



Addis Ababa University
College of Law and Governance Studies



ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF GRADUATE STUDIES
MASTER OF LAWS (LL.M) IN PUBLIC INTERNATIONAL LAW

AFRICAN UNION INTERVENTION IN THE 2015 BURUNDI'S CRISIS:
ASPIRATION VERSUS REALITY

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE MASTER OF LAWS (LLM) IN PUBLIC INTERNATIONAL LAW,

BY:

SETOTA GEBREWOLD WATARO

SUPERVISOR: MOHAMMAD HABIB
(ASSISTANT PROFESSOR OF LAW)

JANUARY 2018

ADDIS ABABA, ETHIOPIA

**AFRICAN UNION INTERVENTION IN THE 2015 BURUNDI'S CRISIS:
ASPIRATION VERSUS REALITY**

**A thesis submitted in partial fulfillment of the requirements for the Master of Laws
(LLM) in Public International Law: College of Law and Governance Studies,**

By:

Setota Gebrewold

Supervisor: Mohammad Habib

January 2018

Addis Abeba, Ethiopia

DECLARATION

I, **Setota Gebrewold**, hereby declare that this is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Name of Author: Setota Gebrewold

Name of Advisor: Mohammad Habib

Signature _____

Signature _____

Board of Examiners

Signature

1. _____

2. _____

ACKNOWLEDGMENT

Above all, I am grateful for my father, God. Then, I am extremely grateful for Abuye and Treza, my brother Hunye and my sister Seni. You have shown me the width and depth of unconditional love and support, I am forever grateful.

I am also thankful for Addis Ababa University for awarding me the 2016 female scholarship.

ACRONYMS

ACLED	Armed Conflict Location and Event Data Project
ACHPR	African Commission on Human and Peoples' Rights
AEC	African Economic Community
APSA	African Peace and Security Architecture
ASF	African Standby Force
AU	African Union
AUC	African Union Commission
CADSP	Common African Defence and Security Policy
CAR	Central African Republic
CASF	Central African Standby Force
CEWS	Continental Early Warning System
COMESA	Common Market for Eastern Southern Africa
DRC	Democratic Republic of Congo
EAC	East African Community
EASF	East African Standby Force
ECDPM	European Centre for Development Policy Management
ECOWAS	Economic Community of West African States
EOM	Election Observation Mission
ESF	ECOWAS Standby Force
EU	European Union
GIZ	Gesellschaft für Internationale Zusammenarbeit
ICISS	International Commission on Intervention and State Sovereignty

ICTY	International Criminal Tribunal for the Former Yugoslavia
IGAD	Intergovernmental Authority on Development
MAPROBU	African Prevention and Protection Mission in Burundi
MOU	Memorandum of Understanding
OAU	Organization of African Unity
PSC	Peace and Security Council
PSD	Peace and Security Department
PSO	Peace Support Operations
REC	Regional Economic Community
RM	Regional Mechanisms
SASF	South African Standby Force
SRCC	Special Representative of the AU Commission Chairperson
UN	United Nations
UNSC	United Nations Security Council

ABSTRACT

Currently, the African Union (AU) Constitutive Act is the only international treaty that provides for a legally binding right of intervention against genocide, crimes against humanity, and war crimes that are committed against inhabitants of a state, within its boundaries. The AU's right of intervention is not only a positive step towards protecting people against mass atrocities from their own state it is also an innovative norm in international law.

This research is anchored on the December 2015 decision of the AU Peace and Security Council (PSC), a precedent-setting invocation of the AU's Article 4(h) authorizing the deployment of a military mission to Burundi to quell violence related to the dispute over the third term of the country's President and the refuting January 2016 summit decision scrapping the plan to deploy troops.

However, as shown in this research, there are major normative and institutional gaps that may hamper the enforcement of the AU's right of intervention. Among the most notable gaps are: lack of precision on the types and criterion for military intervention; lack of credible enforcement organs; lack of unity among members and lack of commitment to the principle of non-indifference. Therefore, the AU needs to tackle these problems to be successful in future interventions.

