

INTERVENTION IN INTERNATIONAL LAW: THE CASE UNDER THE CONSTITUTIVE ACT OF THE AFRICAN UNION

Submitted in partial fulfillment of the degree of Masters of Law in International Law

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DECLARATION

I, Luis Xavier Chuquela, declare that the present work is original. It has never been presented at any other university or institution. Where other people's works have been used, reference has been provided, and sometimes quotations made. It is in this regard that I declare that this work is originally mine. It is hereby presented in partial fulfillment of the requirements of Masters of Law (LLM) in international law.

Signature

Date

Supervisor

Signature

Date

DEDICATION

To my wife, Elsa, my daughter, Elianne and my son, Luis Junior

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LIST OF ABBREVIATIONS

AMISON	African Union Mission in Somalia
APRM	African Peer Review Mechanism
AU	African Union
CA	Constitutive Act
ECOWAS	Economic Community of West African States
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
LOME DECLARATION	Lome Declaration on Unconstitutional Change of Government
NEPAD	New Partnership of African Development
OAU	Organization of African Unity
OPA	Ouagadougou Peace Agreement
PSC	Peace and Security Council of the African Union
DRC	Democratic Republic of Congo
RoSS	Republic of South Sudan
THE ASSEMBLY	Assembly of Head of States and Government of the African Union
UN	United Nations
UNSC	United Security Council
UNOCI	United Nations Operation in Côte d'Ivoire

CONTENTS

Declaration	i
Dedication.....	ii
Acknowledgments	iii
List of abbreviations	iv
Contents.....	v
1. CHAPTER ONE: INTRODUCTION.....	1
1.1 Background of the study	1
1.2 Research questions	2
1.3 Rationale.....	2
1.3 Methodology.....	3
1.4 Limitation of the study.....	3
1.5 Chapter outline	4
2. CHAPTER TWO: INTERVENTION IN INTERNATIONAL LAW	5
2.1 Introduction	5
2.2 The concept of intervention in international law	5
2.3 The concept of sovereignty.....	6
2.4 The theory of humanitarian intervention	6
2.5 Objectives of humanitarian intervention compared to other types of interventions	7
2.5.1 Pro-democratic interventions.....	8
2.5.2 Intervention by invitation	9
2.5.3 Peacemaking, peacekeeping and peace enforcement.....	9
2.6 Customary international law as a basis for humanitarian intervention	11
2.7 Humanitarian interventions in Africa	12
2.7.1 Congo 1964.....	12
2.7.2 Uganda in 1979.....	13
2.8 Conclusion	14
3. CHAPTER THREE: INTERVENTION UNDER ARTICLE 4 (H) OF THE AU CA.....	17
3.1 Introduction	17
3.2 Rationale behind Article 4(h) of the CA of the AU.....	17
3.3 The intervention experience under Article 4(h).....	19
3.3.1 Côte d’Ivoire.....	19
3.3.2 Military intervention as the best legal remedy for the Ivorian conflict.....	22
3.3.3 Arguments against military intervention in the Ivorian conflict.....	24
3.4. Organs of the AU responsible for implementation of Article 4(h) of the AU CA.....	26
3.4.1 Composition of the PSC and challenges.....	28

3.4.2 The relationship between the AU's PSC and the UNSC	29
3.4.3 The legality of AU's PSC authorization for the use of force under the UN Charter	30
3.4.3 Major challenges between the two entities AU's PSC and the UNSC	31
3.4.4 Disagreement over Libya.....	32
3.4.5 Disagreement over Somalia.	35
3.5 Discussion of the amendment of Article 4(h) of the AU CA.....	36
3.6 Conclusion	37
4. CHAPTER.FOUR INTERVENTION UNDER ARTICLE 4(J) OF THE AU CA	39
4.1 Introduction	39
4.2 Request for intervention by a legitimate authority.....	39
4.3 Request for intervention by legitimate authority to assist in fighting insurgency.....	40
4.4The Republic of South Sudan	41
4.5 The Democratic Republic of Congo	42
4.6 Conclusion	43
5. CHAPTER FIVE CONCLUSION.....	45
Bibliography	50
Books.....	50
Articles	51
Case law.....	51
Journals.....	52
Conventions and Declarations	52
Websites	53

1. CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The African Union (AU) was established in Togo on 11 July 2000,¹ and its Charter was formally adopted on 26 May 2001.² The AU metamorphosed from the Organization of African Unity (OAU). The differences between the AU and the OAU are seen in their objectives and political standing at an international level from the time of their inception.³ The OAU was created during the Cold War, during an era of colonial dominance in Africa. Due to this fact, the OAU committed itself to the eradication of colonialism.⁴ Consequently, it overemphasised the principle of sovereignty in international relations it neglected the protection of human rights entirely.⁵

In turn, the AU minimised the legal effect of the principles of sovereignty on matters related to human rights protection, proclaiming the primacy of human rights protection.⁶ To ensure this objective, the AU introduced the right to protect in its Charter, under Article 4(h) of the Constitutive Act (CA), becoming the first international organization to embrace this as a duty.⁷

This research aims to analyse Article 4(h) to determine the level of success of its implementation by the AU, and the extent of its ability to secure human rights protection. This will be done through the analysis of the developments of Article 4(h) and (j), as well as examining their implementation in currently unfolding crises in five African states, namely, Somalia, Libya, Côte d'Ivoire, the Democratic Republic of Congo (DRC) and the Republic of South Sudan (RoSS).

¹ The Constitutive Act of the African Union (adopted 11 July 2000, entered into force on 26 May 2001)

² n 1 above

³ During the cold war, dictators received support from super powers if they were in line with their strategic interests. See C Fombad & Z Kebonang 'AU, NEPAD and the ARPM Democratization Efforts Explored' (2006) 32 *Current Affairs Issue* 36

⁴ C Fombad 'The African Union and Democratisation' (2011) Forthcoming in the *American Journal of Comparative Law* 5

⁵ Fombad & Kebonang (n 3 above) 18

⁶ Fombad & Kebonang (n 3 above) 18

⁷ D Kuwali 'Protect responsibly: The African Unions implementation of Article 4(h) intervention' (2008) *Yearbook of International Humanitarian Law* 11. See Fombad & Kebonang (n 3 above) 21

The focus of this research will be on the lack of decisive action in Côte d'Ivoire; the sidelining of the AU's initiative in Libya by the United Nations Security Council (UNSC) as the supreme body overseeing the threat to peace and security in the world; and the efforts of AU's Peace and Security Council (PSC) in Somalia, which has failed to secure stronger financial support from the UNSC. The relevance of Article 4(j) in the RoSS and the DRC will also be discussed.

These five countries have been selected as case studies because questions have arisen from the manner in which the AU has handled the crises related to human protection through the right to intervene, the relationship between the AU's PSC and the UNSC, and the relevance of the amendment of Article 4(h) and the legitimacy of Article 4(j).

1.2 RESEARCH QUESTIONS

The research questions addressed are as follows:

1. How was human rights protection amongst African member states managed before the inception of the AU's CA Act?
2. Why was the AU the first international organization to introduce the right to protect?
3. Is the amendment of Article 4(h) of the CA a shift from human security to state security?
4. Is it legitimate for AU member states to request intervention from the AU?
5. Is Article 4(h) effective in its mandate?

1.3 RATIONALE

This study is an attempt to identify the shortcomings in the implementation of the right to protect and suggest what would need to be done in order to achieve the objectives of Article 4(h) and (j) of the AU CA concerning the right to intervene in order to protect.

The AU CA appears impressive but seems to be unresponsive in addressing the contemporary situation in Africa with regards to human protection and the threat to peace. Some conflicts, such as the one in Somalia, which constitute threats to peace and human security, has not

received much response despite the fact that they have been continuing for decades. Dictators, such as Laurent Gbagbo of Côte d'Ivoire, refuse to relinquish power after losing elections, and this threatened the peace and security of the state. In the case of Côte d'Ivoire, the AU was invited through the Economic Community of West African States (ECOWAS) to intervene, but did not receive the necessary support to take military action.

This research explores the reasons for the failure of the ECOWAS and the AU to intervene in the crisis in Côte d'Ivoire and the concerns over the amendment of Article 4(h) to accommodate the threat to peace, which gives the threat to peace the same level of severity as war crimes, genocide and crimes against humanity. Furthermore, it will discuss the criticisms raised against Article 4(j) regarding its vulnerability to abuse by incumbent leaders in Africa to suppress democratic values.

1.3 METHODOLOGY

The research approach of this study was literature based. The primary reason that this approach was taken, rather than collecting primary data, was the limitation of the time and the scope of this research. However, a broad overview of all available literature was consulted, including books and journal articles on the topic, as well as that which was written about the case studies in current media. Additionally, the AU's Constitutive Act and its drafts, the UN's Charter and its drafts and comments to the Charter were analysed.

1.4 LIMITATION OF THE STUDY

One of the limitations of this study is that some of the case studies are current, and therefore there has not been sufficient time for in-depth analysis of the situation, and this also means that there is not a well-developed literature base reflecting on the unfolding crisis.

Furthermore, the scope of the research has not allowed for primary data collection through interviews with key stakeholders to find out why certain decisions have been made. As an example, there are no clear explanations available as to why the UNSC is unwilling to provide resources for humanitarian intervention in Somalia at this stage. Interviews with members of the UNSC and the AU's PSC would have enhanced this study considerably, by providing answers to these pertinent questions.

1.5 CHAPTER OUTLINE

This study is desk research exploring the concept of the right to intervention in international law. The second chapter briefly discusses the history of the way in which countries in Africa have been exercising the right to intervene in order to protect, referring to the cases of Uganda during Idi Amin Dada's rule, and the Congo under Patrice Lumumba's rule. It will focus on the concept of intervention in international law, humanitarian intervention and other related types of interventions. It will also provide examples of humanitarian intervention before the enactment of the AU's CA.

The third chapter discusses the rationale behind Article 4(h) of the AU's CA, the composition of the AU's PSC. This is the entity responsible for implementing the AU's decision concerning the right to intervene in order to protect and the relationship between the AU and the UNSC. It provides the legal framework instituted by the AU related to the right to intervene in order to protect under Article 4(h) and the difficulties faced by the AU in implementing the law. The arguments are illustrated through an analysis of the crises in Côte d'Ivoire, Libya, Somalia, the RoSS and the DRC. It also discusses the usefulness of the amendment of Article 4(h) regarding the criticism that only the last part of this provision is addressed in terms of its application.

The fourth chapter discusses the legitimacy of AU member states' requests for intervention from the AU under Article 4(j) as a mechanism of restoring peace and security are discussed. The arguments concerning their relevance are based on the contemporary situations in the RoSS and the DRC, where weak governments cannot ascertain state security and concomitantly human security.

The final chapter draws relevant conclusions regarding what can be done to make the AU more effective in its endeavours to intervene in order to protect.

2. CHAPTER TWO: INTERVENTION IN INTERNATIONAL LAW

2.1 INTRODUCTION

This chapter discusses intervention in international law and other concepts involved in intervention and its historical development. The discussion starts by defining intervention according to international law and the concept of sovereignty. The theory of humanitarian intervention is explored, including the different types of interventions, such as pro-democratic interventions, intervention by invitation and peacemaking, peacekeeping and peace enforcement.

2.2 THE CONCEPT OF INTERVENTION IN INTERNATIONAL LAW

There are various definitions of the concept of intervention. This is because intervention has been used in various contexts, from the economic to the political.⁸ This means that the meaning can differ depending on what context it is discussed in. A concept close to the one used in international law was initially used by Vattel, who defined intervention as a breach of sovereignty of the target state.⁹ Although this is true, the aim of intervention is not simply the breach of sovereignty, as it always has a specific objective to achieve. In this research, the concept of intervention will focus on the objectives of intervention in international law.

