is never justified.¹⁷⁵

However, when a system becomes ineffective like the current Charter system, due to defective procedure, there will be need for reform and where that is not possible through the formal procedures provided, participants might gravitate towards extra-legal options. Although procedure is important, substance is what the system lives for. Usually in the application of law to concrete cases as a part of the constitutive process, the need for remedy becomes obvious due to the inadequacies of the law. Thus, the application of existing Charter framework to humanitarian intervention reveals the need for such remedy. Today, this remedy has found expression in several proposals contained in different reports and studies, such as the Kosovo Report, the Ezulwini Consensus, the ICISS Report and ultimately the World Summit Outcome Document. When taken together, they are evidence of the normative congruence between the Purposes of the Charter system and the AU/ECOWAS RHMI regimes. Some of these instruments contemplate unilateral intervention by regional organisations as a normative response to the inadequate reach of the Charter. They therefore lend credence to the legal validity of the AU/ECOWAS RHMI regimes designed to give effect to them.

Besides, the AU/ECOWAS RHMI regimes do not seek to supplant the Charter system. In fact, it is arguable that since the type 4 constitutive process has reverted back to the type 3, the AU/ECOWAS RHMI regime is an attempt to rescue it. The AU/ECOWAS RHMI regimes could rescue the system not only from the challenge of controversy about the definition of human rights and threshold for intervention but also other conditions that would guide the expression and exercise of authority for enforcement of values shared both by the

¹⁷⁵ Reisman 'Unilateral action' op cit note 3 at 6.

Charter and the AU/ECOWAS framework. To this end, the fact that the AU/ECOWAS RHMI regimes might not meet the criteria of legal validity under the Charter would be of little significance.

5.9 CONCLUSION

When assessing the legal validity of unilateral acts one must examine the nature of such acts under the existing international law principles and whether there are circumstances where such acts are permissible. Does the UN Charter and current international law permit unilateral acts such as those contemplated in the AU/ECOWAS RHMI regimes and by implication a regional legal framework for that purpose? If the answer is yes, then the second question follows: whether the particular act in question fulfills the substantive criteria of lawfulness. If the answer to any of the two questions is negative then the act is illegal. Under the first, unilateral action was not just legal, it was the only rule because the legal system had no hierarchical institution effective or not. Under types 2 and 3, there is a contest over the legality or otherwise of unilateral action because the body to which the constitutive process has granted the primary authority on the use of force—UNSC—has failed or is incapable of exercising it when needed. To the extent that the UNSC was effective in the use of force to protect human rights under a type 4 constitutive process, unilateral action was illegal under international law, since these provisions were made on the assumption of a type 4 constitutive process with an effective hierarchical body.

However, the veto had incapacitated the UNSC, having failed in deserving cases severally to exercise its authority to use force to protect human rights, the system reverted from type 4 back to type 3 constitutive process. This led to states seeking and creating unilateral arrangements outside the Charter framework to protect human rights and maintain regional peace and security.¹⁷⁶ It is only when the global community is able to establish a type 4 constitutive process that states would be willing to abandon self-help and that unilateral action can effectively be declared illegal or invalid. Here, my thesis differs from Reisman, who appears to conclude that the type 3 constitutive process will continue to prevail. I am optimistic that the AU/ECOWAS RHMI regimes will facilitate the transformation of the system back to a type 4 constitutive process where the system is

¹⁷⁶ Reisman 'Unilateral action' op cit note 3 at 11-12.

effective in the protection of human rights and so unilateral intervention legal regimes like those of the AU and ECOWAS would once again become unnecessary and therefore illegal.

CHAPTER 6: THE AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIMES AS A PROCESS OF ILLEGAL INTERNATIONAL LEGAL REFORM

If illegal acts are necessary to bring about important substantive improvements in the system whose rules for legal change are serious impediments to progress, and if these acts are undertaken in a responsible way, with appropriate precautions to reduce the risks of error and abuse, and with a proper regard for the dangers of undermining confidence in the law, then this presumption in favour of change through legal means can be overridden. ... To insist otherwise is to privilege the presumption of change through lawful means over other elements and substantive justice.¹

6.1 INTRODUCTION

In the previous chapter I examined the legal validity of the AU/ECOWAS regional humanitarian military intervention regimes (RHMI) under different constitutive configurations into which the global constitutive process has been categorised. Through a policy-oriented jurisprudence approach, I demonstrated that the global constitutive process has evolved from one without a hierarchical institution of decision-making in the pre-global era (under which unilateral action was legal), to the League of Nations era (where the global community created a constitutive configuration with a hierarchical institution). This institution was ineffective because it relied on the voluntary cooperation of member states for effective operation and when that cooperation was not forthcoming, the system could only achieve limited effectiveness. I therefore concluded that the AU/ECOWAS RHMI regimes would have been legal in that era. I argued that the formation of the UN was an attempt to establish a constitutive configuration with effective hierarchical institutions of decision-making under which unilateral action is unlawful because states had surrendered their right to use force to the United Nations Security Council (UNSC) in exchange for a guarantee of collective security. But the authoritative agency (the UNSC) granted the authority has been unable to exercise it when it matters most, resulting in the failure of the collective security arrangement, reverting the type 4 constitutive configuration back to type 3 under which unilateral actions and the AU/ECOWAS RHMI regimes are legally valid.

Since the primary objective of this thesis is theoretical in nature—to test the legal validity of the AU/ECOWAS RHMI regimes—the present chapter is the second leg of my theoretical tripod interrogating the validity of the AU/ECOWAS RHMI regimes. In this

¹ Allen Buchanan Justice, *Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004) 465 (hereafter Buchanan ‘Self-determination’).

chapter, I examine the AU/ECOWAS RHMI regimes from the perspective of what Allen Buchanan has aptly described as ‘Illegal International Legal Reform’. Like the previous chapter, my focus in this chapter is three major questions: is there a moral foundation underpinning the apparent normative incompatibility between the AU/ECOWAS RHMI regimes and the UN Charter and is it justifiable? Put differently, is there a moral basis for upholding the validity of the AU/ECOWAS RHMI regimes despite the apparent normative incompatibility with the UN Charter? Under what conditions, if any, are the African Union and ECOWAS morally justified to break international law in order to bring about reform in the law and its responses to humanitarian catastrophes in Africa? Do AU/ECOWAS meet these conditions? In other words, when, if at all, is the AU/ECOWAS permitted to break international law in order to improve it?

I shall rely on Buchanan’s theory of Illegal International Legal Reform (IILR) to argue that the existing law of humanitarian intervention that forbids the AU/ECOWAS from undertaking intervention to halt genocides and other mass atrocities unless authorised by the UNSC is so defective that it is incapable of protecting human rights and therefore in need of reform. I will further argue that since attempts at reforming the UN Charter system through formal channels have proved difficult, if not impossible, initiatives like the AU/ECOWAS RHMI regimes which, though *apparently* violate the Charter law, constitute an improvement on the law. They therefore derive their validity from their normative content as moral improvement on the existing Charter-based law of humanitarian intervention and are justifiable. I then examine the possibility of abuse of this process and the implications for international law. I contend that since this *breach* of the law represents improvement on the law its benefits outweigh whatever attendant costs there might be.

It should be emphasised from the outset that the analysis that follows proceeds mainly at a theoretical level (limited to AU/ECOWAS and relevant UN Charter provisions only). It does not examine how the AU/ECOWAS would be implemented nor does it answer the question whether they would actually be more effective than the UNSC in practice. Like the analyses in other chapters of the thesis, the objective is a theoretical validation of specific AU/ECOWAS treaty provisions vis-à-vis the UN Charter and international law.

6.2 THE CONCEPT OF ILLEGAL INTERNATIONAL LEGAL REFORM UNDER INTERNATIONAL LAW

The present Charter-based international legal order has made appreciable progress in human rights, from the pace-setting provisions in the UN Charter to the adoption of the International Bill of Rights² and more recently, the responsibility to protect (R2P) principle. However, this progress was attenuated by the tension between two diametrically opposed values enshrined in the Charter—state sovereignty and the maintenance of international peace and security on the one hand, and the promotion and protection of human rights on the other.³ Article 2(4) and (7) still represent the core of the Charter system notwithstanding the occasional reinterpretations by states and the UNSC in the light of changing circumstances and practices. This has posed two main challenges: first the Charter system has not been able to avert what Classicists traditionally warn against: the need to safeguard the role of law in maintaining world order by protecting its autonomy and insulating it from the whims of state powers.⁴ Secondly, this ad hoc approach to a systemic problem has not been able to prevent genocides and other mass atrocities as we saw in chapter 3. Against the backdrop of the controversy of the legality of humanitarian intervention, the question of finding a legal basis for responding to community demands for protection against genocides and mass atrocity crimes has remained a dilemma. Despite this failure in its institutional goals, efforts to reform the UN Charter system have largely been unsuccessful. One way theorists have sought to resolve this dilemma is by developing the concept of IILR.⁵ The major proponent, Allen Buchanan states the theory thus:

² Jarat Chopra & Thomas G Weiss 'Sovereignty is no longer sacrosanct: Codifying humanitarian intervention' (1992) 6:1 *Ethics & International Affairs* 95 at 101 (hereafter Chopra & Weiss 'Codifying humanitarian intervention').

³ Ibid at 108. See also Kofi Annan, Address of the Secretary-General to the UN General Assembly, 20 September 1999, (SG/SM/7136/GA/9596).

⁴ See Tom J Farer 'Human rights in law's empire: The jurisprudence war' (1991) 85 *AJIL* 117 at 119 (hereafter Farer 'Human rights in law's empire').

⁵ The major works articulating this theory are Allen Buchanan 'From Nuremberg to Kosovo: The morality of illegal international legal reform' (2001) 111:4 *Ethics* 673 (hereafter Buchanan 'From Nuremberg to Kosovo') reprinted as Allen Buchanan 'Reforming the international law of humanitarian intervention' in J L Holzgrefe & Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 130-173 (hereafter Buchanan 'Reforming the law of intervention'); Buchanan 'Self-Determination' op cit note 1; Robert E Goodin 'Toward an international rule of law: Distinguishing international law-breakers from would-be law-makers' (2005) 9:1/2 *The Journal of Ethics* 225 (hereafter Goodin 'Toward an international rule of law') exploring the concept of 'civil disobedience' model in municipal legal systems. He applies the concept to international law to illustrate how supposed law-breakers actually end up reforming existing law and making new laws in the process. For an alternative proposal to IILR for reform of the law on humanitarian intervention, see Jane Stromseth 'Rethinking humanitarian intervention: The case for incremental change' in J L Holzgrefe & Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 232-272

[g]iven the relatively undeveloped state of international law—in particular, its inadequate protection of basic human rights and the limited resources for timely and lawful change in the direction of more adequate protection—there are opportunities for acts which are both illegal and highly desirable as steps towards morally improving the system.⁶

It is generally conceded that there is a gap between the expectations of the global community and the normative reach and response of the law of humanitarian intervention.⁷ Since this chasm borders on legal and institutional arrangements under the Charter, bridging the gap will necessarily require a change in the Charter law. It is the strategy to bring about this change that is the focus of this chapter. All things considered, bringing about the needed change in the law to make it more responsive to community goals may not always be possible within the formal legal frameworks for such reforms.⁸ There will always be opportunity for acts of IILR because as Friedmann stated long ago, and rightly so even now, in my opinion, ‘... the development of contemporary international law does not proceed exclusively—or perhaps even pre-dominantly—through the formal instruments of law-making.’⁹ The making of a new rule of international law sometimes involves the breaking of the existing rule.¹⁰ For example, this is particularly true of customary law because it has no formal institutions and processes for its creation and determination. The implication is that there is no agency for purposive modification of its rules to suit changing times and circumstances, whether by abrogation of old rules or the invention of new ones, because the framework that can permit such reform will require the existence of secondary rules, something customary law lacks.¹¹ So, when a rule of customary law is violated, such act of violation could contain the ‘seeds of a new and contrary rule of custom’, otherwise change in the law would be impossible.¹²

(hereafter Stromseth ‘Rethinking humanitarian intervention’). For a critique of the IILR theory, see Alfred Rubin *Ethics and Authority in International Law* (1997) (hereafter Rubin ‘Ethics and Authority’). Other works arguing for alternative approaches outside the UNSC framework as a way of improving the Charter law on humanitarian intervention include Stanley Hoffman ‘Delusions of world order’ (1992) *The New York Review of Books* 37 at 41 predicting that in future states might be forced to establish a system that bypasses the UNSC; Allen Buchanan & Robert O Keohane ‘Precommitment regimes for intervention: Supplementing the Security Council’ (2011) 25:1 *Ethics & International Affairs* 41 (hereafter Buchanan & Keohane ‘Precommitment Regimes’), outlining the framework of a humanitarian intervention regimes that bypasses the UNSC.

⁶ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 680.

⁷ See Vladimir Kartashkin ‘Human rights and humanitarian intervention’ in Lori Fisler Damrosch & David J Scheffer (eds) *Law and Force in the New International Order* (1991) 202-211 at 209.

⁸ Buchanan ‘Self-Determination’ op cit note 1 at 467-8.

⁹ Wolfgang Friedmann ‘The United Nations and the development of international law’ (1970) 25:2 *International Journal* 272 at 277.

¹⁰ Anthony D’Amato *The Concept of Custom in International Law* (1971) 78-9 (hereafter D’Amato ‘The Concept of Custom’).

¹¹ See HLA Hart *The Concept of Law* (1992) 90.

¹² D’Amato ‘The Concept of Custom’ op cit note 10 at 13.

Therefore, when we observe an instance of violation of customary law, we must not only assess its disruptive impact but also the law-making potential of such incident.¹³ I will return to this point in the next chapter but suffice it to mention here that some of the changes occasioned by IILR could be a matter of course while others are inevitable especially where the international legal framework has no means of dealing with such situations and may therefore require some extra-legal means to solve the problem. The question then becomes whether this provides, at least, a moral basis for embarking on acts that violate the law but which also have the potential for improving it.¹⁴ In other words, taking cognisance of the gap between the *lex lege lata* and the *lex lege ferenda*, is it morally justifiable for actors to take unilateral acts that breach the existing law on humanitarian intervention in order to bring about its moral improvement? ‘Under what conditions, if any, is it morally justifiable to breach international law in order to try to improve the system from a moral point of view?’¹⁵

Advocates of this theory do not have a long list of historical examples to lean on; however, they do have on their side some of the most significant developments with arguably undisputed precedential value in the making and moral improvement of international law. For example, the practice where Britain used its superior naval power to unlawfully board and search ships of other flag states for slaves during the Trans-Atlantic Slave Trade were IILR acts that subsequently resulted in treaty arrangements to reform international law in order to outlaw slavery and the slave trade.¹⁶ Another example of IILR with more profound impact was the Nuremberg Tribunal which introduced what is now known in international criminal law as ‘crime against humanity’ and ‘conspiracy to wage aggressive war’.¹⁷ During World War II when the acts complained of by the prosecution in the Tribunal took place, these acts were neither defined nor sanctions prescribed for them in international law and there was no rule of international law providing for their prosecution and punishment.¹⁸ In effect, the acts did not constitute a crime at the time they were committed prior to 1945 when the London Charter of the Nuremberg Tribunal was drafted.¹⁹ The standard of the Nuremberg Trials did not meet the minimum requirements of criminal justice under general international law and

¹³ Id.

¹⁴ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 675.

¹⁵ Ibid at 682.

¹⁶ Goodin ‘Toward an international rule of law’ op cit note 5 at 245.

¹⁷ See article 6(c) of the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, (1951) 82 U.N.T.S. 279. See William A Schabas *An Introduction to the International Criminal Court* (3ed 2008) 6 (hereafter Schabas ‘Introduction to the International Criminal Court’).

¹⁸ See Buchanan ‘Reforming the law of intervention’ op cit note 5 at 138.

¹⁹ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 681.

has been described as ‘ex post facto criminalisation’ or ‘victors’ justice’.²⁰ The entire trial was an exercise in IILR. Yet, the precedent set at Nuremberg and brought about by a process of IILR, form the bedrock of modern international criminal law and has shaped the development of that branch of public international law ever since.²¹

In the law of humanitarian intervention, such precedent-setting acts have taken place and have been repeated often enough to arguably reinforce its precedential value. First, in 1999, NATO intervened in Kosovo without UNSC authorisation. There is extensive literature on the legality of the intervention, particularly with regard to UN Charter,²² but not so much on the extent to which the intervention constitutes a precedent for IILR aimed at morally improving the law on humanitarian intervention.²³ By its Charter, NATO is a Chapter 51

²⁰Schabas ‘Introduction to the International Criminal Court’ op cit note 17 at 6. There was no law authorising the establishment of the Nuremberg Tribunal under international law at the time. For a critique of the Nuremberg Trials, see Rubin ‘Ethics and Authority’ op cit note 5 at 183. This is also one of Rubin’s major objections to the IILR as an approach to international legal reform because some of the individuals implicated in the atrocities of World War II also sat as judges in the prosecution of their fellow offenders.

²¹Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 681.

²² See Ivo H Daalder & Michael E O’Hanlon *Winning Ugly: NATO’s War to Save Kosovo* (2000) (hereafter Daalder & O’Hanlon ‘Winning Ugly’); Independent International Commission on Kosovo *Kosovo Report: Conflict, Response: Lessons Learned* (2000) (hereafter ‘The Kosovo Report’); Danish Institute of International Affairs *Humanitarian Intervention: Legal and Political Aspects* (1999); Richard A Falk ‘What future for the UN Charter system of war prevention?’ (2003) 97 *AJIL* 590 (hereafter Falk ‘What future for the UN Charter system’); Richard Falk ‘World order and the future of international law’ (1999) 93(4) *AJIL* 847 (hereafter Falk ‘World order and the future of international law’); A collection of essays in Aleksandar Jokic (ed) *Lessons of Kosovo* (2003); Bruno Simma ‘NATO, the UN and the use of force: Legal aspects’ (1999) 10:1 *EJIL* 1; Antonio Cassese ‘Ex iniuria, ius oritur: Are we moving towards the international legitimation of forcible humanitarian countermeasure in the world community?’ (1999) 10:1 *EJIL* 22 (hereafter Cassese ‘Ex Iniuria, ius oritur’); Antonio Cassese ‘A follow-up: Forcible humanitarian countermeasures and opinion necessitates’ (1999) 10:4 *EJIL* 791; Christine Chinkin ‘The legality of NATO’s action in the Former Republic of Yugoslavia (FRY) under international law’ (2000) 49:4 *The International and Comparative Law Quarterly* 910.

²³ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5; Sean D Murphy ‘The intervention in Kosovo: A law-shaping incident’ (2000) 94 *ASIL Proceedings* 302 (hereafter Murphy ‘The intervention in Kosovo’); W Michael Reisman ‘Kosovo’s antinomies’ (1999) 93 *AJIL* 860 (Reisman ‘Kosovo’s antinomies’). In the case of ECOWAS practice, the interventions had seldom been studied from its law-making or law improving perspective. Among the few writers on ECOWAS practice of humanitarian intervention that have explored this theme are David Wippman ‘Enforcing the peace: ECOWAS and the Liberian Civil War’ in Lori Fisler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 157-203 suggesting that the ECOWAS example could become useful model for the future; David Wippman ‘Pro-democratic intervention in Africa’ (2002) 96 *ASIL Proceeding* 132; Jeremy Levitt ‘The evolving intervention regime in Africa: From basket case to market place?’ (2002) 96 *ASIL Proceedings* 143 (hereafter Levitt ‘The evolving intervention regime in Africa’); Jeremy Levitt ‘The law on intervention: Africa’s pathbreaking model’ (2005) 7:1/2 *Global Dialogue* (hereafter Levitt ‘Africa’s pathbreaking model’). Neither the AU nor its predecessor (the OAU) has significant record of practice of humanitarian intervention and the relatively new AU RHMI regime is yet to be tested. The few works exploring the law-making/improvement potential of the AU RHMI regime include Jean Allain ‘The true challenge to the United Nations System of the use of force: The failures of Kosovo and Iraq and the emergence of the African Union’ (2004) 8 *Max Planck United Nations Yearbook* 237 (hereafter Allain ‘The true challenge to the United Nations System’); Jeremy Levitt ‘The Peace and Security Council of the African Union: The known unknowns’ (2003) 13:1 *Journal of Transnational Law and Contemporary Problems* 109 (hereafter Levitt ‘The Peace and Security Council’); Jeremy Levitt ‘African interventionist states and international law’ in Oliver Furley & Roy May (eds) *African Interventionist States* (2001) 15-49 (hereafter Levitt ‘African interventionist states and international law’); Martin Kunschak ‘The African Union and the right

defense alliance rather than a Chapter VIII regional organisation and whenever it seeks to use force not in individual or collective self-defense or pursuant to a UN mandate, it ought to obtain UNSC authorisation.²⁴ However, one of the justifications given by NATO for its unilateral intervention in Kosovo was that it was dictated by the need to avert an imminent extreme humanitarian catastrophe.²⁵ In fact, then UN Special Representative of the Secretary General to Kosovo, Bernard Kouchner, stated that the Kosovo intervention was necessary and hopefully aimed at generating a new rule of international law on humanitarian intervention through practice by modifying or substituting the existing rule requiring UNSC authorisation for one that dispenses with such requirement.²⁶

The interventions by ECOWAS in Liberia and Sierra Leone without UNSC authorisation represent, at least at a regional organisation level, acts of IILR. The ECOWAS practice should be distinguished from other past incidents of humanitarian interventions such as Tanzania in Uganda, India in East Pakistan and Vietnam in Cambodia. The first point of departure is the response of the international community to the earlier interventions. Whereas India and Vietnam, for example, were criticised (even if by a few states), ECOWAS was commended for its interventions.²⁷ Secondly, none of the intervening states in the earlier cases advanced humanitarian considerations as the primary justifications for their actions, but ECOWAS mainly based its justification on humanitarian grounds.²⁸ Thirdly, none of the other states demonstrated a desire to reform the existing Charter paradigm on humanitarian intervention: articles 2(4), 2(7), 24, 53, and 103. ECOWAS gave humanitarian reasons as

to intervene: Is there a need for UN Security Council authorisation?' (2006) 31 *South African Yearbook of International Law* 195 (hereafter Kunschak 'The African Union and the right to intervene').

²⁴ See article 5 of NATO Treaty 1949 available at

http://www.nato.int/cps/en/natolive/official_texts_17120.htm (accessed on 27 July 2011).

²⁵ See Communiqué by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington D.C. on 24 April 1999, (NATO) Press Release, NAC-S (99) 64, available at <http://www.nato.int/docu/pr/1999/p99-064e.htm> (accessed on 18 December 2012), para 38.

²⁶ See Clara Portela 'Humanitarian intervention, NATO and international law: Can the institution of humanitarian intervention justify unauthorised action?' (December 2000) *Berlin Information Centre for Transatlantic Security* 14 available at <http://www.bits.de/public/pdf/rr00-4.pdf> (accessed on 10 December 2012), citing interview in Swiss Newspaper *Le Temps*, 23 October 2000.

²⁷ See S/RES/788(1992) para 1 19 November 1992 on the situation in Liberia; S/RES/1132 (1997) para 3, 8 October 1997 on the situation in Sierra Leone.

²⁸ For example India claimed self-defense as justification for the intervention in East Pakistan. See 26 U.N. S.C.O.R. 1606th meeting, 4 December 1971 para 156–163. See Ronzitti Natalino *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985) 96. See David Wippman 'Military intervention, regional organisations, and host-state consent' (1996) 7 *Duke Journal of Comparative & International Law* 209 at 227.

justification for the intervention demonstrating its desire to initiate a process of IILR to improve the international law on humanitarian intervention, at least in its region.²⁹

The idea of an exercise in IILR by AU/ECOWAS may appear audacious and can hardly, in the nature of things, be grounded in law without debate. However, it finds expression and justification in its moral objective to improve the law of humanitarian intervention, approximating the ideal or the law as it ought to be. From the different moral justifications given for past unilateral acts of humanitarian intervention, it is clear that it is not the normative contents of human rights that are problematic as such, but the existing normative foundation of international law that has no provision for the use of force to halt mass atrocity crimes.³⁰ This underscores the need to bring the law as close as possible to the ideal, and by ideal, I mean a law of humanitarian intervention (whether regional or international) providing the legal framework for the prevention of mass atrocity crimes.³¹ The morally right course of action, in say, Rwanda, Srebrenica, Darfur, may not always be legal and in fact, could mean an infringement of international law because law and morality could be at odds in such situations, making a change in the law necessary.³² Let us assume that this is the case, it will not be necessary, nor is it desirable, for a theory of moral justification of unilateral humanitarian intervention to concede that the AU/ECOWAS RHMI regimes violate the law.³³ Expressing this point in relation to NATO's intervention in Kosovo, Buchanan states:

[t]he significance of the Illegal International Legal Reform is that whereas the other justifications often offered for the NATO intervention in Kosovo merely state that the intervention was morally necessary without in any way implying that the international legal system as a whole or the particular norm violated needs improvement. Thus, to adopt such justification for illegal intervention is fully consistent with believing that

²⁹ See letter from the Permanent Representative of Nigeria to the UN Secretary General 9 August 1990 attached to the letter from the Nigerian Minister of External Affairs on the outcome of the ECOWAS Standing Mediation Committee, S/21485 at 3.

³⁰ Allen Buchanan 'Human rights and the legitimacy of the international legal order' (2008) 14 *Legal Theory* 39 at 51.

³¹ Advancing justifications for unauthorised humanitarian intervention has been difficult. NATO's intervention in Kosovo was described as 'illegal but legitimate'. See International Independent Commission on Kosovo *Kosovo Report: Conflicts, International Response: Lessons Learned* (2000) 4. See George P Fletcher & Jense David Ohlin *Defending Humanity: When Force is Justified and Why* (2008) 134 reviewing various possible moral strategies for defending humanitarian intervention (hereafter Fletcher & Ohlin 'Defending Humanity'). See also Terry Nardin 'The moral basis for humanitarian intervention' in Anthony F Lang Jr. (ed) *Just Intervention* (2003) 11-27, giving a historical account of moral theories in defense of humanitarian intervention.

³² Fletcher & Ohlin 'Defending Humanity' op cit note 31 at 134.

³³ Buchanan 'Reforming the law of intervention' op cit note 5 at 132. Buchanan stresses this point in relation to NATO's intervention in Kosovo.

the existing rule requiring UNSC authorisation is a good rule, even that it is the best rule possible.³⁴

The view rightly criticised by Buchanan here assumes, even against prevailing cases of genocides and mass atrocities, that the existing law of humanitarian intervention is a good law when in fact, it is so defective that it is in dire need of reform. However, the AU/ECOWAS RHMI regimes are morally justifiable because they do not just offer justifications for unilateral acts but posit that the existing law on humanitarian intervention is defective and its objective is to morally improve it through IILR. This view might be challenged since a rule of international law remains valid and ought to be obeyed until changed through the formal processes or procedures for amendment.³⁵ However, as shown in chapter 5, if a ‘law’ is no longer ‘controlling and authoritative’, then its characterisation as such is at best questionable.³⁶ In the context of my present analysis, such ‘law’ has lost its moral pull and can only give rise to a situation where practice is far removed from formal prescriptions.³⁷ This, in my view, is sufficient justification for the validity of the AU/ECOWAS IILR to which I now turn.

6.3 JUSTIFICATIONS FOR ILLEGAL INTERNATIONAL LEGAL REFORM

The main arguments usually offered as justifications for embarking on IILR are, first, that the existing international law on humanitarian intervention is so defective that it is in need of reform and moral improvement; secondly, that since international law is still underdeveloped, change through the formal process such as outlined in the UN Charter is slow and even unlikely to happen; thirdly, it is argued that the current agency saddled with the duty to implement such reform has lost its legitimacy.³⁸ The discussion that follows is intended to give brief insights into these justifications after which I proceed to apply them to the AU/ECOWAS RHMI regimes.

³⁴ Id.

³⁵ See H L A Hart *The Concept of Law* op cit note 11 at 92-7.

³⁶ Anthony Clark Arend & Robert J Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 183 (hereafter Arend & Beck ‘International Law and the Use of Force’).

³⁷ Ibid 184.

³⁸ See generally Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 particularly at 678-82.

6.3.1 *The Current Law on Humanitarian Intervention is Defective and Needs Moral Improvement*

In chapter 5, I established that although international law aimed to develop a type 4 constitutive configuration with centralised decision-making institutions, the system has actually degraded since 1945 and now swings between type 2 and 3 constitutive processes. The hope of an international legal system operating on a type 4 constitutive process like a national legal system will be difficult to replicate at the global level as there is no hope of achieving a world government any time soon.³⁹ International law is still rudimentary and this relative undeveloped nature manifests in its inadequate protection of basic human rights.⁴⁰ This leaves room for states to interpret the same rules of international law differently in similar situations as national interests dictate.⁴¹ The consequence is that rules of international law are refined to fit state behaviour and rather than being what Farer calls a ‘stern judge’ that states follow, the law now follows state behaviour.⁴² More importantly, the law is not able to adequately protect fundamental human rights, and the international community it serves is in a perpetual danger of slipping into chaos.⁴³

This problem has its roots in the history of the Charter. At the time the UN Charter was drafted, the international community prioritised peace over justice and sovereignty over human rights.⁴⁴ To secure this arrangement, human rights was deemed as essentially within the domestic jurisdiction of states and the international regulation of use of force was vested in the UNSC.⁴⁵ At that time, these principles, including sovereignty and non-intervention were perfectly valid and thus permeated the entire Charter-based system. However, the notion of justice and the promotion of human rights as well as the moral duty of peoples and nations across borders to reach out a hand of fellowship to suffering populations in an interdependent and interconnected world became the dominant element of the last quarter of the twentieth

³⁹ See Rubin ‘Ethics and Authority’ op cit note 5 at 146; W Michael Reisman ‘Unilateral Action and the Transformations of the world constitutive process: The special problem of humanitarian intervention’ (2000) 11:1 *EJIL* 3 at 11 note 18.

⁴⁰ Louis Henkin ‘International organisations and the rule of law’ (1969) 23:3 *International Organisation* 656 at 661 (hereafter Henkin ‘International organisations’).

⁴¹ Joseph L Kunz ‘The United Nations and the rule of law’ (1952) 46 *AJIL* 504 at 504.