Keywords: Intervention, Responsibility to protect, non-indifference, Burundi

Table of Contents

List of content	page
DECLARATION	i
ACKNOWLEDGMENT.....	ii
ACRONYMS.....	iii
ABSTRACT.....	v
Table of Contents.....	vi
CHAPTER ONE.....	1
1. INTRODUCTION.....	1
1.1. Background of the Study.....	1
1.2. Statement of the Problem.....	2
1.3. Objective of the study	2
1.3.1. General Objective.....	2
1.3.2. Specific Objectives.....	2
1.4. Research Questions	3
1.5. Significance of the study.....	3
1.6. Research Methodology.....	3
1.7. Scope of the study	4
1.8. Limitation of the study.....	4
1.9. Organization of the Thesis	4
CHAPTER TWO.....	5
2. The African Union and Right to Intervene.....	5
2.1. INTRODUCTION.....	5
2.2. Genesis of Intervention: the AU from non-interference to non-indifference.....	6

2.2.1.	African Union from non-intervention to non-indifference.....	7
2.3.	The Constituent Elements of the African Union’s Right of Intervention	8
2.3.1.	“Right” versus “Responsibility” to Intervene.....	8
2.3.2.	Measures of Intervention	8
2.3.3.	Criteria for the Application of Military Forcible Measures	9
I.	Right Authority	10
II.	Just Cause.....	11
III.	Right Intention.....	11
IV.	Last Resort.....	12
V.	Reasonable Prospects.....	13
VI.	Proportional Means	14
2.4.	REQUIREMENT FOR AUTHORIZATION FROM THE UNSC.....	14
2.5.	IMPLEMENTING INSTITUTIONS	16
I.	THE AU ASSEMBLY.....	16
II.	THE AU PSC	17
III.	THE AFRICAN STANDBY FORCE.....	19
IV.	THE PEACE FUND.....	19
CHAPTER THREE		21
3.	The 2015 Burundi’s Crisis and African Union’s Intervention	21
3.1.	INTRODUCTION.....	21
3.2.	The 2015 Burundian Crisis	21
3.3.	AU’s Involvement in Burundi’s Crisis	24
I.	Mediation.....	24
II.	Monitoring.....	25

III. Security.....	26
3.4. AU’s threat of forcible intervention for human protection purposes	26
3.4.1. Rejecting MAPROBU	27
3.4.2. Does Burundi’s Crisis fall under Article 4(h)	28
3.4.3. Status of MAPROBU	29
CHAPTER FOUR.....	31
4. Analysis of AU’s Intervention: Aspiration versus Reality	31
4.1. Introduction	31
4.2. Balancing the principles of sovereignty and non-indifference.....	31
4.3. Solidarity amid Member States	33
4.4. African states preferring political dialogue over intervention	33
4.5. Inadequate resources	34
CHAPTER FIVE	35
5. Conclusions and Recommendations.....	35
5.1. Conclusion.....	35
5.2. Recommendation.....	38
REFERENCES	39
A. Books	39
B. ARTICLES	39
C. Laws policy instruments and other official documents	42

CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study

The failure of the international community to respond aptly and timely to avert humanitarian disasters in Africa urged the African States to explore for new protection mechanisms¹ and to adopt alterations to the Constitutive Act. Consequently, the AU adopted an intervention clause, in blunt contrast with the 'erstwhile' OAU principles, allowing member states to intervene in case of genocide, war crimes and crimes against humanity. As a result, the AU Act became the first international agreement to codify a right to intervene.² It pulled out from its strict fidelity to non-interference, territorial integrity and sovereignty and become active in preventing and resolving conflict in Africa.³

In December 2015 the AU Peace and Security Council (PSC), announced for the first time ever, its precedent-setting decision using Article 4(h) of AU Constitutive Act, to authorize the deployment of a military mission to Burundi to quell violence related to the dispute over the third term of the country's President.⁴ However, in the January 2016 the 26th summit of the African Union (AU), the plan to deploy troops to Burundi for human protection purposes was scrapped.⁵

African leaders' January 2016 decision not to vouch for deployment of a 5,000-strong African Prevention and Protection Mission in Burundi (MAPROBU), as the African Union (AU) Peace and Security Council (PSC) recommended, divulge a wide rift between member states on how to deal with the crisis.⁶ The dispute seriously ravaged AU credibility and showed that its ambition

¹ D Kuwali 'The end of humanitarian intervention: Evaluation of the African Union's right of intervention'. African Journal on Conflict Resolution. Vol.9 No.1 2009. P.47-48

² Ibid

³ Powell K, Baranyi S (2005). Delivering on the Responsibility to Protect in Africa. Policy Brief, North South Institute. Accessed from www.nsiins.ca/english/pdf/responsibility_protect_africa.pdf P.2

⁴ "The African Union and the Burundi Crisis: Ambition versus Reality", Crisis Group Africa Briefing, N°122, (2016), p.1-2

⁵ Ibid

⁶ Id

to prevent and resolve conflict does not accord its capabilities. It also put the procedural flaws in the PSC's decision-making process out in the open.⁷

1.2. Statement of the Problem

African Union is one of the regional organizations with the mandate to contribute to peace and security as stipulated under the UN Charter. One of the basic principles of the UN Charter is the duty not to interfere in member states regarding matters that fall within the domestic jurisdiction of the countries concerned.