However, the objective of intervention in general will be discussed first. According with Geldenhuys, quoted by Barrie, intervention can be defined as ‘calculated actions of a State or group of States ... intended to influence the political system of another State including its structure of authority, its domestic policies and its political leaders against its will by using various means of coercion (forcible and non-forcible) in pursuit of particular political objectives such as respect of human rights and democratic principles.’¹⁰ There are five reasons that make intervention justifiable in international law namely: a state’s right to

⁸G Barrie ‘Forcible Intervention in International Law’ (1999) *South African Law Journal* 78

⁹A Dorman & T Otte ‘Military intervention: From gunboat diplomacy to humanitarian intervention’ (1995) *Cambridge: Cambridge University Press* 3

¹⁰ Barrie (n 8 above) 791

protect its own citizens, self-defence, self-determination, intervention based on a treaty of mutual assistance and for humanitarian reasons.¹¹

2.3 THE CONCEPT OF SOVEREIGNTY

As was indicated earlier, Vattel¹² argues that intervention represents a breach of sovereignty of another State. This is an exception to the rule of day-to-day diplomatic relations among states in international law, which should be based on a mutual respect between States.¹³ The principle of sovereignty proclaims that a state has the right to exercise supreme authority within its individual boundary. Thus, the formal position of the concept of sovereignty in legal and diplomatic conventions has implied both supremacy of state authority within its territory and equal status within the community of nations.¹⁴ Article 2(7) of the UN Charter codifies this principle of sovereign equality by prohibiting interference by UN member states in matters that fall within the domestic jurisdiction of any state. This means that intervention can only be sanctioned in international law in exceptional cases when a line had been crossed, the norms of civilized behaviour have been violated, and the rest of the world can no longer remain inactive. In such circumstances, national sovereignty cannot be invoked.¹⁵ Therefore, intervention is admissible in international law when pursuing humanitarian purposes under certain conditions, which are explained in the sections that follow.

2.4 THE THEORY OF HUMANITARIAN INTERVENTION

The theory of humanitarian intervention is based on the assumption that states, in relation to their own nationals, have the international obligation to guarantee them certain basic or fundamental rights, which are considered necessary for their existence.¹⁶ 'It holds further that these rights are essential, universal and of such high value to the human person that

¹¹ Barrie (n 8 above) 801

¹² Barrie (n 8 above) 801

¹³ See Article 2(1) of the UN charter

¹⁴ F Abiew 'The evolution of the doctrine of humanitarian intervention' (1999) *Kluwer Law International: The Hague* 30

¹⁵ L Reed & C Kaysen 'Emerging norms of justified interventions' (1993) *American Academy of Sciences* 31

¹⁶ Abiew (n 14 above) 30

violations by any state cannot be ignored by other states.’¹⁷ This theory creates a right of protection for millions of people who are victims of civil wars, insurgencies, state repression, and state collapse.¹⁸ The right of protection can be enforced through the process of humanitarian intervention.

2.5 OBJECTIVES OF HUMANITARIAN INTERVENTION COMPARED TO OTHER TYPES OF INTERVENTIONS

The aim of humanitarian intervention is to forestall, limit or halt large-scale human rights violations, which could lead to massive loss of lives in the target state.¹⁹ It is argued that this may include the violation of socio-economic rights of such magnitude that they may lead to massive loss of lives. Examples of this include inaccessibility to food by the population in case of famine or other natural disasters, or a lack of basic health care resulting in or likely to result in widespread deaths. If the threat or use of force is used to secure access to food or healthcare in a country where the government is unwilling to allow local or international humanitarian assistance, such application of force would constitute humanitarian intervention.²⁰

Humanitarian intervention, which is legally binding within the international community, was stated in the 1993 Vienna Declaration and Programme of Action. This placed some limits on state sovereignty and placed the responsibility of protection of fundamental human rights as a concern for all states.²¹

Humanitarian intervention differs from other types of intervention, such as pro-democratic interventions, intervention by invitation, peacemaking, peacekeeping and peace enforcement, which will be briefly discussed below.

¹⁷ Abiew (n 14 above) 30

¹⁸ ‘The United Nations and the responsibility to protect’

https://www.humansecuritygateway.com/documents/TSF_theUNandR2P.pdf (accessed 10 June 2011)

¹⁹ n 18 above.

²⁰ Fombad & Kebonang (n 3 above)

²¹ United Nations, Vienna Declarations and Programme of Actions UN Doc.A/CONF/157/23, 12 July 1993. <http://www.mpil.de/shared/data/pdf/> (accessed 21 June 2011)

2.5.1 PRO-DEMOCRATIC INTERVENTIONS

It is commonly believed that democratic governments are elected by their people to serve their people with accountability and with respect to human rights and good governance.²² Furthermore, it is argued that democracy has grown in various part of the world in conjunction with various external influences.²³ Considering this presumption, there are many interventions with the intention of overthrowing undemocratic governments. However, democracy and human rights are not interchangeable.²⁴

Pro-democratic intervention differs from humanitarian intervention in that the unconstitutional, illegal or undemocratic governments who are the subject of interventions are not necessarily engaged in human rights violations.²⁵ The figures given by Freedom House about the number of countries regarded as non-democratic in the world support this argument, as there are fewer democratic governments than undemocratic governments.²⁶

Given this fact, some pro-democratic interventions that have taken place were expedient means of pursuing the foreign policy of superpowers.²⁷ The debate about the legality and legitimacy of pro-democratic interventions came to the fore in 1986, when Nicaragua brought a suit against the United States before the International Court of Justice (ICJ).²⁸ Nicaragua described the intervention by the United States as illegal forcible and non-forcible intervention. The United States intervention in Nicaragua consisted of military support to an armed insurgence, known as Contras. In its judgment, the ICJ rejected the legitimacy of pro-

²² P Collier 'Democracy, development and conflict'

<http://users.ox.ac.uk/~econpco/research/pdfs/DemocracyDevelopmentConflict.pdf> (accessed 10 July 2011)

²³ Reed & Kaysen (n 15 above) 69

²⁴ Abiew (n 14 above) 30

²⁵ Reed & Kaysen (n 15 above) 69

²⁶ This report was released after the post cold world war era, in which the advance of democracy was perceived as having reached a high number of countries compared to those sanctioned as democratic. See Freedom House Reports 'Significant declines in democracy in 25 countries last year'

<http://www.1310news.com/news/world/> (accessed 25 June 2011). See also S Loua 'Democracy index for Africa, 2010 (2011) *African Security Review* 20(1) 56

²⁷ Barrie (n 8 above) 795

²⁸ See the case concerning 'Military and paramilitary activities against Nicaragua' (Nicaragua v USA) (1986) International Court of Justice Report 14 paragraph 205, where the court provides and articulates the general concepts and terms.

democratic interventions. The ICJ also explained that if the right of pro-democracy interventions came into existence, it would involve a fundamental modification of the customary international law principle of non-intervention.²⁹

2.5.2 INTERVENTION BY INVITATION

The intervention by invitation coming from a lawful authority of a particular country is normally based on a treaty for collective defence and security.³⁰ This differs from humanitarian intervention, because intervention by invitation comes from an ally to guarantee security, while humanitarian intervention comes from the international community at large.

2.5.3 PEACEMAKING, PEACEKEEPING AND PEACE ENFORCEMENT

Peacemaking is intended to prevent a conflict from arising by identifying potential sources of the conflict and addressing them.³¹ Fundamentally, it is a diplomatic mechanism aimed at achieving a settlement or resolution of conflict, and it begins at the bilateral level.³² Conceptually, peacekeeping entails the prevention, concomitant moderation and termination of hostilities between or within states through a peaceful third party intervention, organized and directed internationally, using the multinational force of soldiers and civilians to restore and maintain peace.³³ As the name suggests, peacekeeping is intended to keep the peace that has been arranged or is about to be concluded.³⁴ Peacekeeping and peacemaking differ from humanitarian intervention, as they are not intended to defeat the aggressor but are aimed at preventing violence.³⁵ Furthermore, in humanitarian intervention operations, the consent of the parties is not necessary, while in peacekeeping and peacemaking the forces intervening

²⁹ n 28 above

³⁰ The North Atlantic Treaty Organization (NATO), through Article 3 and the African Union Constitutive Act Article 4 (j) are examples of state parties of the treaty giving room to intervention by invitation

³¹ F Olonisakin 'Reinventing peacekeeping in Africa: Conceptual and legal issues' ECOMOG Operations (2000) *The Hague: Kluwer* 2

³² Olonisakin (n 31 above)

³³ K Keith 'ECOWAS peacekeeping and the Liberian civil war' (2000) *African Journal of Conflict Prevention, Management and Resolution* 19

³⁴ Olonisakin (n 31 above) 6

³⁵ K Kindiki 'Humanitarian intervention in Africa: The role of intergovernmental organizations' unpublished LL D theses University of Pretoria (2002) 20

should remain impartial in their relationship with the belligerents.³⁶ Peacemaking normally happens before a conflict that can lead to humanitarian intervention, whereas peacekeeping usually happens in the aftermath of humanitarian intervention.

The drafters of the UN Charter did not contemplate peacekeeping,³⁷ and the legal foundation for peacekeeping operations has been debated over the years. The legal foundation for peacemaking, found in Chapter VI, Article 33 of the UN Charter, provides that:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Scholars claiming to see the legal background of the peacekeeping operation in the UN Charter say that this is encapsulated in Article 41³⁸, which states that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

This understanding is debatable, as peacekeepers may be required to use force in self-defence during peacekeeping operations.

Although there is controversy about the origins of the legal concept of peacekeeping under the UN charter, peacekeeping is one of the prominent activities for maintenance and enforcement of peace in the world. The first UN peacekeeping operation was established in 1956, with the United Nations Emergency Force. The force was created and deployed to maintain peace after the invasion of Egyptian Territory by Israel, Britain and France.³⁹

³⁶ Keith (n 34 above) 6

³⁷ Olonisakin (n 31 above) 7

³⁸ Olonisakin (n 31 above) 7

³⁹ Olonisakin (n 31 above) 33

2.6 CUSTOMARY INTERNATIONAL LAW AS A BASIS FOR HUMANITARIAN INTERVENTION

Customary law is the oldest source of international law.⁴⁰ The customary law related with humanitarian intervention existed from early times,⁴¹ before the enactment of the UN charter.⁴² Examples of such practices abound. In 1827, Great Britain, France and Russia intervened in the struggle between revolutionary Greece and Turkey after public opinion expressed horror regarding cruelties committed during the struggle⁴³. Following this, interventions claimed to be humanitarian were registered in Cuba (1898), Syria (1860-1861), Macedonia (1903-1912), Mexico (1916) Bohemia and Moravia (1939), Congo (1964), Dominican Republic (1965), Pakistan (1971), Cambodia (1978), Central African Republic (1979), Uganda (1979) and Grenada (1983).

From the above-mentioned cases, the interventions that took place in Africa will be analysed to determine whether they can be regarded as examples of customary international law, related with the right to protect which the AU should follow in Africa. In principle, for a norm to be considered as an established rule of customary law, it must meet two requirements.⁴⁴ Firstly, there must be state practice supporting the existence of the rule (*usus*) and secondly, there must be a belief among states that the rule is legally binding, as part of customary international law evident in state practice.⁴⁵ The interest in examining this is not intended to attest to whether humanitarian intervention is part of customary international law. Rather, it is proposed to determine whether this is implemented as the most effective mechanism for human protection in Africa.