⁴² Farer ‘Human rights in law’s empire’ op cit note 5 at 118.

⁴³ See Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (1977) 46-7.

⁴⁴ See Louis Henkin ‘Use of force: U.S. law and policy’ in Louis Henkin et al *Might v. Right: International Law and the use of Force* 2ed (1991) 37-69 at 38; Chopra & Weiss ‘Codifying humanitarian intervention’ op cit note 2 at 109.

⁴⁵ See Yoram Dinstein *War, Aggression and Self-Defense* (2005) 89-90; Anthony Clark Arend ‘The United Nations and the new world order’ (1999/2/3) 81 *Georgetown Law Journal* 491 at 496-7 (hereafter Arend ‘The United Nations and the new world order’).

century. Although the Charter had successfully adapted itself to some changes, its basic norms of world order implicating humanitarian intervention essentially remained unchanged and reform in this area is therefore necessary.⁴⁶ The reason is that the international community and the Charter-based law must be able to respond effectively to the demands of victims of mass atrocities. The above idea which Kofi Annan succinctly described as our ‘common humanity’⁴⁷ and the corresponding feeling of a moral duty to uphold as a minimum, certain values of human dignity, remain prohibited under a textual interpretation of the Charter law on humanitarian intervention, even in the face of genocides and mass atrocity crimes. So long as the extant law requiring UNSC authorisation has not been complied with, states and the international community are supposed to do nothing. The question then is whether a people wishing to fulfil what Buchanan calls the principle of ‘Natural Duty of Justice’ to use the collective resources of their states to aid an endangered population overseas should refrain from doing so because the Charter law forbids it?⁴⁸ Such group of states will be morally at odds to feel bound to support the existing international legal order and may well feel morally justified that there is a need for basic change in the current institutions and system through which international law is expressed.⁴⁹ Bringing help to imperilled populations will inevitably require a change in the defective system. The desired change is of such nature that either a major change in the law of the UN system or an alternative system of law and institutional frameworks would have to be established.⁵⁰ As the interventions in Liberia and Kosovo demonstrate, a

responsible agent confronted with the possibility of preventing a humanitarian disaster but aware that doing so is illegal under existing international law will ask not only whether there is a sound moral principle that allows or requires him to violate the law, but also whether he should act so as to try to bring about a change in the law.⁵¹

As I will demonstrate here, to be morally justifiable, an act of IILR must produce an improvement in the current law. The significance of an IILR for humanitarian intervention lies in its postulation that the law requiring every act of humanitarian intervention to be authorised by the UNSC is defective and a reform in the law whereby such authorisation is not always required is desirable even if it has to be brought about through IILR.⁵² Unlike

⁴⁶ See W Michael Reisman ‘International law after the Cold War’ (1990) 84 *AJIL* 859 at 862.

⁴⁷ See United Nations *We the Peoples: The Role of the United Nations in the twenty-first century, Report of the Secretary General* (27 March 2000) A/54/2000 para 217.

⁴⁸ Buchanan ‘Self-determination’ op cit note 5 at 431.

⁴⁹ Id.

⁵⁰ Ibid at 431-2.

⁵¹ Buchanan ‘Reforming the law of intervention’ op cit note 5 at 173.

⁵² Ibid at 133.

other justifications that advocate permissible violations of the law in exceptional cases but not necessarily aimed at improving the defective law, IILR only condones violation of the law when it is aimed at improving it.⁵³ The question is whether the AU/ECOWAS RHMI regime could bring about a moral improvement on the current international law of humanitarian intervention. Buchanan contends that such a humanitarian intervention treaty arrangement that bypasses the UNSC is susceptible to abuse and unlikely to be an improvement on the current system, unless the reform involved only democratic and pro-human rights states.⁵⁴ If established by democratic and human rights-respecting states, such a treaty has greater promise because it is likely to be more effective in responding to genocides and mass atrocities than the Charter-based system requiring UNSC authorisation.⁵⁵ This is because citizens of liberal democratic states would always hold their leaders to account and those leaders would therefore be deterred from acting arbitrarily.⁵⁶ Besides, states are more likely to agree to this kind of arrangement amongst themselves than attempting a reform within the UN Charter framework.⁵⁷ Further, he argues that this approach will constrain hegemonic tendencies by prescribing stiff conditions for intervention and democratic accountability back home by electorates.⁵⁸

However, in my view, states are no more likely to agree to such treaty arrangements than they would tolerate international protection of human rights within their territories.⁵⁹ Also, while a treaty approach of IILR to reforming the law of humanitarian intervention is a sound one, limiting such treaty arrangement to liberal-democratic states will not necessarily avoid abuse. As the US war in Iraq shows, democratic accountability to domestic populations in liberal democratic states is no guarantee that such states will not abuse the IILR process. So the challenge remains one of how to bring about the desired reform within the existing formal channels of the UN Charter.

⁵³ Id.

⁵⁴ Buchanan 'Self-Determination' op cit note 5 at 450-1.

⁵⁵ Ibid at 452.

⁵⁶ Ibid at 451.

⁵⁷ Ibid at 452.

⁵⁸ Ibid at 451.

⁵⁹ For example, the ASEAN continues to insist on the inviolability of sovereignty and non-interference and oppose relaxing the prohibition of the use of force for humanitarian purposes. It appears that only South America seems to have something close to the AU/ECOWAS RHMI regimes. See Linnea Bergholm 'The UN and the AU: A co-dependent relationship on matters of peace and security' in *The United Nations, Security and Peacekeeping in Africa –Lessons and Prospects* (2008) 5 *Critical Currents* 25 at 22 available at <http://www.dhf.uu.se/pdf/file/cc5_art2.pdf> (accessed on 2 September 2011).

6.3.2 *The infeasibility of Reform through Formal Charter Processes*

There is consensus amongst actors in the international legal system on the need to reform the UN system and international law, but the disagreement is about how and to what extent. A commentator summed up the challenge of international legal reform thus:

[t]here is a need for a kind of reform in international law *as a legal system*, and the realistic prospects for developments in specific areas ... depend heavily on the prospects for such reform in the system as a whole. ... A major characteristic of the system that demonstrates this need is the notorious ineffectuality of its processes of appraisal, decision and compliance in particular cases. In some major areas, they are weak, and sometimes spurious, lacking the integrity required for an effectively working system, and foster chronic if misplaced doubts about the genuineness of the international legal system overall.⁶⁰

Since inception, there have been three amendments to the UN Charter despite several proposals for amendment and reform of its institutions.⁶¹ This lack of reform is felt even more in the law relating to humanitarian intervention. The ineffectiveness of the UN in halting mass atrocities is often blamed on the UNSC whose paralysis is in turn blamed on the veto of the five permanent members (P5).⁶² Despite this glaring need, any hope of amendment of the Charter to reflect the demands of humanitarian intervention is even more unlikely today.⁶³ Several approaches have been proposed by different studies.⁶⁴ Following the Kosovo incident, a three-pronged reform process was proposed.

First, was the design of a framework for humanitarian intervention which would be limited to only exceptional circumstances; the second was to draft a UN General Assembly Declaration on the Rights and Responsibility of Humanitarian Intervention which aims to reconcile the concept of sovereignty with the moral imperatives of protecting human rights and preventing humanitarian disasters; the third option was to amend the Charter in order to reflect these changes and outline the duty of the UN and other multilateral institutions that

⁶⁰ John Lawrence Hargrove 'Intervention by invitation and the politics of a new world order' in Lori Fisler Damrosch & David J Scheffer *Law and Force in the New International Order* (1991)113 at 114-115 (hereafter Hargrove 'Intervention by invitation').

⁶¹ See Thomas G Weiss 'The illusion of UN Security Council reform' (2003) 26:4 *The Washington Quarterly* 147 at 148. See generally Nico J Schrijver 'The future of the United Nations' (2006) 10 *Max Planck United Nations Yearbook* 1.

⁶² See 'The Kosovo Report' op cit note 22 at 163; see Falk 'What future for the UN Charter System' op cit note 22 at 591; see International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) para 6.20 (hereafter 'ICISS Report').

⁶³ Buchanan 'Reforming the law of intervention' op cit note 5 at 136.

⁶⁴ See David Steel *The Reform of the United Nations* (1987) 22, 109-110. He calls for a gradualist approach that balances the competing interests and power blocs. For further discussion of the subject especially regarding the North-South divide obstacle to reform within the UN.

undertake humanitarian intervention.⁶⁵ It was argued that this reform could be achieved either through customary international law, a treaty within the UN framework or a treaty arrangement outside the UN framework.⁶⁶ To date, states are still not agreed on the best approach, to reform nor what such reform should entail. There are proposals about expanding the UNSC, increasing the P5, abolishing the veto, admitting new members without veto power among others, but none of these has materialised so far.⁶⁷

Pursuing reform at the global level will face impediments because it requires majority of states to accept the new change and there is always the possibility that things could go wrong or the process could get stuck at several stages in the evolution of an international law principle.⁶⁸ The process of law-making in international law implies that law reform will always be a slow and difficult process so long as the international legal order remains a state-dominated system.⁶⁹ Reform through treaty is laborious and time-consuming.⁷⁰ For example, the negotiation and ratification of the Comprehensive Test Ban Treaty began in 1954 and was only opened for signature in 1996.⁷¹ As the Kyoto Protocol experience shows, it is not a given that the treaty will eventually survive and become law. In addition to the above drawbacks, treaty law gives states several options in deciding whether to be bound by a treaty. A state could choose to accede to a treaty or not, it could ratify the treaty with reservations, qualifications, ‘understandings’ or some may never even sign the treaty at all,⁷² especially if the treaty focuses on monitoring domestic policies and international concern with human rights.

Furthermore, any proposed reform of the UN system through treaty will have to contend with deep division between the global North and South on strategic, political and structural issues in the international legal order.⁷³ Whereas the focus of the North in the reform is international security and combating human rights abuses, the South sees these

⁶⁵ See ‘The Kosovo Report’ op cit note 22 at 87; ‘ICISS Report’ op cit note 62 para 6.29-6.31.

⁶⁶ Buchanan ‘Self-determination’ op cit note 5 at 446.

⁶⁷ Spencer Zifcak *United Nations Reform: Heading North or South* (2009) 22-7 (hereafter Zifcak ‘United Nations Reform’).

⁶⁸ Buchanan ‘Reforming the law of intervention’ op cit note 5 at 134-5.

⁶⁹ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 682.

⁷⁰ Hargrove ‘Intervention by invitation’ op cit note 56 at 115. Buchanan ‘Reforming the law of intervention’ op cit note 5 at 134.

⁷¹ The CTBT has been ratified by 159 states as of 9 April 2012. See Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty ‘Status of signature and ratification’ available at <<http://www.ctbto.org/the-treaty/history-summary>> (accessed on 28 February 2013).

⁷² Buchanan ‘Reforming the law of intervention’ op cit note 5 at 134.

⁷³ Zifcak ‘United Nations Reform’ op cit note 67 at 165.

issues as inextricably linked to existing global economic inequalities.⁷⁴ So, when the North speaks of humanitarian intervention or R2P, they do not necessarily mean the same thing as when the South uses those terms.⁷⁵ This disagreement dominated the 2005 World Summit when some countries of the South vehemently opposed any attempt to liberalise the use of force regime, whether under the R2P framework or otherwise.⁷⁶ Given this situation, it is difficult to envision that states will one day, at a UN summit, come to a consensus on how to rectify the defects and improve the Charter, especially when major powers want to continue to have free reigns to act and retain the freedom to decide.⁷⁷ Change will most likely emerge gradually through state practice, otherwise the system might retain its current unworkable character.⁷⁸ In this situation, the idea of reform through customary law was put forward.

The first challenge any reform through customary law will face is the fact that customary law does not have any provision for its amendment and where a system of law has no mechanism for changing it, reform and improvement in the law usually occurs through breaking the existing law.⁷⁹ Another obstacle to reform through customary law is that a state could declare itself to be a persistent objector to the emerging rule or it could give conflicting reasons for the same conduct in different circumstances.⁸⁰ In both cases, the precedential value of an emerging rule is weakened as a result of the uncertainty and doubtful existence of *opinio juris*.⁸¹ In addition to the above, it is still debatable whether it is the actions rather than pronouncements of states that should be considered in ascertaining the existence of a rule of customary law.⁸² As Hargrove observes, the behaviour of states and

their official utterances in justifying their conduct, have so often been so inconsistent and even contradictory from one case to another as not only to render the law's implementation processes ineffectual, but to be of little utility as a body of practice

⁷⁴ *Id.*

⁷⁵ *Ibid* at 166-173.

⁷⁶ *Ibid* at 175. See the 'Common African position on the proposed reform of the United Nations: The Ezulwini Consensus', Executive Council 7th Extraordinary Session, 7-8 March Addis Ababa, Ethiopia. Ext./EX. CL/2 (VII) (hereafter the 'Ezulwini Consensus').

⁷⁷ Antonio Cassese 'Return to Westphalia? Considerations on the gradual erosion of the Charter system' in Antonio Cassese (ed) *International Law in a Divided World* (1986) 505-23 at 519-20 (hereafter Cassese 'Return to Westphalia?').

⁷⁸ *Ibid* at 520.

⁷⁹ Goodin 'Toward an international rule of law' *op cit* note 5 at 232.

⁸⁰ Michael Byers *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) 102-3 (Byers 'Custom, Power and the Power of Rules').

⁸¹ Buchanan 'From Nuremberg to Kosovo' *op cit* note 5 at 679.

⁸² D'Amato 'The Concept of Custom' *op cit* note 10 at 20, arguing that acts of government is more relevant in deducing custom.

from which the content and evolution of its substantive principles can be ascertained.⁸³

Many cases of state practice of humanitarian intervention since 1945 were justified on some other grounds and scholars remain divided about their legality.⁸⁴ Strictly speaking, even some cases of humanitarian intervention that have received broad international approval actually constitute a violation of article 2(4), the principle of state sovereignty and non-interference under the Charter.⁸⁵ It should therefore not be surprising that the AU/ECOWAS RHMI regimes that aim to develop rules from such practice should be incompatible with the law. Without a procedural system of amendment, the only way states can ‘propose an amendment’ to customary law is by breaking the existing customary law.⁸⁶ The fact that current international law on humanitarian intervention is seldom able to halt genocides and mass atrocities which are supposed to be some of the most fundamental values of the international legal order makes reform of the system even more imperative.⁸⁷ If the reform of the law on humanitarian intervention cannot happen within the Charter framework, then it might happen without it. The fact that the UN is the only legitimate universal body does not make the Charter immutable or the only source of international law within which reform must take place.⁸⁸ If it is to retain its primacy, the Charter must be amenable to reform as an instrument for responding to new challenges, promoting new values and community goals.⁸⁹ Otherwise, its lack of reform would continue to undermine its legitimacy as a world body, weaken the Charter and even push states and regions to seek extra-Charter means of law reform.⁹⁰

⁸³ Hargrove ‘Intervention by invitation’ op cit note 60 at 115. This was the case with NATO’s intervention in Kosovo where the Netherlands did not feel that the intervention was a rule-making precedent whereas the US argued that the intervention was the first step in establishing a new norm of humanitarian intervention without UNSC authorisation.

⁸⁴ For example, India’s main justification was self-defense but it also highlighted the mass atrocities committed by Pakistan in East Pakistan. See S.C.O.R. (XXVI) 1606 Meeting, 4th December 1971 para 153 -67.

⁸⁵ For, example, Tanzania’s intervention in Uganda. See Thomas Franck *Recourse to Force: State Action against Threats and Armed Attacks* (2002) 143-45.

⁸⁶ Goodin ‘Toward an international rule of law’ op cit note 5 at 231.

⁸⁷ Hargrove ‘Intervention by Invitation’ op cit note 60 at 115. Of the numerous armed conflicts since 1945, only very few were brought to an end through direct UN participation. See Nikolai Krylov ‘International peacekeeping and enforcement actions after the Cold War’ in Lori Fisler Damrosch & David J Scheffer *Law and Force in the New International Order* (1991) 94 at 94.

⁸⁸ Buchanan ‘Reforming the law of intervention’ op cit note 5 at 139.

⁸⁹ See Stephen A Garrett *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (1999) 49 (hereafter Garrett ‘Doing Good and Doing Well’).

⁹⁰ See the Ezulwini Consensus op cit note 76 at 6.

6.3.3 *The Challenges of Reform and the UNSC's Loss of Legitimacy*

In a discussion of IILR, an inquiry into the legitimacy of the UNSC is important because it affects the further question of whether or not states are obliged to obey the rules emanating from it⁹¹ and the extent to which their resort to IILR is justifiable. The issue of legitimacy is viewed from diverse perspectives. An institution is said to be legitimate in the normative sense if it has the right to rule by prescribing rules and compelling obedience; whereas it is said to be legitimate in the sociological sense if it is generally believed such institution has the right to rule.⁹² In international law, such institution is legitimate in the sense of the legality of its formation —if it was created based on state consent and in accordance with rules of international law.⁹³ The legitimacy of an international organisation means it has the prerogative to perform certain functions on behalf of members and members too feel a sense of obligation to comply with the rules it issues and not to subvert the enforcement of those rules.⁹⁴ According to Buchanan and Keohane,

[l]egitimacy in the case of global governance institutions, ... is the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliance with them.⁹⁵

In this sense accepting the legitimacy of an institution implies that the actors would seek ways of improving such institution rather than rejecting it for its weaknesses.⁹⁶ Buchanan and Keohane argue that since most countries of the world are now democratic, a global governance institution that has the perpetual consent of human rights-respecting democratic states and which is also democratic is legitimate.⁹⁷ Apart from the democratic criterion, the rationale for the existence and legitimacy of institutions like the UNSC is based on their ability to provide certain social goods that states cannot ordinarily provide for themselves such as the benefit from a stable world order.⁹⁸ In addition, such institutions must follow their own procedures without selectivity and fulfil those conditions that justify their existence in

⁹¹ Buchanan & Keohane 'The legitimacy of global governance institutions' op cit note 5 at 405.

⁹² Id. The distinction between legitimacy in its sociological sense and normative sense should be borne in mind.

⁹³ Buchanan & Keohane 'The legitimacy of global governance institutions' op cit note 5 at 412.

⁹⁴ Thomas Franck *Fairness in International Law and Institutions* (1995) 218 (hereafter Franck 'Fairness in International Law').

⁹⁵ Buchanan & Keohane 'The legitimacy of global governance institutions' op cit note 5 at 411.

⁹⁶ Ibid at 407.

⁹⁷ Ibid at 415-6.

⁹⁸ Ibid at 417, 422

order to maintain a valid claim to legitimacy.⁹⁹ The UNSC's claim to legitimacy and pull towards compliance with its resolutions depends on its compliance with established rules and constraints.¹⁰⁰

On the other hand, an institution may be illegitimate if its operational modalities negate the realisation of the objectives that form the basis for its existence and claim to legitimacy.¹⁰¹ For instance, 'if the fundamental character of the Security Council's decision-making process renders that institution incapable of successfully pursuing what it now acknowledges as one of its chief goals—stopping large-scale violations of basic human rights—this impugns its legitimacy.'¹⁰² This loss of legitimacy may even become more acute and pronounced where efficacious parallel agents with readily available processes and more meaningful benefits have sprung up to fill the vacuum created by the ineffectiveness of the prime institution at cheaper costs.¹⁰³ If we accept the view that the legitimacy of the international legal order and its prime institutions, like the UNSC, should be gauged by the extent to which they protect human rights, prevent genocides and other mass atrocities arguably, the UNSC has serious legitimacy deficits to contend with.¹⁰⁴

There are several objections to the legitimacy of the UNSC but two are prominent. The first is that the failure of the UNSC to prevent several genocides means it has failed to perform one of the fundamental purposes for which it was established.¹⁰⁵ Although the UNSC activism in the 1990s represents a shift in how strikes a balance between human rights and peace, it was not a complete shift because any humanitarian intervention still requires UNSC authorisation.¹⁰⁶ Subsequent humanitarian catastrophes underscore the fact that regardless of the approach, effective normative reform cannot happen in the law of humanitarian

⁹⁹ Ibid at 422.

¹⁰⁰ Thomas M Franck 'Fairness in International Law' op cit note 94 at 218.

¹⁰¹ Buchanan & Keohane 'The legitimacy of global governance institutions' op cit note 5 at 423.

¹⁰² Id.

¹⁰³ Ibid at 422.

¹⁰⁴ Buchanan 'Self-determination' op cit note 5 at 432.

¹⁰⁵ See Allen Buchanan 'The legitimacy of international law' in Samantha Besson & John Tasioulas (eds) *The Philosophy of International Law* (2010) 80-96 at 87 (hereafter Buchanan 'The legitimacy of international law').

¹⁰⁶ Tom J Farer 'The prospects for international law and order in the wake of Iraq' (2003) 97 *AJIL* 621 at 624 (hereafter Farer 'The prospects for international law'). Through a series of UNSC resolutions, massive violations of human rights was construed as constituting threat to international peace and security and removed from being within the domestic jurisdiction of states; sovereignty was reconceptualised as not absolute; and ultimately as responsibility to protect.

intervention without addressing the problem of the UNSC itself and its perceived illegitimacy by a sizeable portion of the international community.¹⁰⁷

A second objection is that the organisation and the system on which it is based are controlled by a few powerful states.¹⁰⁸ It is argued that the unjustifiable exclusion of Africa from a permanent seat on the UNSC as the major decision-making organ underscores its current unrepresentative structure.¹⁰⁹ Arguably the legitimacy of the UN is seriously undermined by this fact, at least from an African perspective. As the legitimacy of the UNSC wanes, states are likely to look up to their regional organisations and devote more time and material resources to these organisations at the expense of the UN.¹¹⁰ One can conclude from the above analysis that if reform is impossible, the UNSC will continue to lose legitimacy and actions will be taken outside its processes.¹¹¹ The AU/ECOWAS RHMI regimes which, at least in theory, attempt to reform the law on humanitarian intervention outside the Charter framework underscore this point. As people's moral view of their relationship to peoples in faraway lands who are victims of genocides increasingly influence how they perceive the legitimacy of the international legal order, they might be more favourably disposed to acts of IILR aimed at improving the law on humanitarian intervention and any legal mechanism designed for that reform,¹¹² even if this results in a parallel system. As Buchanan puts it, given the nature of the international legal order, one 'cannot assume that at every point in the development of international law, there will be only one system of law. Progress may occur through the development of parallel and sometimes competing law-like systems of rules in distinct but also sometimes overlapping domains of competence.'¹¹³

6.4 OBJECTIONS TO REFORMING THE LAW OF HUMANITARIAN INTERVENTION THROUGH ILLEGAL INTERNATIONAL LEGAL REFORM

There are several objections to IILR as an alternative approach for bringing about reform in international law. This debate usually turns on three issues: the legitimacy of global governance institutions (already discussed above), the obligation of states to obey

¹⁰⁷ For an analysis of the challenges and perceptions of the reform in different regions, see generally Yehuda Z Blum 'Proposals for UN Security Council reform' (2005) 99 *AJIL* 632.

¹⁰⁸ See Buchanan 'The legitimacy of international law' op cit note 105 at 85.

¹⁰⁹ Zifcak 'United Nations Reform' op cit note 67 at 20.

¹¹⁰ Ademola Abass *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 100, 102-3.

¹¹¹ Zifcak 'United Nations Reform' op cit note 67 at 35.

¹¹² Buchanan 'Self-Determination' op cit note 5 at 431-2.

¹¹³ Ibid at 456.

international law and the fidelity to the rule of law.¹¹⁴ First, it is argued that when an agent undertakes an act of IILR, he violates the fidelity to law rule; and secondly that such agent is guilty of ‘moral imperialism’ for foisting his concept of justice on others; thirdly that states have an obligation to obey international law since they consented to its creation.¹¹⁵ A final argument, one that has particularly been raised in the context of the global war on terror is that the ‘new’ and transformative change often advanced as justifying an act of IILR by its proponents are anything but new and transformative.¹¹⁶ The last argument has often been made in the context of the legal effect of 9/11 on the Charter paradigm on the use of force and the right to self-defense in article 51 and the abuse of IILR. It challenges the attempt to, through acts of IILR, extend the principle of inherent individual and collective self-defense to include ‘pre-emptive strike’ against both states and non-state actors in the so-called ‘Global War On Terror’ (GWOT). My analysis is also limited to GWOT and IILR in this respect.¹¹⁷

The argument of ‘Legal Absolutists’, as Buchanan calls them, is that it is never morally justifiable to break the law in order to improve it.¹¹⁸ If this argument is accepted then the AU/ECOWAS RHMI regime which seeks to reform the law on humanitarian intervention through IILR are morally unjustifiable. A major proponent of the ‘moral imperialism’ criticism, Alfred Rubin, premised this argument on the fact that a moral agent of IILR could be mistaken in his perception of the issues and moral values at stake and this possibility and the impact it could have on the system should be a limiting consideration for IILR.¹¹⁹ He asserts that no one has the moral justification to determine how others are governed and there is no defect in an international legal order that seeks to protect such arrangement, ‘except in the minds of those who feel secure enough in their own moral insight and perception of facts to try to govern the lives (and deaths) of others.’¹²⁰ Accordingly, Rubin concludes that

[t]hose who would argue that the evils of genocide can be apparent and the moral obligation to stop it so compelling that the use of third-party force is legally as well as morally justifiable in response, the legal system poses two answers. First, the notion that moral conviction by an outsider justifies the use of force by that outsider is an open invitation to chaos: rule by the

¹¹⁴ See Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 682.

¹¹⁵ For an exploration of these objections to IILR, see Buchanan ‘Self-determination’ op cit note 5 at 458.

¹¹⁶ See Obiora Chinedu Okafor ‘Newness, imperialism, and international legal reform in our time: A TWAIL perspective’ (2005) 43:1/2 *Osgoodhall Law Journal* 171 (hereafter ‘Okafor international legal reform’).

¹¹⁷ See Garth Abraham & Kevin Hopkins ‘Bombing for humanity: The American response to the 11 September attacks and the plea of self-defense’ (2002) 119 *South African Law Journal* 783 (hereafter Abraham & Hopkins ‘Bombing for humanity’).

¹¹⁸ Buchanan ‘Self-Determination’ op cit note 5 at 457.

¹¹⁹ Rubin ‘Ethics & Authority’ op cit note 4 at 185.

¹²⁰ Id.

strongest outsider with the most persuasive demagogues and scrapping the fundamental rule of sovereign equality of states.¹²¹

Rubin's alternative proposal in cases of genocides and mass atrocities is that third states should open their borders to fleeing refugees rather than launch unilateral humanitarian interventions.¹²² Therefore, the AU/ECOWAS act of IILR that attempts to legalise humanitarian intervention is unjustifiable. In my view, Rubin's criticism is flawed in some respects. First, his proposed solution to genocides can only have very little effect for a very small number of imperilled populations able to flee and it does not address the source of threat. Secondly, his criticism stems from a view that equates justice with the international rule of law by implying that a just international legal order implies a commitment to the goal of justice through international law only.¹²³ In his view, when you comply with international rule of law, you are in pursuit of justice. However, when we apply this proposal to a case like Rwanda for example, the moral deficit is at once obvious and at an unacceptably high cost. The failure of the UNSC, third states and regional organisations to intervene in Rwanda could be explained to be in compliance with the rule of sovereignty and non-intervention, but one would be hard pressed to conclude that the resulting genocide amounts to justice even though the interest of international rule of law was served.

Besides, halting genocides and other mass atrocity crimes are now universally regarded as basic norms of the international legal order and acts to improve the system to reflect these norms cannot be described as the imposition of moral values.¹²⁴ These moral values which form the object of the AU/ECOWAS IILR are already widely shared. For example, we find similar norms (of intervention to halt genocides, war crimes and crimes against humanity) in R2P, Genocide Convention, and the Rome Statute of the ICC among others. The whole world expressed shock over Rwanda and Srebrenica and blamed the international community for failure to intervene. The need to end impunity and protect victims of ethnic cleansing, war crimes, crimes against humanity and genocide in Africa, is at least, in theory, a normative value shared by AU members as expressed in article 4(h)¹²⁵ as well as by ECOWAS members as expressed in article 25 of the ECOWAS Protocol on the

¹²¹ Id.

¹²² Id.

¹²³ Buchanan 'Self-Determination' op cit note 5 at 459.

¹²⁴ Buchanan 'From Nuremberg to Kosovo' op cit note 5 at 699.

¹²⁵ See Garth Abraham 'Universal Jurisdiction and the African Union (AU) – '... the wrong side of history?' (2011) *African Yearbook on International Humanitarian Law* 129 at 140.

Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (MCPMRPS).¹²⁶

The fidelity to law argument states that our adherence to the rule of law as a normative ideal is incompatible with support for acts of IILR, regardless of whether such acts are aimed at morally improving the law and reforming the system.¹²⁷ If this argument is accepted, then the AU/ECOWAS RHMI regimes would be morally unjustifiable and invalid. The ideal of the rule of law at the international level means appeal to law rather than states and state power.¹²⁸ It implies a system of normative restraints on state behaviour as against the rule of the powerful state in international affairs.¹²⁹ The ideal of the rule of law came about because of the desire to avoid anarchy by states whereby states agreed to the limitation of their powers in exchange for the powers of other states being restricted in the interest of all.¹³⁰ Hence, critics of IILR rely on the Hobbesian notion of commitment to the rule of law as the only guarantee of order and an obligatory system of rules as the only way to avoid a state of nature and the concomitant anarchy.¹³¹ They conclude that acts of IILR aimed at moral improvement of the law are unjustifiable because they risk reintroducing the state of nature where life is ‘short, nasty and brutish’.¹³² The second basis of this criticism is what I may call the *sources of law* thesis. Here, the argument is that there is a relationship between international rule of law and the ‘quality’ of the source of a rule of international law to which proponents of IILR fail to attach the relevant weight in terms of the normative value inherent in the international law-making process.¹³³ The very fact that a rule of international law emanates from the legally sanctified process of law-making confers certain normative value on that rule and by ignoring that law-making process, acts of IILR, however urgent the demands and whatever the motivations, undermine the law and by extension the international rule of law.¹³⁴ According to Besson,

¹²⁶ Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peacekeeping and Security Lome, Togo, 10 December, 1999 which entered into force on adoption. Available at <<http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en>> (accessed on 2 June 2010).

¹²⁷ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 684.