However, the AU Charter has embarked on a new institutional practice permitting it intervention during mass atrocities named crimes against humanity, genocide and war crimes which result from domestic conflicts within a member state. The AU's existing practice of intervention is far from providing consistent and conclusive evidence in this respect. Thus this study will attempt to shed some light on the emerging institutional practice of intervention by using the AU's unprecedented decision to intervene in the Burundi's 2015 crisis.

1.3. Objective of the study

1.3.1. General Objective

The general objective of the study is to explore issues related to Intervention as per Articles 4(h) of the AU Constitutive Act with a particular reference to Burundi's case, the reason for the AU's failure to intervene.

1.3.2. Specific Objectives

- To briefly explain the evolution of the right of intervention in the AU
- TO portray the meaning, criteria and implementing institutions of intervention under the AU.
- To identify the implication of intervention clause in the AU vis-à-vis the UN's prohibition of use force.
- To illuminate the dynamics' of the Burundian crisis and the intervention efforts made by the AU.
- To briefly review the short life of MAPROBU.

⁷ "The African Union and the Burundi Crisis: Ambition versus Reality", Crisis Group Africa Briefing, N°122, (2016), p.1-2

- To pinpoint the challenges faced by the AU in its efforts to intervene in Burundi.
- To present a way forward.

1.4. Research Questions

This research will strive to shade light on the following research questions:

- Does intervention in the AU Constitutive Act entail military intervention?
- Is the AU's right of intervention in line with the UN Charter?
- Does the AU require primary authorization by the UNSC before intervening?
- Does Burundi's 2015 crisis fall under Article 4(h) of the Constitutive Act?
- Is MAPROBU over?
- What are the challenges faced by the AU regarding Burundi's intervention attempts?

1.5. Significance of the study

- This case study will serve as a rich base for fellow researchers in the same area as there is little research regarding intervention, since Burundi is the first country to receive a decision on military intervention under Article 4(h) of the Constitutive act.
- It will give a better understanding regarding the issue of intervention: the meaning, criteria, and the implementing institution.
- It would give insight on the challenge faced by the AU and reasons for its failures.
- It provides lessons learned and recommendations for political decision makers in order to contribute to the ambitious goal of the AU.

1.6. Research Methodology

This study is a qualitative/doctrinal research that is based upon an extensive review of the existing literature in the area produced by respected authors in their respective fields. The research has drawn materials both printed and online to address the issue of AU intervention in Burundi's crisis.

1.7. Scope of the study

Due to time and space factors, this research will be limited to the AU's intervention powers as per Article 4(h) with a special emphasis on Burundi's 2015 crisis. It will assess why the AU has failed to intervene in Burundi's 2015 crisis.

1.8. Limitation of the study

The first and foremost drawback of this study is the lack of related literature since the AU has never resorted to Article 4(h) for the purpose of protection of populations from mass atrocities before and also because the research subject by itself is an ongoing development which makes it difficult to ascertain some facts to generate a certain theme. The other limitation for this study is as regards to time and money. There was also language constraints as most of the documents the researcher came across were written in French. So, these and other related issues are the factors behind the limitation of the study that to some extent hampered its potential to address the stated problem.

1.9. Organization of the Thesis

Chapter **one** is designed to draw a general picture of the study. And it gives an insight about the general background, the principal issues addressed, objectives sought to be achieved, significance, methodologies used, limitations and scope of the study.

Chapter **two** discusses the genesis of responsibility to protect in general and the AU's right of intervention in particular. It will explain the meaning, threshold and implementing institution of Intervention under the AU.

Chapter **three** gives an overview of the Burundian Crisis and the measures taken by the AU. The chapter also looks if the Burundian crisis qualifies for a military intervention and it discusses the current status of MAPROBU.

Chapter **four** brings to light the major challenges faced by the AU and why its ambition to intervene is not backed by actions.

And the last chapter will give conclusions and recommendations.