⁴⁰ See Article 38 (1) (b) of the International Court of Justice

⁴¹ The reference is dated from 480 BC when a prince from Syracuse laid down the conditions for peace against the Carthaginians to refrain from the barbarous custom of sacrificing their children to Saturn. See Olonisakin (n 31 above) 44

⁴² See Article 38 of the International Court of Justice

⁴³ G Barrie 'International law and forcible intervention: A millennium assessment' in The Challenge of Military Intervention in L du Plessis and M Hough (eds) (2000) *Managing Africa's conflict: The challenge of military intervention* HSRC Publishers: Pretoria 102

⁴⁴ MN Shaw 'International law' (1991) Cambridge: Cambridge University Law 59-60

⁴⁵ As per Article 38 (1) (b) of the ICJ which defines the sources of customary international law as describing 'custom' as evidence of a general practice accepted as law

2.7 HUMANITARIAN INTERVENTIONS IN AFRICA

2.7.1 CONGO 1964

Civil war began in the newly independent territory of Congo⁴⁶ in 1964. The insurgents fighting against the government took thousands of foreign residents hostage, with the objective of obtaining concessions from the government. When the government rejected their demands, the insurgents started killing the hostages.⁴⁷ Belgium intervened to protect its own citizens and other foreign nationals whose safety was at risk. The government of the United States⁴⁸ and the United Kingdom assisted the Belgian forces in the rescue operation with military equipment.⁴⁹ When the conflict intensified, the first three UNSC resolutions failed to identify a threat to the peace. Only with its fourth resolution, after the murder of the Prime Minister Patrice Lumumba, did the UNSC identify the threat to peace.⁵⁰ The Belgian government justified their prompt intervention by saying that its actions were in accordance with the rules of international law codified by the Geneva Convention and were in line with the UN Charter concerning the protection of human rights.⁵¹

Some other countries, such as Italy and Argentina, were of the same view and supported Belgian action, asserting that the intervention was necessary to keep law and order and prevent more serious incidents.⁵² However, some African states, as well as the Soviet Union, argued that the intervention was aimed at creating conditions for a consolidation of the

⁴⁶ Congo was a Belgian colony from 1884 until 14 June 1960

⁴⁷ Barrie (n 8 above) 103

⁴⁸ HL Weisberg 'Congo crisis 1964: A case study in humanitarian intervention' (1972) 12 *Journal of International Law*. In a statement released by the US state department justifying their involvement in the humanitarian operation it was said that the intervention was intended to avoid bloodshed and not to engage in the rebel force bloodshed.

⁴⁹ Weisberg (n 48 above)

⁵⁰ Reed & Kaysen (n 15 above) 102

⁵¹ Weisberg (n 48 above) The Belgian representative to the president of the Security Council dated on 24th November

⁵² Barrie (n 43 above) 106

secessionist aspirations of Moise Tshombe, who wanted the separation of the province of Katanga from the Congo.⁵³

The fact is that there was a threat to the peace, and the UNSC should have taken an earlier resolution to intervene. Allowing Belgium to intervene before the resolution was taken gives precedence for countries to intervene unilaterally to protect their citizens abroad. This played a significant role in forming the resolution of the Right to Protect.⁵⁴ However, today countries must have the permission of the UNSC before they may intervene.

2.7.2 UGANDA IN 1979

Another example of intervention on the African continent was in Uganda in 1979. The Tanzanian army, in joint effort with Ugandan rebels, intervened militarily in April 1979 to topple the regime of Idi Amin.⁵⁵ Tanzania raised two arguments as the motive behind the intervention. The immediate cause and first argument for intervention was based on self-defence, due to the occupation by Uganda of a 710 square mile strip of Tanzanian territory known as the Kagera Salient.⁵⁶ Idi Amin thereafter declared that this territory had been annexed, and that this created a new boundary between the two countries.⁵⁷ Tanzania reacted in February 1979, by launching a full scale invasion of Uganda which culminated with in overthrowing the Amin government and the institution of a provisional government of the rebel movement allied to the Tanzanian army in April 1979.⁵⁸ The Tanzanian Foreign Affairs minister presented the second argument for the motive of intervention immediately after the capture of Kampala. He affirmed that the intervention had a humanitarian basis and

⁵³Tshombe was a Katangese who wanted a separation of the rich province of Katanga from the central government. See Yearbook of the United Nations (1964) New York: United Nations 96

⁵⁴ <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2626-un-resolution-on-the-responsibility-to-protect> (accessed 10 June 2011)

⁵⁵ When Idi Amin came to power in 1971, until he was ousted in 1979, it was reported that he was involved in widespread executions, torture and arbitrary arrests. See, Amnesty International 'Human Rights: A report to the International Commission of Jurists to the United Nations' (1978) <http://www.amnesty.org/en/library/asset/AFR59/007/1978> (accessed 10 May 2011)

⁵⁶ Abiew (n 14 above) 121

⁵⁷ U Umorzurike 'Tanzania's intervention in Uganda' (1982) 20 *Archi Des Volkerechts* 301

⁵⁸ F Hassan 'Realpolitik in international law: After the Tanzania–Uganda conflict' (1980) 17 *Law Review* 880

the fall of Idi Amin was a victory for the people of Uganda and a triumph for freedom, justice and human dignity.⁵⁹

Tanzania received support on the grounds of both arguments of self-defence and humanitarian intervention. The United States voiced its support of Tanzanian action based on the argument of self-defence,⁶⁰ while many other countries, such as the United Kingdom, Zambia, Ethiopia, Angola, Botswana, Mozambique and Gambia expressed their support on the basis of the human rights argument.⁶¹ The Organization of the African Union (OAU) in the light of the aggression did not condemn this when it happened, but urged Tanzania to withdraw its forces.⁶² However, during the summit held in the aftermath of Ugandan occupation by Tanzania in July 1979, most African states remained silent. Exceptions came from Sudan and Nigeria who both criticized Tanzanian invasion, arguing that the intervention showed interference in the internal affairs of Uganda and this was a violation of the principles of the OAU.⁶³ In response to this criticism, President Binyasa of Uganda stated that OAU member states should not hide behind the formula of non-intervention when human rights are blatantly violated.⁶⁴

The silence of most African countries suggested an implicit approval of the Tanzanian intervention.⁶⁵ It is worth mentioning that, although the arguments presented by Tanzania in favour of intervention were twofold, it can be asserted that there was room for humanitarian intervention. Amin's killing of large numbers of people provided a justification for humanitarian intervention.⁶⁶

2.8 CONCLUSION

Interventions started to take place in Africa after World War II in the Congo, Uganda and the Central African Republic. In these cases, the process was unilateral and primarily led by the

⁵⁹ N Ronzitti 'Rescuing nationals abroad through military coercion and intervention on grounds of humanity' (1985) *Dordrecht: Martinus Nijhoff Publishers* 103

⁶⁰ F Teson 'Humanitarian intervention: An inquiry into law and morality' (1988) *New York: Transnational* 165

⁶¹ Abiew (n 14 above) 122

⁶² Hassan (n 57 above) 303

⁶³ Abiew (n 14 above) 123

⁶⁴ Abiew (n 14 above) 124

⁶⁵ Abiew (n 63 above) 124

⁶⁶ Teson (n 60 above) 195

former colonial power to halt gross violations of human rights. This was the case of Belgian intervention in the Congo and French intervention in the Central African Republic.⁶⁷

The intervention of Belgium in Congo was focused on protecting its own interest, as they wanted to protect their own nationals. Likewise, the Tanzanian intervention was aimed at halting gross violations of human rights in Uganda, but it was triggered by Ugandan occupation of the Kagera strip in Tanzania. This overview indicates that states intervened under the banner of human rights protection where they also had own special interests.

The many arguments that have been made in justification of humanitarian intervention and the prevalence of unilateral intervention rather than collective intervention has hindered a formation of well-established rules of customary international law regulating humanitarian intervention in order to protect.

As a general principle the criterion for the validity of a rule for customary international law can be realized through the tacit approval or acquiescence that states consistently accord to such norms,⁶⁸ that is, the *opinio juris*. In the case of humanitarian intervention with the intention to protect, as illustrated in the above cases, there is no consistency of the opinion expressed by the international community in support of or against humanitarian intervention.

Nevertheless, for a certain norm to be regarded as a principle of international customary law, there must be an indication of consistency in the application of such a norm and a sense of legal obligation to act in certain way,⁶⁹ namely, in order to protect. The ICJ, in the case of *Nicaragua v US*, declared that the conduct of the states is the indicator of the *opinio juris*.⁷⁰ In other words, if certain practices are repeated consistently they are rendered obligatory and required to be implemented as a rule of law.⁷¹

The interventions that took place in Africa did not indicate that the intervention processes were taken as obligatory by the countries intervening in order to protect. The international

⁶⁷ The Central African Republic was under France since the 1887 convention when France consolidated their legal claim, until August 13, 1960 when it became independent. See The History of Central African Republic <http://www.factover.com/history/Central> (accessed 21 June 2011)

⁶⁸ I Bronwile 'Principles of public international law' (5th ed) *Oxford: Oxford University Press* 6

⁶⁹ Bronwile (n 68 above)

⁷⁰ *Nicaragua v US* merits (1986) Rep 14

⁷¹ *Nicaragua v US* merits (1986) Rep 77

community has also demonstrated a level of reserve with regards to the reasons for intervention. This indicates the lack of a legal obligation to intervene in order to protect.

In fact, the inconsistency was favoured by the contemporary principles applied in international law. In Africa, the OAU had a clause prohibiting interference in the internal affairs of other states through Article 3.⁷² The UN Charter had incorporated a provision in Article 2(7)⁷³ with the same intent.

It bears mentioning that the norms governing interventions are still relatively unconstrained by firmly established structures,⁷⁴ therefore intervention has been seen as legitimate only when the UNSC⁷⁵ or other regional organizations, such as the AU, authorizes it.⁷⁶

⁷² Article 3 (2) of the OAU states non-interference in the internal affairs of states

⁷³ See Article 2 (7) of the UN Charter

⁷⁴ Reed & Kaysen (n 15 above) 31

⁷⁵ After the end of the Cold War the UNSC authorized the intervention that contemplated the use of force by the US (in Iraq, Somalia and Haiti), by France (Operation Turquoise in Rwanda); by Italy (Operation Alba in Albania) and by Australia (East Timor). See Sir Michael Wood, Centre of International Law, University of Cambridge:<http://www.cambridge.org/law> (accessed 4 May 2011)

⁷⁶ The AU, through its organs, has authorized the creation of a peacekeeping force with the authorization to use force for self-defense. See the CA of the AU Article 4.

3. CHAPTER THREE: INTERVENTION UNDER ARTICLE 4 (H) OF THE AU CA

3.1 INTRODUCTION

Article 4(h) describes 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 as well as *a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council*.

The first part of this chapter is a discussion of Article 4(h) of the CA of the AU. The second part of this Article stipulates that the AU has the right to intervene when there is serious threat to legitimate order to restore peace and stability to the Member States' of the Union upon the recommendation of the PSC.

This chapter will explore Article 4(h) in detail. It will then discuss the intervention by the AU in specific case studies, namely, Côte d'Ivoire, Libya and Somalia. The limitations of the AU's ability to intervene due to its relationship to the UNSC and its dependency on the UNSC's funding and support will be examined. Arguments in favour of military intervention by the AU in Côte d'Ivoire after the electoral deadlock will be made. In conclusion, it will be argued that the UNSC's double standard regarding AU interventions it does and does not support affects the effectiveness of AU intervention.

3.2 RATIONALE BEHIND ARTICLE 4(H) OF THE CA OF THE AU

The first version of Article 4(h) of the AU CA,⁷⁷ before the enactment of the Additional Protocol,⁷⁸ stipulated a *prima facie* duty on the AU to exercise the right of protecting to end mass atrocities, namely war crimes and crimes against the humanity.⁷⁹ The crimes mentioned

⁷⁷ n 1 above

⁷⁸ n 78 above. This protocol introduced the right to intervene once there is a serious threat to legitimate order to restore peace and stability to a member state of the Union upon the recommendation of the PSC.

⁷⁹ Kuwali (n 7 above) 11. See also Fombad & Kebonang (n 3 above). Fombad writes that with the stipulation of Article 4(h) there should be no excuse for inaction by the AU to intervene once the crimes encapsulated in Article (h) occur.

under the first version of Article 4(h), namely, genocide, war crimes, and crimes against humanity, overlap with those that are the subject of humanitarian intervention, based on the principle established by the international commission on interventions and state sovereignty.⁸⁰ This commission laid the legal foundation that authorizes state to intervene to protect once these crimes occur.⁸¹ Furthermore the UN has acknowledged the responsibility to protect as a principle of international law.⁸² Hence, egregious crimes, such as the ones listed in Article 4(h), can also be prosecuted by international conventions.