¹²⁸ Goodin ‘Toward an international rule of law’ op cit note 5 at 227.

¹²⁹ Ibid at 227-228.

¹³⁰ Fernando R Teson ‘International obligation and the theory of hypothetical consent’ (1990) 15 *Yale Journal of International Law* 84 at 90 (hereafter Teson ‘International obligation’).

¹³¹ See Rubin ‘Ethics and Authority’ op cit note 5 at 183-84.

¹³² Id.

¹³³ Samantha Besson ‘Theorizing the sources of international law’ in Samantha Besson & John Tasioulas (eds) *The Philosophy of International Law* (2010) 163-85 at 173 (hereafter Besson ‘Theorizing the sources of international law’).

¹³⁴ Id.

[o]n the long run, and despite the occurrence of such forms of illegal law-making in the current circumstances of international law, international law's legality will only be able to consolidate itself if its law-making processes are organised so as to reflect the very values inherent in the Rule of International Law.¹³⁵

This criticism has several weaknesses. First, on the ideal of rule of law, the question of whether or not an agent truly committed to the ideal of the rule of law is barred from IILR depends in part, on the extent to which the existing legal system approximates the ideal.¹³⁶ Commitment to an effective international legal order does not necessarily preclude an act of IILR directed at improving the international legal order which currently poorly approximates the ideal as far as humanitarian intervention is concerned.¹³⁷ It is difficult to argue that in a case like Rwanda, an agent would have been forbidden from intervening because doing so would have amounted to a violation of commitment to international rule of law. This is the dilemma that confronts humanitarian intervention and how to bring about reform in the Charter-based system. According to Buchanan,

[p]rogress towards justice is especially likely to require illegal acts if the system's imperfections include serious barriers to expeditious, legally permissible reform. ... that is precisely the case regarding the existing international legal system's capacity for reforming the law of intervention. The UN Charter-based law of intervention is recalcitrant to legally permissible reform because the same obstacles to securing Security Council authorisation for morally justifiable interventions make it unlikely that the Charter will be amended to relax the requirement of Security Council authorisation. Being willing to act illegally to make a very unjust system more just need not be inconsistent with a commitment to justice through law; it may indeed be required by it.¹³⁸

Furthermore, commitment to the ideal of law presupposes that the law in question meets certain basic characteristics to be able to attract the required pull towards compliance.¹³⁹ Current international law, particularly the Charter, does not meet one of these requirements—equality before the law.¹⁴⁰ For example, notwithstanding article 2(1) of the Charter, there is no equality before the law amongst states.¹⁴¹ By legalising a system where five states have veto power, the Charter itself negates the ideal of rule of law and established a system of inequality anchored in actual power.¹⁴² However, the current legal order does not meet the

¹³⁵ Id.

¹³⁶ Buchanan 'From Nuremberg to Kosovo' op cit note 5 at 684.

¹³⁷ Id.

¹³⁸ Buchanan 'Self-Determination' op cit note 5 at 462.

¹³⁹ See John Tasioulas 'The legitimacy of international law' in Besson & Tasioulas 'The Philosophy of International Law' op cit note 133, 97-116 at 115.

¹⁴⁰ For other criteria, see Allen Buchanan 'The legitimacy of international law' in Besson & Tasioulas 'The Philosophy of International Law' op cit note 133, 80-95 at 89.

¹⁴¹ See chapter 2 for a discussion of this principle.

¹⁴² See Ann-Marie Slaughter 'Security, solidarity and sovereignty: The grand themes of UN reform' (2005) 99 *AJIL* 619 at 630.

requirement of equality before the law, its moral pull to the ideal of rule of law is weakened and states are less likely to feel a moral obligation to obey.¹⁴³ As we have seen, this has impacted the effectiveness of the system, particularly the UNSC and its ability to act to prevent genocides and other mass atrocities. It is this lacuna in the Charter that provides the justification for acts of IILR like the AU/ECOWAS regimes, directed at morally improving the system. After all, to what extent states will refrain from violating international law due to their allegiance to the ideal of law depends on how close international law approximates the ideal.¹⁴⁴ The moral failure of the system in Rwanda, Somalia, Liberia, Sierra-Leone and Sudan compels unilateral acts of legal reform such as the AU/ECOWAS provisions on humanitarian intervention and are therefore morally justified.

On the claim that IILR risks reintroducing the Hobbesian system, it might be replied that history debunks the assumption that the stability of international life entirely depends on the efficacy of international law alone. Acts of IILR in the past, such as the Nuremberg Trials, did not result in a Hobbesian state of nature in the international community.¹⁴⁵ It is not always the case that failure to follow the laid down procedures for the amendment of a rule of international law necessarily destabilises the legal order.¹⁴⁶ There are several cases of IILR, some overt and others less obvious. For example, the UNSC has, through an initial act of IILR improved its voting procedures in article 27(3), the redefinition of ‘threat to international peace and security’ and the meaning of ‘enforcement action’.¹⁴⁷ Through IILR, these terms have received new interpretations and applications very different from those intended by the Charter in 1945. Finally on this point, I think the claim that IILR does not give sufficient weight to the formal processes of law-making in international law seems to prioritise procedure over substance, and order over justice. It pays little attention to human dignity or the protection of human rights.

Another objection to IILR is that it violates state consent.¹⁴⁸ Watson contends that since international law is based on consent, the normative order can only be maintained by seeking state consent to changes in the system and states should therefore refrain from

¹⁴³ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 684.

¹⁴⁴ Id.

¹⁴⁵ Buchanan ‘Self-Determination’ op cit note 5 at 461.

¹⁴⁶ Ibid at 465.

¹⁴⁷ Murphy ‘The intervention in Kosovo’ op cit note 23 at 303.

¹⁴⁸ J S Watson ‘A realistic jurisprudence of international law’ (1980) 34 *The Yearbook of World Affairs* 265 at 274.

unilateral acts or IILR.¹⁴⁹ This argument is based on two premises, first, that states are under a moral obligation to obey international law because they consent to it, and secondly, that the principle of fairness demands such obedience from states because of the ‘non-excludable benefits’ they receive from the international legal order.¹⁵⁰ The first premise posits that since international rules generally are created based on state consent, acts of IILR by states violate such consent.¹⁵¹ The second premise asserts that the international legal order is a system of cooperation in which states work with one another by obeying international law in exchange for similar moral duty being expected of other states for the benefit of all.¹⁵² So long as states receive benefits from the international legal order by other states’ compliance with international law, then the principle of fairness demands that states have a moral obligation to also obey international law and so contribute to securing goals of common value.¹⁵³ If these arguments are accepted, then the AU/ECOWAS RHMI regimes would be morally unjustifiable because they are acts of IILR.

The first response to the above objection is that it is not in all cases that states obey international law they consented to because of a feeling of moral obligation.¹⁵⁴ In most cases state behaviour is based more on national interest calculus than any feeling of moral obligation to obey international law.¹⁵⁵ Posner disputes the view that there is a moral obligation on states to obey international law and maintains that states perform their international obligations because they perceive it to be in their interest to do so.¹⁵⁶ States have no inherent need to obey international law and conduct that conforms to international law should be seen as decisions made on the basis of rational choice.¹⁵⁷ Perhaps a fairer

¹⁴⁹ Id.

¹⁵⁰ David Lefkowitz ‘The principle of fairness and states’ duty to obey international law’ (2011) 24 *Canadian Journal of Law & Jurisprudence* 327 at 333 (hereafter Lefkowitz ‘The principle of fairness’).

¹⁵¹ Buchanan ‘From Nuremberg to Kosovo’ op cit note 5 at 690-1.

¹⁵² Lefkowitz ‘The principle of fairness’ op cit note 150 at 349.

¹⁵³ Id

¹⁵⁴ Of course, consent is fundamental in making international law whether treaty or custom. See *The Case of the S.S. ‘Lotus’* PCIJ Series A. No. 10, 7 September 1927 at 18. However, the basis of obligation in international law is sometimes disputed between those who see this obligation as deriving from state consent only and those who see the obligation as based on the interdependence of states in the international legal system. For a discussion of both approaches, see Teson ‘International obligation’ op cit note 130 arguing that the consent and interdependence theories of international obligation are inadequate to explain the basis of obligation in international law.

¹⁵⁵ Michael J Glennon ‘How international rules die’ (2005) 93 *Georgetown Law Journal* 939 at 940 (hereafter Glennon ‘How international rules die’).

¹⁵⁶ Henkin ‘International organisations’ op cit note 40 at 661.

¹⁵⁷ Eric A Posner ‘Do states have a moral obligation to obey international law?’ (2003) 55:5 *Stanford Law Review* 1901 at 1919 (hereafter Posner ‘Moral obligation to obey international law’); Jack L Goldsmith & Eric A Posner *The Limits of International Law* (2005) 10-16 arguing that state behavior could be explained by either a ‘coincidence of interest’, ‘coordination’, ‘cooperation’ or ‘coercion’ in different circumstances at a given time.

assessment may lie between both extremes—that the system operates on a spectrum based as much on international cooperation as effective power.¹⁵⁸ For example, states consented to the Charter, but that has not led to the implementation of the Military Agreement and the creation of standing UN army as contemplated by article 43 and this is because states do not deem it in their interest to create one yet.¹⁵⁹ In certain circumstances, a state will not comply with international law if it calculates that the benefit accruing from such a violation is greater than the costs.¹⁶⁰

Examined in this light, the decision of AU/ECOWAS to initiate IILR through their treaty provisions on humanitarian intervention would be seen to have been motivated by the interests of member states in having a legal framework for the prevention of mass atrocities through regional arrangements. It is obvious that the AU/ECOWAS are more concerned about developing a legal framework for regional humanitarian intervention than compliance with legal ‘niceties’.¹⁶¹

6.5 HUMANITARIAN INTERVENTION, ILLEGAL INTERNATIONAL LEGAL REFORM AND THE QUESTION OF ABUSE

Before going further with the discussion on the AU/ECOWAS RHMI regimes as IILR, it is pertinent to examine the likelihood of abuse of the IILR process, especially with regards to GWOT. As discussed above, whether an act of IILR is justified will be contingent on other variables, including the existence of moral deficits in the law, the infeasibility of legal reform through the formal processes, and that its institutions have legitimacy issues.¹⁶² In a nutshell, an IILR must not only bring about moral improvement in the existing law, fulfil the basics of substantive justice and fairly approximate the ideal of international rule of law, the IILR can

¹⁵⁸ See Thomas M Franck ‘The power of legitimacy and the legitimacy of power: International law in an age of power disequilibrium’ (2006) 100 *AJIL* 88 (hereafter Franck ‘The power of legitimacy’) where he rejects the rational choice arguments advanced by Glennon, Goldsmith and Posner and mounts a vigorous defense of international rule of law. See Byers ‘Custom, Power and the Power of Rules’ op cit note 80 at 15, 88-105.

¹⁵⁹ See Arend ‘The United Nations and the new world order’ op cit note 45 at 508.

¹⁶⁰ Glennon ‘How international rules die’ op cit note 155 at 940.

¹⁶¹ See Ben Kioko ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’ (2003) 85:852 *International Review of the Red Cross* 807 at 21 making this point in respect of the AU, and David Wippman ‘Pro-democratic intervention in Africa’ (2002) 96 *ASIL Proceedings* 143 at 145 making similar point in respect of ECOWAS.

¹⁶² Buchanan *Self-Determination* op cit note 5 at 463-4, asserting that an IILR that morally improves the law is morally justifiable even absent a legal justification for it.

only occur in situations where the existing legal system's moral pull towards compliance is weak because of its poor approximation of justice and legitimacy deficits.¹⁶³

With respect to the GWOT, the argument is that IILR is open to abuse and could be used to advance morally questionable national interest projects of dubious legality such as the policy of pre-emptive strike as an instrument of the GWOT.¹⁶⁴ It is doubtful whether the GWOT can successfully appeal to IILR to validate a rule of pre-emptive strike in international law. The GWOT project is very different to the prevention of genocide and mass atrocities project that the AU/ECOWAS IILR treaties apply to. This difference lay in 'new' developments that have occurred but which were not foreseen in 1945.¹⁶⁵ These 'new' phenomena were not envisaged in 1945 when article 2(7) and Chapter VIII were drafted and since reform in the law of intervention has not been possible to reflect these new developments, it becomes one of the bases for justifying the AU/ECOWAS IILR. However, the same 'new' and transformative change cannot be said of international terrorism because the 'new' element that GWOT claims as justifying pre-emptive strikes as IILR is anything but new.¹⁶⁶ As Okafor points out, the September 11 terrorist attacks on the US 'have been significantly overstated by claims that the "post-9/11" world is so significantly new that it justifies pre-emptive strikes, targeted killings, and acts of torture that would be otherwise illegal under international law.'¹⁶⁷ In this respect and bearing in mind the discussion of IILR rendered above, I can make the following observations with regards to GWOT and abuse of IILR.

First, one of the conditions that distinguish an IILR agent from a random law breaker is that whereas the IILR agent openly breaks the law and acknowledges that he has broken the law, a random lawbreaker denies that he has broken the law and instead will try to justify

¹⁶³ For a discussion of criteria for appraising an act of IILR, see Buchanan 'From Nuremberg to Kosovo' op cit note 5 at 698.

¹⁶⁴ Many authors question the legality of the US invasion of Iraq and Afghanistan in response to the 11 September 2001 terrorist attacks on the US. See Abraham & Hopkins 'Bombing for humanity' op cit note 117 at 788, 792, 793-6, 797-8; while other authors have argued that the attacks were so fundamentally 'new' and transformative that they form the basis of a new world order and justify an illegal international legal reform to usher in a doctrine of pre-emptive strikes. See Richard Falk 'Rediscovering international law after September 11th' (2002) 16 *Temple International & Comparative Law Journal* 359; Thomas M Franck 'Criminals, combatants, or what? An examination of the role of law in responding to the threat of terror' (2004) 98 *AJIL* 686 at 688. For a critique of this view, see Okafor 'international legal reform' op cit note 114 at 186.

¹⁶⁵ I have already discussed some of these changes above including the fact that the causes of genocides are now mainly intra-state conflicts.

¹⁶⁶ Okafor 'international legal reform' op cit note 116 at 186.

¹⁶⁷ Id. See also Carsten Stahn 'Enforcement of the collective will after Iraq' (2003) 97 *AJIL* 804 at 807.

the action on the basis of the existing law.¹⁶⁸ The initial US response to 9/11 was based on its right to self-defense under article 51 of the UN Charter, locating its justification within, rather than without, the Charter's normative order.¹⁶⁹ The US did not acknowledge that it was breaking any rule of international law and so does not meet this condition. Secondly, an agent of IILR is motivated to break the law in protest against the injustice or moral deficits of the extant law.¹⁷⁰ However, a random lawbreaker breaks the law without regard to its moral contents.¹⁷¹ The US invasion of Iraq in response to 9/11 was not a protest against the deficits in the current Charter rule on self-defense or that it was morally defective and needed improvement. Thus, the GWOT does not meet this condition as an act of IILR. Thirdly, an agent of IILR breaks the law with a declared motive: to compel a change in the law and bring about its moral improvement.¹⁷² However, the random lawbreaker breaks the law for a variety of reasons that change with its circumstances and the objective is not to bring about moral improvement in the law but to operate outside the law.¹⁷³ In this sense, it was only as part of extending the scope of its GWOT that the US sought to advance the 'newness' and transformative character of 9/11 argument to justify the right of 'anticipatory self-defense' character of its future policy responses to terrorism.¹⁷⁴ It did not seek a reform of the Charter-based law nor did it call for an amendment to the Charter paradigm because it was morally unjust but as an unnecessary restraints on the exercise of its power.

Thirdly, there is nothing in the development of international law, whether at regional or UN level, to suggest that the absence of a right of pre-emptive strike poses a threat to

¹⁶⁸ The conduct of a great power that is contrary to the rule of international law has the potential to create new norm but whether it actually does so depend on how the state in question justifies its action. See Farer 'The prospects for international law' op cit note 106 at 622. If it tries to hide its conduct then this indirectly means that the state acknowledges the existing rule and approves of obedience to it even though it decided to break it in the present case because it served its national interest. Such random law breaker is not an agent of reform and does not appeal to IILR as justification for its unlawful conduct since it is not committed to the rule of law. See Goodin 'Toward an international rule of law' op cit note 5 at 232. However, the state could argue that it did not break the law, and that its behaviour was in line with the existing rule because the case in question is novel and was not contemplated by the existing rule so it did not depart but merely clarified what the proper application and interpretation of the existing norm would be in such unanticipated situation. See Farer 'The prospects for international law' op cit note 106 at 622. This second rationalisation has a 'potential legislative effect' depending on whether other states follow it or not.

¹⁶⁹ See Carsten Stahn 'Enforcement of the collective will after Iraq' (2003) 97 *AJIL* 804 at 807. The US claim of a right of individual and collective self-defense in the wake of the 9/11 terrorist attacks was implicitly recognised by the UNSC in the preamble to S/RES/1368/2001.

¹⁷⁰ See Goodin 'Toward an international rule of law' op cit note 5 at 233.

¹⁷¹ *Id.*

¹⁷² *Ibid* at 232.

¹⁷³ Whereas an agent of IILR respects and wants to maintain the rule of law while establishing a new rule within the existing rule of law framework to regulate its conduct, the 'law-breaker wants to operate outside the law, weaken the rule of law and its application to its behaviour. *Id.*

¹⁷⁴ See Okafor 'international legal reform' op cit note 116 at 184-7.

international peace and security as do mass atrocities.¹⁷⁵ In fact, it is its presence rather than its absence that could return the world to a Hobbesian order. As the R2P norm indicates, the need to prevent genocides, war crimes and crimes against humanity is a call to all states, but the claim of a right to pre-emptive strikes will most likely only be made by powerful states. Whereas the international concern with the protection of human rights within the borders of states is the concern of the international community, the right to pre-emptive strike has not received such broad consensus. Except for a few, a number of powerful states do not even support it because it threatens global stability. Thus, pre-emptive strike will most likely fail the validity test under IILR.

6.6 AU/ECOWAS RHMI REGIMES AS EXERCISE IN ILLEGAL INTERNATIONAL LEGAL REFORM AND THE IMPLICATIONS FOR INTERNATIONAL LAW

One can view the evolving legal situation in Africa either as part of a process of developing new norms of international law or as ‘reinterpretations’ of the extant rules.¹⁷⁶ If taken as the creation of new norms, the AU/ECOWAS regimes are merely adding to their reservoir of contributions to the development of international law, having introduced several norms through treaty and practice that have shaped international law in the past.¹⁷⁷ In some of these cases, African states did not consciously set out to create comprehensively new international law but it was necessary to build on existing general international law by giving certain rules and principles a specifically African regional orientation.¹⁷⁸ This is the case with the doctrine of humanitarian intervention which article 4(h) of the AU Act and article 25 of the ECOWAS MCPMRPS Protocol codify. The fact that these reforms were achieved through IILR only becomes significant when we discount this regional dimension. In a recent document, the AU (not ECOWAS), articulated this regional dimension of its legal framework and stated that it seeks to engage rules of international law to see that they address the specific problems

¹⁷⁵ The UNSC described humanitarian crises in Somalia and Rwanda as threats to international peace and security. See S/RES/794 (1992) 3 December 1992 and S/RES/929 (1994) 22 June 1994 respectively.

¹⁷⁶ Tiyanjana Maluwa ‘OAU/African Union and International Law: Mapping new boundaries or revising old terrain?’ (2004) 98 *ASIL Proceedings* 232 at 232 (hereafter Maluwa ‘OAU/African Union and international law’).

¹⁷⁷ *Id.* The doctrine of *uti possidetis* and the codification of a right of humanitarian and pro-democratic intervention are some examples.

¹⁷⁸ Maluwa ‘OAU/African Union and international law’ op cit note 176 at 233.

Africa faces with respect to intervention to protect populations.¹⁷⁹ In the same vein, Maluwa notes that

[i]n a sense, the preoccupation of African states with the need to regulate the right of intervention within the Constitutive Act, and on their own terms, signifies not only a desire to map new boundaries of international law but also to wrest the use of the right of intervention from the conventional “civilizing mission” within which it is framed under current international law.¹⁸⁰

In terms of ‘mapping new boundaries’ of international law,¹⁸¹ at least from a theoretical perspective, the AU/ECOWAS RHMI regimes seek to achieve the following by introducing reform to the international law of humanitarian intervention. First, they have achieved codification of the law of humanitarian intervention, thereby enhancing normative clarity. Secondly, it could reduce problems of delay that often arise from the normative ambiguity surrounding the legality of humanitarian intervention during crisis. Thirdly, the AU/ECOWAS regimes could set uniform standards for intervention and thus help reduce complaints of selectivity or double standards. Fourth, the regimes would provide a legal framework of a binding character for action to prevent mass atrocity crimes. Fifth, the regimes could ultimately create the basis for imposing a legal duty on AU/ECOWAS as regional agents to act in deserving cases under a theory of regional responsibility to protect. Sixth, they set predetermined objective criteria for intervention and in theory this should make the evaluation of each case of intervention easier. Finally, the regimes provide the legal framework for the establishment of necessary institutional structures such as a standing military command such as the ECOWAS Monitoring Group (ECOMOG) and the African Standby Force) as originally envisaged by article 43 of the UN Charter.

With the AU/ECOWAS RHMI regime, at least in theory, intervention in Africa is not just ‘permissible’ but there is now a ‘legal right of intervention’, though as Kindiki and Kuwali point out, a more progressive approach would have been an ‘obligation’ or ‘duty’ to

¹⁷⁹ See *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 Peace and Security Council 307th Meeting 9 January 2012, Addis Ababa, Ethiopia, para 91 available at <<http://www.peaceau.org/uploads/report-au-un-jan2012-eng.pdf>> (accessed on 11 July 2012).

¹⁸⁰ Maluwa ‘OAU/African Union and international law’ op cit note 176 at 238. The relevant provisions in the AU/ECOWAS RHMI were couched in a way that shows the focus on the dominant problem of mass atrocity in Africa. Ibid at 235. It seems that in making these provisions, incompatibility with the Charter was not so much a concern for the AU/ECOWAS as the need to establish a legal framework for humanitarian intervention on the continent. See Thomas Franck ‘What happens now: The United Nations after Iraq’ (2003) 97 *AJIL* 607 at 614. See Chapter 4.

¹⁸¹ See Jeremy I Levitt ‘Pro-democratic intervention in Africa’ in Jeremy I Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2010) 103 at 111 lamenting the lack of study of these new developments.

intervene.¹⁸² This makes intervention, at least in principle, a real possibility backed by law. For its part, and through ‘institutional innovation’, ECOWAS seems to have settled the controversy surrounding the legality of pro-democratic intervention within its subregion.¹⁸³ However, at the global level, there is still debate whether there is a right to democratic governance enforceable by pro-democratic intervention.¹⁸⁴

Thus, the AU/ECOWAS RHMI regimes arguably constitute improvement in the law of humanitarian intervention and can be regarded as attempts to initiate reforms from without rather than from within the UN. It is possible that such acts of IILR by large regional blocs could lead to new rules that could modify the principal rule, especially when other states follow the practice or indicate a favourable disposition to do so in the future.¹⁸⁵ It is also possible that a practice that was initiated by a few states, with calculated benefits in the envisaged outcomes, could eventually produce results that blend such apparent infringement of the law into legal reform that benefits other states, the relevant global governance institutions and the entire system.¹⁸⁶

However, though the foregoing analysis has been a theoretical inquiry, it is important to make a few observations about the possible negative impact of an IILR act like the AU/ECOWAS RHMI regimes as a way of introducing reform to the law of humanitarian intervention. The first point is that such act of IILR could further weaken the UN Charter system.¹⁸⁷ Secondly, states may regress to pre-Charter era coalitions of the willing, collective security alliances and regional arrangements with severe consequences for the present multilateral system and international legal order.¹⁸⁸ Thirdly, as an essentially regional approach to reform, the AU/ECOWAS RHMI regimes seem to discount the fact that regional organisations vary greatly in many respects.¹⁸⁹ Fourthly, in an interdependent and interconnected world, it is difficult to see how the AU/ECOWAS RHMI regimes will not have implications beyond Africa’s boundaries. As Kofi Annan pointed out, what is needed is

¹⁸² Kithure Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’ (2003) 3*African Human Rights Law Journal* 97 at 106.

¹⁸³ Allen Buchanan ‘Institutionalising the just war’ (2006) 34:1 *Philosophy & Public Affairs* 1 at 22.

¹⁸⁴ Ibid at 25; Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1997) 30-1.

¹⁸⁵ Farer ‘The prospects for international law’ op cit note 108 at 623.

¹⁸⁶ Thomas Franck ‘What happens now: The United Nations after Iraq’ (2003) 97 *AJIL* 607 at 614.

¹⁸⁷ Fletcher & Ohlin ‘Defending Humanity’ op cit note 31 at 135.

¹⁸⁸ Ibid at 134.

¹⁸⁹ See Franck ‘The power of legitimacy’ op cit note 158 at 100.

not a replacement for the UN but how to make the organisation more effective.¹⁹⁰ Acts of IILR or pursuit of reform outside the UN platform not only undermines this objective, but also risk introducing a race to the bottom in collective security.

There is however reason to be optimistic that the enduring spirit of the Charter will withstand the impact of any act of IILR. This is because the normative erosion occasioned by the IILR discussed here will most likely be temporary. If the new norms receive wider acceptance and become consolidated in international law, they will contribute to the development of international law, the legitimacy of the UN and a regression to pre-Charter world order would be less likely. If on the other hand, the norms were rejected by the majority of states, they will most likely fizzle out. It is therefore important to emphasise, as I have analysed in this thesis, that the AU/ECOWAS regimes have merely developed a legal framework for humanitarian intervention which, in theory should be an improvement on the Charter, whether this will be so in practice is a matter for conjecture and a lot will depend on this. Therefore, the extent to which the AU/ECOWAS RHMI regimes are capable of weakening the Charter system will depend on the success of the implementation of the frameworks. Should the AU/ECOWAS RHMI regimes fail in implementation, African states will return to the Charter earlier than expected.¹⁹¹ As Wippman cautions, the lack of resources may hinder the utility of the AU/ECOWAS regimes so we might see less of it in practice than in theory.¹⁹² If this trend continues, then the utility of the AU/ECOWAS regional legal and theoretical framework for humanitarian intervention as instruments for operationalising R2P in Africa and their impact on the UN and international law would be less profound.

6.7 CONCLUSION

I have argued that due to the inadequacy of international law in the protection of human rights, and the obstacles to legal reform through the formal processes, the AU/ECOWAS acts of IILR that seek a moral improvement in the law of humanitarian intervention is morally justifiable. Relying on Buchanan's theory of IILR, I have argued that the current law of humanitarian intervention that forbids the AU/ECOWAS from undertaking intervention to prevent genocide and other mass atrocities unless they obtain UNSC authorisation in Africa

¹⁹⁰ Ibid at 101.

¹⁹¹ See David Wippman 'The nine lives of article 2(4)' (2007) 16 *Minnesota Journal of International Law* 387 at 406.

¹⁹² Id.

has proved incapable of protecting human rights and therefore so defective that it is in dire need of moral improvement and reform. Since the necessary reform could not be achieved within the Charter framework, the AU/ECOWAS RHMI regimes that introduced reform in Africa outside the Charter is morally justified even though they breach international law, they represent improvement in the law. By acceding to the treaties, African states acknowledge that: sovereignty resides in the people; that states derive their legitimacy from their citizens; that states are under an obligation to protect the human rights of citizens because their legitimacy depend on it; that states forfeit that legitimacy and become legal targets for regional humanitarian intervention when they violate, or are incapable of protecting, those rights. I also argued that the theory of IILR cannot be used to validate such claims as the right of pre-emptive strike because this claim does not meet some of the fundamental requirements of a valid act of IILR. Finally, the AU/ECOWAS RHMI regimes will have implications for international law and the UN Charter, much of which will depend on how the frameworks are implemented. However, they do not seek to replace the law-making processes of international law, rather they give allegiance to international law but insist that where formal law-making processes have failed in the reform of international law, especially with reference to intervention to halt mass atrocities, then IILR is welcome as an exceptional measure to bring about moral improvement in the law.

CHAPTER 7: THE LEGAL VALIDITY OF THE AU/ECOWAS UNILATERAL HUMANITARIAN INTERVENTION LEGAL REGIME UNDER CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW

Whether international law will deteriorate or flourish will depend upon whether the idea of the rule of law comes to be embodied in new, more responsive institutional structures, within which new, more sensitive principles will be appropriately applied. However, this much is clear: In the absence of a vigorous dialogue about the moral foundations of international law and an open-minded, critical exploration of the morality of international legal reform, the path of least resistance is likely to be destruction without reconstruction, the abandonment of existing legal constraints on the exercise of power without the development of new legal strictures to take their place.¹

7.1 INTRODUCTION

In chapters 5 and 6, I addressed the validity question from a legal and moral standpoint. The present chapter represents the third and final leg of my tripod theoretical inquiry into the legal validity of the AU/ECOWAS RHMI regimes. Like the two previous chapters that inquired into the theoretical validity of the AU/ECOWAS intervention treaties, the present chapter is also focused on the legal validity from a theoretical perspective. However, unlike the previous chapters, the interrogation is undertaken within the framework of the two main sources of international law (treaties and customary law). The chapter is divided into two major sections. In section 1, I examine the legal validity of the AU/ECOWAS RHMI regimes under conventional international law. I ask three questions: since the AU/ECOWAS RHMI regimes are treaty-based, what is the impact of member states' consent on the validity question under the UN Charter? Have the conditions for states assuming Charter obligations in 1945 been met? If no, what are the legal implications for Charter obligations and the AU/ECOWAS validity question, particularly in relation to articles 53(1) and 103 under the principle of *rius sic stantibus*? It is asserted that the AU/ECOWAS framework cannot be valid because they sanction use of force, arrogate the right of unilateral intervention to the AU/ECOWAS in violation of articles 2(4), 53(1) and 103. I advance three main arguments in reply: First, I argue that article 2(4) only prohibits *aggressive use of force* and the AU/ECOWAS RHMI regimes deal with *consensual use of force*, which is not the same thing as *aggressive use of force*. Secondly, I argue that article 53(1) relates to 'enforcement action' and since lack of consent is a fundamental requirement in enforcement actions, the

¹ Allen Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004) (hereafter Buchanan 'Self-Determination') 474.