CHAPTER TWO

2. The African Union and Right to Intervene

2.1. INTRODUCTION

In May 2001, all African States but one (Morocco until 2017) ratified the African Union Constitutive Act, a regional treaty, which allows for intervention inside Member States in cases of genocide, crimes against humanity, and war crimes.⁸ “The AU Constitutive Act is not only the first international treaty that institutionalized intervention as a matter of common obligation,⁹ but also, the only international treaty containing an explicit legal basis for military intervention.”¹⁰ The adoption of the AU’s right of intervention is a ‘stark’ departure from the longstanding strict loyalty to the principles of sovereignty and non-intervention by African states towards the principle of non-indifference.¹¹ This right of intervention in the AU was motivated by a number of historical and political factors. These include rising focus on human rights as a result of the cold war coming to an end; the objective to develop a collective self-reliance caused by UN’s little or no commitment towards resolving African conflicts; and the fresh wounds from the numerous ‘preventable’ genocides all over the continent.¹²

The **objective** of this chapter is to explain the AU’s right of intervention against genocide, crimes against humanity, and war crimes; to highlight the development of intervention in order to illustrate its context and relevance; to explain the content of the AU’s right of intervention by analyzing its constituent elements and to describe the institutional framework for the implementation of the AU’s right of intervention.

⁸ Constitutive Act of the African Union, art. 4(h), May 26, 2001.

⁹ Girmachew Aneme, ‘The Institutionalization of Cosmopolitan Justice: The Case of the African Union’s Right of Intervention’, *MJIL Humphrey Supplement*, Vol.22 (2013) PP.5

¹⁰ Amnesty International Document, April 2017, “Counting Gains, Filling Gaps: Strengthening African Union’s Response to Human Rights Violations Committed in Conflict Situations.” pp.18

¹¹ M Mwanasali, (2008), ‘From non-interference to non-indifference: The emerging doctrine of conflict prevention in Africa’ in J Akokpari et al (eds) *The African Union and its institutions* pp.41.

¹² Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* PP.137–145 (1999).

2.2. Genesis of Intervention: the AU from non-interference to non-indifference

Until recently, the principle of sovereignty and non-intervention were the pillars of international law.¹³ Nonetheless, the rising normative and institutional importance of human rights has led to the expansion of several arguments in order to rationalize humanitarian intervention.¹⁴

In 1992 Boutros Boutros-Ghali, the first African UN Secretary General, published a report called “Agenda for Peace”, which argued in favor of proactive peacemaking and humanitarian intervention and also outlined suggestions that would enable intergovernmental organizations to respond quickly and effectively to threats of international peace and security in the post-Cold War era.¹⁵

The former UN Secretary-General Kofi Annan, in his Millennium Report, has also challenged the UN General Assembly to take in hand the dilemma immersed in intervention against mass atrocities.¹⁶ As a response to the Secretary-General’s Millennium Report, the government of Canada instituted the International Commission on Intervention and State Sovereignty (ICISS) in September 2000 to study the legal, moral, operational, and political issues involved in intervention against massive atrocities inside states and report its findings to the UN Secretary-General.¹⁷ By the end of 2001, the ICISS submitted its most comprehensive report, labeled “The Responsibility to Protect,” to the UN Secretary-General.¹⁸ And in 2005, the UN General Assembly adopted the World Summit Outcome document legitimizing the Responsibility to Protect as an international doctrine, on the basis of the ICISS Report.¹⁹

¹³ Antonio Cassese, 2005, INTERNATIONAL LAW 22–25 (2d ed.) PP. 22-25

¹⁴ G.Aneme, surpa note 9, pp.8

¹⁵ Boutros-Ghali, Boutros (1992) (In particular, four major areas of activity were identified: 1. preventive diplomacy; 2. peacemaking; 3. peacekeeping; and 4. Post-conflict peacebuilding.)

¹⁶ U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, 48, Millennium Report, (Apr. 3, 2000) (Kofi A. Annan), available at: <http://www.un.org/millennium/sg/report/>

¹⁷ International Commission on Intervention and State Sovereignty (ICISS) 2001. “The Responsibility to Protect,” December. Available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

¹⁸ Ibid

¹⁹ U.N. General Assembly, Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields, U.N. Doc. A/60/L.1, 138–140 (Sept. 15, 2005)

Albeit the ICISS report on the Responsibility to Protect presents an in depth arguments and explanation for the use of force against mass atrocities inside states, the world community failed to institutionalize the framework beyond general endorsement, in so doing it shrank the status to a mere moral argument.²⁰

2.2.1. African Union from non-intervention to non-indifference

“The Organization of African Unity (OAU) was notorious for disregarding the suffering and oppression of African citizens in its member states. It embraced a tacit policy of non-interference and non-intervention in the affairs of member states.”²¹ As a result violent conflict perpetrated in African states and caused enormous damages to member states and the continent as a whole.²² Learning from the lessons and failures of the OAU, African States has adopted a much more interventionist stand and established African Union, as the successor of the OAU, with a major paradigm shift from non-intervention to non-indifference.²³ A ground-breaking principle was adopted in the Constitutive Act, giving the AU the right “to intervene in a Member State pursuant to article 4(h) of the same act which states;

“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;”

²⁴

With the adoption of this legal provision, for the first time in the history of Africa, the continental organization has the authority to intervene in the internal affairs of member states that might lead to atrocities being committed against societies.²⁵

²⁰ ICISS, *supra* note 17.