Looking at the cases related to humanitarian intervention before the enactment of the CA, political interests were the driving force for interventions and legal arguments were used later for the crimes that Article 4(h) addresses. This has been the *usus* applied at the international level, including in African countries.⁸³ In a response to the lack of adequate protection of humanitarian protection, the AU instituted the right to protect as an answer to the to the aspiration of African people,⁸⁴ as the UN had placed the human rights in Africa in a secondary position to other parts of the world.⁸⁵ This can be demonstrated by the UNSC's lack of political interest in preventing the Rwandan genocide.⁸⁶ Moreover, the UNSC's bureaucratic procedure, even when there is political will, is sluggish and does not facilitate a rapid response to mass atrocities.⁸⁷ The UNSC has acknowledged that fact, and when the sub-regional organizations usurp its power in order to enforce peace, it has never complained, but acquiesced or given a *post facto* endorsement of such intervention, due to this fact.⁸⁸ An example of such a case is when the UNSC adopted Resolution 788, commending the

⁸⁰ n 18 above

⁸¹ ICISS (2001a) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* Ottawa: IDRC

⁸² C Fombad 'Internationalisation of constitutional law and constitution in Africa' (2011) *Furthercoming in the American Journal of Comparative Law* 18

⁸³ See 'Intervention in Uganda', section 2.7.2

⁸⁴ The feeling of desolation about the lack of interest in African situations was openly expressed in the preamble of the Declaration of the Assembly of the head of states (Lome 2000) (AHG)/Decl2 (XXXVI) stating that the international community has not always accorded due attention to conflict management in Africa, as it has done in other regions of the world <http://www.africanreview.org/docs/arms/lome.pdf> (accessed 25 June 2011)

⁸⁵ G Aneme 'A study of the African Union's right of intervention against genocide, crime against humanity and war crime' (2008) Faculty of Law: University of Oslo 83

⁸⁶ Aneme (n 85 above) 83

⁸⁷ Kuwali (n 3 above) 56

⁸⁸ Abiew (n 15 above) 205

Economic Community of the West Africa Monitoring Group (ECOMOG) action in stopping and driving the rebels back from the capital of Liberia,⁸⁹ despite the fact that the ECOMOG operation was initiated without UNSC approval.

The imperfections of the UN system created the conditions for the AU to institute Article 4(h) with the aim of standing on its own when the need for stopping gross violations of human rights arises.

3.3 THE INTERVENTION EXPERIENCE UNDER ARTICLE 4(H)

After the enactment of Article 4(h), Africa has experienced genocide, war crimes, and crimes against humanity in different conflicts throughout the continent.⁹⁰ The Article will be examined through three case studies, evaluating how the AU has exerted the power and actions encapsulated under Article 4(h). The three case studies are Côte d'Ivoire, Libya and Somalia.

3.3.1 CÔTE D'IVOIRE

Côte d'Ivoire was previously one of the most prosperous countries in West Africa,⁹¹ but since 1999⁹² has been experiencing political instability, which reached its climax during the 2011 conflict. Declarations made during an interview by Young-Jin Choi, special representative of the UN Secretary General in Côte d'Ivoire, reported incidents of mass graves, which are

⁸⁹ The resolution was adopted on 19 November, 1992

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/010/46/IMG/N9301046.pdf?OpenElement> (accessed 12 March 2011)

⁹⁰ UN News Centre 'ICC issues arrest warrant for Sudanese President for war crimes in Darfur' (2009) <http://www.un.org/apps/news/story.asp?NewsID=30081&Cr=darfur&Cr1=icc>. (accessed 10 August, 2011). This is the same court through which the Pre-trial Chamber awarded the charges of war crimes against humanity to six Kenyan perpetrators during the 2007-2008 post-electoral violence. Human Rights Watch has accused both sides of the Côte d'Ivoire civil war for committing atrocities amounting to war crimes and crimes against the humanity. <http://www.hrw.org/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive>. (Accessed 10 August, 2011)

⁹¹ A Monteiro 'United Nations secretary general representative in Côte d'Ivoire for the electoral process: Costa Do Marfim um de ameaça a estabilidade e a segurança internacional' (2002) 217.

⁹² During the Christmas season of 1999 Côte d'Ivoire was stricken by a military coup led by Genral Robert Guei against Konan Bedié, who succeeded the later president Houphouët-Bogny. See Monteiro (n13 above) 218

evidence of what amounts to war crimes and crimes against humanity.⁹³ These incidents happened after the 2010 electoral process. This electoral process was deemed to be one of the most carefully prepared in Africa⁹⁴ in the last two decades. Its results were unanimously accepted by the majority of the international community as free and fair.⁹⁵

However, after losing the election in the second round,⁹⁶ then President Laurant Gbagbo refused to recognise the electoral verdict based on the legalistic argument centred on the proclamation of the results by a Constitutional Counsel, the organ with the competence to officially proclaim the electoral results.⁹⁷

The majority of African political leaders (with the notable exception of Angola and Gambia) and the regional political and economic organizations endorsed Allassane Ouattara's victory, and used a range of diplomatic avenues to persuade Gbagbo that it would be in best interest of all for him to hand over power.⁹⁸ Among the avenues used was the good office of the special representative of the UN Secretary General Young-Jin Choi,⁹⁹ and the AU's PSC.¹⁰⁰ This happened hand-in-hand with the engagement of the Economic Community of West African States (ECOWAS).¹⁰¹ All the efforts occurred in the midst of the conflict, which was worsening daily and claiming casualties from the both sides.

⁹³ P Handy & D Zounmenou 'Views and analyses from the African continent' (2011) *Institute of Security Studies* 11. In an interview given by the United Nations special representative in Côte d'Ivoire he said that there was indication of about 247 people who died before Gbagbo was captured on 11 April 2011 and that there were countless mass graves

⁹⁴ In order to secure an efficient structure to monitor the electoral process, the UNSC through resolution 1603 decided to create a chair of the high representative for elections in Côte d'Ivoire, appointing the Portuguese Ambassador Monteiro. See Monteiro (n 13 above) 226. Later Monteiro was replaced by Mr Young-Jim Choi. See Handy & Zounmenou (n 15 above) 19

⁹⁵ Handy & Zounmenou (n 15 above) 18

⁹⁶ The second run election in Côte d'Ivoire was held on 28 November 2010

⁹⁷ As per Article 59 of the 2000 Electoral Code of Côte d'Ivoire it is within the power of the Constitutional Council to proclaim the final results of the elections. See Key Provisions of the Electoral Act <http://reliefweb.int/sites/reliefweb.int/files/resources/> (Accessed on 12 August 2011)

⁹⁸ Handy & Zounmenou (n 15 above) 16

⁹⁹ Handy & Zounmenou (n 15 above) 19

¹⁰⁰ This included president Ernest Bai Koroma (Sierra Leone), Thomas Yayi Boni (Benin), Pedro Verona Rodrigues Pires (Cape Verde) and Prime Minister Raila Amollo Odhinga (Kenya)

¹⁰¹ Handy & Zounmenou (n 15 above) 17

The conflict was fuelled by the military capabilities enjoyed by the leaders of the contending parties. Ouattara, the winning candidate, held the support of the rebel 'Forces Nouvelles',¹⁰² a militia loyal to the incumbent prime minister and ministry of defence of Ouattara's government, Guillaume Soro Ouattara.¹⁰³ In turn, Gbagbo, as a head of state, had the control of the military, which he used to repress the demonstrators who demanded his resignation.¹⁰⁴ The rebels had a strong influence in the North, which was Ouattara's stronghold,¹⁰⁵ and they faced relative hostility in the South, which was deemed Gbagbo's stronghold. In this scenario, it could be predicted that the political climate could degenerate into war crimes or crimes against humanity, or at least a conflict that would pose a threat to peace.¹⁰⁶

The evidence supporting the possibility of conflict at these proportions are ten years of political instability, attacks against United Nations peacekeepers, blockades for circulation by militants loyal to Gbagbo to monitor the situation on the field, and hate messages broadcast by radio and television stations controlled by the people from Laurent Gbagbo's camp.¹⁰⁷ Even though the United Nations Operation in Côte d'Ivoire (UNOCI) did not take a stand against the provocation which posed immediate threat to peace and stability waged by Gbagbo side, Young-Jin Choi, reiterated that the mandate was to protect both civilians and the Golf Hotel, where Ouattara and his government were based, which was besieged by Gbagbo's troops.¹⁰⁸

¹⁰² The Forces Nouvelles are estimated to be 8000 in total. See Handy & Zounmenou (n 15 above) 16

¹⁰³ See Allassane Ouattara's cabinet <http://www.panapress.com/Ouattara-forms-cabinet->. (Accessed 20 August 2011). See also K. Daniel 'Armed Non-State Actors Series: Côte d'Ivoire's Forces Nouvelles' Chatam House: Africa Programme <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/ivoirycost0907.pdf>. (Accessed 10 June 2011)

¹⁰⁴ Gbagbo's youth military, the Young Patriots, estimated to be 1500 in number, were in a position to engage in hostilities in conjunction with government troops in case of military intervention. The state army was estimated to be 12000. See Handy & Zounmenou (n 15 above) 16

¹⁰⁵ Handy & Zounmenou (n 15 above) 16

¹⁰⁶ The AU CA has instituted an Early Warning system intended to gather timeously the relevant information related to political, economic and social situations in order to advice the PSC about the appropriate measure to be taken. See Article 12 (4,5) of the Protocol relating to the establishment of the PSC of the AU

¹⁰⁷ E-news channel evening programme, 14 August 2011. See also <http://www.hrw.org/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive>. (Accessed 10 August 2011)

¹⁰⁸ Handy & Zounmenou (n 15 above) 19

As the UNSC had recognised Ouattara's government and accepted the credentials of his ambassador at the UN, it could have exercised its power, under chapter VII authorizing its mission in Côte d'Ivoire, to force Gbagbo's to depart from office. A precedent at international level was created for the coup d'état in Haiti. The UNSC, through resolution 940,¹⁰⁹ authorized an establishment of international forces to reinstate the ousted democratically elected President Jean Bertrand Aristides.¹¹⁰ In the next section, the arguments supporting a military intervention will be given.

3.3.2 MILITARY INTERVENTION AS THE BEST LEGAL REMEDY FOR THE IVORIAN CONFLICT

Making a retrospective of these events in Côte d'Ivoire, it can be argued that a military intervention would have been the best option at an early stage of the conflict. This view is reinforced by a combination of the following facts.

Firstly, military intervention would have been used as a mechanism of enforcement of the principles of the AU CA.¹¹¹ supporting this argument, it is suggested that the military, political and social instability in Côte d'Ivoire had reached its threshold for military intervention under Article 4(h) of the AU CA. The fighting between the government troops and Ouattara's¹¹² supporters had displaced thousands of people, who had fled to neighbouring countries.¹¹³ Human Rights Watch reported that the combat between the belligerents of the conflict has led to a commission of war crimes and crimes against humanity.¹¹⁴ With a military intervention by the AU this could have been avoided. Furthermore, this situation might have been predicted through the early warning system since this conflict has been boiling for ten year between the two contesting parties.¹¹⁵ The occurrence of the incidents mentioned above, namely, the displacement of people and the commission of war crimes, amount to the failure of the AU to exercise the right of protection as prescribed by Article 4(h).