AU/ECOWAS RHMI regimes do not constitute ‘enforcement action’ within the meaning of Chapter VIII because consent was given via treaties and so do not violate articles 2(4), 53(1) and by implication article 103. Thirdly, I argue that treaties of intervention based on valid consent constitute an exercise of state sovereignty which the Charter did not take away from states. Therefore, treaties of intervention like the AU/ECOWAS RHMI regimes that are based on the valid exercise of sovereignty are legally valid.

In section 2, I examine the validity question from a customary international law perspective. I ask whether the AU/ECOWAS RHMI treaties violate norms of *jus cogens* and if so, whether the treaties are null and void. Secondly, I ask whether there was a regional customary law of unilateral humanitarian intervention in Africa prior to the AU/ECOWAS RHMI regimes. And if so, do the AU/ECOWAS RHMI regimes constitute a codification of such regional customary law existing side by side with customary general international law and the UN Charter?

7.2 AU/ECOWAS RHMI REGIME UNDER CONVENTIONAL INTERNATIONAL LAW

One approach scholars have adopted in studying the legality of humanitarian intervention under the Charter is by examining the sources of international law.² There is the classical view which emphasises the traditional sources of international law (primarily treaties and custom) and the Realists who prioritise a policy-oriented approach, insisting that the Charter law must be interpreted in the context of subsequent developments in international law.³ The controversy about whether international law is ‘law properly so called’⁴ has as much to do with its decentralised system, lack of authoritative determinant in ascertaining its rules and how its sources are determined as with how its system of sanctions is organised.⁵ This controversy also implicates how some of its norms are determined, the nature of the rights and obligations they give rise to and their relationship with other norms in the system. For present purposes, since the Treaty of Westphalia and the emergence of the nation state as the

² Article 38 (1) of the ICJ Statute provides: ‘The Court whose function is to decide in accordance with international law such dispute as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilized nations.’

³ Tom J Farer ‘An inquiry into the legitimacy of humanitarian intervention’ in Lori Fisler Damrosch & David Scheffer (eds) *Law and Force in the New International Order* (1991) 186.

⁴ See HLA Hart *The Concept of Law* (1961) 208. (hereafter Hart ‘The Concept of Law’).

⁵ See John Austin *The Province of Jurisprudence Determined* Wilfred E Rumble (ed) (1832/1995) 20, 123, 160 particularly at 171.

mode of organising the international system, consent has always been central to the making of international law, whether by treaty or custom.⁶ It is trite that, as a general rule, a treaty only binds states that are parties to it and only to the extent of the provisions of that treaty, just as a custom does not bind a persistent objector.⁷

There is no doubt that part of what was at stake in 1945 at the negotiation of the UN Charter—particularly, article 2(4) & (7), 53(1) and 103 in relation to sovereignty—was how much sovereignty states were willing to cede to the new organisation by consenting to the Charter. As an attribute of sovereignty, the freedom of a state to bind itself by entering into agreement with other actors in the system has been circumscribed under the Charter. Article 2(4), for example, limits the freedom to use force whether unilateral or in a multilateral agreement with others. Article 103 also limits the freedom of states to make treaties.⁸ Such is the fundamental nature of consent to international law-making that a treaty freely consented to by states should not be lightly discarded as invalid without thorough legal scrutiny to determine its validity.⁹ This is even more so in the case of treaties of intervention like the AU/ECOWAS RHMI regimes.

7.3 THE VALIDITY OF TREATY-BASED INTERVENTIONS UNDER THE UN CHARTER

Leaving aside for the moment the question of the *jus cogens* character of article 2(4), it is pertinent to examine the right of a state to enter into treaties that authorise other states or organisation to use force within its territory, the limit to that right and the validity of such treaties under contemporary international law. It should be stated from the outset that the freedom of states to undertake treaty obligations is limited and governed by international law.¹⁰ Any use of force that falls short of the Charter paradigm under article 51, Chapter VII and article 53 is an infraction of the Charter.¹¹ Invariably, any treaty arrangement to that

⁶ See Fernando R Teson 'International obligation and the theory of hypothetical consent' (1990) 15 *Yale Journal of International Law* 84 at 90.

⁷ Anthony D'Amato 'Trashing customary international law' (1987) 81 *AJIL* 101 at 103. This binding character flows from states consenting to be bound by a treaty through series of processes and procedures recognised under international law.

⁸ Even the decision to consent to the limitation clause in article 103 of the UN Charter itself is an exercise of sovereignty.

⁹ Ademola Abass 'Consent precluding state responsibility: A critical analysis' (2004) 53:1 *International & Comparative Law Quarterly* 211 at 225 (hereafter Abass 'Consent precluding state responsibility').

¹⁰ Jonathan I Charney 'Universal international law' (1993) 87 *AJIL* 529 at 534 (hereafter Charney 'Universal international law').

¹¹ Bruno Simma 'The UN, NATO and the use of force: Legal aspects' (1999) 10 *EJIL* 1 at 4 (hereafter Simma 'The UN, NATO and the use of force').

effect would also be illegal. As mentioned above, a state only assumes obligations under the treaty it consents to but that obligation arises not just from the mere act of consenting but from the principle of *pacta sunt servanda*, which states that treaty obligations must be fulfilled in good faith.¹² Consequently, Simma argues that, as a rule of international law, states cannot contract out of the norm of nonuse of force at the regional level due to article 2(4) of the Charter, which they consented to; and states are therefore under an obligation to refrain from the use of force.¹³ The question then is, can a state through a treaty, authorise another state, group of states or regional organisation to use force in its territory? Is such treaty valid in view of the provisions in article 2(4)? As shown in chapter 2, the current international legal order is based on the principles of state equality, sovereignty and non-intervention.¹⁴ Therefore any answer to these questions necessarily implicates the concept of sovereignty of states.

Two major approaches have been adopted in resolving the question of treaties of intervention: the ‘freedom to contract’ model and the ‘jus cogens’ model.¹⁵ The ‘freedom to contract’ model states that inherent in the very idea of sovereignty of all states is the right to accept treaty-based restrictions on future exercise of that sovereignty and a state may limit its sovereignty in anyway or extinguish it altogether by treaty by merging with another state.¹⁶ Such limitation of sovereignty may be by entering into a treaty of intervention so that although a state has a right to be free from intervention and other states owe it the obligation not to infringe this right, the state can actually release other states from this obligation.¹⁷ As Winfield succinctly put it long ago, ‘[i]f an individual must not commit suicide, a State may.’¹⁸ In the *S.S. Wimbledon Case*, the PCIJ stated that while the mere fact that a state has

¹² See article 26 of the Vienna Convention on the Law of Treaties 23 May 1969 which entered into force on 27 January 1980, U.N.T.S. Vol. 1155 at 331 (hereafter VCLT); see also Charney ‘Universal international law’ op cit note 10 at 534.

¹³ See Simma ‘The UN, NATO and the use of force’ op cit note 11 at 2-4.

¹⁴ These principles have been confirmed by several international instruments and form part of customary international law. See the Preamble, articles 1(2) and 2(7) of the UN Charter; Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (G.A. Resolution 2625 (XXV) adopted without a vote on 24 October 1970) (hereafter ‘Declaration Concerning Friendly Relations’); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (G.A. Resolution 2131 (XX) adopted on 21 December 1965); the Definition of Aggression (G.A. Resolution 3314 (XXIX) adopted on 14 December 1974).

¹⁵ See David Wippman ‘Treaty-based intervention: who can say no?’ (1995) 62 *University of Chicago Law Review* 605 at 610. (Wippman ‘Treaty-based intervention’).

¹⁶ Id.

¹⁷ P H Winfield ‘The grounds for intervention in international law’ (1924) 5 *British Yearbook of International Law* 149 at 157 (hereafter Winfield ‘The grounds for intervention in international law’).

¹⁸ Id.

undertaken treaty obligations does not mean that it has surrendered its sovereignty, it only means ‘a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.’¹⁹

By the same token, whenever a state assumes international treaty obligations in relation to the protection of human rights, it amounts to an exercise of its sovereignty.²⁰ Usually, the protection of human rights would require domestic legislations and accession to international treaties and if a state enters into a treaty that shapes her internal and foreign policy direction such as authorising external intervention by a regional organisation to protect human rights, even though such treaty impugns its sovereignty, the state has the legal right to do so. There is no doubt that such treaty of intervention would encumber a state’s sovereignty and freedom of action, however, the treaty is not illegal.²¹ According to some commentators, if it is legal for a state to forfeit its sovereignty through integration with another state, then it would be odd to argue that a state cannot accept a ‘less drastic curtailment of its sovereignty by releasing its right of non-intervention, which is a right of each individual state flowing from sovereignty itself, ... The view maintaining that such consent is illegal is not in accord with usage or with law.’²²

Under classical international law, the right to intervene on the territory of another state by military force could be granted by treaty whether bilateral or multilateral.²³ Such treaties reflected the relationship and interest amongst the parties, though often skewed in favour of a dominant party.²⁴ It is noteworthy that while Winfield wrote prior to the UN Charter, Thomas wrote after the Charter entered into force, which suggests that this right existed prior to 1945 and arguably continues to exist even in the post-Charter era. Even today, there are still a couple of these treaties in force notwithstanding that their legal validity remains doubtful because of the apparent incompatibility with articles 2(4) and 103 of the

¹⁹ See *Case of the S.S. Wimbledon* (United Kingdom, France, Italy & Japan v Germany) PCIJ, Series A, No. 1, 1923 at 25.

²⁰ Helen Ruiz Fabri ‘Human rights and state sovereignty: Have the boundaries been significantly redrawn?’ in Philip Alston & Euan MacDonald (eds) *Human Rights, Intervention and the Use of Force* (2008) 33-86 at 43.

²¹ Winfield ‘The grounds for intervention in international law’ op cit note 17 at 158.

²² See Ann Van Wynen Thomas & A J Thomas Jr. *Non-Intervention: The Law and its Import in the Americas* (1956) 92.

²³ Ian Brownlie *International Law and the Use of Force by States* (1963) 18 (hereafter Brownlie ‘Use of Force by States’).

²⁴ Ibid at 19. See Manouchehr Ganji *International Protection of Human Rights* (1962) 17-22 discussing some of these treaties of intervention (hereafter Ganji ‘International Protection of Human Rights’); Brownlie ‘Use of Force by States’ op cit note 23 at 318-20.

Charter. However, Brownlie maintains that a treaty of intervention would be void today if it has an illegal object (such a pact for aggression) or the state target of intervention is not a party to such treaty.²⁵ Doswald-Beck contends that though intervention treaties were legal in the past, they would be illegal now for violating article 2(4) and article 103.²⁶ Commenting on the Iranian-Soviet intervention Treaty of 1921, Reisman argues that whereas a treaty of intervention might have been legal in the League of Nations era in which it was made, the legality of that treaty is now in doubt because of the entering into force of the Charter, which introduced new ‘intertemporal principles’ like articles 2(4) and 103 for assessing the continuing legal validity of existing norms.²⁷

Furthermore, in the wake of the US invasion of Panama in 1989 relying on the Panama Canal Treaty of intervention between the US and Panama, Louis Henkin argued that the US could not legally rely on the treaty to intervene in Panama and even if the said treaty existed, it was void for violating article 2(4).²⁸ In the same vein, Wippman submits that any treaty that authorises another state or group of states to intervene on its territory without its ‘contemporaneous consent’ infringes article 2(4) as well as article 103 and is therefore void.²⁹ What is decisive in Wippman’s argument is that regardless of the existence of a treaty of intervention, the existing government at the time of the proposed intervention must consent to an intervention for it to be legal. Such conclusion is hard to sustain because if that was the intention of the parties, of what use is the treaty of intervention? The essence of a treaty is to define and confer rights and obligations in advance. If contemporaneous consent is a requirement for intervention, a treaty of intervention would be unnecessary or at best redundant. In the absence of such express or implied provision, it is reasonable to conclude that a treaty of intervention confers the right of intervention in accordance with the terms of such treaty and contemporaneous consent is not required.

²⁵ See Brownlie ‘Use of Force by States’ op cit note 23 at 320-1.

²⁶ See Louise Doswald-Beck ‘The legality of military intervention by invitation of the government’ (1985) 56:1 *British Yearbook of International Law* 189 at 246.

²⁷ See W Michael Reisman ‘Intervention treaties in international law’ in Tunde Adeniran & Yonah Alexander (eds) *International Violence* (1980) 231-45 at 239 (hereafter Reisman ‘Intervention treaties in international law’). See generally W Michael Reisman ‘Termination of USSR’s treaty right of intervention in Iran’ (1980) 74 *AJIL* 144. Apart from the provision in article 2(4) there are several authorities upon which to question the legal validity of the AU/ECOWAS RHMI regimes as treaties of intervention. See Declaration Concerning Friendly Relations supra note 14. Several decisions of the ICJ also firmly establish the principle of the prohibition of use of force by states.

²⁸ Louis Henkin ‘The invasion of Panama under international law: A gross violation’ (1991) 29 *Columbia Journal of Transnational Law* 293 at 309.

²⁹ Wippman ‘Treaty-based intervention’ op cit note 15 at 620.

Besides, as a treaty, the UN Charter impliedly confers a right to interfere in the external affairs of states on the United Nations Security Council (UNSC) in pursuit of its function of maintaining international peace and security.³⁰ Similarly, through practice, the UNSC has developed its power to intervene in the internal affairs of states in cases of humanitarian catastrophes by relying on Chapter VII of the Charter.³¹ There is some sort of implied consent by states when they joined the UN that the UN may intervene in their affairs under Chapter VII, thus limiting the future powers of the sovereign state to act freely. Article 103 also limits the freedom of a sovereign state to act freely in the future by precluding states from assuming treaty obligations that are inconsistent with their Charter obligations. Therefore, the argument that the AU/ECOWAS RHMI regimes limit the freedom of action of member states and so is void, is problematic. If this is accepted as valid, it follows that states can bind themselves by permitting external intervention by regional organisations like AU and ECOWAS without the necessity of the contemporaneous consent of the incumbent government. Perhaps this explains why the argument about the legal validity of the AU/ECOWAS states seems to have shifted from the right of African states to enter into such treaties to the incompatibility of the treaties with the Charter. It can be safely concluded that a state can sign a treaty of intervention limiting its future freedom of action so long as it is signed by the *de jure* government.³² The relevant organisation can then rely on such treaty to intervene to protect human rights or for pro-democratic causes.

From a state practice point of view, the use of treaties of intervention to protect human rights—especially the rights of religious minorities—is well established, at least since the later part of the seventeenth century.³³ However, the Treaty of Guarantee of 6 August 1960 between Cyprus, on the one hand, and Greece, Turkey and Great Britain, on the other hand, is the only one in the post-Charter era to have received significant attention from legal scholars and deserves some consideration here.³⁴ Article IV of the Treaty of Guarantee provides that:

³⁰ See article 2(7) and Chapter VII of the UN Charter.

³¹ Carsten Stahn 'Enforcement of the collective will after Iraq' (2003) 97 *AJIL* 804 at 810.

³² Wippman 'Treaty-based intervention' *op cit* note 15 at 678.

³³ See Ganji 'International Protection of Human Rights' *op cit* note 24 at 17-22.

³⁴ See Thomas Ehrlich 'Cyprus, the "Warlike Isle": Origins and elements of the current crisis' (1965-6) 18 *Stanford Law Review* 1021 (hereafter Ehrlich 'Cyprus, the Warlike Isle'), discussing some of these treaties including article 6 of the Treaty of Friendship between Persia (now Iran) and the defunct USSR of 26 February 1921. This treaty gave the Soviet Union the right to use force within Iranian territory on the conditions stipulated in the treaty. See also Agreement in Implementation of Article IV of the Panama Canal Treaty of September 1977 signed at Washington D.C., reprinted in *United States Treaties and other International*

[i]n the event of a breach of the provisions of the present Treaty, Greece, Turkey, and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.³⁵

In 1974, when Turkey intervened in Cyprus relying on this provision, the legality was challenged by Cyprus who argued that the treaty was invalid because it authorised the use of force against another state in contravention of article 2(4) of the Charter.³⁶ Turkey contended that intervention on the basis of article IV of the Treaty did not violate article 2(4) because military force was not used ‘against the territorial integrity or political independence’ of Cyprus, but in fact, used to secure Cyprus’s territory and independence in compliance with the condition for military intervention stipulated in the Treaty.³⁷ For its part, the UK argued that where the occasion demands, the UK was entitled to undertake military intervention in Cyprus without UNSC authorisation based on the provisions of the Treaty.³⁸ Hence Ronzitti concludes that article IV(2) of the Treaty of Guarantee is legally valid.³⁹

The significance of this example lies in the fact that whereas the Iranian-Soviet Treaty was made in the League of Nations era and there could be doubts about its continuing validity under the Charter; the same cannot be said of the Cyprus Treaty which was made fifteen years after the Charter came into force. Obviously, the parties were aware that article IV of the treaty would conflict with articles 2(4) and 103 of the Charter and invalidate them if indeed that was the correct interpretation and effect of articles 2(4) and 103 on treaties of intervention. The UNSC, in the context of the Turkish invasion of Cyprus, without expressly stating so, suggested that the treaty of intervention was legally valid.⁴⁰ Thus, Brownlie

Agreements Vol. 33 Part 1 (1979-1981) 307, at 309. Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 342 (hereafter Hannikainen ‘Peremptory Norms in International Law’).

³⁵ See Treaty of Guarantee between the Republic of Cyprus on the one part, and Greece, Turkey, and the United Kingdom of Great Britain and Northern Island, signed at Nicosia on 16 August 1960. Available at <[http://www.mfa.gov.cy/mfa2006.nsf/All/484B73E4F0736CFD22571BF00394F11/\\$file/Treaty%20of%20Guarantee.pdf](http://www.mfa.gov.cy/mfa2006.nsf/All/484B73E4F0736CFD22571BF00394F11/$file/Treaty%20of%20Guarantee.pdf)> (accessed on 15 November 2012) (hereafter ‘Treaty of Guarantee’).

³⁶ See Natalino Ronzitti ‘Use of force, jus cogens and state consent’ in A Cassese (ed) *The Current Regulation of the Use of Force* (1986) 147-166 at 159 (hereafter Ronzitti ‘Use of Force’).

³⁷ Ehrlich ‘Cyprus, the Warlike Isle’ op cit note 34 at 1072.

³⁸ Ibid at 1067. See Natalino Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985) 121-23 (hereafter Ronzitti ‘Rescuing Nationals Abroad’); U.N. S.C.O.R 1098th meeting, 27 February 1974 para 79.

³⁹ Ibid at 131.

⁴⁰ See UN Security Council Resolution 353 (1974) adopted by the Security Council at its 1781st meeting on 20 July 1974, S/RES/353 (1974), stating in the Preamble that the UNSC was ‘Equally concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by *international agreements*.’ (Emphasis mine); UN Security Council Resolution 186 [on the establishment of the UN Peace-Keeping Force in Cyprus], 4 March 1964, S/RES/186 (1964) also make reference to the Treaty of

concludes that the right of military intervention on the territory of a state could be lawfully conferred by treaty.⁴¹ Arguably, this includes entering into treaties of intervention for the protection of human rights in circumstances predetermined by such treaties. When a state or group of states, enter into a treaty amongst them or under the aegis of a regional organisation, authorising intervention in their territories by that regional organisation, this is a valid exercise of sovereignty and is legal.

7.4 AU/ECOWAS RHMI REGIMES AS TREATIES OF INTERVENTION

The end of the Cold War ushered in new optimism about the prospect of the UNSC finally functioning in international law as envisaged in 1945⁴²—a type 4 global constitutive process with highly effective hierarchical institutions where the appointed authority (the UNSC) is able to respond to egregious human rights violations efficaciously and thus diminish the penchant for unilateral mechanisms.⁴³ Since this did not happen, David Wippman's prediction that states may be persuaded to adopt Stanley Hoffman's proposal for a multilateral treaty regime under which signatory states would agree to intervention in their internal affairs if necessary, to end gross human rights violations, has been patently fulfilled in the AU/ECOWAS RHMI regime. It is possible that with the increasing interdependence, treaty systems like the Concert of Europe system, permitting states or organisations to intervene in the internal affairs of states to protect certain values could become prominent once again.⁴⁴ Recently, calls for such treaty arrangements have resurfaced in the literature and it is against this background that I analyse the legal validity of the AU/ECOWAS regime.⁴⁵

The argument in favour of the validity of the AU/ECOWAS regime as treaty qua treaty law falls into two broad categories: the intervention by invitation argument and the

Guarantee. See Ronzitti 'Use of Force' op cit note 36 at 160 arguing that these resolutions show that the UNSC considered the Treaty of Guarantee valid.

⁴¹ Brownlie 'Use of Force by States' op cit note 23 at 321.

⁴² Thomas Franck 'What happens now: The United Nations after Iraq' (2003) 97 *AJIL* 607 at 609 (hereafter Franck 'The United Nations after Iraq').

⁴³ See W Michael Reisman 'Unilateral Action and the Transformations of the world constitutive process: The special problem of humanitarian intervention' (2000) 11:1 *EJIL* 3 at 6-7. See Chapter 5.

⁴⁴ Wippman 'Treaty-based intervention' op cit note 15 at 609. See Ganji 'International Protection of Human Rights' op cit note 24.

⁴⁵ See Allen Buchanan & Robert O Keohane 'Precommitment regimes for intervention: Supplementing the Security Council' (2011) 25:1 *Ethics & International Affairs* 41 (hereafter Buchanan & Keohane 'Precommitment regimes for intervention').

‘consent precludes wrongfulness’ argument. Both of these arguments are intertwined and are separated here for convenience of analysis only.

7.4.1 *The AU/ECOWAS RHMI Regimes as Intervention by Invitation*

In international law, the legitimate government of a state can request the intervention of foreign forces in its territory.⁴⁶ Although what constitutes ‘legitimate government’ is unsettled, democratic credentials are fast becoming the criteria for both domestic and international governmental legitimacy.⁴⁷ Brownlie distinguishes between the different situations in which the government of a state may lawfully request external intervention.⁴⁸ One such ground is to end an armed insurrection or to assist a people in their struggle for democracy as a manifestation of self-determination.⁴⁹ Incidentally, these are two of the major causes of violent conflicts that often result in genocides, war crimes and crimes against humanity in Africa today and partly explain the necessity for the AU/ECOWAS RHMI regimes.

In a recent study, Buchanan and Keohane called for intervention treaty regimes which they termed ‘precommitment regimes’⁵⁰ under which states would sign intervention treaties whether under a multilateral treaty arrangement comprising representatives of democratic states or under the auspices of regional organisations.⁵¹ The authors argued that such treaty arrangement should dispense with UNSC authorisation for intervention to halt genocide and other massive violations of human rights and this would not violate the Charter.⁵² Similarly, Farer contends that it is lawful for a group of democratic states to enter into agreement permitting intervention by the group in a member state in order to restore democracy.⁵³ In the

⁴⁶ Brownlie ‘Use of Force by States’ op cit note 23 at 321.

⁴⁷ W Michael Reisman ‘Humanitarian intervention and fledgling democracies’ (1994/5) 18 *Fordham International Law Journal* 794 at 795 (hereafter Reisman ‘Fledgling democracies’); Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1997) 142 (hereafter Teson ‘Law and Morality’). See generally, Gregory Fox & Brad Roth *Democratic Governance and International Law* (2000), Cf Ian Brownlie ‘The United Nations Charter and the use of force, 1945-1985’ in A Cassese (ed) *The Current Legal Regulation of the Use of Force* (1986) 491 at 501 suggesting that in situations of civil wars, effective control would be the test of legality of consent.

⁴⁸ For example, to suppress internal insurrection and put down a rebellion. See Brownlie ‘Use of Force by States’ op cit note 23 at 322-7 reviewing several earlier authorities on the issue.

⁴⁹ See Teson ‘Law and Morality’ op cit note 47 at 146. This was a core feature of the decolonisation process but in recent times seems more commonly associated with the right to democratic governance. See Reisman ‘Fledgling democracies’ op cit note 47 at 795, 803.

⁵⁰ See generally, Buchanan & Keohane ‘Precommitment regimes for intervention’ op cit note 45 at 58

⁵¹ Ibid at 52.

⁵² Ibid at 58.

⁵³ See Tom Farer ‘A paradigm of legitimate intervention’ in Lori Fisler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflict* (1993) 316-47 at 332 (hereafter Farer ‘A paradigm of legitimate

same vein, some writers also construe the humanitarian intervention framework of the AU (and arguably ECOWAS too) as ‘precommitment regimes’ or intervention by a priori invitation.⁵⁴ Kuwali argues that the legal basis of the right of intervention under these treaties can be viewed as an invitation apriori.⁵⁵ If this analysis is accepted, it is arguable that without necessarily examining the basis of the political authority or democratic credentials of all AU and ECOWAS member states, the AU/ECOWAS RHMI regimes will also qualify as a ‘precommitment regime’ or intervention by invitation, which permits intervention in the territories of AU/ECOWAS members without the necessity of UNSC authorisation.

Generally, the purpose of article 2(4) is to regulate the recourse to use of force by states. My argument here is that when states by consent to a treaty enlarge the scope of the unilateral use of force beyond that contemplated under the Charter as it relates to such states, it falls outside the scope of article 2(4) and the UNSC can only act when such use of force threatens international peace and security.⁵⁶ Similarly, in view of the invitation to intervene contained in the treaty, it is doubtful whether the UNSC, acting under its powers in the Charter, can purport to preclude AU/ECOWAS from intervening in member states except where such intervention can be viewed as constituting a threat to international peace and security. To argue otherwise is to stretch article 2(4) and 53 (1) too far. Just as the Treaty of Guarantee of Cyprus expands the reach of unilateral resort to force by the Guarantor Powers beyond article 51 of the Charter,⁵⁷ the AU/ECOWAS intervention treaties extend the right to unilateral use of force by AU/ECOWAS beyond the scope of article 51 and therefore outside the ambit of article 2(4), 53 and 103.

The UN Charter does not preclude the right of AU/ECOWAS states to enter into a treaty of intervention because that would amount to a violation of their sovereignty under article 2(7) since the matters sought to be regulated by the AU/ECOWAS RHMI regimes are

intervention’). Some other regional bodies have also articulated principles aimed at the preservation of democracy even though not as radical as those of ECOWAS in its codification of a right of pro-democratic intervention. See for example articles 1, 17, 18, 19, 20 and 21 of the Inter-American Democratic Charter, adopted at the 28th Special Session of the OAS General Assembly, OAS Doc. OEA/Ser.P/AG/RES.1(XXVIII-E/01), 11 September 2011 available at http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm (accessed on 15 July 2012).

⁵⁴ Dan Kuwali *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2010) 20 (hereafter Kuwali ‘Implementation of Article 4(h) Intervention’).

⁵⁵ Dan Kuwali ‘The end of humanitarian intervention: Evaluation of the African Union’s right of intervention’ (2009) 9:1 *African Journal of Conflict Resolution* 41 at 57. Cf Hennie Strydom ‘Peace and security under the African Union’ (2003) 28 *South African Yearbook of International Law* 59 at 71 arguing that enforcement action by the AUPSC must be authorised by the UNSC.

⁵⁶ Ehrlich ‘Cyprus, the Warlike Isle’ op cit note 34 at 1074.

⁵⁷ Id.

matters essentially within their domestic jurisdiction as outlined in several United Nations General Assembly Declarations.⁵⁸ Arguably, human rights are now matters of international concern and states have assumed international obligations under human rights treaties. However, the policy framework, legal and institutional arrangements for human rights protection and enforcement at national level (to the extent that they do not violate any existing norm of international law), continue to be matters within the domestic jurisdiction of states in exercise of their sovereignty. This is why article 53(1) of the Charter does not apply to the AU/ECOWAS RHMI regimes if member states have entered into regional arrangements for the prevention of genocide and other mass atrocities.

7.4.2 *Consensual Intervention and the preclusion of wrongfulness under the AU/ECOWAS Framework*

An intervention would be lawful if, absent UNSC authorisation, it was consented to by the target state at the time of the intervention.⁵⁹ This is because consent by the injured state precludes wrongfulness of the intervention.⁶⁰ However, some writers argue that in such cases, the intervention is not a ‘humanitarian intervention’ but ‘armed assistance’.⁶¹ Whatever nomenclature is used to describe it, the important element is that the type of force proscribed by article 2(4) is ‘coercive’ or ‘aggressive’ use of force which means use of force without the *consent* of the target state and which is different to ‘consensual use of force’.⁶² The consensual intervention argument states that since intervention treaties are based on the consent of states, intervention on the basis of such treaties are lawful because the Charter prohibition of use of force presupposes absence of consent of the territorial state.⁶³ Summing up the argument in this respect, Wippman observes that

consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle. When a government is both widely recognised and in effective control of most of the state, this principle affords a clear alternative to Security Council authorisation as a basis for justifying external intervention,

⁵⁸ See note 14 and accompanying texts.

⁵⁹ Fredrik Harhoff ‘Unauthorised humanitarian interventions-Armed violence in the name of humanity?’ (2001) 70 *Nordic Journal of International Law* 65 at 701 (hereafter Harhoff ‘Unauthorised humanitarian interventions’).

⁶⁰ James Crawford *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 163 (hereafter Crawford ‘Articles on State Responsibility’); Ronzitti ‘Use of Force’ op cit note 36 at 148; Abass ‘Consent precluding state responsibility’ op cit note 9 at 214.

⁶¹ Harhoff ‘Unauthorised humanitarian interventions’ op cit note 59 at 69.

⁶² Wippman ‘Treaty-based intervention’ op cit note 15 at 622.