²¹ TIM MURITHI, 2009 “The African Union’s Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect?”, pp.93

²² Ibid, p.91 (The conflicts in Angola, Liberia, the Democratic Republic of the Congo (DRC), Sierra Leone, and South Sudan, and the genocide in Rwanda, the situation in the Darfur region of Sudan have raised further questions about the doctrine of humanitarian intervention.)

²³ Kioko, B. (2003).The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention. Vol. 85, No 852, p. 807

²⁴ AU Constitutive Act, *supra* note 8, art. 4(h)

²⁵ TIM MURITHI, *supra* note 21, p.93

2.3. The Constituent Elements of the African Union’s Right of Intervention

2.3.1. “Right” versus “Responsibility” to Intervene

There seems to be a slight difference of terminologies between the ICISS Report and the AU Constitutive Act: the previous one uses the word “responsibility”²⁶ whereas the latter uses the term “right.”²⁷

*“The ‘right to intervene’ under the AU Constitutive Act is not necessarily in conflict with the ‘responsibility to protect’ phrase implemented by the ICISS. First, according to article 4(h) of the AU’s Constitutive Act ... the crimes that are grounds for the AU’s right of intervention are crimes against individuals or groups of citizens, not states; thus, the duty bearer is the State whose citizens are facing one or all of the three identified crimes. Second, the AU Constitutive Act is a treaty between fifty-four African states, and therefore there is a shared collective responsibility of all state parties against the commission of genocide, crimes against humanity, and war crimes inside a Member State. Third, the AU’s right of intervention refers only to the responsibility to react, not the responsibility to prevent and rebuild, and therefore is within the limits of ICISS Report.”*²⁸

2.3.2. Measures of Intervention

Neither the Constitutive Act nor the PSC Protocol define the term “intervention” or the kind of forcible measures that constitutes intervention, leaving some uncertainty as to the potential measures that the AU can deploy under the umbrella of Article 4(h).²⁹

Generally, under the ICISS Report there are three broad categories of forcible measures: military, economic and political, and diplomatic forcible measures.³⁰ And in the AU, the term “intervention” under Article 4(h) could denote all possible types of measures (including but not limited to the use of force), but practice and evolution of the concept of intervention under

²⁶ ICISS, *supra* note 17, paragraph 2.27

²⁷ AU Constitutive Act, *supra* note 1, art. 4(h) (“the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”)

²⁸ Girmachew Aneme, *supra* note 9, p.10

²⁹ Amnesty International Document, *supra* note 10, p.18

³⁰ ICISS, *supra* note 17, par. 4.6–4.9.

international law implies that what is envisaged is strictly military intervention.”³¹ Other forms of intervention, be it diplomatic, political, economic etc. fall outside of the scope of Article 4(h)³² and they are listed in separate provisions of the AU Constitutive Act.³³

2.3.3. Criteria for the Application of Military Forcible Measures

The conditions for intervention under Article 4(h) of the AU Act are mass atrocity crimes namely: war crimes, genocide and crimes against humanity. These thresholds imply that not all violations of international human rights and humanitarian law could justify AU intervention.

The power of the AU’s Assembly as per Article 4(h) appears to be focused on assessing the presence of legally defined situations on the ground which presents an implementation challenge associated with making a lucid and politically-neutral determination on when an Article 4(h) intervention can be called for and justified.³⁴

Article 7(1)(e) of the PSC Protocol provides that the PSC shall recommend intervention in a member state in respect of “grave circumstances” under article 4(h) as “defined in relevant international conventions and instruments”. This implies that the AU, specifically the PSC, will have to adopt the definitions of “war crimes”, “crimes against humanity” and “genocide”, as enshrined in a number of international instruments.³⁵ Therefore, determination of whether the specific acts constitute any of the grave circumstances under Article 4(h) inevitably risks being politicized, as defining these crimes is highly subjective.³⁶

³¹ Amnesty International Document, supra note 10, p.18

³² Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union available at <http://www.chr.up.ac.za/index.php/centrenews-2013/1218-pretoria-principles-on-ending-mass-atrocities-pursuant-to-article-4h-of-the-constitutive-act-of-the-african-union.html> (accessed May 2017).