¹⁰⁹ <http://www.un.org/en/peacekeeping/missions/past/unmihbackgr2.html#four> (accessed 20 July, 2011)

¹¹⁰ n 109 above

¹¹¹ Article 4 (m) of the AU charter

¹¹² n 25 above

¹¹³ N 15 above

¹¹⁴ n 27 above

¹¹⁵ n 14 above

Secondly, Ouattara, as the declared winning candidate of the Côte d'Ivoire election by the UN,¹¹⁶ invited the ECOWAS to intervene to remove Gbagbo from office.¹¹⁷ The reason for the invitation was based on the argument that he had engaged in an unconstitutional change of government,¹¹⁸ and he was driving the country into civil war.¹¹⁹

Thirdly, the existence of the legal body, the ECOWAS, standby force, which expressed the intention of taking action once they had received the necessary logistical support from the international community,¹²⁰ increased the AU's responsibility. The legitimacy of ECOWAS is consistent with the UN chapter VIII, which provides for regional peace and security arrangements.¹²¹ As a way of giving effect to the regional arrangement for peace and security, the AU has established, through Article 16 of the Protocol establishing the PSC, autonomies for different African countries to institute military standby forces. The regional bodies have the primary responsibility to take action when the circumstances prescribed under Article 4(h) take place. The ECOWAS military standby force had enough experience, acquired in previous interventions in Sierra Leone and Liberia,¹²² to successfully engage against the troops loyal to Gbagbo. As the International Commission on Intervention and State Sovereignty (ICISS) advised, military intervention should be used when there is the prospect that this will be successful with little collateral damages.¹²³

¹¹⁶ n 97 above

¹¹⁷ http://www.opendemocracy.net/opensecurity/security_briefings/060111 (accessed 10 July 2011)

¹¹⁸ Article 23 (4) African Charter on Democracy Election and Governance

¹¹⁹ Similarities to the Ivorian situation can be drawn in international law from the situation in Haiti where unconstitutional change of government took place after numerous attempts by the organization of American states to resolve the issues of unconstitutional change of government by peaceful means without success. The UNSC adopted resolution 940 authorizing the members' states to form a multilateral force and use all the necessary means required to remove the military from office. See Abiew (n 3 above) 216

¹²⁰ Handy & Zounmenou (n 15 above) 17

¹²¹ As per Article 24, read together with Article 26, of the United Nation charter, the primary function of the UNSC is to ensure the maintenance of peace and security and respond to threats to peace in the world. These are *mutatis mutandis* the functions assigned to the PSC of the AU

¹²² The ECOMOG had in 2010 a stand by force numerically closer to the troops loyal to Gbagbo, ready to engage in military operations. See Handy & Zounmenou, (n 15 above) 18. See also Olonisakin (n 33 above)

¹²³ n 81 above

Fourthly, the presence of UN troops on the ground at the time the dispute arose in Côte d'Ivoire¹²⁴ with the capabilities to assist ECOWAS troops against the troops loyal to president Gbagbo makes the UNSC share the responsibility as well.

It may have been as a result of the failure of the AU in taking action at the right time in the Ivorian process, the commission of war crimes by both sides during the conflict¹²⁵ and the possibility of Ouattara's administration engaging in winner's justice, that The Elders encouraged an establishment of a truth and reconciliation commission in Côte d'Ivoire.¹²⁶ Although this is considered a healing process, it will not deter future cases and is not conducive to the enforcement of international law and AU principles.

3.3.3 ARGUMENTS AGAINST MILITARY INTERVENTION IN THE IVORIAN CONFLICT

Although the previous section argued for military intervention, there are also arguments against military intervention. There are political and legal arguments that indicate that the presidential election in Côte d'Ivoire was not fair and free. The rebel movement also violated certain conditions, which resulted in reluctance on the part of Gbagbo in accepting the final results of the presidential election. The UNSC was unable to place pressure on the rebel movement to comply with the agreements that were made.

Despite the fact that the presidential election in Côte d'Ivoire is deemed to be one of the most carefully prepared processes in Africa,¹²⁷ it has been argued that the political atmosphere in which the election took place was improper for the organization of fair and transparent

¹²⁴ The UNOCI, the peacekeeping force in Côte d'Ivoire, had at the time when the electoral results were released a stationed military force superior in number to government troops. See Handy & Zounmenou (n 15 above) 18

¹²⁵ Human Rights Watch 'Ouattara forces killed and raped civilians during offensive'. These types of crimes are also reported to have been committed by Gbagbo's forces <http://www.hrw.org/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive> (Accessed on 10 August 2011)

¹²⁶ The Elders include Martti Ahtisaari, Kofi Annan, Ela Bhatt, Lakhdar Brahimi, Gro Brundtland, Fernando Henrique Cardoso, Jimmy Carter, Graça Machel, Mary Robinson and Desmond Tutu (Chair). Nelson Mandela and Aung San Suu Kyi are honorary Elders. They developed plans for truth and reconciliation processes in Côte d'Ivoire. The ones who presented this plan to the Ivorian authorities are Desmond Tutu, Kofi Annan and Mary Robinson

<http://www.theelders.org/docs/cotedivoire/2011.05.02-media-release-cotedivoire.pdf> (Accessed on 12 August 2011)

¹²⁷ n 94 above

electoral processes, as the country was divided.¹²⁸ The south part of the country was under the administration of the central government, while the north was under control of the rebels loyal to Guillaume Soro, but supported by Ouattara, who became known as the ‘father of the rebellion.’¹²⁹

The maintenance of armed groups in the north was a violation of the agreement that preceded the presidential election.¹³⁰ Furthermore, armed rebels in the north were accused of intimidating voters in the areas under their control.¹³¹ As a consequence of this violence, in certain districts some ballots allegedly in favour of Ouattara were nullified.¹³²

Concurrently, voters in the Gbagbo camp, despite knowing that Gbagbo had been defeated in the election argued that he should remain in power, as an injustice had been done to their leader, as Ouattara funded the rebellion and did not open the areas under his control for a transparent electoral process.¹³³

Therefore, the option of military intervention to oust Gbagbo from office was described by one analyst as a choice between two evils regarding respecting the will of the people as expressed in the runoff to the election, and the safety of their lives.¹³⁴ With intervention it would mean giving support to one candidate who did not act in accordance with the rules of the peace accords. Ouattara, conspiring with Guillaume Soro, did not disarm their military wing, in violation of the peace agreement.¹³⁵

¹²⁸ S Pierre ‘Côte d'Ivoire's elections: Chronicle of a failure foretold’ <http://pambazuka.org/en/features> (Accessed 6 June 2011)

¹²⁹ G Bush ‘The empire strikes back: France and the Ivory Coast’.
<http://pambazuka.org/en/category/features/69808/> (accessed 7 May 2011)

¹³⁰ International Crises Group ‘The Côte d'Ivoire: Can the Ouagadougou Agreement bring peace?’
<http://www.crisisgroup.org/en/regions/africa/west-africa/cote-divoire/127-cote-divoire-can-the-ouagadougou-agreement-bring-peace.aspx> (accessed 7 May 2011). See also Article 3.2 of the Ouagadougou Political Agreement

¹³¹ n 130 above

¹³² N Cook ‘Côte d'Ivoire post-Gbagbo: Crisis recovery’ (2011) CRS Report for Congress
<http://www.fas.org/srgp/crs/row/RS21989.pdf> (accessed 21 June 2011)

¹³³ H Champbell ‘Ivory Coast showdown: A discussion on the political crisis in West Africa’
<http://pambazuka.org/en/category/features/69808/> (accessed 7 May 2011)

¹³⁴ n 133 above 26

¹³⁵ n 130 above

The rebel's refusal to disarm was a breach of the peace agreement signed in Ouagadougou by Gbagbo and Guillaume Soro on 4 March 2007, setting out the conditions for a serene organization of presidential elections.¹³⁶ The agreement established though Article 3.2 of the Ouagadougou Political Agreement stated: 'The Parties to this Agreement undertake to disarm their respective forces as soon as possible.' In addition, Article 8 of the amendment to same agreement acknowledges that 'the absence of reunification of the country and the slow progress of the institutional and political normalisation critically hinder the organisation of free, fair, and democratic elections.'

The rebel movement did not comply with the agreement and its amendment, and the UNSC did not give the necessary pressure compelling the rebels to comply with this crucial accord, which forms the cornerstone of all of the processes. The failure of the rebels to comply with the agreements and its amendment and the inability of the UNSC to exert its power against the rebels is another argument raised against using a military solution to force Gbagbo to leave the office at the end of process.

3.4. ORGANS OF THE AU RESPONSIBLE FOR IMPLEMENTATION OF ARTICLE 4(H) OF THE AU CA

The PSC is considered a pivotal organ of the AU.¹³⁷ It is responsible for dealing with the implementation of the AU agenda, namely, peace and security, military intervention, democracy and good governance. The AU CA did not previously envisage the PSC, and it was established by the Assembly in terms of Article 5(2) of the Protocol on the PSC, which authorizes the establishment of other organs. The role played the AU's PSC can be compared to the one played by the UNSC¹³⁸ regarding its mandate, objectives and functions. According to Article 6 of the Protocol, the PSC's functions include anticipation and prevention of conflicts and its authority covers the following areas:

- (a) Promotion of peace and security in Africa;
- (b) Early warning and prevention diplomacy;
- (c) Peacemaking, including the use of good offices, mediation and conciliation;

¹³⁶ n 128 above

¹³⁷ Fombad & Kebonang (n 3 above) 29

¹³⁸ n 121 above

- (d) Peace support operations and intervention, pursuant to Article (h) and (j) of the constitutive act;
- (e) Peace-building and post-conflict reconstruction;
- (f) Humanitarian action and disaster management;
- (g) Any other function as may be decided by the assembly.

For the accomplishment of its agenda the PSC relies on support from the AU's following organs namely, the Panel of the Wise,¹³⁹ the Continental Early Warning System,¹⁴⁰ the African Standby Force¹⁴¹ and a special fund.¹⁴²

As indicated in Article 6(d) of the Protocol relating to the establishment of the PSC, one of the functions is to coordinate and support operations related to intervention. The PSC has the power to recommend to the Assembly, pursuant of Article 7(e) of the Protocol related with the establishment of the PSC, to intervene on behalf of the Union in the case of grave circumstances, namely, war crimes, genocide and crimes against humanity, as defined by relevant international conventions and instruments.

So far, one of the most daunting tasks of the PSC is to find where the threshold for intervention has been met according to what is defined by relevant international conventions and instruments without favour or prejudice. This is even more important when one considers that the PSC acts as the agent of the AU, and its decisions bind all member states' decisions.¹⁴³ Furthermore, it is not clear yet what the legal effects of the PSC deliberations; whether the decisions it makes are all legally binding and how they should be enforced.¹⁴⁴

In this regard, Fombad argues that the language used in the draft rule is problematic. At the end of AU meetings, a communiqué is issued, but it is not indicated what types of decisions

¹³⁹ Article 11 of the Protocol relating to the establishment of PSC of the AU

¹⁴⁰ Article 12 of the Protocol PSC of the AU

¹⁴¹ Article 13 of the Protocol PSC of the AU

¹⁴² Article 21 of the Protocol PSC of the AU

¹⁴³ Fombad & Kebonang (n 31 above) 30

¹⁴⁴ Fombad & Kebonang (n 31 above) 30

are binding to all members¹⁴⁵ and which are non-binding, which reflect matters of concern and like declarations.

3.4.1 COMPOSITION OF THE PSC AND CHALLENGES

The PSC is designed to give representation to the different regions of Africa¹⁴⁶ with a composition of 15 members. Different to the UNSC where there are five permanent members¹⁴⁷ as general principle, any African countries can be members of the PSC. However, there are some requirements which the country willing to be a member of the PSC should comply with; namely, they must not be in arrears with their annual membership contribution to the AU and must have a good record of democratic governance, and a proved recent commitment to peace and security through a contribution to peacekeeping operations.¹⁴⁸ Once a country has met all these requirements, they can be elected to be a member of the PSC, and enter into a process where the candidate must receive a majority of two-third votes in a secret ballot.¹⁴⁹

The rules underlined as a basic requirement to become a member of the PSC have not been scrupulously implemented. Countries like Zimbabwe, with bad record of good governance and human rights,¹⁵⁰ have pushed to be formally considered eligible to be a member of the AU's PSC¹⁵¹ where it is a potential subject of discussion regarding its internal problems.

Adding to the list of deviations from the principles governing admission to the PSC, Côte d'Ivoire was formally considered to be qualified as member of the PSC in July 2011,¹⁵²

¹⁴⁵ Fombad & Kebonang (n 37 above) 21

¹⁴⁶ J Cilliers, & K Sturman 'Challenges facing the AU Peace and Security Council: A commentary' (2004) *Institute of Security Studies* 99

¹⁴⁷ The Permanent members of the UNSC are China, Russia, United Kingdom United States of America and France see article of the UN Charter

¹⁴⁸ Cilliers & Sturman (n 39 above) 100

¹⁴⁹ Cilliers & Sturman (n 40 above) 100

¹⁵⁰ S Gabriel 'A critical reflection on 2002 presidential election in Zimbabwe African Rights' (2002) *African Human Rights Law Journal* 341

¹⁵¹ D Brown, & S Dersso 'Peace and Security Council Protocol' (2011) *Institute of Security Studies* 1

¹⁵² Cilliers & Sturman (n 41 above) 99

although the country has been involved in conflict related to a violation of the Lomé declaration, where the leadership is under investigation of war crimes.¹⁵³

The lack of compliance to the rules has potentially discredited the ability of the AU's PSC action.