⁶³ Abass ‘Consent precluding state responsibility’ op cit note 9 at 224.

whether by states acting unilaterally, or by states acting under the auspices of the United Nations (U.N.) or a regional organisation.⁶⁴

According to the International Law Commission (ILC), '[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'⁶⁵ Where consent is involved, the wrongfulness of the act is a matter of law and not politics or morality.⁶⁶ The legal effect of the operation of this rule actually is not to exclude the responsibility that would have resulted from the act but to forbid the act being labeled wrongful in the first place.⁶⁷ It is the consent of the target state that precludes the intervention from falling into the realm of illegality and it does not matter whether the consent was given via a treaty or otherwise, provided it is a valid consent under international law.⁶⁸

However, the objection to the consent argument is that the prohibition of use of force by states is a value in which all states have an interest in safeguarding, thus giving rise to an obligation *erga omnes*.⁶⁹ The implication of this is that when a state relies on a treaty of intervention to intervene in another state, whereas such intervention is not unlawful against the target state, it may nevertheless be unlawful against other states members of the UN to whom the obligation *erga omnes* is also owed except where they have consented to such intervention.⁷⁰ Because in such intervention, it is not just the interest of the consenting state that is at stake but the entire international legal order.⁷¹ As already mentioned above, Wippman also argues that for consent to preclude the wrongfulness of an intervention, it must be given contemporaneously with the proposed intervention. Consent given in advance via a treaty would violate the freedom of a state to exercise its sovereignty in future and is therefore invalid.⁷² If one accepts this view, interventions based on the AU/ECOWAS treaties would be invalid because the consent given via the treaties was given in advance. But since

⁶⁴ David Wippman 'Military intervention, regional organisations, and host-state consent' (1996) 7 *Duke Journal of Comparative & International Law* 209 at 209 (Wippman 'Regional organisations and host-state consent').

⁶⁵ Article 20 of the ILC's Articles on State Responsibility, Report of the International Law Commission to the General Assembly on the Work of its Fifty-Third Session 2001 vol II pt II *Yearbook of International Law Commission* 2001 at 72, A/CN.4/SER.A/2001/Add.1 (Part 2) available at <http://www.untreaty.un.org/ilc/reports/2001/2001report.htm> (accessed on 20 September 2012); Ronzitti 'Use of Force' op cit note 36 at 148.

⁶⁶ See Ole Spierlmann 'Humanitarian intervention as a necessity and the threat of *jus cogens*' (2002) 71 *Nordic Journal of International Law* 523 at 525 (hereafter Spierlmann 'Humanitarian intervention as a necessity').

⁶⁷ *Id.*

⁶⁸ See note 77 *infra*.

⁶⁹ Ronzitti 'Rescuing Nationals Abroad' op cit note 38 at 131.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Wippman 'Treaty-based intervention' op cit note 15 at 620.

the freedom to consent and assume international treaty obligations is itself an attribute of state sovereignty, it follows that if a group of states sign a treaty that authorises one or more of them to use force against one of the signatory states, however incongruous this may appear, the treaty itself does not violate article 2(4) because the absence of consent is a condition for *use of force* in the first place and so a condition for wrongfulness.⁷³ Abass also shares this view, arguing that when states, either through practice or treaties of intervention, consent to an international organisation intervening in their internal conflicts by use of force, such intervention is legal by virtue of article 20 of the Article on State Responsibility.⁷⁴ It does not matter that such treaty of intervention, whether bilateral or multilateral, relates to the internal social, economic, cultural and political organisation of the state or that it may result in the limitation of the internal and external dimensions of her sovereignty.⁷⁵

The above argument can be taken further when the legal effect of the consent to intervene given in a treaty is examined closely. As Roberto Ago rightly observed, when states consent to a treaty such consent operates to suspend the normal rules of international law that otherwise regulate their relationships.⁷⁶ A state may give such consent in advance, though what constitutes valid consent depends on several variables governed by rules of international and municipal law.⁷⁷ Arguably, this applies to intervention treaties as well. The use of force in the territory of a state on the basis of prior consent freely given in a treaty is valid under treaty law because such consent suspends both articles 2(4), 2(7) and 53(1) between the parties in that particular circumstance. It is apparent that the AU/ECOWAS RHMI regimes satisfy the criteria for consensual intervention. The only relevant question that may arise would be on the valid exercise of this right and that will require an objective assessment to determine at the time of the decision to intervene whether AU/ECOWAS complied with their

⁷³ Spierlmann 'Humanitarian intervention as a necessity' op cit note 66 at 535.

⁷⁴ See Abass 'Consent precluding state responsibility' op cit note 9 at 224.

⁷⁵ Helen Ruiz Fabri 'Human rights and state sovereignty: Have the boundaries been significantly redrawn?' in Philip Alston & Euan MacDonald (eds) *Human Rights, Intervention and the Use of Force* (2008) 33 at 37, 43.

⁷⁶ See Roberto Ago *The International Law Commission Eight Report on State Responsibility* (1979) *Yearbook of the International Law Commission* Vol. II, 1, at 31, UN Doc. A/CN. 4/318.5-7 available at http://www.untreaty.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf (accessed on 5 October 2012) (hereafter Ago 'ILC Eight Report'). See approving of this view, Wippman 'Regional organisations and host-state consent' op cit note 64 at 210.

⁷⁷ See Crawford 'ILC's Articles on State Responsibility' op cit note 62 at 163. For consent to serve as element excluding wrongfulness it must meet certain criteria '(i) it must have been given prior to the commission of the international wrong; (ii) it must be given by an authority which can be said to express the will of the local State; (iii) the local State's expression of will must be valid, not vitiated by so-called vices de volonte; (iv) the action by the infringing state must be kept strictly within the limits of the consent given by the local sovereign authority; (v) the infringing state must not violate an *erga omnes* obligation.' See Crawford at 163, 164-5. See Ronzitti 'Use of Force' op cit note 36 at 148; Abass 'Consent precluding state responsibility' op cit note 9 at 215.

constituent documents and procedural requirements. So long as the AU/ECOWAS stay within the humanitarian objectives stipulated in the treaties, the consent of the target state will serve as circumstances precluding wrongfulness in any humanitarian intervention they might undertake without UNSC authorisation.⁷⁸

On the question of whether AU/ECOWAS would require UNSC authorisation when acting under the AU/ECOWAS RHMI regimes, I already pointed out that the ‘enforcement action’ referred to in article 53(1) for which regional arrangements must obtain UNSC authorisation refers to use of force without the consent of the territorial state.⁷⁹ When a state consents to the use of force on its territory, whether such consent was given contemporaneously or via a treaty, such use of force does not qualify as ‘enforcement action’ within the meaning of article 53(1) for which UNSC authorisation is required.⁸⁰ Echoing this point, Farer argues that when a group of states acting under a regional bloc enter into a treaty that permits members of the bloc upon express invitation or majority vote to intervene in a state, such intervention does not need UNSC authorisation because it is not an ‘enforcement action’ within the ambit of Chapter VIII.⁸¹ Since member states have consented to the AU/ECOWAS RHMI regimes, such interventions do not constitute ‘enforcement action’ and fall outside the purview of article 53(1). Brownlie put it succinctly thus: ‘[t]he limitations on the resort to force in the Covenant, the Kellogg-Briand Pact, and the Charter do not relate to the case in which express permission to intervene is given.’⁸² This is reinforced by the fact that the purpose of the AU/ECOWAS RHMI regimes is to avert or halt genocides and other mass atrocities. Ordinarily, states are under international obligations to prevent genocides and other mass atrocities in their territories and when a state consents to external intervention for that particular purpose, that state is merely acceding to and giving effect to its legal obligations.⁸³ This is the case with AU/ECOWAS members and their intervention treaties. Another basis for contending that the AU/ECOWAS RHMI regimes be accepted as legally valid is what may be called the modification argument discussed below.

⁷⁸ Ronzitti ‘Use of Force’ op cit note 36 at 157.

⁷⁹ Farer ‘A paradigm of legitimate intervention’ op cit note 53 at 332.

⁸⁰ Georg Nolte ‘Restoring peace by regional action: International legal aspects of the Liberian conflict’ (1993) 53 ZAoVR 62; Yoram Dinstein *War, Aggression and Self-Defense* 4ed (2005) 85 suggesting that the use of force prohibited by the Charter relates to inter-state rather than intra-state conflicts. Levitt therefore concludes that the AU/ECOWAS intervention treaties cannot be invalidated by the Charter because they are concerned with intra-state conflicts. See Jeremy Levitt ‘Peace and Security Council of the African Union: Known unknowns’ (2003) 13 *Transnational & Contemporary Problems* 109 at 127.

⁸¹ Farer ‘A paradigm of legitimate intervention’ op cit note 53 at 332.

⁸² Brownlie ‘Use of Force by States’ op cit note 23 at 20.

⁸³ Wippman ‘Treaty-based intervention’ op cit note 15 at 679.

7.5 AU/ECOWAS INTERVENTION TREATIES AND THE MODIFICATION OF THE CHARTER

The question addressed in this section was once summed up by a writer when he asked rhetorically, '[i]f the Charter ineffectively maintains the peace, when, if at all, may state practice in effect modify the Charter norms by providing an alternative customary law of public order?'⁸⁴ The unilateral use of force by states, 'coalition of the willing' and regional organisations have led some writers to conclude that there has been a paradigm shift in the *jus ad bellum* of use of force under the Charter.⁸⁵ This argument claims that since 1945, there have been series of unilateral uses of force contrary to article 2(4) and this constitutes state practice modification of the Charter rule on the use of force.⁸⁶ This view hinges on the principle that a multilateral treaty could be modified by subsequent practice.⁸⁷ Whether this is the case with the Charter is disputed. For example, Louis Henkin has consistently argued that despite violations of the Charter paradigm on the use of force, it remains the rule, and he doubts whether any 'responsible voice' has advocated 'that the failures of the organisation vitiated the agreement and nullified or modified the Charter's norms.'⁸⁸

⁸⁴ Gordon A Christenson 'Jus cogens: Guarding interests fundamental to international society' (1987/8) 28 *Vanderbilt Journal of International Law* 585 at 621 (Christenson 'Guarding interests fundamental to international society').

⁸⁵ See Anthony Clark Arend & Robert J Beck *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 4-5, 192-193.

⁸⁶ Thomas Franck, 'Who killed Article 2(4)? Or: Changing norms governing the use of force by states' (1970) 64 *AJIL* 809 at 811, 822; 837; Franck 'The United Nations after Iraq' op cit note 42 at 610, 614; Michael Glennon 'How international rules die' (2005) 93 *Georgetown Law Journal* 939 strongly arguing that Article 2(4) has fallen into desuetude because through series of violations states have withdrawn their consent from the norm.

⁸⁷ See The International Law Commission *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly* (1966) *Yearbook of the International Law Commission* Vol. II at 235-6, A/CN.4/SER.A/1966/Add.1 (hereafter 'Reports of the ILC to the General Assembly 1966') available at

[http://www.untreaty.un.org/publications/yearbooks/Ybkvolumes\(e\)/ILC_1966_v2_e.pdf](http://www.untreaty.un.org/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf) (accessed on 12 September 2012); see article 31(3)(b) of VCLT supra note 12; see Yehuda Z Belum *Eroding the United Nations Charter* (1993) 241 (hereafter Belum 'Eroding the United Nations Charter').

⁸⁸ Louis Henkin 'Use of force: Law and U.S. policy' in Louis Henkin et al *Right v. Might: International Law and the Use of Force* 2 ed (1991) 37-9 at 38. There are as many authorities supporting this view as there are against it but I am not particularly concerned with this since I do not dispute that the Charter remains the law in this context. See Edward Gordon 'Article 2(4) in historical context (1984/5) 10 *Yale Journal of International Law* 271 at 275; Louis Henkin 'The reports of death of Article 2(4) are greatly exaggerated' (1971) 63 *AJIL* 544; Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* (2001); Christine Gray *International Law and the Use of Force* (2008) 4-29; David Wippman 'The nine lives of Article 2(4)' (2007) 16 *Minnesota Journal of International Law* 387. For the view that the Charter rule has been modified by state practice see the text at note 86; Michael Glennon 'The new interventionism: The search for a just international law' (May/June 1999) 78:3 *Foreign Affairs* 2; *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (2001).

Most scholars still agree that aggressive use of force violates the UN Charter, but the unilateral use of force by bodies like AU/ECOWAS to halt humanitarian catastrophes and maintain regional peace and security presents a complex problem. This is because such organisations comprise several states whose practice carry weight in terms of *opinio juris* and so raise questions of precedential value of such unilateral acts. Also, the usual objections raised against unilateral use of force by single states are often difficult to sustain in the case of regional organisations. These practices and the momentum towards regional peace and security arrangements creates the bases for arguing that without necessarily going through the formal processes of amendment under article 108, the Charter framework on the use of force has been modified.⁸⁹

The Charter was drafted to accommodate the veto-wielding permanent members (P5) in the structure of the UNSC as its collective security organ because of the realities of effective power prevailing in 1945.⁹⁰ The idea was that given the power configuration in the UN, the collective security mechanism should be structured to mobilize the Great Powers for the common purpose of pursuing peace.⁹¹ Although it seemed to have succeeded in averting another world war so far, the Charter has been less successful in preventing genocides and other mass atrocities.⁹² Most, if not all the major wars, genocides and mass atrocities that have occurred since World War II have been stopped not by the UN (though it might have played some roles) but by unilateral acts of either single states or regional organisations (Tanzania in Uganda, India in East Pakistan, Vietnam in Kampuchea, ECOWAS in Liberia and Sierra Leone, NATO in Kosovo).⁹³

The problem, it seems, is the strictures inherent in the Charter normative and institutional frameworks in which change has been difficult. The attitude of some writers has been to treat the Charter as though it were an immutable world constitution, a status the

⁸⁹ Ralph Zacklin *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (2005) 180-1 (Zacklin 'The Amendment of the Constitutive Instruments'); Blum 'Eroding the United Nations Charter' op cit note 87 at 244.

⁹⁰ W Michael Reisman 'Redesigning the United Nations' (1997) 1 *Singapore Journal of International & Comparative Law* 1 at 5 (Reisman 'Redesigning the United Nations').

⁹¹ Id.

⁹² See William A Schabas 'Preventing genocide and mass killing: The challenge for the United Nations' (2006) available at <http://www.eprints.mdx.ac.uk/7840/1/MRGGenocideReport.pdf> (accessed on 5 May 2013); Edward a Kolodziej 'The Great Powers and genocides: Lessons from Rwanda' (2000) 12:2 *Peace, Security & Global Change* 121 at 131-2.

⁹³ See Alex J Bellamy 'Conflict prevention and the responsibility to protect' (2008) 14 *Global Governance* 135 at 147; Nikolai B Krylov 'International peacekeeping and enforcement actions after the Cold War' in Lori Fisler Damrosch & David Scheffer (eds) *Law and Force in the New International Order* (1991) 94-100 at 94.

Charter itself does not lay claim to.⁹⁴ Even if the UN Charter were regarded as a world constitution reflecting the agreement on institutions and functions amongst states, an explication of how those institutions have functioned in the past or will function in the future can only be gained through an understanding of the frame of reference of the ‘comprehensive constitutive process’ that created those institutions.⁹⁵ International law is not fabricated but it is the outcome of both conscious and sometimes inadvertent processes undertaken by people and calculated to create, change or recreate the fundamental organisational framework of ‘community life.’⁹⁶ The Charter-based law and the system it supports must therefore reflect the ‘community life’ of its members as they change. As Roscoe Pound pointed out long ago,

... continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability.⁹⁷

It is difficult to see how the Charter would meet the objective of the community of states if its amendment or modification is almost impossible. As a treaty, the Charter can be modified by subsequent state practice.⁹⁸ The Charter can also be modified by subsequent practice of relevant UN organs both of which could result in fundamental changes in the original intention of the Charter.⁹⁹ The ICJ has held that the subsequent practice of parties to a treaty is to be taken into account when interpreting the treaty.¹⁰⁰ It is important to scrutinize practice to ascertain to what extent it reflects such modification.

It is possible that practices that are seemingly incompatible with the Charter actually comply with such modifications rather than the anachronistic letters of the Charter.¹⁰¹ Judging by the developments that have taken place since 1945—some of which are inconsistent with the Charter—but which nevertheless have persisted and in some cases, even

⁹⁴ See for example Bardo Fassbender ‘The UN Charter as constitution of the international community’ (1998) 36 *Columbia Journal of Transnational Law* 529.

⁹⁵ Reisman ‘Redesigning the United Nations’ op cit note 94 at 4.

⁹⁶ Id.

⁹⁷ Roscoe Pound *Interpretations of Legal History* (1986) 1.

⁹⁸ Sean D Murphy ‘Calibrating global expectations regarding humanitarian intervention’ Conference of Minda de Gunzburg Centre for European Studies, Harvard University and Kenan Institute for Ethics at Duke University, Cambridge, 18 – 19 January 2001, at 8. (hereafter Murphy ‘Calibrating global expectations’). (On file with author).

⁹⁹ Ibid at 7-8.

¹⁰⁰ See *Kasikili/Sedudu Island Case (Botswana v Namibia)* Judgment, ICJ Reports (1999) 1045 para 45, 49, 50.

¹⁰¹ See for example Malgosia Fitzmaurice ‘The practical working of the law of treaties’ in Malcolm D Evans (ed) *International Law* (2010) 172 at 197 asserting that it would border on anachronism to insist on maintaining a state of affairs based on a treaty that is not amenable to modification or purports to be immutable and absolute for all times.

fulfil the fundamental purposes of the UN, it is arguable that such practice can be held to be valid modification of the Charter. An example is the changing state behaviour towards intervention and the use of force to protect human rights by the UN. The changing state behaviour, the increasing roles of non-state actors and the emergence of new shared global norms indicate that at the minimum, the global community accepts the protection of these universal values.¹⁰² The series of unilateral interventions show the extent to which states are prepared to go to protect these values regardless of what construction is placed on the UN Charter in relation to these changes.¹⁰³ It is my aim to show that there have been modifications to the Charter and that the AU/ECOWAS RHMI treaty regimes that codify some of those modifications are legally valid.

First, it is argued that though at inception the Charter, particularly article 2(4), had a huge impact on customary law, it did not ‘freeze’ the development of international law afterwards.¹⁰⁴ There continue to be the possibility that over time, consensus may evolve regarding certain practices and interpretations of the Charter which impose or create obligations different from those originally imposed when the Charter was drafted.¹⁰⁵ In relation to article 2(4) D’Amato argues that

... the rule of Article 2(4) underwent change and modification almost from the beginning. Subsequent customary practice ... has profoundly altered the meaning and content of the non-intervention principle articulated in Article 2(4) in 1945. ... Under the rules of interpretation of international treaties, the subsequent practice of states can modify and change the meaning of the original treaty provisions. Hence state practice since 1945—whether considered as simply formative of customary international law or as constituting interpretation of the Charter under the subsequent-practice rule—has drastically altered the meaning and content of Article 2(4).¹⁰⁶

Evidence of this modification is the construction now given to ‘threat to international peace and security’.¹⁰⁷ The meaning of ‘threat to international peace and security’ as understood under the Charter in 1945 has since evolved from its traditional sense of inter-state and trans-boundary aggressive use of force to now include internal strife, massive violations of human

¹⁰² Murphy ‘Calibrating global expectations’ op cit note 98 at 7.

¹⁰³ *Id.*

¹⁰⁴ Anthony D’Amato *International Law: Process and Prospects* (1995) 144 (hereafter D’Amato ‘International Law: Process’).

¹⁰⁵ Bernhardt ‘Article 103’ op cit note 13 at 1121.

¹⁰⁶ *Id.*

¹⁰⁷ W Michael Reisman & Myres S McDougal ‘Memorandum upon humanitarian intervention to protect the Ibos’ (1968) 9 asserting that massive violations of human rights within a country internationalises an otherwise internal matter. See S/RES/794(1992), S/RES/788 (1992) and S/RES/1132 (1997) which described the humanitarian situations in Somalia, Liberia and Sierra Leone as threat to international peace and security respectively.

rights and humanitarian catastrophes.¹⁰⁸ In their assessment of intervention by ECOWAS for example, some writers observe the emergence through state practice, of a norm permitting unilateral intervention in extreme cases, thus constituting a modification of the Charter.¹⁰⁹ In the same vein, it is on the basis of such implied modification that NATO's intervention in Kosovo was justified and interpreted by some writers as relaxing the strictures on the use of force and laying the foundation for the establishment of a new norm that permits unilateral intervention by regional organisations to halt mass atrocities.¹¹⁰ It is also on the basis of such modification that after assessing the UN response to several unauthorised interventions by states and regional organisations, that Reisman concludes that there are other criteria used for ascertaining the lawfulness of unauthorised interventions under international law other than article 2(4).¹¹¹ Some writers therefore suggest that the NATO and ECOWAS interventions support the view that practice has modified the Charter, particularly article 53(1) to confer more powers on regional organisations to undertake humanitarian interventions without prior UNSC authorisation.¹¹²

As the roles of regional organisations expand, I think there is an increasing tendency for them to view their roles in the maintenance of peace and security in their regions as autonomous.¹¹³ For example, in its policy thrust on human rights protection, peace and security in Europe, NATO restated its commitment to building legitimacy for its actions in the future, but nevertheless to stand ready to act when the UNSC is prevented from acting to maintain international peace and security; because the right to individual and collective self-defense includes the right to defend common interests and values when they are threatened by

¹⁰⁸ Ibid.

¹⁰⁹ Jane Stromseth 'Rethinking humanitarian intervention: The case for incremental change' in J L Hlzegrefe & Robert Keohane *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 232-272 at 247 (hereafter Stromseth 'Rethinking humanitarian intervention').

¹¹⁰ Harhoff 'Unauthorised humanitarian interventions' op cit note 59 at 119; David Wippman 'Kosovo and the limits of international law' (2001) 25:1 *Fordham Internal Law Journal* 127 at 135-136 (Wippman 'Kosovo and the limits of international law').

¹¹¹ W Michael Reisman 'Coercion and self-determination: Construing article 2(4)' (1984) 78 *AJIL* 642 at 643, 645. Such criteria would include that the intervention was for humanitarian purposes, collectively carried out by a regional organisation, that there was timeous withdrawal without annexation of territory, and that it was supported by the international community.

¹¹² Deen Racsmany Zsuzsanna 'A redistribution of authority between the UN and regional organisations in the field of maintenance of peace and security' (2000) 13 *Leiden Journal of International Law* 297 at 330; Thomas Franck *Recourse to Force: State Actions against Threats and Armed Attacks* (2003) 113 (hereafter Franck 'Recourse to Force') Cf Christine Gray *International Law and the Use of Force* 2ed (2004) 318 arguing that there is no basis for reaching this conclusion.

¹¹³ Anthony Clark Arend 'The United Nations, regional organisations, and military operations: The past and the present' (1994/5) 7 *Duke Journal of Comparative & International Law* 4 at 5.

humanitarian catastrophes such as war crimes and crimes against humanity.¹¹⁴ The evolving norm is not yet clear, but it suggests expanded latitude for regional organisations to use force. When we take this attitude of regional organisations elsewhere, the AU/ECOWAS RHMI regimes discussed in this thesis, and the recommendation by the ICISS that regional organisations could undertake unilateral intervention to implement R2P (if the UNSC is deadlocked), there seems to be a gradual shift towards a modification of Chapter VIII of the Charter.¹¹⁵

To take the argument further, the concept of ‘peacekeeping’ is not provided for in the Charter but the UNSC practice has modified the Charter to accommodate this principle.¹¹⁶ Besides the consent of the target state, this modification is the reason the UNSC is able to authorise the use of force within the territory of a state in circumstances that would have amounted to a violation of article 2(7) back in 1945. Another evidence of modification of the UN Charter is the construction now given to article 27(3) of the Charter which provisions ordinarily requires that non-procedural matters of the UNSC must be adopted by nine affirmative votes including the ‘concurring’ votes of the P5.¹¹⁷ However, through subsequent practice of the UNSC, it is now accepted that the affirmative vote of all P5 members is not necessary and that abstention is sufficient, provided there is no negative vote.¹¹⁸

Some scholars view these changes as mere reinterpretations rather than modification of the Charter.¹¹⁹ While it is conceded that how the provisions of the Charter are interpreted, applied, change with changing circumstances and needs of the international community, it is also true that some of these changes are so far-reaching in their impact that they effectively pass off as ‘informal’ amendments or modifications of the Charter. These nuances explain why the ‘most far-reaching departure’ from the plain meaning of the provisions in the

¹¹⁴ Resolution on Recasting Euro-Atlantic Security Adopted by the Atlantic Parliamentary Assembly in November 1998, NATO Doc. AR 295 SA (1998) para (e) - (d).

¹¹⁵ Although the recommendation was not included in the paragraphs 138 & 139 of the WSOD, it is significant that the Commission made the recommendation.

¹¹⁶ Dan Ciobanu ‘The power of the Security Council to organise peace-keeping operations’ in A Cassese (ed) *United Nations Peace-keeping: Legal Essays* (1978) 15-53 at 16. The so-called ‘Chapter Six and Half’ could also be placed in this category. Sean D Murphy ‘The intervention in Kosovo: A law-shaping incident?’ (2000) 94 *ASIL Proceedings* 302 at 304 (hereafter Murphy ‘The intervention in Kosovo’).

¹¹⁷ See article 27(3) of the Charter.

¹¹⁸ Murphy ‘The intervention in Kosovo’ op cit note 116 at 303.

¹¹⁹ Franck ‘Recourse to Force’ op cit note 112 at 138, 162.

constitutive documents of intergovernmental organisations is usually explained as interpretation rather than modification by subsequent practice.¹²⁰ As Blum concludes,

international legislators, while in fact engaged in the legislative activity of informal treaty modification, pretend to be engaged in treaty interpretation. They will thus endeavour to present their decisions, however innovative, as being in conformity with already existing law. Under the guise of interpretation treaty modification is taking place.¹²¹

By their very nature, the constitutive documents of global governance institutions change with the dynamic conditions of international life developing through the practice of parties, and in this respect, members of the UN and its agencies and organs can be instruments of modification and change.¹²² The crucial element in the modification of the Charter through subsequent practice is whether there was consent by relevant UN organs and members to such practice by UN organs, states, and regional organisations.¹²³ As a global body charged with the maintenance of international peace and security and prevention of genocides and mass atrocities, the capacity of the UN to discharge its functions and its continuing relevance depends on its ability to meet the demands of a changing international community.¹²⁴ This, in turn, requires amendment to the Charter which has been difficult to achieve, despite the importance of such amendment to the continued effectiveness of the UN. In fact, the reason these ‘modifications’ of the Charter had taken these ‘informal’ means is because there was no way of addressing many subsequent developments after 1945 without amending the Charter. If the formal procedure for the amendment of the constitutive document of an international organisation is not adequately effective, ‘the incidence of informal modification will be high.’¹²⁵ What the absence of formal amendment to the Charter indicates is the difficulty of reform within the UN, but there have been modifications to the Charter in several aspects were this not so, the UN would have become an ‘obsolete and totally ineffective institutions—utterly in the backwater of world events’.¹²⁶ Obviously, these modifications have added value to the development and legitimacy of the Charter law and the UN.¹²⁷

In line with the foregoing analyses of modification through practice, there is an emerging norm that notwithstanding articles 2(4), 24, 53(1) and 103 of the Charter, in the interest of preventing or halting genocides and other mass atrocities, it is lawful that where

¹²⁰ Blum ‘Eroding the United Nations Charter’ op cit note 87 at 244.

¹²¹ Id.

¹²² Zacklin ‘The Amendment of the Constitutive Instruments’ op cit note 89 at 172.

¹²³ Blum ‘Eroding the United Nations Charter’ op cit note 87 at 244.

¹²⁴ Zacklin ‘The Amendment of the Constitutive Instruments’ op cit note 89 at 180.

¹²⁵ Blum ‘Eroding the United Nations Charter’ op cit note 87 at 240.

¹²⁶ Zacklin ‘The Amendment of the Constitutive Instruments’ op cit note 89 at 180.

¹²⁷ Blum ‘Eroding the United Nations Charter’ op cit note 87 at 242.

the UNSC is paralysed a regional organisation could launch humanitarian intervention without UNSC authorisation.¹²⁸ If it is accepted that the Charter has indeed been modified by subsequent practice with reference to articles 2(4), 53(1) and 103, arguably treaties like the AU/ECOWAS RHMI regimes that reflect the new development and practice must be legally valid because they merely embody existing principles.

7.6 *The AU/ECOWAS RHMI Regimes as a Modification of the Charter amongst AU/ECOWAS Members Inter se*

Generally, the AU/ECOWAS RHMI regimes only apply to members of the organisations and their relations with each other. The AU/ECOWAS RHMI regimes have only modified articles 2(4), 24, 53(1) amongst AU/ECOWAS members inter-se in so far as they are also members of the UN. Although article 103 appears to suggest that states cannot contract out of the Charter framework, it has been argued, and rightly so in my opinion, that in relation to inconsistent treaty provisions (such as those provisions of the AU/ECOWAS RHMI regimes discussed in chapter 4), states can actually modify the provisions of the Charter between them via a treaty.¹²⁹ As a commentator observed,

[a]ny fundamental deviation from the Charter by means of a treaty concluded between the Member States would amount to an amendment of the Charter inter se. The Charter does not explicitly prohibit such amendments; they are arguably permissible if in accordance with the general law of treaties.¹³⁰

According to Roberto Ago, when two or more states enter into a treaty that permits an act that would otherwise be wrongful under the Charter in apparent modification of the Charter in terms of their relationship, the agreement takes effect and the Charter obligation is only suspended as between the parties involved in that treaty.¹³¹ The act continues to remain an internationally wrongful act in relation to other states not party to the subsequent treaty or agreement.¹³² Such inter se amendment of the Charter provisions among only some of its members is permissible provided that it meets two conditions: that it does not alter the rights and duties of other states; and secondly, that the amendment is not inconsistent with or impedes the fulfilment of the purpose and object of the Charter.¹³³ It is not difficult to

¹²⁸ Murphy 'Calibrating global expectations' op cit note 98 at 9.

¹²⁹ Ago 'ILC Eight Report' op cit note 76 at 38.

¹³⁰ See Rain Liivoja 'The scope of the supremacy clause of the United Nations Charter' (2008) 57 *International & Comparative Law Quarterly* 583 at 597 (Liivoja 'The scope of the supremacy clause').

¹³¹ Ago 'ILC Eight Report' op cit note 76 at 38.

¹³² Id.