³³ For instance, Article 23(2) stipulates that measures such as the denial of transport and communications links and other measures of a political or economic nature may be imposed by the AU against any member state that fails to comply with the decisions and policies of the organization. For the specific issue of an unconstitutional change of government, Article 30 of the Constitutive Act prescribes suspension from the AU as the collective measure to be taken.

³⁴ Amnesty International Document, supra note 10, p.20

³⁵ the Rome Statute of the International Criminal Court (ICC) (Articles 6, 7 & 8); the Genocide Convention (Article II); the 1949 Geneva Conventions (Article 3); the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Articles 3, 4 & 5); and the Statute of the International Criminal Tribunal for Rwanda (Articles 2, 3 & 4) . If it ever enters into force, the definition of these crimes under the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) will also become relevant (Articles 28B, 28C, and 28D).

³⁶ Amnesty International Document, supra note 10, p.21

The Peace and Security Directorate of the AU Commission is supposed to come up with the standards for implementing military intervention under Article 4(h) of the AU Constitutive Act,³⁷ however, the Directorate has not done so.³⁸ Consequently, when determining the threshold for the existence of Article 4(h) in a particular case, analysts recommend that the PSC should consider adopting the criteria proposed by the ICISS.³⁹ Importantly when deciding to intervene ‘the AU must prioritize the imperative to save lives over technical or overly legalistic ascertainment of the commission of war crimes, genocide and crimes against humanity.’⁴⁰

The ICISS provides the following six criteria for the application of military intervention.⁴¹

I. Right Authority

As per the “right authority” benchmark, the UN Security Council should be the first institution to which to refer for military authorization to shield the people from mass human rights violations.⁴² However, the ICISS recognized that in case the UN Security Council failed to authorize military intervention, other institutions such as the UN General Assembly can be used through the “Uniting for Peace” procedure or regional organizations.⁴³ On the contrary, the UN High–Level Panel that adopted the Responsibility to Protect recommended that the sole authority for authorizing the use of military intervention inside a state should be the UN Security Council.⁴⁴

³⁷ Report of the 3rd Ordinary Session of the Executive Council on the Proposed Structure, Human Resource Requirements and Conditions of Service for the Staff of the Commission of the African Union and their Financial Implications, Assembly/AU/Dec.22 (July 8, 2003). As cited by G.ANEME, *supra* note 2 p.11

³⁸ *Peace and Security Directorate*, AFRICAN-UNION.ORG, Available at: http://www.african-union.org/Structure_of_the_Commission/depPEACE%20AND%20SECURITY%20DIRECTORATE.htm. Accessed on July 2017

³⁹ Kioko, B. *supra* note 23, p.807, 818.

⁴⁰ Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Centre for Human Rights, Pretoria, 2012. Principe 10

⁴¹ ICISS, *supra* note 17; The Common African Position on the Proposed Reform on the United Nations: “The Ezulwini Consensus,” Mar. 8, 2005, Ext/EX.CL/2 (VII) (showing that the AU has generally accepted the concept of the responsibility to protect); *see also* U.N. SCOR, 2005 World Summit Outcome, G.A. Res. 56/211, U.N. Doc. A/60/L.1 (Sept. 15, 2005 As cited by Girmachew Aneme, *supra* note 9, p.12

⁴² ICISS, *supra* note 17, 6.15.

⁴³ *Ibid*, 6.28–35.

⁴⁴ Representative of the Secretary General’s High–Level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565, ¶ 198, 207 (Dec. 2, 2004), *available at* <http://www.un.org/secureworld/report2.pdf>.

When we come to the African Union, the AU Assembly passes the final decision regarding military intervention.⁴⁵ A significant inquiry here is, whether the AU Assembly needs UN Security Council authorization to implement its decision on military intervention inside its Member States or not.⁴⁶ This will be elaborated latter, under sub-2.4.

II. Just Cause

This criterion relates to the grounds that can justify a military intervention inside states.⁴⁷ According to the ICISS military intervention can be initiated under the circumstances when there is “a large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state, situation; or when there is a large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”⁴⁸

On the other hand, under the AU Constitutive Act there is a much more precise ground for intervention, (the commission of genocide, crimes against humanity and war crimes as defined in relevant international conventions and instruments), that can trigger military intervention inside AU Member States.⁴⁹

III. Right Intention

The “right intention” requirement limits the purpose of military interventions primarily to averting or ending violations of human rights and humanitarian laws.⁵⁰ For instance, military intervention against genocide, crimes against humanity, and war crimes by the AU should not result in the occupation of a State or the redrawing of its borders⁵¹ and it should not also be used as a ploy to undermine the sovereignty, independence and territorial integrity of states.”⁵²

Article 4(g) of the Constitutive Act of the African Union recognizes that according to the principle of non-interference, a state cannot intervene in the internal affairs of another. However,

⁴⁵ AU Constitutive Act, *supra* note 8, art. 9(1).