3.4.2 THE RELATIONSHIP BETWEEN THE AU'S PSC AND THE UNSC

Recognising the primacy of the UN Security Council on maintenance of peace and security in the world, the Protocol establishing the AU's PSC created a legal framework for cooperation between the two institutions, through Article 17, which states:

1. In fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall co-operate and work closely with the United Nations Security Council, which has the primary responsibility for maintenance of peace and security. The Peace and Security Council shall also co-operate and work closely with other relevant UN agencies in 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 organizations in maintenance of international peace and security;
3. The Peace and Security Council and Chairperson of the commission shall maintain close and continued interaction with the United Nations, its members, as well as with the United Nations Security Council, its members, as well as with the Secretary-General, including holding periodic meetings and regular consultation of questions of peace and security.

Through Article 17 of the Protocol, which acknowledges the UNSC as the organ with the primary responsibility for maintaining peace and security in the world, the AU has created the necessary legal background of pursuing its missions in compliance with the United Nations Charter and with the general principle of international law.

The legal framework for institutions of regional organizations like the AU and its PSC is provided by the UN Charter itself, which allows for the existence of such organizations through Article 52 (1), which declares that:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating with the maintenance of international peace and security as are appropriate

¹⁵³ n 30 above

for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Providing explanation to the wording of this Article 52(1), Girmachew¹⁵⁴ says that the terms ‘agencies’ refers to regional organizations, like the AU, which are engaged in the implementation of multilateral treaties.¹⁵⁵ Based on this legal recognition, there are regular meetings between the AU’s PSC and the UNSC to define the agenda, appropriate action to be taken on issues related with conflict resolution and maintenance of peace in Africa.¹⁵⁶

3.4.3 THE LEGALITY OF AU’S PSC AUTHORIZATION FOR THE USE OF FORCE UNDER THE UN CHARTER

Although the two organizations, the AU and the UNSC, have been working in close collaboration, it is frequently questioned whether the objectives of the AU’S PSC described in Article 3 of the Protocol are consistent with the UN charter. the objectives of AU’S PSC as stipulated by Article 3 of the protocol are:

The objectives for which the Peace and Security Council is established shall be to:

- a. promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development;
- b. anticipate and prevent conflicts. In circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace building functions for the resolution of these conflicts;
- c. promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence;
- d. co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects;

¹⁵⁴ G Aneme ‘Introduction to the Norms and Institutions of the African Union’ (2010) http://www.nyulawglobal.org/Globalex/African_Union.htm (accessed 21 June 2011)

¹⁵⁵ Report of the Secretary General ‘An agenda for peace: preventing diplomacy, peacemaking and peacekeeping’ (1992) UN doc A/47227-S/244111 Paragraph 61. <http://www.un.org/en/sc/repertoire/> (accessed 10 June 2011)

¹⁵⁶ Article 17 PSC /PR/2(LXXXV)

- e. develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act;
- f. promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

As stated in Article 52(1),¹⁵⁷ the UN does not claim a monopoly over the initiative intended to secure peace and security in the world, including the use of force. The prohibition on the use of force is established by Article 2(4), which reads as follows:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

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

The intervention under Article 4(h) and (j) is not used against the territorial integrity or political independence of an African State, but rather to enhance the protection of human rights and advance state security as a mechanism of human protection.

The legality of the AU's PSC interventions in member states can be justified by a number of arguments, including that the intervention under Article 4(h) is conducted by member states of the AU's CA, which is an international treaty,¹⁵⁸ binding the states that have agreed to it. The intervention under Article 4(j) can only be used by states that are party to the AU's CA.

3.4.3 MAJOR CHALLENGES BETWEEN THE TWO ENTITIES AU'S PSC AND THE UNSC

The AU's PSC and UNSC have regular annual consultations about issues related to peace and security in Africa at the headquarters of the AU in Addis Ababa, Ethiopia.¹⁵⁹ The UNSC has been cooperating with the AU's PSC in finding solutions for conflicts affecting the

¹⁵⁷ See 3.4.2 above

¹⁵⁸ It is argued that once a state is part of an international treaty it should be bound to the rules and principles of that treaty and it is the AU's principle to protect the people against genocide, war crimes and crimes against humanity.

¹⁵⁹ Peace and Security Council Report (2011) *Institute of Security Studies* 6

continent,¹⁶⁰ but frequently, the UNSC has side-lined the AU's recommendations and actions.¹⁶¹ A significant dispute resulted from NATO's intervention in Libya, with the UNSC's approval, allegedly in order to protect civilians,¹⁶² while the AU's PSC had already tabled an alternative roadmap¹⁶³ for conflict resolution. The UNSC prioritised the intervention in Libya, even though the AU's PSC needed the assistance of the UNSC's funding for their intervention in Somalia.

3.4.4 DISAGREEMENT OVER LIBYA

In February 2011, North Africa was swept by uprisings of the population demanding democratic change.¹⁶⁴ The Libyan authorities responded with violence to the demonstrators.¹⁶⁵ The AU's PSC immediately initiated contact with Libyan authorities, demanding that they end the repression and violence.¹⁶⁶ Subsequently, the UNSC adopted Resolution 1970,¹⁶⁷ which imposed measures to stop the violence, ensure accountability and facilitate humanitarian aid. Further, the UNSC adopted Resolution 1973¹⁶⁸, which

¹⁶⁰ n 50 above 7

¹⁶¹ Resolution 1973 of the UNSC makes only a scant reference to the AU, but emphasises the important role of the Arab League in matters relating to the maintenance of international peace and security in the region, and bearing in mind Chapter VIII of the Charter of the United Nations, requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4; <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> (Accessed 21 June 2011)

¹⁶² The intervention took place in Libya under the cover of the UNSC 1973 which “‘Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, intended to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’”

¹⁶³ n 50 above 6

¹⁶⁴ n 142 above

¹⁶⁵ Amnesty International press release 23 February 2011 www.amnesty.org (accessed 28 June 2011)

¹⁶⁶ See AU press release dated from 23 February 2011 <http://au.int/fr/sites/default/files> (accessed 28 June 2011)

¹⁶⁷ On 26 February, 2011, the UNSC issued a resolution targeting sanctions on key regime figures, seventeen Gaddafi loyalists are subject to an international travel ban. Six of these individuals, including Gaddafi himself and his immediate family members, are also subject to a freeze of their assets. The Security Council commits to ensure that any frozen assets will be made available to benefit the people of Libya. A Sanctions Committee is established to impose targeted sanctions on additional individuals and entities who commit serious human rights abuses, including ordering attacks and aerial bombardments on civilian populations or facilities.

¹⁶⁸ On 17 March 2011 the UNSC authorized Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-

established a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians.¹⁶⁹

Shortly after the adoption of these resolutions, issues were raised over different interpretations of the language of Resolution 1973 of the UNSC. NATO,¹⁷⁰ a regional military organization, engaged in a military operation, with the acquiescence of the UNSC, against the Libyan Arab Jamahiriya, after the UNSC adoption of Resolution 1973. Of the countries involved, three are permanent members of the UNSC, namely the United States, France, and the United Kingdom. For the AU's PSC, the military operation was a strategy intended to foster a regime change in Libya,¹⁷¹ which the AU's PSC disagreed with. In turn, the AU's PSC supported the implementation of its initiative for peace, especially the roadmap.¹⁷²

The AU's PSC roadmap did not advocate the possibility of using military intervention for conflict resolution, which may be due to the inexistence of the standby force in North Africa and the death toll that could lead to military intervention, considering the capability of the Libyan Army.¹⁷³ Firstly, the North African standby force headquarters, the one responsible for the enforcement of peace by military force, is based in Libya¹⁷⁴ and this country shared the responsibility of hosting the units with Egypt, which was also affected by political

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 foreign occupation forces of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council.

¹⁶⁹ n 52 above, paragraph 6 of 1973 UNSC Resolution

¹⁷⁰ The test of the document establishing North Atlantic Treaty Organization. www.nato.int. (Accessed 30 July 2011)

¹⁷¹ On 26 May 2011 the AU's PSC released a statement arguing that the NATO led military operation defeated the very purpose for which it was authorized in the first place, namely, to protect the civilian population and complicate any transition to democratic dispensation

¹⁷² The Proposals on a Framework Agreement for a Political Solution to the Crisis in Libya, was adopted by the 265th meeting of the PSC, held on 10 March 2011, and the 17th Ordinary Session of the Assembly of the Union, held in Malabo, from 30 June to 1st July 2011.

<http://mrzine.monthlyreview.org/2011/au260811p.html> (accessed 27 August 2011)

¹⁷³ n 18 above

¹⁷⁴ C Jakkie 'The African Standby Force: An update report' (2008) 16 *Institute for Security Studies* 17

instability.¹⁷⁵ Secondly, considering that the Libyan government had the second best trained and equipped army in North Africa,¹⁷⁶ it was unlikely to be defeated by AU military operations, which made the military option unsustainable. This position could be justified by the principle established by the ICISS, which stipulates that intervention can only be carried out when there is the prospect of minimum collateral damage to civilians.¹⁷⁷

Based on the preliminary figures released by media before the assassination of Muammar Gaddafi on 20 October 2011, twenty five thousand people had died due to war between the rebels supported by NATO and troops loyal to the toppled government.¹⁷⁸ These figures illustrate that, from humanitarian point of view, the AU's approach regarding the use of non-forcible measures to resolve the crises was justified. Furthermore, the UNSC had been less consistent for not condoning the rebels for the violation of the international humanitarian law, namely the Hague convention and its protocol for wilful assassination the unarmed enemies¹⁷⁹ which is tantamount to war crime. Beyond that, doubts remain over legal arguments concerning the interpretation of the UNSC resolution, which imposed a ban on flights, but assisted rebellion military actions against the government forces across the country.

¹⁷⁵ M Costanza 'The Arab democratic wave and the Middle East: a window of opportunity'

<http://www.iss.europa.eu/publications/detail/article/q-the-arab-democratic-wave-and-the-middle-east-a-window-of-opportunity-1/> (accessed 27 october 2011)

¹⁷⁶ The Libyan SAM Network <http://geimint.blogspot.com/2010/05/libyan-sam-network.html> (accessed 10 July 2011)

¹⁷⁷ n 18 above

¹⁷⁸ See news released by the French Press quoting Mustafa Abdul Jalil, the rebel leader, speaking at the United Nations <http://www1.folha.uol.com.br/mundo/978005-revolta-libia-deixou-vinte-e-cinco-mil-mortos-diz-lider-rebelde.shtml> (accessed 30 September 2011)

¹⁷⁹ 'I killed Gaddafi', claims Libyan rebel as most graphic video yet of dictator being beaten emerges <http://www.dailymail.co.uk/news/article-2052816/Gaddafi-death-video-I-shot-killed-says-Libyan-rebel.html#ixzz1fJLPBhQj> (Accessed 21 october 2011)

3.4.5 DISAGREEMENT OVER SOMALIA.

Like the Libyan situation, the AU's PSC is at loggerheads with the UNSC over the conflict in Somalia, which is one of the oldest civil wars in Africa.¹⁸⁰ The disagreement between the organizations is specifically about the funding of the AU Mission in Somalia (AMISON).¹⁸¹

The UNSC, through Resolution 794, authorized humanitarian intervention in Somalia with the aim of creating conditions to make the delivery of humanitarian assistance and restoring of peace and stability possible.¹⁸² However, a standoff led to the withdrawal of UN peacekeeping troops in March 1995, leaving a limited UN political office for Somalia, based in Nairobi for security reasons.¹⁸³ After that, the civil war continued, creating serious threats to international peace together with hunger, which generated a serious humanitarian disaster.¹⁸⁴

As a result, the AU took the lead, exercising its right to intervene under Article 4(h) with the endorsement of the UNSC.¹⁸⁵ With the deployment of the AU mission in Somalia, the security improved in Somalia, a fact that the UN acknowledged,¹⁸⁶ and it became possible to provide humanitarian assistance in the country.¹⁸⁷

¹⁸⁰ The conflict in Somalia started in 1991 when President Mohammed Siad Barre was overthrown in a coup d'état by the United Somali Congress led by Ali Mahdi and subsequently followed by a civil war which led to a collapse of central government and the rise of fractional conflict. See C Hull & E Svensson 'African Union Mission in Somalia' (2008) 15. <http://www.foi.se/upload/projects/Africa/FOI-R--2596--SE.pdf> (accessed 21 June 2011).