¹³³ Id. See Liivoja 'The scope of the supremacy clause' op cit note 130 at 597.

establish the legal validity of the AU/ECOWAS RHMI regimes on this basis. First, the treaties only bind the respective AU and ECOWAS member states that have ratified the instruments. Secondly, the treaties do not impede but actually promote the execution of the fundamental principles and purposes of the UN—maintenance of international peace and security, ‘save succeeding generations’ by preventing or halting genocides and other mass atrocities.¹³⁴

Similarly, the AU/ECOWAS RHMI regimes affect their obligations under the Charter in view of article 103 of the Charter, it should be stated that article 103 only relates to ‘conflict between the obligations of ... Members’ under the Charter and other treaties.¹³⁵ In that sense, it is only the inconsistent *obligations* of AU/ECOWAS states arising from the RHMI regimes that should be in question and not the validity of the entire treaty. Secondly, article 103 provides that the Charter obligations would ‘prevail’. This means that the Charter obligation merely takes precedence over other competing treaty obligations to be performed by the state in particular circumstances. When article 103 operates therefore, it does not terminate an inconsistent treaty permanently but merely takes precedence over the conflicting treaty obligation.¹³⁶ In other words, it temporarily operates to allow the concerned state to perform its Charter obligations rather than the conflicting treaty obligations. Finally, as will be shown below, these treaties evolved from regional customary law and, as Levitt argues, article 103 does not apply to customary international law, so article 103 cannot prevail over the AU/ECOWAS RHMI treaty provisions that derive from customary law.¹³⁷

¹³⁴ See Preamble, articles 1(3), 55 and 56 of the UN Charter.

¹³⁵ See article 103 of the UN Charter. See Chapter 4 outlining these areas of conflict. In practice, there is usually a presumption against normative conflict and different interpretation techniques are employed to avoid normative clash as much as possible. If it is possible to interpret both treaties in manner that makes them compatible, this would be adopted so that the issue of hierarchy of norms or which norm should prevail is avoided. See See Antonios Tzanakopoulos ‘Collective security and human rights’ in Erika de Wet & Jure Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (2012) 55. In resolving the normative incompatibility between the AU-ECOWAS RHMI frameworks and the UN Charter, this interpretation technique may be helpful. However, it should be mentioned that the extent to which this will be applicable will depend on the context in which the frameworks are utilised the AU and ECOWAS.

¹³⁶ See Jure Vidmar ‘Norm conflicts and hierarchy in international law: towards a vertical international legal system?’ in Erika de Wet & Jure Vidmar *Hierarchy in International Law: The Place of Human Rights* (2012) 19; Liivoja ‘The scope of the supremacy clause’ op cit note 130 at 596-7.

¹³⁷ Jeremy Levitt ‘Humanitarian intervention by regional actors: The case of ECOWAS in Liberia and Sierra Leone’ (1998) 12 *Temple International & Comparative Law Journal* 333 at 351 (hereafter Levitt ‘Humanitarian intervention by regional actors’).

7.6 AU/ECOWAS RHMI REGIMES UNDER CUSTOMARY INTERNATIONAL LAW

Custom is recognised in article 38(1)(b) of the ICJ Statute as one of the sources of international law. As a source of international law, custom has many drawbacks, particularly how its rules emerge—its process is elusive and uncertain and its normative outcomes often difficult to pinpoint.¹³⁸ Nonetheless, since states are unlikely to be able to reach a consensus on updating the UN Charter,¹³⁹ many scholars look forward to customary law as the only possible source of developing a clear right of humanitarian intervention deducible from an assessment of state practice to determine whether state practice indicates trends and needs for change in the law as it is.¹⁴⁰

Usually, an indication of whether a state intends its practice to generate a new rule is how such state rationalises its conduct.¹⁴¹ If a state or international organisation acknowledges the existing rule while insisting that its breach be excused, it apparently does not want the existing rule changed.¹⁴² However, if it justifies its action as a clarification of the application of an existing rule then this has the potential of generating a new rule depending on time and whether other states condemn or subsequently follow the practice.¹⁴³ According to Farer,

... every action by a consequential state for which it claims legitimacy will produce prescriptive implications beyond its peculiar facts, it will generate a modification of the principal norm if other consequential states follow suit (or even declare a readiness to) when the appropriate occasion arises. On the other hand, should most states reject the rationalization and condemn the act, they would drain out most of its legislative potential. Not quite all, however. If the behavior is repeated with some frequency and other states do gradually begin to replicate it, the initial act will begin to appear as a precedent rather than remain forever stigmatized as a delinquency.¹⁴⁴

¹³⁸ Jack L Goldsmith & Eric Posner 'A theory of customary international law' (1999) 66:4 *The University of Chicago Law Review* 1113 at 1117 (hereafter Goldsmith & Posner 'A theory of customary international law').

¹³⁹ Antonio Cassese 'Return to Westphalia? Considerations on the gradual erosion of the Charter system' in Antonio Cassese (ed) *The Current Regulation of the Use of Force* (1986) 505-23 at 519 (hereafter Cassese 'Return to Westphalia?').

¹⁴⁰ Spencer Zifcak *United Nations Reform: Heading North or South?* (2009) 108, 109 (hereafter Zifcak 'United Nations Reform').

¹⁴¹ Tom J Farer 'The prospect for international law and order in the wake of Iraq' (2003) 97*AJIL* 621 at 622 (hereafter Farer 'The prospect for international law').

¹⁴² *Ibid* at 622.

¹⁴³ *Id.* See Anthony D'Amato *The Concept of Custom in International Law* (1971) 49 (hereafter D'Amato 'The Concept of Custom') 104.

¹⁴⁴ Farer 'The prospect for international law' *op cit* note 141 at 623.

As already noted, rules of customary law relating to the use of force exist independently of the Charter.¹⁴⁵ Therefore, besides article 51 and Chapter VII, a third exception to the prohibition of use of force includes development in customary international law.¹⁴⁶ Under general customary international law, a state has a right to authorise future coercive use of force on its territory.¹⁴⁷ Thus, in the Cypriot example, customary law allows the state to consent to a treaty of future intervention for the protection of the existence of the Cypriot Turkish minority without the specific consent of the incumbent Cypriot government but not for the prescription of its government or political affairs.¹⁴⁸

7.6.1 *Practice Evidence of Validity of AU/ECOWAS RHMI Regimes under Customary International Law*

Apart from states, treaties and practice of international organisations are evidence of customary international law.¹⁴⁹ Treaties and arrangements by regional organisations could also lead to new universal customary law norms on human rights.¹⁵⁰ During the UNSC debate following the ECOWAS intervention, the Nigerian Representative stated '[t]he "collective self-help" undertaken by ECOWAS is "an important building-block in the new world order of shared responsibility for the maintenance of international peace and security which we seek to establish."¹⁵¹ Since then, there have been other developments suggesting an evolving practice of shared responsibility and authority with the UNSC in the use of force and the maintenance of international peace and security. The President of the UNSC stated:

Liberia continues to represent an example of systematic and effective cooperation between the United Nations and regional organisations, as envisaged in Chapter VIII. The role of the United Nations has been a supportive one. Closer contact and consultation have been maintained with *ECOWAS* which will continue to play the central role in the implementation of the [Cotonou] peace agreement.¹⁵²

¹⁴⁵ Anthony D'Amato 'Trashing customary international law' (1987) 81 *AJIL* 101 at 103 (hereafter D'Amato 'Trashing customary international law').

¹⁴⁶ D'Amato 'International Law: Process' op cit note 104 at 126; Mahir Kanade 'Article 2(4) of the UN Charter: Alive and well' (2009) *Peace & Conflict Monitor* Available at http://www.monitor.upeace.org/archive.cfm?id_article=632#_ftn29 (accessed on 20 October 2012).

¹⁴⁷ Hannikainen 'Peremptory Norms in International Law' op cit note 34 at 346.

¹⁴⁸ Ibid at 348.

¹⁴⁹ Mark Villiger *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* 2ed (1997) 17 (hereafter Villiger 'Customary International Law').

¹⁵⁰ Louis Henkin 'International organisations and the rule of law' (1969) 23:3 *International Organisation* 656 at 661; Allain Pellet 'State sovereignty and the protection of fundamental human rights: An international law perspective' (2000) *Pugwash Occasional Papers* 37 at 38 Available at <http://www.pugwash.org/reports/rc/pellet> (accessed on 30 June 2010).

¹⁵¹ Statement by Nigerian Representative U.N. Doc. S/PV.3138 (1992) 19 November 1992, 44-45.

¹⁵² Further Report of the Secretary General U.N. Doc.S/26200, 4 August 1993, para 17.

Some commentators have been willing to conclude from the Liberian and Sierra Leonean experience that the UNSC at least viewed these interventions as practice in the region that allows a regional organisation to fill the gap where the UNSC is deadlocked.¹⁵³ The AU/ECOWAS RHMI regimes represent a development of this theory and a codification of the resulting norms. Although the overall normative impact of these developments on general customary international law of humanitarian intervention is still unclear and less studied, it is arguable that the practice has created a norm of regional humanitarian intervention with a potential to influence the future development of general customary international law.¹⁵⁴ NATO's intervention in Kosovo is well documented and needs no rehashing here but its precedential value is disputed.¹⁵⁵ Some commentators regard the intervention as 'part of the establishment of a new and emerging principle of international law' creating a right of unauthorised intervention by regional organisations.¹⁵⁶ For example, on the basis of such ECOWAS and NATO interventions, Garrett argues that as a matter of general customary law, regional organisations like the Organisation of American States (OAS) and the Organisation of African Unity (OAU) (AU) can now lawfully undertake unilateral intervention.¹⁵⁷ Others reject this view arguing that non-condemnation of NATO's intervention in Kosovo at best could be taken to constitute ex post facto authorisation rather than the inception of a new rule of customary law.¹⁵⁸ Cassese asserts that the statements of states after Kosovo suggest that the intervention was not intended to be a precedent or to generate a new rule of customary international law.¹⁵⁹ The fact that the ECOWAS/NATO-style interventions have not been repeated ever since also corroborate this conclusion.

Yet, developments in state and regional organisations' practice since the 1990s suggest the contrary. For example, in the elaboration of the EU's peace and security framework, there is no express declaration that the EU would only act with UNSC authorisation. In fact, there is suggestion that the EU reserves its decision making autonomy

¹⁵³ See Franck 'Recourse to Force' op cit note 112 at 155.

¹⁵⁴ Martin Kunschak 'The African Union and the right to intervention: Is there a need for UN Security Council authorisation?' (2006) 31 *South African Yearbook of International Law* 195 at 204.

¹⁵⁵ For a detailed discussion of the subject see Ivor H Daalder & Michael E O'Hanlon *Winning Ugly: NATO's War to Save Kosovo* (2000).

¹⁵⁶ Harhoff 'Unauthorised humanitarian interventions' op cit note 56 at 119.

¹⁵⁷ Stephen A Garrett *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (1999) 59-60. For a contrary view, see Simma 'The UN, NATO and the use of force' op cit note 11 at 4.

¹⁵⁸ Simma 'The UN, NATO and the use of force' op cit note 11 at 4. See also Monica Hakimi 'To condone or condemn? Regional enforcement actions in the absence of Security Council authorisation' (2007) 40 *Vanderbilt Journal of International Law* 643 at 677 arguing that Article 53 remains the rule.

¹⁵⁹ Antonio Cassese 'A follow-up: Forcible humanitarian countermeasures and opinio necessitatis' (1999) 10:4 *EJIL* 791 at 794, 798-799.

in this respect.¹⁶⁰ It is too early to say whether the EU/NATO will act along this line in the future, which would further support the conclusion about the existence of such norm in general customary law. A caveat should however be sounded in drawing on NATO's practice, because, unlike the AU/ECOWAS, NATO is not a Chapter VIII but article 51 Organisation, with the implication that its use of force under the Charter rules should be for individual or collective self-defense, which does not ordinarily require UNSC authorisation.¹⁶¹ Secondly, NATO's attempt to create a new norm was taken outside its 'region' while AU/ECOWAS applies to Africa only.¹⁶² Thirdly, unlike NATO intervention which was a spontaneous response to a crisis and so far has not been repeated, the AU/ECOWAS rules evolved out of practice over a period of two decades before being codified. Thus, Levitt cites the examples of the Mission to Monitor the Implementation of the Bangui Agreement (MISAB) in Central African Republic, and ECOWAS interventions in Liberia and Sierra Leone, as evidence of this practice and a basis for concluding that regional organisations claiming a right of intervention in a member state is an exception to the rule of non-intervention under general customary international law.¹⁶³

7.6.2 AU/ECOWAS RHMI Regime as Regional Customary Law

Customary international law consist of customary general international law and special or regional customary law.¹⁶⁴ Whereas the former applies to all states, the latter only applies to states in a particular geographical region.¹⁶⁵ This is of significance to the AU/ECOWAS RHMI regime.¹⁶⁶ It means that a practice among a few states in a region like West Africa or Africa can constitute customary law for those states and regions only. Although often

¹⁶⁰ See Presidency Conclusions: Helsinki European Council, 10-11 December 1999, para 26. Available at <<http://www.bits.de/public/pdf/rr00-4.pdf>> (accessed 10 December 2012).

¹⁶¹ See Christin Chinkin 'The legality of NATO's action in the Former Republic of Yugoslavia (FRY) under international law' (2000) 49:4 *The International and Comparative Law Quarterly* 910 at 913-14. See article 5 of the North Atlantic Treaty Organisation of 1949 available at <http://www.nato.int/cps/en/natolive/official_texts_17120.htm> (accessed on 27 July 2011). Its status as a regional organisation remains a subject of controversy since the end of the Cold War and the way NATO now views its roles.

¹⁶² Ibid at 915.

¹⁶³ Levitt 'Humanitarian intervention by regional actors' op cit note 13 at 335.

¹⁶⁴ D'Amato 'The Concept of Custom' op cit note 143 at 153; Villiger 'Customary International Law' op cit note 149 at 56.

¹⁶⁵ Anthony D'Amato 'The concept of special custom in international law' (1969) 69 *AJIL* 211 at 212; Villiger 'Customary International Law' op cit note 149 at 56; see *Case Concerning Right of Passage Over Indian Territory* (Portugal v. India) (Merits) (Judgement of 12 April 1960) ICJ Report 4 at 39 (hereafter *Right of Passage Case*). See also *Asylum Case* (Colombia v Peru) (Judgment of 20 November 1960) ICJ Reports 266 at 293-4, (dissenting opinion of Judge Alvarez) (hereafter *Asylum Case*).

¹⁶⁶ Usually, the practice of an international organisation is relevant for the question of the customary law of that organisation. See Villiger 'Customary International Law' op cit note 149 at 17.

neglected when compared to general customary international law, there still exists regional or special customary law that only binds a small number or group of states of a particular geographical region or subset of the world.¹⁶⁷ Such rule need not be accepted by all countries.¹⁶⁸ In the *Right of Passage Case*, the ICJ stated,

[i]t is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.¹⁶⁹

The custom may develop from a rule of general customary law or conventional law but it must be proved and consent established.¹⁷⁰ In other words, the states in the geographical region involved in the customary practice must give it express or implied recognition.¹⁷¹ According to D'Amato, 'special custom evolves where particular states have developed rules that relate to them only showing their mutual agreement. Hence, special custom may reaffirm or deviate from the existing rule.'¹⁷² The legality of regional customary law was affirmed by the ICJ in the *Nationalities Case* when it stated that the legal basis of regional customary law is traceable to article 38(1)(b) of the ICJ Statute which lists as one of the sources of international law, custom as 'evidence of general practice accepted as law.'¹⁷³ Although the defunct OAU had very few cases of actual intervention, when the totality of its practice is considered, it arguably suggests a gradual evolution of a regional customary law of humanitarian intervention.¹⁷⁴ For its part, there can be little doubt about the existence of a

¹⁶⁷ Ibid at 56. See also D'Amato 'The Concept of Custom' op cit note 143 at 135. In the *Right of Passage Case* the ICJ held that when there is a clash between a general and special custom and the practice is clear in the special and not in the general custom, the Court would give effect to the special or local custom. See *Right of Passage* supra note 165 at 44.

¹⁶⁸ *Asylum Case* supra note 165 at 294, (dissenting opinion of Judge Alvarez). Where a practice is not sufficiently general, it may still 'constitute special i.e. local or regional customary law'. See Villiger 'Customary International Law' op cit note 149 at 56-7.

¹⁶⁹ *Right of Passage Case* supra note 165 at 39.

¹⁷⁰ D'Amato 'The Concept of Custom' op cit note 143 at 134. In the *Asylum Case*, the ICJ held that the Colombian Government must establish that the rule invoked is in constant and uniform usage and practiced by the state in question. See *Asylum Case* supra note 165 at 276.

¹⁷¹ Villiger 'Customary International Law' op cit note 149 at 33.

¹⁷² D'Amato 'The Concept of Custom' op cit note 143 at 150.

¹⁷³ See *Case Concerning Rights of Nationals of the United States of America in Morocco (France V The United States of America)* (1952) ICJ Rep 176 at 199-200 approving of the *Asylum Case* principle on local custom.

¹⁷⁴ See for example the OAU culminated in Article 4 (h); Draft Kampala Document for a Proposed Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), Kampala, Uganda, 22 May, 1991; Declaration of the Assembly of Heads of State and Government on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution (1993) AHG/Decl. 3/(XXIX) adopted by the 29th Session of the Assembly of Heads of State and Government at Cairo, Egypt, from 28-30 June, 1993.

regional ECOWAS law of humanitarian intervention developed by ECOWAS practice and institutional law.¹⁷⁵

It is often the practice that when states find a rule of law unsatisfactory, they resort to treaty amongst them to change it.¹⁷⁶ Not only do such treaties create instant obligations for parties, they could also bring about changes and modification of general customary law.¹⁷⁷ The same can be said of the AU/ECOWAS RHMI regimes.¹⁷⁸ I will therefore submit that the AU/ECOWAS RHMI regimes qualify as regional customary law, and if this is accepted, arguably they are legally valid under international law as well.

Besides the ECOWAS practice already discussed here, elsewhere in the continent, there has been practice of humanitarian intervention by Southern African Development Community (SADC), which intervened in Lesotho in 1998.¹⁷⁹ SADC's intervention in Lesotho was similar to the ECOWAS intervention except in two important ways. First, the intervention was widely criticised for exacerbating the conflict and for being a push to protect a particular party in power as well as maintain South Africa's economic interests in Lesotho.¹⁸⁰ Secondly, the scale of violence and human destruction in Lesotho obviously was in no way comparable to that in the Liberian crisis.

In the context of the present analysis it is significant to point out that SADC's intervention was not authorised by the UNSC nor was such authorisation necessary since the intervention was at the request of the legitimate government. However, there is still doubt

¹⁷⁵ See Chapter 3 and 4.

¹⁷⁶ D'Amato 'The Concept of Custom' op cit note 143 at 105, 162.

¹⁷⁷ Ibid at 104-5.

¹⁷⁸ Tiyanjana Maluwa 'The OAU/African Union and international law: Mapping new boundaries or revising old terrain?' (2004) 98 *ASIL* 2332 (hereafter Maluwa 'African Union and international law').

¹⁷⁹ The South African Defense Force and the Botswana Defense Force deployed troops in Lesotho on 22 September 1998 purportedly at the request of the Prime Minister to restore stability to the Kingdom under the auspices of SADC as a result of the crisis that arose from the disputed May 1998 elections leading to the occupation of the King's palace by demonstrators. The objective of the intervention according to South African officials was to stabilize the situation and allow Lesotho authorities assume the maintenance of law and order while regional diplomatic efforts were being made to find a political settlement. But the legality of the SADC intervention in Lesotho has been a subject of controversy for many reasons. See generally, Roger Southall 'SADC's intervention into Lesotho: An illegal defense of democracy?' in Oliver Furley & Roy May (eds) *African Interventionist States* (2001) 153-171; Jeremy Levitt 'Pro-democratic intervention in Africa' (2006) 24:3 *Wisconsin International Law Journal* 785 at 819; Jeremy Levitt 'Conflict prevention, management, and resolution: Africa –Regional strategies for the prevention of displacement and protection of displaced persons: The case of the OAU, ECOWAS, SADC, and IGAD' (2001) 11:39 *Duke Journal of Comparative & International Law* 39; Willie Brettenbach 'Failure of security co-operation in SADC: The suspension of the Organ for Politics, Defense and Security' (2000) 7:1 *South African Journal of International Affairs* 86; SANDF 'SADC launches Operation Boleas' available at <http://www.info.gov.za/speeches/1998/98a01_boleas9811173.htm>

¹⁸⁰ Southall 'SADC's intervention into Lesotho' op cit note 179 at 159, 162.

whether the intervention was a SADC-mandated intervention or a South African operation because as an author has pointed out, at the time of the intervention, the relevant organ of SADC which is responsible for intervention had already been suspended.¹⁸¹ The legal basis of the intervention has therefore remained a source of controversy. This is not surprising because similar questions about the legal basis of ECOWAS interventions and subsequently led to the development of the ECOWAS legal framework for humanitarian intervention where it claims a right of intervention without UNSC authorisation.¹⁸² However, in the case of SADC, whereas the Lesotho experience also led to the establishment of the SADC Protocol on Politics, Defense and Security Cooperation, unlike ECOWAS and the AU, SADC's law states that SADC can only undertake interventions with UNSC authorisation.¹⁸³ In this respect, SADC follows the OAS and Organisation for Security and Cooperation in Europe, rather than ECOWAS and the AU practice.¹⁸⁴

The point being made here is that at different levels and to varying degrees, there have been practices of humanitarian intervention by regional organisations in Africa without UNSC authorisation giving rise to a regional customary law right of unilateral humanitarian intervention in Africa.¹⁸⁵ Just as the AU has stated in the Ezulwini Consensus that article 4(h) represents a qualification of the Charter paradigm on the use of force, we could also witness similar developments in other regions—rules of regional customary law that could influence international law and become additional exceptions to article 51 and Chapter VII. As some scholars have argued, such practices would allow consensus to develop on the propriety of a legal framework for unilateral humanitarian intervention.¹⁸⁶ The development of such regional customary law prior to codification would also allow the broader international

¹⁸¹ Ibid at 166-7.

¹⁸² See Chapters 3 and 4.

¹⁸³ See the SADC Protocol on Politics, Defense and Security Cooperation adopted on 14 August 2001 and entered into force on 2 March 2004.

¹⁸⁴ See article 11(3) (d), (e) of the SADC Protocol on Politics, Defense and Security Cooperation which specifically requires SADC to seek UNSC authorisation for any use of force by SADC; and article 15(1) which though recognises the responsibility of the UNSC to maintain peace and security did not state whether such authority is primacy. However, when taken together with other provisions like article 11, it is clear that that it meant to defer to the UNSC in matters of authorisation of intervention. See Rodrigo Tavares *Regional Security: The Capacity of International Organisations* (2010) 57. For an analysis of the normative divergences between the SADC and AU approaches and the implications for the AU humanitarian intervention architecture, see John-Mark Iyi 'The legal framework for subregional humanitarian intervention in Africa: A comparative analysis of ECOWAS and SADC regimes' (2012) 2:2 *SADC Law Journal* 281 at 292-3, 299.

¹⁸⁵ Kuwali 'Implementation of Article 4(h) Intervention' op cit note 54 at 25; Jeremy Levitt 'Pro-Democratic intervention in Africa' in Jeremy Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2010) 103 at 105. That this is correct is immediately evident from an examination of the practice of the OAU and ECOWAS which would reveal a process of gradual evolution of regional custom culminating in the codifications in the AU/ECOWAS RHMI regimes.

¹⁸⁶ Stromseth 'Rethinking humanitarian intervention' op cit note 109 at 254, 255.

community to react to the various interventionist practices and come up with assessments of whether they meet the humanitarian intervention thresholds.¹⁸⁷ Although the ECOWAS practice was initially a reaction to exigencies, its framework and subsequent codification was influenced by the reaction of the international community to those interventions and subsequent developments in general international law, all of which preceded the codification in the AU Constitutive Act.

Furthermore, the AU is made up of 53 members and all have ratified the AU Act and the AUPSC Protocol. ECOWAS has 15 members and they all ratified the Revised Treaty and the ECOWAS Protocol. Besides, these states support and contribute troops to AU and ECOWAS missions in the implementation of the treaties and such conduct can be viewed as *opinio juris* for the existence of regional custom of humanitarian intervention in the region.¹⁸⁸ This further shows that such regional customary law existed and also suggests that the AU/ECOWAS RHMI regimes originally derive their legality from regional customary law before they were codified and so would be valid under international law.¹⁸⁹ If it is accepted that they existed as regional customary law and were valid, then the mere fact that they have now been codified in treaties should not render them inconsistent with the Charter or invalid.

7.7 OBJECTIONS TO THE AU/ECOWAS RHMI REGIMES AS CODIFICATION OF REGIONAL CUSTOMARY LAW

Long before the AU/ECOWAS RHMI treaties, there have been calls for the codification of criteria for humanitarian intervention by which any intervention could be appraised.¹⁹⁰ The argument is based on first, the ever increasing need for humanitarian intervention, the inability of the UNSC to meet all the demands; the increasing rates of unilateral interventions and the controversy surrounding the universality of certain norms.¹⁹¹ Apart from being unable fully to restrain states from unilateral use of force, the current system does not effectively protect human rights and so undermines the legitimacy of international law by perpetuating

¹⁸⁷ Series of UNSC resolutions underscore the UNSC's appraisal and approval of this practice. See S/RES/788; S/RES/1132 (1997). See Harhoff 'Unauthorised humanitarian interventions' op cit note 59 at 90.

¹⁸⁸ Levitt 'Humanitarian intervention by regional actors' op cit note 137 at 339.

¹⁸⁹ Ibid at 335.

¹⁹⁰ See The Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 186-7. See generally Michael Burton 'Legalizing the Sub-legal: A proposal for codifying a doctrine of unilateral humanitarian intervention' (1996) 85 *Georgetown Law Journal* 417 arguing that codification would curb abuse and enhance the legitimacy of international law.

¹⁹¹ Stromseth *Rethinking humanitarian intervention* op cit note 109 at 255-6.

the lacuna between the *lex lege lata* and the *lex lege ferenda*.¹⁹² Accordingly, Stanley Hoffman had predicts a New World Order, arguing that in many respects, the ‘new’ world order is essentially a continuation of the ‘old’ except certain steps are taken, particularly in the area of humanitarian intervention.¹⁹³

Although the nature of threats changed from predominantly inter-state to intrastate conflicts and mass atrocities in Africa arising from human rights violations, the ‘defence of human rights’ continue to be secondary to political considerations and national interests.¹⁹⁴ As a remedy, Hoffman argues that in such world order, an effective regional organisation capable of launching peacekeeping operations or enforcement mission is indispensable.¹⁹⁵ Given that internal conflicts would be a major source of threat to international peace and security, collective intervention by regional organisations (like AU and ECOWAS) would be a useful way to proceed when massive violations of human rights threaten regional peace and stability.¹⁹⁶ Predicting how such potential violence that eventually engulfed many African states in the 1990s would eventually evolve and be tackled, Hoffman recommends that

[f]our kinds of measures could limit such domestic violence. The boldest would be a treaty, open to (but unlikely to be signed by) all states, that would define rigorously the circumstances in which collective intervention for humanitarian purposes could be undertaken for purposes, for a limited period, by a group of states whose action would be authorised by a strong majority of the treaty’s signers.¹⁹⁷

Such group of states should report its operations to the UNSC for scrutiny.¹⁹⁸ However, critics doubt the utility of setting out the legal criteria for unilateral humanitarian intervention in advance through codification.¹⁹⁹ They argue that such criteria would either be too narrow, permitting only crimes like genocide, or too broad and so susceptible to abuse.²⁰⁰ By its nature, humanitarian intervention in reality will require case-by-case analysis and balancing of competing values between non-use of force and protection of human rights, hence codification will lift the heavy ‘burden of justification’ currently imposed on every intervener.²⁰¹ Stromseth therefore suggests a gradual development of normative consensus on

¹⁹² Id.

¹⁹³ Stanley Hoffman ‘Delusions of world order’ (1992) *The New York Review of Books* 37 at 38.

¹⁹⁴ Ibid at 40.

¹⁹⁵ Id.

¹⁹⁶ Ibid at 41.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Stromseth ‘Rethinking humanitarian intervention’ op cit note 109 at 259.

²⁰⁰ Ibid at at 256, 257.

²⁰¹ Ibid at 256, 257, 259.

a right of humanitarian intervention within the UN framework.²⁰² According to her '[a]n international consensus on when humanitarian intervention should be deemed both legitimate and lawful is more likely to emerge over time from the international community's assessment of concrete interventions ... than from an exercise in codification.'²⁰³ Although Stromseth admits that codification of unilateral humanitarian intervention could minimise abuse by stipulating universally accepted criteria, the challenge would be how to reconcile such a treaty with state sovereignty because most states would not even agree to it.²⁰⁴

While this argument reflects the current thinking, in my view it has one major weakness. It locates its search for a legal framework within the UN paradigm as the only feasible platform for codification. It overlooks the possibility of a development of regional custom and codification through a process of 'evolution rather than revolution'.²⁰⁵ As already noted above, the AU/ECOWAS RHMI regimes are examples of codification of regional customary law. The objection that the AU/ECOWAS RHMI regimes codifying humanitarian intervention cannot stand in view of its apparent incompatibility with the Charter-based law and sovereignty is predicated on the assumption that continental or regional international law, whether conventional or customary, must be subordinated to universal international law. However, this is not necessarily so because both are correlates.²⁰⁶ If a norm supposedly universal ceases to be applicable or acceptable in a continent, it means that norm is no longer universal and when a rule applied in a continent or region is not embraced by the rest of the world, it only means that rule is peculiar to that region or continent.²⁰⁷ It does not necessarily follow that the continental or regional law is illegal. It is in this context that one must understand the regional dimension to the AU/ECOWAS RHMI regimes. More so, because of the constant interaction between treaty and custom, regional and international law, provisions in treaties whether bilateral or multilateral, could generate rules of general international customary law.²⁰⁸ So it is possible that the codification could begin with a handful of states and gradually evolve and spread to other states.²⁰⁹ In the same way, the AU/ECOWAS

²⁰² Ibid at at 257-8.

²⁰³ Id.

²⁰⁴ Ibid at 234, 257-8.

²⁰⁵ Kuwali Kuwali 'Implementation of Article 4(h) Intervention' op cit note 54 at 80. This assessment may have to be qualified with respect to the AU since it is difficult to point at any consistent practice of intervention by the defunct OAU.

²⁰⁶ *Asylum Case* supra note 165 at 294.

²⁰⁷ Ibid at 293 (Judge Alvarez discussing the notion of American continental international law).