⁴⁶ Compare U.N. Charter, with the AU Constitutive Act art. 4(a).

⁴⁷ ICISS, *supra* note 17, at XII.

⁴⁸ Ibid

⁴⁹ AU Constitutive Act, *supra* note 8, art. 4(a).

⁵⁰ ICISS, *supra* note 17, par. 4.33.

⁵¹ Ibid

⁵² The Ezulwini Consensus, *supra* note 33; AU Constitutive Act, *supra* note 1 art. 4(a) (providing that sovereign equality and interdependence among Member States of the Union.)

the AU places limitations on state sovereignty under Article 4(h).⁵³ There is no contradiction between article 4(g) and 4(h), as 4(g) prohibits unilateral intervention while 4(h) illustrates the doctrine of non-indifference in the form of multilateral action, hence they complement each other.⁵⁴

IV. Last Resort

The fourth criterion for military intervention presented by the ICISS is the “last resort” requirement, which denotes the exhaustion of all non–military measures prior to taking military action.⁵⁵ In its explanation of the “last resort” criterion, the ICISS does not tell apart between non–military forcible measures and the whole set of preventive actions such as the use of diplomatic envoys and political mediation.⁵⁶

The AU’s right of intervention, however, can only be carried out once the events that would activate intervention are in the offing or are already taking place.⁵⁷ Thus, within the AU, the criterion of “last resort” should generally refer to the exhaustion of the non–military preventive actions like the employment of diplomatic and political pressure on the target state.⁵⁸ The “last resort” standard should be implemented rationally, on a case–by–case basis, in order to avoid a prolonged torment of the people while fruitless preventive measures are being applied.⁵⁹

⁵³ D. Kuwali ‘The end of humanitarian intervention: Evaluation of the African Union’s right of intervention’ available at: http://www.humansecuritygateway.com/documents/AJCR_EndOfHumanitarianIntervention_EvaluationAUsRightOfIntervention.pdf (accessed on August 2017).

⁵⁴ G. Puley, ‘The responsibility to protect: East, West and Southern African perspectives on preventing and responding to humanitarian crises’ available at <http://www.responsibilitytoprotect.org/files/ploughshares.pdf> (accessed on: August 2017). P.5

⁵⁵ ICISS, *supra* note 17, par. 4.37.

⁵⁶ PSC Protocol, arts. 6(a), (b), (c).

⁵⁷ Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Principle 10. (While the text of Article 4(h) seems to suggest that intervention will occur only upon the commission of war crimes, genocide and crimes against humanity, such an interpretation is inconsistent with the objectives Constitutive Act and the PSC Protocol. Therefore, deployment of military action should not only be to stop a grave circumstance that is already underway but also to prevent such circumstance from happening in the first place)

⁵⁸ BRIAN OREND, MICHAEL WALZER (2000), ON WAR AND JUSTICE, (contending non–military means should always be exhausted before using military means). P.87

⁵⁹ G.Puley, *supra* note 46

V. Reasonable Prospects

The fifth criterion of “reasonable prospects” is probability of the military intervention being successful i.e. the intervener must foresee that doing so will have a measurable impact on reversing the situation on the ground, otherwise it will lead to a greater disaster than the one military intervention is trying to dodge.⁶⁰ One of the key factors which can influence the successfulness of a military intervention is the power balance among the intervener and the state and/or non–state actors in the target state.⁶¹

Implementation of the “reasonable prospects” criterion is the utmost difficult test in the application of the AU’s right of intervention. First of all, the maturity of the AU’s military competencies is still in its infancy as a result of Member State’s poor political willingness and ability to establish a strong and coordinated financial and logistical capability to the organization.⁶²

Second factor affecting the AU’s assessment of reasonable prospects is that the majority African states have put together massive armies and such military build–up has given easy access of weaponry by state and non–state actors,⁶³ hence it will be hard to evaluate the accurate military potential of the targeted state..

And finally, most intra–state conflicts in Africa have waves of impact on the whole sub–region,⁶⁴ thus in a case of military intervention the assessment needs to include regional and sub–regional actors that may be involved in and affected by the conflict, which is burdensome for the AU.⁶⁵

⁶⁰ OREND et al, *supra* note 53, at 87 (“*Probability of Success*: A state may not resort to war if it can. The aim here is to block mass violence which is going to be futile.”).

⁶¹ Girmachew Aneme, *supra* note 9, p.15

⁶² G. Puley, *supra* note 53, p.21.