¹⁸¹ n 62 above 10

¹⁸² It was the first time that the UNSC invoked the enforcement powers of the UN Charter against a sovereign country without seeking that governments consent for a purely humanitarian reason, as there was no effective government in Somalia exercising the complete authority of the country. See (n 62 above) 15

¹⁸³ See UNSC Report about Somalia, January 2006. <http://www.securitycouncilreport.org/site/>. (Accessed 15 June, 2011)

¹⁸⁴ n 52 above. In the first three months of 2011 Somalia had nearly 50 000 new refugees registered in the neighbouring countries Kenya, Ethiopia and Yemen. These figures represent an increase in 100 percent from the number of refugees registered in 2010. In 2010, the number of displaced people in the capital Mogadishu was estimated to be 24500

¹⁸⁵ The UNSC Resolution 1725 authorizing an African Union intervention in Somalia.

¹⁸⁶ In April 2008 the UNSC issued resolution 1809 welcoming the AU Peace initiatives.

¹⁸⁷ n 64 above

Due to the challenge related to military intervention, the AU's PSC requested from an increase of AMISON troops from the UNSC, and the UNSC agreed through Resolution 1964.¹⁸⁸ As part of the extension of AMISON, the AU's PSC asked the UNSC on several occasions for financial assistance from the UN. Following a request made in 2007, Security Council members, namely France, the United Kingdom and Russia refused, alleging that the UN's scarce resources should be used to manage UN operations.¹⁸⁹ At the meeting held on 21 May 2011, an attempt was made to secure more funding related to the allowance for soldiers involved in AMISON operations.¹⁹⁰ The UNSC refused to provide this funding. However, the UN agreed to provide financial assistance to the AU's mission in Darfur.¹⁹¹ This scenario has underlined a policy of double standards on the part of the UN, in that they ignore some humanitarian crises but send aid to others.

3.5 DISCUSSION OF THE AMENDMENT OF ARTICLE 4(H) OF THE AU CA

The amendment of Article 4(h), incorporating the right of intervention once there is serious threat to legitimate order, peace and stability in a member state, under the CA of the AU, is intended to uphold state security,¹⁹² and it is seen as a shift from the original purpose, which was the protection of people against grave violations of their rights when their governments are unable or unwilling to protect them.

This amendment was received and incorporated with strong suspicion. The initial draft was written as follows: 'In case of unrest or external aggression in order to restore peace and stability to the members of the Union.'¹⁹³ In 2002, Libyan authorities at the Durban Summit proposed the amendment, under the regime of then president Mouammar Gaddafi.¹⁹⁴ It may be suggested that, perhaps foreseeing a possible end to his regime by popular uprising, he

¹⁸⁸ 'Security Council extends authorization of African Union Mission in Somalia until 30 September 2011 - resolution 1964 (2010) unanimously adopted'. <http://reliefweb.int/node/378735> (accessed 12 August 2011)

¹⁸⁹ n 69 above 37

¹⁹⁰ n 69 above

¹⁹¹ n71 above 37-38

¹⁹² E Baimu & K Sturman 'Amendment to the African Union's right to Intervene: Shift from Human Security to Regime Security' (2003) 12 *African Security Review* 1

¹⁹³ n73 above 2

¹⁹⁴ The President of Libya ruled his country for four decades, from 1969 until August 2011, and was overthrown by popular uprising which received the military support of NATO

wanted to create an African legal mechanism among the instituted regimes to develop a way of defending themselves against any form of popular demand.

The suspicious way in which this amendment was drafted led to doubts as to whether it might be used to frustrate democracy, as it would give room for intervention in support of a dictator facing the kind of popular protest normal in a free and democratic society.¹⁹⁵ However, the PSC of the AU, in cooperation with the UNSC as the supreme body that oversees threats to peace and stability in the world, would hopefully be reluctant to accept any type of intervention that would undermine democracy.¹⁹⁶

3.6 CONCLUSION

The AU's PSC and the UNSC have worked in cooperation with one another. The UN Charter does not prohibit the creation of regional organizations and expresses support for them under Article 53. The AU's PSC has been carrying out humanitarian interventions in Darfur and Somalia, which are led with the UNSC's acquiescence. However, the conflicting criterion used by the UNSC regarding providing financial assistance has the potential to jeopardise the AU's PSC humanitarian interventions. As was discussed in this chapter, the UN did provide financial support to the AU's PSC in Darfur but has not provided financial support for their intervention in Somalia.

Additionally, the marginalisation of the AU's PSC peace initiative in Libya might be related to the AU's inability to act promptly in the Ivorian conflict using its own means, but also due to the inexistence of the standby force capabilities in North Africa. More importantly, the differences in the interpretation of the UNSC resolution which, for the AU's PSC, did not entitle NATO to engage in military operations to destroy the military capability in Libya, or to supply weapon for the rebels, but only to protect civilians from air strikes.

The intervention to stop serious threats to legitimate order to restore peace and stability in a member state of the AU upon the recommendation of the PSC has not been abused. Various undemocratic regimes have been overthrown by citizens of their own countries, such as the cases of Egypt and Tunisia, without the need for the AU to intervene. The AU remained

¹⁹⁵ Fombad & Kebonang (n 37 above) 21

¹⁹⁶ Fombad & Kebonang (n 37 above) 21

impartial, prepared to offer support, but without the need to interfere where it was not necessary.

4. CHAPTER.FOUR INTERVENTION UNDER ARTICLE 4(J) OF THE AU CA

4.1 INTRODUCTION

In this chapter, the applicability of Article 4(j) of the CA of AU will be discussed. The intervention under Article 4(j) has been the subject of criticism. The relevance of it within the AU legal framework, which is intended to uphold human protection, has been questioned. This paper argues that this provision, which was developed within the contemporary context of Africa, is essential. Intervention by invitation coming from a legitimate authority provides a better mechanism for conflict resolution, which is necessary for human protection, than when the initiative comes from the AU's PSC under Article 4(h).

The arguments about the relevance of Article 4(j) are based on case studies of two African countries, namely, the Democratic Republic of Congo (DRC) and the Republic of South Sudan (RoSS). Both have been ravaged by wars and have been the subject of humanitarian interventions that have not been effective.

4.2 REQUEST FOR INTERVENTION BY A LEGITIMATE AUTHORITY

The right of the AU member states to request intervention in order to restore peace and security under Article (j) is subject to strong criticism. It is contended that this provision could be used to jeopardise democratic dispensations. The same is contended of the second part of Article 4(h), which was introduced through the Protocol on amendment of CA of AU. It is questioned whether the AU's PSC would decide to intervene where a total breakdown of law and order has taken place due to political turmoil, caused by a regime which has lost elections and refuses to hand over power with the people demanding its resignation, causing chaos and anarchy.¹⁹⁷ If this were to happen, would the AU's PSC intervene to support the regime, or would they support those who have claimed power?

It may be argued that the AU's PSC would not be in a position to intervene in support of regimes that would rule against the will of their people for a number of reasons encapsulated in the AU charter. Firstly, the organ with ultimate authority to oversee threats to peace and

¹⁹⁷ Baimu & Sturman (n 172 above) 7

security in the world is the UNSC, and the AU's PSC has to act in conformity with its decisions.¹⁹⁸ Secondly, the AU's PSC Protocol supports democratic practices,¹⁹⁹ as the organs which oversee the PSC's role are pro-democracy.²⁰⁰

Considering these facts and arguments, the AU's PSC will not be in a position to embrace a process of intervention to repress democratic demands unless it has the support of the UNSC²⁰¹. Internally, it will also be impossible for the AU's PSC to exert its power without being accountable to the AU's parliament.²⁰² In other words, the AU can only intervene with the support of the UNSC and AU parliament. The same can be said when intervention is requested by a member state.

4.3 REQUEST FOR INTERVENTION BY LEGITIMATE AUTHORITY TO ASSIST IN FIGHTING INSURGENCY

The request for intervention by a legitimate authority²⁰³ in a country affected by civil war can be regarded as lawful and acceptable within the legal framework of Article 4(j) of the AU's CA. This conclusion can be drawn from Article 3(d) of the AU Protocol which stipulates, amongst others, as its objectives: 'to defend the sovereignty, territorial integrity and independence of its member states.'

The implementation of this provision as part of the AU's objectives and the admissibility of the AU states to request intervention from the AU in order to restore peace and security are interconnected. This conclusion can be drawn from the following: the African borders have been designated, not according to different national identities, but by the imposition of

¹⁹⁸ See 3.4 regarding the relationship between the AU's PSC and the UN charter and also Article 39 to 41 of the UN Charter

¹⁹⁹ See the objectives of the AU in Article 3 (g)

²⁰⁰ The AU has instituted its own parliament which is entrenched in democratic values. See Article 11 (1) of the protocol to the treaty establishing the African Economic Community relating to the Pan-African Parliament

²⁰¹ See (n 3 above)

²⁰² See (n 6 above)

²⁰³ Haiti conflict background <http://www.un.org/en/peacekeeping/missions/> (accessed 21 June 2011)

external forces.²⁰⁴ Furthermore, many civil wars in Africa are related to border disputes,²⁰⁵ which the AU might address through an intervention to restore peace and security.

The evidence supports this view in that a considerable number of civil wars waged in Africa are the ones responsible for creating human insecurity. It is indicated that many conflicts are not ingrained in popular demands for democratic changes, but some are rooted in historical, social, economic and political factors that can be addressed through intervention of the AU under Article 4 (j) of the AU after deliberations with the PSC.²⁰⁶

In support of these arguments, Augustine Ikelebe and Wafula Okumu, after analyzing 19 civil war related conflicts in Africa before the enactment of the AU's CA between 1990 and 2000,²⁰⁷ came to the conclusion that 'human insecurity has been the major cause in terms of massive internal displacements, disruption of livelihoods, violations of human rights, heightened criminality, loss of lives and human crises.'²⁰⁸

As previously indicated, in some cases, the wars are caused not directly by democratic demands, but for other related factors, such as border disputes and natural resources. This will be analysed through the violence that has taken place in the RoSS and the DRC and the remedy proposed by the UN peace mechanism.

4.4 THE REPUBLIC OF SOUTH SUDAN

The RoSS became independent from Sudan on 9 July 2011, separating itself from the north, which remains as the Republic of Sudan. The reasons on the part of the people of the south to divide the country after a long liberation struggle were the alleged Arab dominance and the marginalization of the predominantly African South.²⁰⁹

²⁰⁴ W Breytenbach, D Chilemba, T Brown & C Plantive 'Conflict in the Congo: From Kivu to Kabila (1999) *African Security Review* 1

²⁰⁵ D Brown & S Dersso 23 'Border disputes in Africa' (2011) *Institute of Security Studies* 6

²⁰⁶ R Bowd & A Barbara 'Understanding Africa's contemporary conflicts: Origins, challenges and peace building' (2010) *Institute of Security Studies* 26

²⁰⁷ The analyse contemplated the following civil war in Mozambique, Algeria, Angola, Burundi, the Central African Republic, Chad, the Republic of Congo, the DRC, Egypt, Kenya, Liberia, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan and Uganda. See Bowd & Barbara (n 10 above) 10

²⁰⁸ R Bowd & A Barbara (n 207 above) 3

²⁰⁹ L Louw-Vaudran 'Hopes as a new country is born' (2011) *Institute of Security Studies* 6

However, short time after independence, there has been clashes in the newly independent RoSS, which have had a high number of casualties²¹⁰. The cause of the conflict is related to historical factors, namely, age-old cultural practices, such as cattle rustling and child abduction, inter-ethnic tensions originating from long-standing animosity, insecurity emanating from strains in north relations and politically motivated tensions originating from political competitions and alliances and interpersonal clashes.