²⁰⁸ D'Amato 'The Concept of Custom' op cit note 143 at 121.

²⁰⁹ See Allen Buchanan *Justice, Legitimacy and Self-Determination: Moral Foundations of International Law* (2004) 450-1.

codification of the law of humanitarian intervention is an important contribution to the development of international law.

7.8 AU/ECOWAS RHMI REGIMES AND USE OF FORCE AS JUS COGENS

Those who object to the legal validity of the AU/ECOWAS RHMI regimes also rely on the jus cogens argument. In the main, their argument can be summed up thus: peremptory norms are non-derogable and any treaty inconsistent with a peremptory norm is invalid. The principle of non-use of force in article 2(4) is a peremptory norm; the AU/ECOWAS RHMI regimes authorise the use of force in violation of article 2(4) and are therefore invalid.²¹⁰ Where a Charter provision reflects a norm of jus cogens like article 2(4), any conflicting treaty (like the AU/ECOWAS RHMI) is invalid because such treaty violates articles 2(4), 53 and 103 of the Charter and article 64 of the Vienna Convention on the Law of Treaties (VCLT).²¹¹ The core of this argument is that a treaty stipulating a right of intervention against the will of a future government cannot be a valid treaty because it is prohibited by a norm of jus cogens.

At this stage it is pertinent briefly to examine the nature of jus cogens and how it emerges. The aim is threefold: first, is to show what is peremptory about article 2(4). Secondly, it is to demonstrate that the claim of non-derogability usually attributed to article 2(4) as jus cogens is anything but absolute. Thirdly, I intend to show that to replace one norm of jus cogens with another norm of the same character in practice requires derogating from the existing jus cogens norm. If this is accepted, then the objection that the AU/ECOWAS RHMI regimes are invalid for infringing a norm of jus cogens is unsustainable.²¹²

²¹⁰ Bernhardt 'Article 103' op cit note 13 at 1121; David Wippman 'Pro-democratic intervention in Africa' (2002) 96 *ASIL* 143 at 145.

²¹¹ See Chapter 4.

²¹² Traditionally, states have a 'contractual autonomy' to enter into any form of agreement even where such agreements were contrary to existing international law rules. See Christos L Rozakis *The Concept of Jus Cogens in the Law of Treaties* (1976) 3 (hereafter Rozakis 'The Concept of Jus Cogens'). However, the concept of jus cogens now restricts this autonomy of the will of states because certain norms are deemed so fundamental to order that states are prohibited from derogating from them even by treaty. The purpose is to regulate the 'rational and moral existence' of members of the community to refrain from conduct that violate the morality of the community. See Alfred Von Verdross 'Forbidden treaties in international law' (1937) 31 *AJIL* 571 at 572. Jus cogens presuppose that there is a hierarchy of norms whereby some norms bind states regardless of the states' consent. See Prosper Weil 'Towards relative normativity in international law' (1983) 77 *AJIL* 413-442 at 427 (hereafter Weil 'Towards relative normativity'). So fundamental is jus cogens to a minimum public order in the international system that even when the purposes and objects of a treaty conform to community goals, if the substantive provisions of the treaty infringe a jus cogens norm such treaty is invalid. See Alexander Orakhelashvili *Peremptory Norms in International Law* (2006) 139, 161 (hereafter Orakhelashvili 'Peremptory Norms').

In order to be valid, a treaty, or its performance must not conflict with a norm of jus cogens.²¹³ Also, states cannot derogate by consent from a jus cogens norm and a consensual arrangement for the aggressive use of force would therefore be illegal.²¹⁴ However, there are problems with this iron-cast view of the nature, import and status of jus cogens whose content and scope is anything but clear and remains a source of controversy, especially in relation to the use of force. Since jus cogens is non-derogable, at least there ought to be clarity as to which norm qualifies as jus cogens and how it emerges. However, this is not so and there is debate about whether or not certain norms qualify to be in this category.²¹⁵ According to Weisburd

[a]s law, *jus cogens* fails. Its content is inevitably uncertain, reflecting intellectual confusion as to the core of the doctrine. Correspondingly, its claim to legitimacy in international law is murky. It is applied as a characterisation to rules which, if treated as though they really were non-derogable, would do more harm than good in many contexts. And the means most often suggested for determining its content lack both the authority and the capability to carry out the task.²¹⁶

This indeterminacy and ambiguity are some of the reasons critics continue to challenge the idea of a normative hierarchy and the status of jus cogens.²¹⁷ However, it is conceded that to the extent that there is a category of legal norms called ‘jus cogens’, the non-use of force

²¹³ Orakhelashvili ‘Peremptory Norms’ op cit note 214 at 136; see article 53 Vienna Convention on the Law of Treaties (1969) 23 May 1969 and entered into force on 27 January 1980, U.N.T.S. 1155 at 331.

²¹⁴ See article 26 of the ILC Articles on State Responsibility 2001 supra note 56. It does not matter when such arrangement is made, if it violates an existing jus cogens it is void by virtue of Article 53 and if it conflicts with a subsequent jus cogens, it is void by virtue of article 64, VCLT supra note 12. See Anne Lagerwall ‘Invalidity, termination and suspension of the operation of treaties’ in Olivier Corten & Pierre Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary* (Vol. II) (2011) 1455-1482 at 1459.

²¹⁵ Gordon A Christenson ‘The World Court and jus cogens’ (1987) 81 *AJIL* 93 at 97 (hereafter Christenson ‘The World Court and jus cogens’). Anthony D’Amato ‘It’s a bird, it’s a plane, it’s jus cogens!’ (1990) 6:1 *Connecticut Journal of International Law* 1-6; Whiteman had attempted to render a list of such norms. See Majorie M Whiteman ‘Jus cogens in international law, with a projected list’ (1977) 7 *Georgia Journal of International & Comparative Law* 609 at 625-626.

²¹⁶ A Mark Weisburd ‘The emptiness of the concept of jus cogens, as illustrated by the war in Bosnia-Herzegovina’ (1996) 17 *Michigan Journal of International Law* 1 at 50-51 (hereafter Weisburd ‘The emptiness of the concept of jus cogens’).

²¹⁷ Hilary Charlesworth & Christine Chinkin ‘The gender of jus cogens’ (1993) 15:1 *Human Rights Quarterly* 63 at 65. This problem has to do with how jus cogens emerge: custom which is patently fluid. This is where the politics of the powerful, rather than the rule of the consent of equal sovereigns come in. it is true that supernorms invalidate derogating norms, but supernorms do not invalidate other norms themselves, people with authority and decision-making do. See Charney ‘Universal international law’ op cit note 10 at 642. ‘Jus cogens’ is a normative myth masking power arrangements that avoid substantive meaning until later decision thereby both postponing and inviting political and ideological conflict.’ See Christenson ‘Christenson ‘Guarding interests fundamental to international society’ op cit note 84 at 590.

qualifies as one and this was confirmed in the *Nicaragua Case*.²¹⁸ My response to the jus cogens objection is as follows:

First, not every obligation created under article 2(4) is peremptory but the obligation to refrain from the aggressive use of force by states.²¹⁹ Thus, as Orakhelashvili argues, and I agree, '[a] State may consent to the deployment or use of foreign armed forces on its territory. That would not necessarily involve a breach of *jus cogens* ...'.²²⁰ Such state consent as already argued in this thesis can be given a priori via a treaty. If this is accepted, arguably the AU/ECOWAS RHMI regimes do not violate the jus cogens norm in article 2(4) because as stated above the object of the treaties is not aggressive use of force but aimed at halting genocide and other mass atrocities.²²¹

A corollary of the above is the question of the contents of jus cogens and how those contents are determined. As Charney points out when we say that derogation from public order is not permitted on grounds of international public morality (jus cogens), this non-derogation is determined by state consent and the interests of powerful states.²²² Decisions in particular instances driven by effective interest and power begin to express the moral standards of the international community, and it is the directions of those decisions that then determine or consist of the content of the resulting peremptory norm.²²³ Charney points out that

[t]he ideas for a new international public order, then, amount to political struggle among powerful States, coalitions of States, international institutions, and the elites that decide their actions. This struggle will pour content into the emptiness of jus cogens. Preserving the possibility of a functionally different order, the dissonance between the emerging supernorm not yet present backed by new power and the entrenched statist system might force revision of ordinary norms to accommodate the new order.²²⁴

²¹⁸ Ronzitti 'Use of Force' op cit note 36 at 150. See also *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment of 27 June 1986) 14 ICJ Reports 100 para 190.

²¹⁹ Abass 'Consent precluding state responsibility' op cit note 9 at 225.

²²⁰ Orakhelashvili 'Peremptory Norms' op cit note 72 at 361.

²²¹ Ronzitti 'Use of force, jus cogens' op cit note 36 at 159. Notwithstanding the jus cogens norm in Article 2(4) a state can still validate the use of force on its territory by treaty. See Wippman 'Treaty-based intervention' op cit note 15 at 622. To draw on Winfield's analogy here, 'while slavery and the slave trade is absolutely reprehensible and violates jus cogens at all times, whether intervention, on the other hand, violates jus cogens will be relative.' See Winfield 'The grounds for intervention in international law' op cit note 17 at 157.

²²² Charney 'Universal international law' op cit note 10 at 642.

²²³ Id.

²²⁴ Id. The 1970s and 80s were characterised by such intellectual struggle about who shapes global norms and the making of international law especially with respect to the right to development and the movement for a New International Economic Order which have recently found expression in the new movement of Third World Approaches to International Law (TWAIL).

History has several examples of how powerful states/coalition of states drove the emergence of certain jus cogens norms in international law and in this thesis, I have already cited the example of Great Britain in the creation of a jus cogens norm prohibiting slavery. Unlike the municipal system from where its lessons are largely drawn, it is argued, and rightly so in my opinion, that jus cogens in international law lack content.²²⁵ The ILC itself, in a subtle admission of this fact, refrained from characterising jus cogens and opted to leave its determination to states over time.²²⁶ The point being made here is that the somewhat nebulous character of jus cogens in content is sufficient grounds for arguing that it does not exclude the norm-making potential of a treaty of intervention like the AU/ECOWAS regimes.

The third point to be made in this respect is about how an existing norm of jus cogens is modified or replaced by a new one. Since jus cogens is non-derogable, and cannot be changed except by a norm of 'similar character' how then does the new norm of 'similar character' emerge without violating the existing jus cogens? Taking use of force as an example, if use of force is jus cogens and non-derogable, how will the norm of use of force to halt mass atrocities emerge without first violating the existing jus cogens of non-use of force? The process presents a dilemma, but, according to Elias, '[a]ny notion of *ordre public* assumed to exist within the international community is to be deemed subject to changes from time to time according to the prevailing ideas of international morality and social justice.'²²⁷ This change ought to occur through a gradual process of 'international practice and growing consensus.'²²⁸ The other possibility relies on the practice of states often resorting to treaties amongst themselves to change a rule of law they find unsatisfactory.²²⁹ It appears this also applies to jus cogens. In its comments in its 1966 Report, the ILC seems to suggest that states can change a norm of jus cogens through a multilateral treaty.²³⁰

Whether pursued through a gradual process of customary law practice or multilateral treaty, what is clear from the foregoing analysis is that when we say a jus cogens norm cannot be changed except by a norm of similar character, it follows that the only way another jus cogens norm is going to emerge is by breaking the existing law. If the AU/ECOWAS regimes are charged with violating jus cogens, it is reasonable to argue that the only way a new jus cogens can emerge is by a new customary practice and if by customary practice we mean that

²²⁵ Weisburd 'The emptiness of the concept of jus cogens' op cit note 216.

²²⁶ See 'Reports of the ILC to the General Assembly 1966' op cite note 87 at 247.

²²⁷ T O Elias *New Horizons in International Law* (1979) 50.

²²⁸ Charney 'Universal international law' op cit note 10 at 642.

²²⁹ D'Amato 'The Concept of Custom' op cit note 143 at 162.

²³⁰ See 'Reports of the ILC to the General Assembly 1966' op cite note 87 at 248.

a state ‘must act in the same way that others have acted in the past, how can a new custom ever get started when by definition there has been no prior practice? Similarly, how can an existing custom be changed when any change or deviation from prior practice would appear illegal?’²³¹ The reality is that the change of jus cogens norm inevitably will involve some form of illegality.²³² So, whether the change occurs through multilateral treaty or customary law practice, the emerging norm seeking to replace the existing jus cogens must reflect the prevailing precepts of the international community. I can argue that the norm in the AU/ECOWAS RHMI treaties (the use of force to halt genocide and other mass atrocities within states) is a principle shared not only amongst AU/ECOWAS member states but many states outside Africa even though codification of the norm in a treaty of humanitarian intervention is not yet possible at the global level. This is underscored by the practice of NATO and EU mentioned above, the report of the International Commission on Intervention and State Sovereignty, the OAS and the emerging R2P norm. One can conclude therefore that while a norm of use of force to halt genocide and other mass atrocities within states as contained in the AU/ECOWAS RHMI treaties may not have attained the status of jus cogens as of yet, it is already widely shared and has the potential to become a jus cogens norm.

7.9 AU/ECOWAS RHMI REGIMES AND THE PRINCIPLE OF REBUS SIC STANTIBUS

States accede to treaties for various reasons including assumptions, expectations of some future occurrence which are provided for in the treaty.²³³ However, if such expectation did not materialise subsequently, the basis on which the parties consented to the treaty is affected and could lead to the application of *conventio omnis intelligitur rebus sic stantibus*.²³⁴ The doctrine which literally translates to ‘every treaty is understood by the things then standing’ is contained in article 62 of the VCLT.²³⁵ It is a rule of international law relating to treaty-making that could take effect whenever the conditions for its operation are met.²³⁶ This condition is primarily a ‘fundamental’, ‘substantial’, ‘essential’ or ‘radical’ change in the circumstances of parties.²³⁷ In addition, two considerations are important in deciding the

²³¹ D’Amato ‘The Concept of Custom’ op cit note 143 at 4-5.

²³² D’Amato ‘International Law: Process’ op cit note 104 at 104.

²³³ Athanassios Vamvoukos *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (1985) 190-1 (hereafter Vamvoukos ‘Termination of Treaties’).

²³⁴ Id.

²³⁵ See article 62 VCLT supra note 12.

²³⁶ Vamvoukos ‘Termination of Treaties’ op cit note 233 at 187.

²³⁷ Ibid at 188.

lawful invocation of this principle: it should give effect to what the reasonable expectations of the parties would have been had they foreseen the change in circumstances; and secondly, to promote the fundamental purposes and objectives of the treaty.²³⁸ The rationale is to determine whether the construction or application of a treaty to a case is in tandem with the ‘shared intentions, expectations and objectives of the parties.’²³⁹ Thus, parties to a treaty may be discharged from their obligations when there has been a fundamental change in circumstances.²⁴⁰ The rationale is that ‘a treaty should not be applied in circumstances which are so different from those for which the parties sought to provide that its application would be contrary to the parties’ shared expectations and would defeat their apparent objectives.’²⁴¹ The consequence of the invocation of *rebus sic stantibus* is not automatic termination of treaty obligations but could be a range of other possibilities including limited performance or revision of the treaty.²⁴²

As already noted, when states agreed to surrender their right to use of force in the proposed type 4 constitutive process under the Charter in 1945, the reasonable expectation of the parties was that the UNSC would be effective.²⁴³ This expectation was based on some assumptions. First, the creation of a military agreement between the UN and member states and the establishment of a standing army under article 43 as part of an international collective security mechanism was an obligation left to be performed. Till date, this condition has not been fulfilled by the UN. Secondly, article 24(1) that vests primary responsibility for the maintenance of international peace and security on the UNSC predicated it on the condition that the UNSC would take ‘effective and prompt action’ in appropriate circumstances for the maintenance of international peace and security in line with the purposes of the Charter.²⁴⁴ However, as argued in chapter 3, though the UN is involved in many humanitarian crises in Africa, the glaring failure to ‘take effective and prompt action’ in the genocide and mass

²³⁸ Oliver Lissitzyn ‘Treaties and changed circumstances (*rebus sic stantibus*)’ (1967) 61 *AJIL* 895 at 896 (hereafter Lissitzyn ‘Treaties and changed circumstances’).

²³⁹ *Id.*

²⁴⁰ Jeremy Waldon ‘The half-life of treaties: Waitangi, *rebus sic stantibus*’ (2005-2008) 11 *Otago Law Review* 161 at 162 (hereafter Waldon ‘The half-life of treaties’).

²⁴¹ Lissitzyn ‘Treaties and changed circumstances’ op cit note 238 at 896.

²⁴² *Ibid* at 911; Vamvoukos ‘Termination of Treaties’ op cit note 233 at 198. The principle does not necessarily operate to free a state from its treaty obligations though the circumstances had changed, but it does prevent the treaty from being invoked to apply in situations that could not have reasonably have been foreseen by the states. See Bin Cheng *General Principles of International Law as Applied by International Courts and Tribunals* (1987) 113.

²⁴³ See Henkin ‘Use of force: Law and U.S. policy’ op cit note 88 at 138 arguing that these fundamental changes and unmet expectations have actually increased the desirability of the Charter.

²⁴⁴ Ademola Abass *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 131 (hereafter Abass ‘Regional Organisations and the Development of Collective Security’).

atrocities in Rwanda, Liberia, Sierra Leone, Darfur support the view that that the UNSC has not met this condition.

The non-realisation of these two material conditions and the resulting ineffectiveness of the UNSC maintaining peace and security in Africa qualify as fundamental changes in circumstances warranting the invocation of the principle of *rebus sic stantibus*.²⁴⁵ The legal implication of this is not only that it revives the pre-Charter rights of states as argued by Abass, but also that it leads to a systemic transformation resulting in a different constitutive process.²⁴⁶ Consequently, regional organisations like the AU and ECOWAS can now share this ‘primary’ responsibility for the maintenance of peace and security in Africa. If this is accepted, then the treaties adopted by the AU/ECOWAS to give effect to these responsibilities, though *apparently* incompatible with the Charter, would be valid since the UNSC no longer enjoys exclusive or ‘primary’ responsibility for the maintenance of international peace and security in the current constitutive process.²⁴⁷ The effect on articles 24(1), 53(1) and 103 of the Charter vis-à-vis the AU/ECOWAS RHMI regimes is that it resolves the question of normative incompatibility in favour of the AU/ECOWAS RHMI regimes and supports the argument that in view of the fundamental change in circumstances since 1945, the AU/ECOWAS members can rely on the principle of *rebus sic stantibus* when their AU/ECOWAS obligations clash with their Charter obligations.

The AU/ECOWAS do not seek a wholesale termination or suspension of articles 2(4), 24(1), 53(1), and 103 of the Charter, rather, a modification of these provisions in scope and application to the AU/ECOWAS in the light of the changed circumstances, shared intentions and expectations of parties when the Charter was adopted in 1945, so that it takes cognizance of these changes. More so AU/ECOWAS states performing their obligations (intervention to prevent genocides and mass atrocities) under the AU/ECOWAS RHMI regimes will also further the purposes and principles of the Charter.

²⁴⁵ Tom J Farer at ‘Paradigm of legitimate intervention’ in Lori Fisler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 320; W Michael Reisman ‘Criteria for the lawful use of force in international law’ (1984/5) 10 *Yale Journal of International Law* 279 at 280; Lissitzyn ‘Treaties and changed circumstances’ op cit note 239 at 896.

²⁴⁶ Abass argues that since the power was transferred to the UNSC collectively, it could only be repossessed collectively as well. This is only tenable if it is assumed that the legal effect of the failure to fulfil the condition upon which the power was surrendered in the first place was a reversion to State of their pre-Charter power, but when it is appreciated that the legal effect of the failure of the UNSC is actually a transformative one from type 4 back to type 2-3 constitutive process, then the powers do not merely revert to state, but States and the regional organisations they create for that purpose become first-line beneficiaries or repositories of such powers in the type 3 constitutive process. See Abass ‘Regional Organisations and the Development of Collective Security’ op cit note 244 at 138-40.

²⁴⁷ Ibid at 131.

7.10 CONCLUSION

I have argued here that the AU/ECOWAS RHMI regimes are valid under conventional international law because they do not violate articles 53(1) or 103 of the Charter. The basis of this conclusion is that article 53(1) applies to enforcement action by regional organisations. To amount to enforcement action, the use of force must have taken place without the consent or invitation of the target state. A state can consent to intervention in its territory and such consent could be given a priori via a treaty. The AU/ECOWAS right of intervention without UNSC authorisation is valid because member states have given their consent in the AU/ECOWAS RHMI treaty regimes. This means that article 53(1) does not apply to the AU/ECOWAS RHMI regimes and consequently, there is no conflict in members' obligations under the AU/ECOWAS treaties and their Charter obligations under article 103. Furthermore, the AU/ECOWAS RHMI regimes do not violate the peremptory norms in article 2(4) because what is peremptory in article 2(4) is the prohibition of aggressive use of force. The AU/ECOWAS regimes do not provide for 'aggressive use of force' but a *consensual use of force and use of force by invitation via a treaty*.

The AU/ECOWAS have evolved a legal framework for humanitarian intervention through regional customary law and have proceeded to clarify these norms by codification as African regional or continental law. The AU/ECOWAS RHMI regimes therefore constitute regional customary law and valid under customary general international law. It is hoped that this could generate 'ripple effects' that will influence and improve general international law. Already, article 4(h) of the AU Act and arguably article 10 of ECOWAS MCPMRPS Protocol influenced the evolution of R2P and in the following and concluding chapter of this study I examine and suggest ways the AU/ECOWAS RHMI regimes could serve as a model legal and theoretical framework for R2P under a doctrine of regional responsibility to protect RR2P.

CHAPTER 8: CONCLUSION: AU/ECOWAS UNILATERAL INTERVENTION REGIMES AND THE OPERATIONALISATION OF R2P IN AFRICA: TOWARDS A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT

Although the Council still has constitutional authority on its side, by dint of the Charter and by reason of the peremptory rules of international law, as with other constitutional systems it is dependent upon issues such as legitimacy, authority and loyalty, and if the UN Security Council cannot uphold the fundamental principles of the Charter and of international law, then authority may pass elsewhere leading to a degradation on the most basic rules in any legal order, namely those governing the use of force.¹

8.1 INTRODUCTION

My analysis thus far has focused on testing the legal validity of the AU/ECOWAS RHMI regimes and the *raison d'être* for the AU/ECOWAS treaties. Being a theoretical inquiry, I have focused on interrogating whether these treaty provisions can be said to be valid in international law. Through a deconstruction of specific intervention provisions, I analysed the normative incompatibility between these provisions and the UN Charter and proceeded to subject them to legal validity tests under international law. However, establishing the legal validity of the AU/ECOWAS regimes will be of little utility if it does not in turn result in greater protection of human rights, which is the essence of the UN, the AU/ECOWAS RHMI regimes, the doctrine of humanitarian intervention and the emerging norm of responsibility to protect (R2P). This is even more so given the normative convergence of the AU/ECOWAS regional humanitarian military intervention (RHMI) regimes and R2P. Building on my analysis of the legal validity of the AU/ECOWAS regimes, the current chapter proposes a theory of 'regional responsibility to protect'² for the implementation of R2P using the AU/ECOWAS framework.³

¹ Nigel D White 'Regional organisations and humanitarian intervention' (2007-8) 24 *Merkourios-Utrecht Journal of International & European Law* 24 at 32.

² This term was taken from Kristin M Haugevik *Regionalising the responsibility to protect: Possibilities, capabilities and actualities* (2009) 1 *Global Responsibility to Protect* 346 at 347 (hereafter Haugevik 'Regionalising the responsibility to protect').

³ For purposes of outlining the contours of a theory of regional responsibility to protect proposed here, ECOWAS is regarded as a subregional organisation while the AU is regarded as a regional organisation. The nature of the relationship between the AU and ECOWAS with respect to the use of force is not clear. Whereas both AU and ECOWAS stand in a relationship of subsidiarity to the UN under Chapter VIII, the same cannot be said of ECOWAS with respect to the AU. Although regional economic communities are regarded as the building block of the AU peace and security architecture (suggesting a subsidiarity arrangement), there is no express provision in the AU Act or the ECOWAS Revised Treaty to this effect. See Sarah Ancas 'The effectiveness of regional peacemaking in Southern Africa-problematising the United Nations-African Union-

My thesis is that for Africa, the primary responsibility to protect rests with the state, when the state fails, that responsibility should pass to the relevant subregional organisation where there is one. Where there is no subregional organisation or where the sub-regional organisation fails or is incapable of acting, the responsibility should pass to the relevant regional organisation within a theory of regional responsibility to protect. When the regional organisation fails or is incapable or unwilling to act, the responsibility should pass to the broader international community acting through the UN. This proposal is based on the conclusions drawn from my conclusions in the preceding chapters that the AU/ECOWAS RHMI regimes are valid humanitarian intervention legal framework under international law. This framework can therefore be utilised for the implementation of this theory and though focused on Africa, it could also be adapted by other regions with modifications.

However, as a theory, regional responsibility to protect will still require two important changes in the current legal order under the UN Charter and R2P paradigms. First, there should be a redistribution of authority between the United Nations Security Council (UNSC) and regional organisations for purposes of authorising the use of force to implement the responsibility to protect under Chapter VIII of the Charter. Such redistribution of authority should give regional organisations the legal authority to use force in accordance with a set of pre-determined criteria embodied in a regional treaty regime. Secondly, within the R2P paradigm, there should be a recalibration of the order of responsibility and how that responsibility shifts from national authorities to subregional and regional organisations, and finally, the UN. Rather than having two levels of responsibility, there could be three or four, depending on the particular region and whether there is a subregional or regional organisation.⁴

Southern African Development Community relationship' (2011) 11:1 *African Journal on Conflict Resolution* 129 at 133 For example, which of the organisations should defer to the other in terms of authorisation of intervention in a member state? This case played out in the Libyan and Cote d'Ivoire crises where both the AU and ECOWAS seemed to have taken different approaches and maintained divergent positions. See Observatoire De L'Afrique 'The African Union's role in the Cote d'Ivoire and Libyan crises' (16 May 2011) Africa Briefing Report available at <http://www.obsafrigue.eu/wp-content/uploads/2011/06/ABLibya-Report_11-07-2011.pdf> (accessed 21 March 2013). As Abbas points out at the Pretoria Conference, though raised during the drafting of the AU instruments, the issue was never really addressed. However, it would seem that an insight could be gleaned from the AU Act which regards the RECs as the building blocks and part of the overall framework of the AU. Secondly, article 52 of the ECOWAS Protocol seems to suggest that ECOWAS would be in a subsidiary relationship with the AU as well, but this is only an inference because the provision merely uses the word 'cooperate fully'.

⁴ As the UN Secretary General pointed out in his report, though R2P is a universal concept, context is still very important and its implementation must take cognizance of 'institutional and cultural differences from region to region' because ultimately, 'each region will operationalize this principle at its own pace and in its own way.'

It is pertinent to emphasise that this theory only applies to the responsibility to react by military force under Pillar Three and not the entire pillars of R2P. My concern here is limited to a theoretical proposal for the operationalisation of the ‘responsibility to react’ with focus on military intervention. I focus on this component of R2P for three reasons: first, many of the questions surrounding the legal validity of the AU/ECOWAS RHMI regimes touch mainly on the use of force and who authorises it. Secondly, the question of use of force for the operationalisation of R2P remains the most divisive within the UN framework and I hope that establishing the theoretical basis of the AU/ECOWAS RHMI regimes will contribute to the debate on the development of a theoretical framework at the global level. Thirdly, although the search for an acceptable and effective legal framework for the implementation of the use of force for R2P has been elusive; it is one area of normative convergence between R2P and the AU/ECOWAS RHMI regimes. For Africa, I hope a theory of regional responsibility can provide a theoretical framework for implementing the responsibility to react component of R2P by locating this implementation within the AU/ECOWAS RHMI legal framework.

Besides proposing an underlying theory, the present chapter does not claim to be a framework for the practical implementation of R2P. It therefore focuses on the following questions: Why do we need a theory of regional responsibility to protect? What are the principles required for a theory of regional responsibility to protect? In what way will it enhance the implementation of R2P as against what is currently available? Regionalisation has always formed part of the academic debate on maintenance of international peace and security even at the San Francisco Conference on the United Nations.⁵ The discourse on regionalisation had then taken place at a time when there had not been so many changes in the international legal order as we have seen since the 1990s. One such change is the scope and content of the principle of sovereignty and non-interference which were once conceived as absolute.⁶ Both concepts have since been reconceptualised and even more so under the emerging R2P norm. Thus, the concept of regionalisation under R2P would not necessarily be the same as it had been under the UN Charter. This underscores the need for a new theory in this respect—a theory of regional responsibility to protect. Before outlining the contours of

See United Nations *The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect Report of the Secretary General* (27 June 2011) A/65/977-S/2011/393.

⁵ See Michael Akehurst ‘Enforcement action by regional agencies, with special reference to the Organisation of American States’ (1967) 42 *British Yearbook of International Law* 175 at 175-7; S Neil MacFarlane & Thomas G Weiss ‘The United Nations, regional organisations and human security: Building theory in Central America’ (1994) 15:2 *Third World Quarterly* 277 at 280.

⁶ See chapter 2 for a discussion of these principles.

this theory, it is necessary to explain why a theory of regional responsibility to protect is necessary in the first place.

8.2 JUSTIFICATIONS FOR A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT

As pointed out in chapter 2, though the use of military force to halt genocides and other mass atrocity crimes may sometimes be inevitable, it is only to be deployed as a last resort in the R2P continuum.⁷ It is only the international community that can exercise this power through the UNSC.⁸ Perhaps, in line with historical objections, some of which date back to the drafting history of the Charter, regional organisations were not given any major role in this arrangement.⁹ The usual arguments against regionalising R2P are threefold. First, it is argued that the UN is the only universal body that provides a forum for political dialogue and creating alternative authority outside the UNSC would create more problems than it would solve.¹⁰ It may be true that failures by the UN to respond to mass atrocities in the past shows it is a fundamentally flawed organisation, but to open the door to regionalisation would create more problems and it is better to pursue alternative authorisation structures within the UN.¹¹ Secondly, it is argued that not all regional organisations have the capability to intervene though R2P has a wide spectrum of components where regional organisations could play

⁷ See generally, Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (2008) (hereafter Evans 'Responsibility to Protect'); Michael Byers *War Law: International Law and Armed Conflict* (2005) 111; Kofi Annan *We the Peoples: The Role of the United Nations in the Twenty-first Century* (2000) 35 para 219; Paul D Williams 'Military responses to mass killings: African Union Mission in Sudan' (2006) 13:2 *International Peacekeeping* 168 at 168; International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) (hereafter 'ICISS Report'); United Nations *A More Secure World: Our Share Responsibility, Report of the High Level Panel on Threats, Challenges and Change* (2004) U.N. Doc A/59/565 (hereafter HLP 'A More Secure World') available at <http://www.un.org/secureworld/report2.pdf> (accessed 20 June 2010); *In Larger Freedom, Towards Development, Security and Human Rights for All, Report of the Secretary General* (21 March 2005) UN Doc. A/59/2005 available at <http://www.un.org/largerfreedom/contents.htm> (accessed 20 June 2010) (hereafter 'In Larger Freedom'); Global Centre for the Responsibility to Protect 'State by State position on the Responsibility to Protect at the 2005 World Summit' Available at: http://www.reponsibilitytoprotect.org/files/Chart_R2P_11August.pdf (accessed 25 June 2010) (hereafter 'State by State position on R2P').

⁸ See 2005 World Summit Outcome Document (GA Res 60/1) 24 October 2005 para 139 (hereafter 'WSOD') available at <http://www.unrol.org/files/2005%20World%20Summit20Outcome.pdf> (accessed on 20 March 2010) para 139.

⁹ See Jan Wouters, Philip Vincent & Marie De Mans 'The Responsibility to protect and regional organisations: Where does the EU stand?' (June 2011) *Leuven Centre for Global Governance Studies Policy Brief No 18* at 3, 9 available at http://www.ghum.kuleuven.be/be/ggs/publications/policy_briefs/pd18.pdf (Last accessed 2/10/2012) (hereafter Wouters et al 'The Responsibility to protect and regional organisations'); Anthony Clark Arend 'The United Nations, regional organisations, and military operations: The past and the present' (1994/5) 7 *Duke Journal of Comparative & International Law* 4 at 5.

¹⁰ Haugevik 'Regionalising the responsibility to protect' op cit note 2 at 351.

¹¹ Ibid at 351.

important roles.¹² Third, either due to self-interest or ineffective decision-making procedures, regional organisations often lack the willingness even where they have the capability to act.¹³ Fourthly, the problem of hegemonic aspirations and lack of capacity is often raised as obstacles to the utilisation of regional organisations in this regard.¹⁴ Finally, there is also concern about states' membership of multiple regional organisations and how to decide which will have the authority to intervene.¹⁵ Regional organisations have several other weaknesses including lack of funding, narrow mandates, poor training doctrine development and intelligence gathering capacity and so on.¹⁶ Although these are all valid arguments, they were advanced primarily in the context of regional maintenance of peace and security and humanitarian intervention doctrine and these are not necessarily coterminous with the responsibility to protect under which I propose a theory of regional responsibility to protect. I have already explained that one significant difference is the way the concept of sovereignty is now understood in relation to intervention and this should be borne in mind.

There are several reasons for arguing for a more central role for regional organisations in the operationalisation of the responsibility to react under a theory of regional responsibility to protect. First, besides the territorial state, which bears the primary responsibility to protect, and the international community, which has a residual responsibility, it is not clear which agency in the R2P scheme is to do what and when.¹⁷ It is not also clear what should happen if such designated agency fails to act.¹⁸ Secondly, under R2P, when the state fails to discharge its responsibility to protect, the responsibility passes to the *international community* acting through the UNSC.¹⁹ Yet, we are not told who constitutes this 'international community' for purposes of taking the decision to intervene to prevent or halt genocides and other mass

¹² Jane Boulden 'United Nations Security Council Policy on Africa' in Jane Boulden (ed) *Dealing with Conflict in Africa: The United Nations and Regional Organisations* (2003) 11-33 at 22-23 (hereafter Boulden 'United Nations Security Council Policy on Africa').

¹³ See S Neil MacFarlane & Thomas G Weiss 'The United Nations, regional organisations and human security: Building theory in Central America' (1994) 15:2 *Third World Quarterly* 277 at 284.

¹⁴ Haugevik 'Regionalising the responsibility to protect' op cit note 2 at 362.

¹⁵ Alex J Bellamy & Paul D Williams 'The new politics of protection: Cote d'Ivoire, Libya and the responsibility to protect' (2011) 87:4 *International Affairs* 825 at 846.

¹⁶ See Kwesi Aning & Samuel Atuobi 'Application of and responses to the responsibility to protect norm at the regional and subregional levels in Africa: Lessons for implementation' in *The Role of Regional and Subregional Arrangements in Strengthening the Responsibility to Protect* (May 2011) 12-19 available at <http://www.stanleyfoundation.org/publications/report/RoleRegSbregArgumentsR2P.pdf> (access on 21 July 2012).

¹⁷ Alex Bellamy 'Conflict prevention and the Responsibility to Protect' (2008) 14 *Global Governance* 135 at 147 (hereafter Bellamy 'Conflict Prevention and R2P').

¹⁸ Carsten Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm?' (2007) 101 *AJIL* 99 at 117 (Stahn 'Political rhetoric or emerging legal norm?').

¹⁹ See 'WSOD' op cit note 6 para 138-9.

atrocities.²⁰ For example, where the UNSC is deadlocked and the United Nations General Assembly is divided, who does this ‘international community’ refer to and what can they lawfully do? Does it mean regional organisations, a coalition of states, a coalition of democratic states or a coalition of neighbouring states?²¹ Commenting on this issue with regard to Darfur in 2008, Bellamy observes that

imprecision in this matter is, in the long run, more troublesome because the whole concept of responsibility is rendered meaningless without a related concept of where that responsibility resides. Thus, the world’s response to the crisis in Darfur has been characterised by disagreements about where responsibility ought to lie—with the host government, the African Union, or the UN Security Council—and these disagreements themselves have served to stymie collective efforts to respond to the unfolding emergency.²²

The issue of a vaguely defined ‘international community’ has implications for R2P in other aspects, apart from location of authority. Another point is that it affects the scope of what can be done and the legality of such action. For example, can a regional organisation undertake unilateral intervention to implement R2P when the UNSC is paralysed or must such intervention be authorised by the UNSC?²³ This issue also implicates the question of accountability for violations of international humanitarian law during such interventions.²⁴ For example, if a state takes unilateral action purportedly acting on behalf of the international community to operationalise R2P, the mechanisms required for accountability on how the mission is launched and the implications thereof would be different to those applicable in the case of UN missions or those carried out under the auspices of a regional organisation. Thus, it is important to clarify the ‘notion of international community’ and the role of different actors as originally canvassed by the International Commission on Intervention and State Sovereignty (ICISS), but to which much confusion have been introduced by subsequent debates and documents on R2P.²⁵ A theory of regional responsibility to protect will bring

²⁰ Bellamy ‘Conflict Prevention and R2P’ op cit note at 147.

²¹ Id.

²² Id.

²³ This issue has never really been resolved. From a legal point of view, paragraph 139 of the WSOD is the position of the law. However, other documents on R2P allow for the possibility of such unilateral intervention in extreme cases when the UNSC is deadlocked. See Nicholas J Wheeler ‘Operationalising the responsibility to protect: The continuing debate about where authority should be located for the use of force’ (2008) 3 *Norwegian Institute of International Affairs* 1 at 18 (hereafter Wheeler ‘Operationalising the responsibility to protect’). See also ‘ICISS Report’ op cit note 7 para 6.15. See infra note 33 and accompanying text.

²⁴ The representative of India alluded to this issue during the UNSC debate when he asked albeit rhetorically, ‘*Quis custodiet ipsos custodiet?* Who watches the guardians?’ See UN Security Council 6531st mtg., 10 May 2011, S/PV.6531 at 10 available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S%20PV%206531.pdf>> (accessed on 20 May 2012) (italics in original).

²⁵ For example, the HLP ‘A More Secure World’ op cit note 7; UNSG Report ‘In Larger Freedom’ op cit note 7; WSOD op cit note 8, all treat this issue differently. For an assessment of these conflicting conceptual

clarity to the apparent confusion about the location of authority and responsibility to act on R2P. It does this by designating which agency constitutes the ‘international community’ for purposes of the R2P scheme; and by recalibrating the R2P scheme, it predetermines which agency bears responsibility at what stage in the R2P continuum.

Another justification for this theory is that several regional organisations now make compliance with mass atrocity crimes prevention criteria for membership.²⁶ Furthermore, more states are signing on to more onerous regional community membership commitments and other intrusive human rights treaty obligations at the regional level, thereby creating opportunity for leveraging such frameworks for the operationalisation of R2P. Finally, members of regional organisations are more likely to subject themselves to rules they helped create and are more willing to contribute troops to organisations which they are a member of and have a say in or which is led by or in cooperation with a regional organisation to which they have affinity.²⁷ For example, R2P has historical significance for the African continent because, as the normative convergence between the norms of R2P and the AU/ECOWAS norms shows, R2P was already well developed in Africa prior to the ICISS Report and WSOD.²⁸

8.3 THE CONTOURS OF A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT (RR2P)

My aim in this section is to sketch the contours of a theory of regional responsibility to protect. This theory makes two assumptions: the existence of authoritative structures in order to produce coherent policy,²⁹ and secondly, that it would be easier to forge consensus for a treaty of intervention like the AU/ECOWAS regimes within regional blocs.³⁰ The basis for these assumptions is that, as argued by Miller long ago, increasingly, groups of states seems

approaches see Jennifer Welsh, Carolin Thielking & S Neil MacFarlane ‘The responsibility to protect: Assessing the Report of the International Commission on Intervention and State Sovereignty’ (2002) 57:4 *International Journal* 489-512; Stahn ‘Political rhetoric or emerging legal norm?’ op cit note 16 at 103-110; C Focarelli ‘The responsibility to protect doctrine and humanitarian intervention: Too many ambiguities for a working doctrine’ (2008) 13:2 *Journal of Conflict and Security Law* 191-213.

²⁶ ICRtop ‘Clarifying the third pillar’ op cit note 108.

²⁷ Wouters et al ‘The Responsibility to protect and regional organisations’ op cit note 9 at 4-5.

²⁸ See ‘Secretary General’s remarks to the General Assembly on the responsibility to protect’ available at <<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2487-secretary-generals-remarks-to-the-general-assembly-on-the-responsibility-to-protect-rtop>> (accessed on 24 October 2012).

²⁹ Lynn H Miller ‘The prospects for order through regional security’ in Richard A Falk & Cyril E Black (eds) *The Future of the International Legal Order* Vol I (1969) 556 at 591 (hereafter Miller ‘The prospects for order’).

³⁰ See Wouters et al ‘The Responsibility to protect and regional organisations’ op cit note 9 at 4.

to have realised that the myriad of common problems they confront require them to adopt cooperative approach for common solutions because such problems defy the frequent piecemeal strategies adopted at global level.³¹ The result of these shared problems is a more intense regional solidarity and deeper allegiance to regional institutions in quest of regional peace and security.³² Hence, some commentators argue that regional organisations could be legitimate enforcement agents in this respect.³³ If that is to happen, then they would benefit from a theory of regional responsibility to protect, which is delineated here.

In constructing a theory of regional responsibility to protect, I propose that two things be done: first, a redistribution of authority between the UNSC and the AU/ECOWAS.³⁴ Chapter VIII of the Charter, particularly article 53, needs to be amended to give autonomy to regional organisations on the question of location of authority. There is consensus that in the interest of stability in the international legal order, the UNSC should retain the authority for the use of force under Pillar Three of R2P.³⁵ Thus, all the major documents on R2P continue with the subsidiarity arrangement enshrined in Chapter VIII of the Charter that subordinates regional organisations to the UNSC in the authorisation of the use of force.³⁶ However, there

³¹ Ibid at 588.

³² Id.

³³ Lee Feinstein & Ann Marie Slaughter 'Duty to prevent' (2004) 83:1 *Foreign Affairs* 136-150 at 148. ICRtop 'Clarifying the third pillar of the responsibility to protect: Timely and decisive response' Available at <<http://www.responsibilitytoprotect.org/Clarifying%20the%20Third%20Pillar.pdf>> (accessed 2 July 2012). (hereafter ICRtop 'Clarifying the third pillar').

³⁴ Boutros Boutros-Ghali had once called for a 'decentralization' of responsibilities between the UN and regional organisations. See Boutros Boutros-Ghali *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary General* (1992) A/47/277-S/24111, 17 June 1992. See Thomas M Franck 'The power of legitimacy and the legitimacy of power: International law in an age of power disequilibrium' (2006) 100 *AJIL* 88 at 100 rejecting the devolution of powers to regional organisations. However, the ICISS, while acknowledging the primacy of the UNSC in authorising interventions also proposed that regional organisations could undertake enforcement action subject to subsequent authorisation from the UNSC. See Greg Puley 'The Responsibility to Protect: East, West, and Southern African Perspectives on Preventing and Responding to Humanitarian Crises' (September 2005) *Project Ploughshares Working Paper* available at <<http://www.dsplace.cigilibrary.org/jspui/bitstream/123456789/17368/1/The%20Responsibility%20to%20Protect%20Working%20Paper.pdf?1>> (accessed on 7 June 2012). However, I think an amendment to article 53 to grant regional organisations autonomy would bring clarity to the process of implementing R2P when the UNSC is paralysed rather than working from an initial illegality to ex post facto authorisation.

³⁵ 'ICISS Report' op cit note 7 para 6.15; 'WSOD' op cit note 7 para 139.

³⁶ See 'ICISS Report' op cit note 7 para 6.15 stating that 'Security Council authorisation must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorisation...'; 6.28; see 'WSOD' op cit note 7 para 139; The UNSG also states that where peaceful means of protecting civilian populations appear inadequate, 'the Security Council may out of necessity decide to take action under the Charter, including enforcement action, if so required...' See 'In Larger Freedom' op cit note 7 para 7(b); The HLP also states 'We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising 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.' See 'A More Secure World' op cit note 7 para 203. The Panel states further at para 272 that regional

is no consensus as to what should happen where the UNSC is paralysed. Those who maintain that action cannot be taken without UNSC authorisation have not come up with an acceptable alternative proposal where the UNSC is deadlocked in the face of genocide or other mass atrocities.³⁷ On the other hand, those who support the localisation of authority in different agents argue that the same factors that often paralyse the UNSC from taking action might also prevent it from authorising intervention by others, thus rendering this approach unhelpful.³⁸

The ICISS and the UN Secretary-General's High Level Panel on Threats, Challenges and Change (HLP), attempted to circumvent this dilemma first by recommending a more responsible use of the veto through so-called 'constructive abstention', whereby the five permanent members of the UNSC undertake to refrain from using the veto where their vital national interest is not at stake.³⁹ Secondly, they also left open the possibility of other actors intervening and seeking ex post facto authorisation where the UNSC is deadlocked.⁴⁰ But even these were rejected by the World Summit Outcome Document (WSOD) and states merely resolved to take 'collective action' through the UNSC.⁴¹ The legal position therefore remains that even with R2P, where the UNSC is paralysed in a case of genocide or other mass atrocities, there is little R2P can do as a principle or that any other agent can do under the Charter. The broad consensus and support that made the WSOD possible in 2005 seems to have come at a price—R2P as conceived by the ICISS and adopted by HLP appeared to have been weakened in this regard.⁴²

A theory of regional responsibility to protect comes in here not to dislodge the existing international legal order but to complement it by providing an alternative platform for the operationalisation of the responsibility to react under R2P. Under the theory, the

organisations' efforts should converge with UN purposes and be organised within the UN System and that 'authorisation from the Security Council should in all cases be sought for regional peace operations.' See Wouters et al 'The Responsibility to protect and regional organisations' op cit note 9 at 10.

³⁷ This problem which Wheeler has described as a 'moral and legal conundrum' was only addressed by the ICISS but avoided by the other documents on R2P. See 'Operationalising the responsibility to protect' op cit note 22 at 18. See 'ICISS Report' para 6.35.

³⁸ See ICICC Report op cit note 6 para 6.20

³⁹ See 'ICISS Report' op cit note 7 para 8.29.

⁴⁰ See Carsten Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm' (2007) 101 *AJIL* 99 at 106; (hereafter Stahn *Responsibility to protect*). A *More Secure World* op cit note 5 para 272.

⁴¹ WSOD op cit note 7 para 139. Spencer Zifcak 'The responsibility to protect' in Malcolm Evans (ed) *International Law* (2010) 504-527 at 516 (hereafter Zifcak 'The responsibility to protect').

⁴² Ibid at 515. See also Thomas G Weiss 'R2P after 9/11 and the World Summit' (2006) 24:3 *Wisconsin International Law Journal* 741 at 750.

UNSC remains the lawful agency to authorise the use of force. Hence regional organisations would ordinarily seek UNSC authorisation before they can legally use force to implement R2P. However, where the UNSC fails to authorise such intervention, the theory of regional responsibility to protect provides a legal basis for taking action by the relevant regional organisation on the basis of an existing regional intervention treaty, which does not ordinarily require UNSC authorisation. This is where the AU/ECOWAS RHMI regimes could be most useful in the implementation of R2P, because they provide a sort of dual-authority level which locate jurisdiction in both the UNSC via the Charter and regional organisations via a treaty of intervention. As stated above, the ideal would be an amendment of Chapter VIII of the Charter to redistribute authority between UNSC and regional organisations in this respect. However, it is still possible to apply the theory without such amendment. Without amending Chapter VIII of the Charter, a regional organisation can intervene if either of two conditions are met: if UNSC authorisation has been obtained or if there is an existing treaty of intervention. If the UNSC functions as it should by leading or authorising intervention in compelling cases, it goes without saying that such authorisation is a sufficient legal basis for a regional organisation's intervention. However, where the UNSC is paralysed, as is sometimes the case, the regional organisation can still intervene on the basis of the existing regional intervention treaty. In such situations, UNSC authorisation is ordinarily not a legal requirement.

However, whereas the focus of this theory is the AU/ECOWAS RHMI regimes, the difficult cases would be regions without regional intervention treaties. Location of authority remains with the UNSC and action on R2P can only be taken through the UNSC. In such cases, a theory of regional responsibility to protect cannot offer anything more than what is currently available under the Charter paradigm and R2P framework. In regions where there is no intervention treaty, UNSC authorisation will always be a requirement, otherwise the theory can only be applied in such region if there is an amendment to Chapter VIII redistributing authority accordingly.

The second change necessary for the construction of a theory of regional responsibility to protect is the recalibration of the R2P scheme, such that regional organisations can occupy an intermediate level in the sphere of responsibility. This dovetails with the call for redistribution of authority made above because neither can work effectively without the other. The reason for calling for a redistribution of authority is to provide the legal authority to back up the intermediate level duties regional organisations are called upon

to perform under a theory of regional responsibility to protect.⁴³ Under the current R2P framework, whereas there is emphasis on states and the international community, none of the documents create any specific role for regional organisations like AU/ECOWAS in the area of use of force under Pillar Three, despite the strategic position they occupy.⁴⁴ The WSOD states that when a state fails in its R2P responsibility, it passes to the ‘international community’.⁴⁵ In this ‘international community’, there is the UNSC, subregional organisations, regional organisations and so on, that are authoritative agents recognised by the Charter.⁴⁶ The ICISS seems to acknowledge this when it states in its report that the UNSC only has ‘primary’ but not exclusive, responsibility for the maintenance of international peace and security.⁴⁷ It also referred to the fact that articles 11 and 52 of the Charter confer powers on the United Nations General Assembly (UNGA) and regional organisations though merely recommendatory in the former and limited in the latter.⁴⁸ Many studies, including the major documents on R2P, suggest that regional organisations should have authority to intervene where the UNSC is deadlocked.⁴⁹ In the Ezulwini Consensus which is the AU’s official policy document on the R2P, the AU pointed out that

[s]ince the General Assembly and the Security Council are far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity conflicts, are *empowered to take action* in this regard. The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted “after the fact” in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.⁵⁰

However, states did not adopt the position of the ICISS and the WSOD therefore confers the responsibility to protect on two agents: first, the territorial state, which has the primary

⁴³ The virtues and weakness of regional organisations are well known and need not be repeated here. For a detailed treatment of the subject, see for example Boulden ‘United Nations Security Council Policy on Africa’ op cit note 12 at 22-23; See S Neil MacFarlane & Thomas G Weiss ‘The United Nations, regional organisations and human security: Building theory in Central America’ (1994) 15:2 *Third World Quarterly* 277 at 284; Michael Pugh & Waheguru Pal Singh Sidhu *The United Nations and Regional Security: Europe and Beyond* (2003).

⁴⁴ Ibid at 7.

⁴⁵ WSOD op cit note 7 para 139.

⁴⁶ See article 52 of the UN Charter.

⁴⁷ See ‘ICISS Report’ op cit note 7 at 48 para 6.7.

⁴⁸ Id. Although the UNGA has acted under the Uniting for Peace or Chapter ‘Six-and-Half’ principle. The powers of regional organisations is only exercisable by peaceful means or by use of force if authorised by the UNSC.

⁴⁹ See for example The Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 292, ‘ICISS Report’ op cit note 7 at para 6.31.

⁵⁰ The Ezulwini Consensus, ‘The common African position on the proposed reform of the United Nations’, Executive Council, 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia Ext/EX.CL./2(VII) (Hereafter ‘The Ezulwini Consensus’) 6. Emphasis supplied.

responsibility to protect its citizens from mass atrocities, and the international community, which has a secondary responsibility to assist the territorial state and to step in when the state fails. Yet, between the territorial state and the international community, there is an intermediate level occupied by subregional and regional organisations. This is a vacuum which ought to be filled by subregional and regional organisations.⁵¹ In practice they fill this role but with respect to the use of force, their legal authority under the Charter does not reflect the kind of duty they are called upon to perform because they cannot act without UNSC authorisation. This has created a normative schism between practice and law.⁵² It is therefore necessary to reorder the R2P schema in order to place subregional and regional organisations at the intermediate level such that when the responsibility to protect passes from the territorial state, it goes to the sub-regional and then to the regional organisations before passing to the broader international community acting through the UNSC.

This means that R2P has to be recalibrated to bring regional organisations to the second or intermediate line of action behind the territorial state. In other words, subregional and regional organisations would be the first agents in the international community that bear the responsibility to protect. When a state is manifestly failing or is unable or unwilling to discharge its responsibility to protect, the responsibility passes from the state to the relevant subregional or regional organisation. Where they too fail, the responsibility should then pass to the broader international community. However, in a region without a regional organisation or where the regional organisation apparently lacks the capability, the responsibility to protect should automatically pass from the territorial state to the broader international community acting through the UNSC.

The above proposal will serve the purpose of assigning responsibility to specific, pre-determined agents in the international community and avoid the situation described by Bellamy above. The proposal will also help in establishing accountability for failure by the international community at any material point on the different levels of the R2P spectrum. For example, with respect to Africa, it should be clear that under a theory of regional responsibility to protect, when the territorial state fails, the responsibility to protect passes to

⁵¹ Wouters et al 'The Responsibility to protect and regional organisations' op cit note 9 at 5.

⁵² For example, a survey of occasions where external actors have successfully brought an end to civil wars in recent decades reveals that the military involvement of regional organisations was decisive. See Robin Luckham 'The international community and state reconstruction in war-torn societies' (2004) 4:3 *Conflict, Security & Development* 481 at 486.

SADC and ECOWAS in the Southern African and West African subregions respectively before passing on to the African Union and ultimately the broader international community through the UNSC. Thus, the particular agent can be readily identified and held accountable. There should be a flexible timeline within which each actor is expected to act before the responsibility passes, depending on the circumstances.

This is not meant to be a watertight division of labour. As a multilateral approach, how the different agents (the sub-regional, regional organisation and the UNSC) interface with one another to apply the theory within the R2P spectrum depends on many variables, the most important of which is whether or not the sub-regional or regional organisation has an existing treaty of intervention. Following the AU/ECOWAS model, a theory of regional responsibility to protect (RR2P) makes the assumption that member states would partially surrender their sovereignty and accede to a treaty of intervention under a regional framework. Each regional organisation sets out its criteria and framework for intervention for the operationalisation of the responsibility to react and clearly defines legal parameters in regional treaties. It is recognised that not all regions have the capacity in this regard and each region will have to develop its own framework and mechanism along with its unique history and challenges.⁵³ As we have seen, although there exist a plethora of legal norms in IHRL and IHL that could be useful in determining when the threshold have been crossed, there is as yet, with the possible exception of the Genocide Convention, no treaty that creates a clear legal obligation for intervention as in a case of genocide.⁵⁴ The effectiveness of this theory depends on developing such regional treaty regimes.

The AU/ECOWAS RHMI represents the first of its kind and though as a treaty among states in the post Charter era, it could be a useful model for other regions, it is doubtful whether such framework could be achieved under UN auspices. In fact, it is one of the goals the World Summit was supposed to achieve, ie that the international community must be under a duty to act on R2P when a pre-determined threshold has been crossed. But as it turned out, the WSOD failed to impose such positive obligation on the international

⁵³ See Lessons Learned Unit 'Cooperation between the UN and regional organisations/arrangements in a peacekeeping environment: Suggested Principles and Mechanisms (March 1999) 12 available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNRO%20Cooperation%20between%20the%20UN%20and%20Regional%20Organisations.pdf>> (accessed on 18 May 2011).

⁵⁴ With the possible exception of the AU/ECOWAS RHMI regimes discussed in this thesis, which do not even impose a duty to intervene on the respective organisations.

community due to concerns from certain states. A theory of RR2P has implications for the question of political will. Framed as a moral, rather than a legal obligation, states would be unlikely to act if what is at stake is moral rather than legal duty. It also has connotations for would-be violators. If a theory of RR2P is located within a regional treaty arrangement such as the AU/ECOWAS, it will be more difficult for a would-be violator to argue that there is no basis for intervention or that such intervention by the regional organisation constitutes an interference in its internal affairs and a violation of its sovereignty and international law, since it is bound by the RR2P treaties it signed and under which the region acts.

To utilise the theory, each region will need an organisation where states can effectively pursue the common goal without becoming an instrument of domination by one state.⁵⁵ But as an institution of global governance, the UN is likely to remain the forum for norm articulation and standard-setting, and even action—especially in areas with weak regional institutions—and also as a platform for mobilizing resources to support regional interventions that have received moral approval from the broader international community.⁵⁶ Under a theory of regional responsibility to protect, the responsibility of a regional organisations committed to the fundamental objectives of the UN Charter and expressed in a regional legal and theoretical framework like the AU/ECOWAS RHMI regimes should be seen as complementing rather than supplanting the international responsibility to protect borne by the community of states and exercisable through the United Nations. If the AU/ECOWAS RHMI regimes can fulfill this in practice much as it has done in theory, the effort will have been worth the while in the number of genocides and mass atrocity crimes it will have prevented or halted.

8.4 CONCLUSION

This thesis had set out with one major objective: to provide a theoretical explanation for the legal validity of the African Union and ECOWAS humanitarian intervention treaty provisions. I began by providing a historical background of humanitarian intervention and other normative concept employed in the study while situating the evolution of the African approach in its regional and historical context through case studies. Nonetheless, there are

⁵⁵ Id.

⁵⁶ Id.

several apparent normative incompatibilities between these treaty provisions and the UN Charter-based paradigm on the use of force and humanitarian intervention. The task of reconciling them was approached in three ways.

First, by employing Reisman's theory of transformations of world constitutive process, it was argued that the current global constitutive process is one that has not matured to the expected level with the effective hierarchical institutions that are able to prevent and halt genocides and mass atrocities and under which treaties of unilateral intervention would be illegal. This system therefore permits unilateral acts like those of AU/ECOWAS and their treaties providing the legal framework for those acts are arguably valid. I then proceeded to rely on Buchanan's theory of illegal international legal reform to argue that the AU/ECOWAS regional humanitarian military intervention regime actually qualify as an exercise in international legal reform. By examining what that concept means and the necessity for such approach to law reform in the international legal order, I offered justifications and reasons why the AU/ECOWAS treaties should be seen as an exercise in illegal international legal reform aimed at improving the law of humanitarian intervention. Finally, I subjected the treaty regimes to legal validity test under conventional international law and customary international law and considered the legal objection that the AU/ECOWAS treaty provisions in question violate the *jus cogens* norm of non-use of force. I argued that a proper understanding of what is peremptory in article 2(4) and the operation of the principle of consent in international law is sufficient ground to conclude that the treaties are legally valid because not only do they not provide for aggressive use of force, they actually constitute intervention by invitation and consent.

Thus, having concluded that the AU/ECOWAS RHMI regimes are legally valid under international law, I went on to propose in my final chapter that it be used as a theoretical basis for implementing the responsibility to react component of R2P. I argued for the adoption of a theory of regional responsibility to protect based on my conviction that the existing multilateral system can be better utilised by clearly defining the responsibility of agents in the international community within the R2P schema using the AU/ECOWAS regional intervention treaty approach. The theory relies on the redistribution of authority between the UNSC and regional organisations under Chapter VIII and a recalibration of the R2P schema. The proposal is that the territorial state continues to bear primary responsibility to protect but when that state fails, the responsibility should pass to the sub-regional organisation or regional organisation as the case may be. When the regional arrangement

fails, then it should pass to the broader international community acting through the UNSC. The aim of a theory of regional responsibility to protect is not necessarily to develop an R2P operationalisation mechanism outside the existing UN system but to provide a legal basis for action at the regional level that can complement the existing multilateral system and with both functioning within a mutually reinforcing arrangement that can be effective in preventing or halting genocide and other mass atrocities. Although a reform of the Charter would facilitate this proposal, a theory of regional responsibility can still be adopted in the absence of such amendment to the Charter. What is critical is the adoption at the regional level, of humanitarian intervention legal framework and it is hoped that this can be achieved. In this way, the theory is able to provide a complementary as well as an alternative platform for collective action to prevent or halt genocide when necessary. This thesis has tested the legal validity of the AU/ECOWAS humanitarian intervention regimes under international law at a theoretical level. It has also made some proposals for adapting them in the implementation of R2P in Africa. However, it is imperative that in the future, research focusing on an assessment of the effectiveness of these frameworks in practice should be undertaken.

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