Internal conflicts with similar features as conflicts in RoSS give the country legitimate authority to request intervention from the AU to assist in forcible and non-forcible measures to secure peace and stability under Article 4(j) of the AU CA. The request for intervention by a legitimate authority can be requested from the AU's PSC before the conflict degenerates into large-scale disaster, as is stated in Article 4(h).

4.5 THE DEMOCRATIC REPUBLIC OF CONGO

The DRC is perhaps one of the most complex and perplexing situations since the end of the Cold War.²¹¹ A war involving a dozen nations, from Rwanda to Zimbabwe, in the conflict was described as the African equivalent of World War I.²¹² Amongst the countries involved in the hostilities are Angola, Namibia and Zimbabwe who were siding with the DRC governments, while Uganda and Rwanda were siding with the rebels, and each of these forces can be seen as pursuing its own agenda.²¹³

As a result of cyclical conflicts, the DRC has undergone various interventions, one of which is regarded as the largest in the world, in terms of the number of peace keepers and amount of resources allocated to it.²¹⁴ However, these interventions failed to achieve their purpose and

²¹⁰ A Atta-Assamoh, R sharamo & P Mwanzia 'South Sudan: Orgins and implications of emerging insecurity (2011) *Situation Report* 3

²¹¹ Breytenbach, Chilemba, Brown & Plantive (n 205 above) 1

²¹² Breytenbach, Chilemba, Brown & Plantive (n 205 above) 2

²¹³ Breytenbach, Chilemba, Brown & Plantive (n 205 above) 8

²¹⁴ S Koko 'MONUC and the quest for peace in DRC: Assessment of the peacekeeping mission' (2011) 20(2) *African Security Review* 29

it is contended that the failure rests on the fact that the UN staff view intervention on a macro level, namely, human security only, and not in conjunction with state security.²¹⁵

This happens because the UN system of humanitarian intervention is shaped with the aim of protecting civilians, and not with the aim of resolving the root cause of the conflict and finding solutions to stop the fighting.²¹⁶ Furthermore, the UN is focused on ending the war through facilitating elections at the national level in an effort to promote democracy, without addressing the root cause of the violence.²¹⁷ What is needed is an analysis of the reasons for the conflict and ways of resolving these. In opposition to this, intervention under Article 4(j) under the AU is based on a request by insiders, who are able to provide insight into the root cause of conflict. The AU's PSC are thus in a position to address effectively the root causes of the conflict.

In the case of the DRC, the conflict is twofold. On one side, there is an internal dispute. On the other side, the conflict is fuelled by neighbouring states and their agendas. Under the AU's legal mechanism of Article 4(j), the framework to address the conflict properly is in place, once there is the necessary support of the international community.

4.6 CONCLUSION

This chapter has considered the case of the RoSS and the DRC to argue that member states have the legitimacy to request intervention from the AU's PSC because they understand the root cause of the conflict and can work with the AU's PSC to find a suitable resolution to the conflict.

It has been argued that the AU's PSC will not be in a position to act against democratic dispensations when receiving an invitation from a member state as this is part of its own agenda.²¹⁸ It has also been argued that UN interventions focus on human security, but ignore state security and this undermines the success of long term human protection. The UN is quick to implement election processes in order to ensure democracy and secure peace, but the

²¹⁵ S Kjeksrud & A Randall 'Emerging lessons from the United Nations mission in DRC: Military contributions to the protection of civilians' (2011) 20(2) *African Security Review* 3

²¹⁶ M Nest 'From local-level violence to international relations theory: A journey through the trouble with the Congo' (2011) 20(2) *African Security Review* 66

²¹⁷ Nest (n 198 above) 66

²¹⁸ This is because it is the AU's objective to promote democracy. See Article 3 of the AUPSC.

conflict remains because the root cause has not been addressed. In both cases discussed, the root causes are border disputes and disputes over natural resources.

Considering these two case studies, it can be argued that the right of member states to request intervention from the AU in order to restore peace and security is a matter related to human security, which must be achieved through stronger state security. Through strengthening of the military and police forces of these countries, border disputes and disputes over natural resource can be resolved. Supporting an election process and withdrawing intervention as soon as a democratically elected government is in place is not effective, as it does not mean that the underlying conflict has been resolved.

5. CHAPTER FIVE CONCLUSION

This research has discussed the concept of intervention in international law and the implication of intervention against the principle of sovereignty as coded by Article 2(7) of the UN Charter. Subsequently, the objectives of humanitarian intervention have been compared to other types of intervention. The comparison is based on the aim of humanitarian intervention underlined by customary international law and international convention.

The theory of humanitarian intervention states that there are human rights which are essential, universal and of such high value to the human person that their violations by any state cannot be ignored posing the obligation for the international to protect them.

However this theory has not been applied by the international community. In several cases, there have been serious human rights violations in Africa, and the rest of the world, where the international community has failed to intervene in order to protect. This finding is supported by the case studies in Africa during the era of the OAU when emphasis was placed on the principle of sovereignty and non-intervention in the internal affairs of other states.

In Africa, humanitarian intervention started after the World War II. This type of intervention used to be unilateral. The intervention was triggered by the self-interest of the intervening state. An example of this is that of the Tanzanian intervention in Uganda. The former wanted to expel Ugandan troops that had occupied the Tanzanian area of Kegera. The military operation went beyond that toppling the regime of Idi Amin, which was guilty of serious violations of human rights. A similar case is the intervention of Belgium in Congo. The former colonial master wanted to protect its own citizens in Congo when it was under a civil war.

These interventions were conducted in such a way that sources have concluded that they were motivated by self-interest, and their foremost intention was not to protect fundamental human rights, even though these rights are considered universal, and in theory, violations against these rights cannot be ignored by other states and warrant intervention.

The AU, successor of OAU, is concerned with the inconsistency of its predecessor in consistently securing the protection of fundamental human rights in Africa. This is why the

AU made a legal turnaround to the principle of non-intervention by introducing to its CA the right to intervene in order to protect. There are three conditions for these interventions, which are:

Firstly, when war crimes, genocide and crimes against humanity occur, this is provided for by the first edition of Article 4(h).

Secondly, when there is serious threat to legitimate order, and there is a need to restore peace and stability to the member state of the AU. This was added, under recommendation of the PSC, to Article 4(h) by the Protocol CA of the AU.

Thirdly, in response to an invitation of member states, upon recommendation of PSC, this is provided for under Article 4(j).

Although it is argued that the AU's legal framework has established the necessary legal platform to protect African people when a humanitarian crisis arises, little has been done, due to various reasons, namely:

1. The AU and its various organs are bound by international law to work in cooperation with UNSC. The AU legal framework acknowledges this obligation in Article 17 of the PSC. Due to this fact, all AU initiatives should be brought before UNSC. However, the UNSC does not endorse and support some of these initiatives. For example, ECOWAS intended to intervene in Côte d'Ivoire on behalf of AU after the second round of presidential elections, when the electoral dispute turned into a civil war that put civilian lives at risk. ECOWAS was unable to be secure legal and logistical support from UNSC to remove Gbagbo from the office in order to end the dispute and secure peace
2. The majority of AU member states have serious financial constraints, which affect the budget of the organization and its activities. If there is need to conduct humanitarian intervention, the AU is often forced to ask for financial assistance from the UNSC. Sometimes, AU priorities differ from UNSC priorities. This has been the case regarding AU humanitarian intervention in Somalia. AMISON did not receive funding from UNSC, and it was given to the AU mission in Darfur.
3. The internal rule of AU PSC in practice do not consistently prevent states that have been involved in human rights violations or conflict related unconstitutional changes of governments from participating in the decision making of AU PSC. This happened with the

accession of Zimbabwe to AU PSC while still subject for review for human rights violation. Another example is when Côte d'Ivoire became eligible for the AU PSC before settling its problems regarding unconstitutional change of government.

4. The AU military body established in each region for humanitarian intervention, known as standby force, did not exist in North Africa, which hindered the AU when it came to taking decisive stand when the former Libyan government was apparently engaged in violent repression of pro-democracy demonstrators. Therefore, it may be suggested that this is reason that the AU's approach to the conflict envisaged a peaceful settlement of the conflict through a roadmap to peace.

The legal possibility established by Article 4(j) of the AU CA, relating to the right of a member state to request intervention from the union, has been subject to a great deal of criticism. The criticisms posed to this are very similar to those raised against Article 4(h), which allows the AU to intervene once there is serious threat to legitimate order to restore peace and stability to a member state of the union, upon recommendation from the PSC.

It is also argued that African leaders who are reluctant to accept democratic dispensation are likely to use Article 4(j) as a legal prerogative to request intervention from the union, claiming that the democratic demands are threats to peace. Concerning Article 4(h), it is argued that the same leaders can be tempted to assist their peers, should these peers face a popular democratic uprising, as they will be operating under the pretext of serious threat to legitimate order.

Examples from the past do not provide much evidence of abuse of AU right to intervene by invitation, or when there is serious threat to legitimate order. African leaders facing democratic uprising have been removed from power without receiving solidarity or assistance from the union. For example, in 2011, Laurent Gbagbo lost the presidential election of Côte d'Ivoire in the second round and faced popular rebellion demanding his resignation. The AU aligned with the majority of the Ivorian people in demanding his resignation although there dissenting voices.

The same happened in North Africa, where the previous leaders of Tunisia and Egypt were forced to resign by demonstrators demanding democratic reform. In both cases, the AU did not support the leaders.

This is an indication that the AU PSC leans more toward its own objectives, as set in Article 3(g) concerning the promotion of democratic institutions, popular participation and good governance.

The experience in Africa has indicated that human insecurity in Africa, especially in DRC and RoSS, is caused by border disputes between different communities over natural resources. Conflicts of this nature can be better handled by intervention by invitation by the legitimate authority if there is threat to legitimate order, rather than waiting for a catastrophe for humanitarian intervention.

The AU CA is tailored to address human security through state security as different sides of the same coin. This is paramount in African context, where the process of national cohesion is weaker. Hence the opinion that Article 4(h), as amended, and Article(j) is justified and necessary in the contemporary situation in Africa.

However, the prospects of AU CA implementation require the financial assistance of UNSC. Unfortunately, the AU initiatives related to humanitarian intervention have been systematically side-lined by the UNSC. This has happened in various conflicts. For example, in Côte d'Ivoire, ECOWAS failed to secure logistical assistance from UNSC in order to out carry out a military intervention to remove Gbagbo from office, and thus help to re-establish peace. In Somalia, AMISON failed to receive the necessary financial assistance from the UNSC, in order to secure a success of its intervention to protect. In both cases, the conflict has degenerated into catastrophic loss of human lives, when military intervention had the prospect of success with little collateral damage, as it is advised by ICISS

Surprisingly, given its past tendencies, the UNSC opted for military intervention in order to protect in Libya, where AU PSC did not foresee urgent humanitarian intervention. The AU approach may have been related to its non-existent standby force in North Africa, but was, more importantly, due to the possibility of high collateral damages, which could have resulted from military intervention in the Libyan conflict.

This fact indicates that AU might well have perceived the appropriate manner in which to resolve the conflict, in contrast to UNSC approach. Before the formal declaration of the end of the conflict on 20 October 2011, marked by assassination of Muammar Gaddafi, the death toll was calculated at twenty five thousand.

In conclusion, the facts illustrate that the AU needs the assistance of the UNSC in its effort to implement and exercise the right to protect. Likewise, the UNSC needs to consider the approaches recommended by the AU's PSC regarding conflict resolution in Africa to avoid the violation of international law while engaged in its implementation

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