⁶³ IANSA, OXFAM & SAFERWORLD AFRICA’S MISSING BILLIONS, (2007), International Arms Flows and the Cost of Conflict *available at* http://www.oxfam.org/en/policy/bp107_africas_missing_billions. pp.3.

⁶⁴ Stelios Michalopoulos & Elias Papaioannou, 2011, *The Long–Run Effects of the Scramble for Africa* 1–2 (Nat’l Bureau of Econ. Research, Working Paper No. 17620) *available at* <http://www.nber.org/papers/w17620.pdf>.

⁶⁵ G. Puley, *supra* note 53, p.17

VI. Proportional Means

The proportional means criterion stipulates that “[t]he scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.”⁶⁶

The test of proportionality requires the fulfillment of the “reasonable prospects” criterion discussed above i.e. the analysis of military intervention in terms of “the universal goods expected to result from it against the universal evils expected to result i.e. causalities.”⁶⁷

2.4. REQUIREMENT FOR AUTHORIZATION FROM THE UNSC

The intervention clause under Article 4(h) of the AU Constitutive Act is claimed to have a prospective conflict with at least two provisions of the UN Charter: Articles 2(4) and 53.⁶⁸ Article 2(4), prohibits UN member states from the 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’ except in case of self-defense⁶⁹ or pursuant to a Chapter VII decision of the UNSC⁷⁰.

The second provision, Article 53, explicitly prohibits regional organizations such as the AU from collectively or unilaterally deploying the use of force or military intervention without the authorization of the UNSC.⁷¹ The 2005 World Summit Outcome similarly recognizes the primacy of the UN Security Council in authorizing and executing military interventions.⁷²

The AU intervention clause is not in contradiction with the UN Charter for the following reasons. Since “the AU’s right of intervention is treaty-based, i.e. all members of the AU have granted their consent for intervention when they ratified the AU Constitutive Act, and consequently, they have transferred a certain part of their sovereignty to AU. While the prohibition of the use of force has the status of *jus cogens* and thus cannot be contracted out by

⁶⁶ ICISS, *supra* note 17, par.4.39.

⁶⁷ OREND et al, *supra* note 59, at 87.

⁶⁸ Amnesty International Document, *supra* note 10, pp.19

⁶⁹ UN Charter, Article 51.

⁷⁰ *Ibid* art. 42

⁷¹ *Id*, Article 53 “The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”

⁷² 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, para. 139.

States, AU States waived their right to be free from intervention by the AU as a multilateral body in the face of mass atrocity crimes.”⁷³ Thus, Article 4(h) can be interpreted as a general *a priori* invitation to intervene to stop mass atrocities.⁷⁴ While the Security Council remains the bedrock of international peace and security, the AU has a ready, steady and wide range of military and civilian options to timely respond to crises in Africa. The AU right to intervene under Article 4(h) can and should co-exist with the Security Council’s primary responsibility for the maintenance of international peace and security in Article 24 of the UN Charter.⁷⁵

Despite the fact there is consensus that intervention on the part of regional organizations should be under UN authorization, the ICISS, the AU Act and the PSC Protocol are silent on what will happen if the UN will not authorize intervention.⁷⁶

The insertion of Article 4(h) in the Constitutive Act was partially a reaction to the international community’s failure, the UNSC in particular, to pay keen attention or quickly intervene to prevent or resolve conflicts in Africa.⁷⁷ For that reason, some analysts contended that lack of reaction from the UNSC could be a valid reason for the AU to unilaterally carry on with military intervention. Therefore, the AU may intervene without authorization of the UN if the UNSC is ‘unwilling or indecisive in authorizing intervention’.⁷⁸

In the Ezulwini Consensus, the AU also expressed the wish to see a flexible application of Article 53 in urgent cases, that is, for the required authorization to be granted after deployment has already taken place.⁷⁹ Repetition of the UNSC also suggests that it is open to approve the use of force by regional organizations “after the fact” where circumstances so warrant.⁸⁰

Since 2005 the AU has explicitly acknowledged that it needs to seek UN Security Council authorization for any use of military force beyond self-defense, including that authorized under

⁷³ Dan Kwali, supra note 52, p.52

⁷⁴ Kunschak, M. 2006. The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorization? *South African Yearbook of International Law* 31, 195-208.

⁷⁵ Dan Kwali, supra note 52, p.57

⁷⁶ Ibid, p.51

⁷⁷ Amnesty International Document, supra note 10, p.19

⁷⁸ Pretoria Principles, supra note 56, Principle 11.

⁷⁹ Ezulwini Consensus, supra note 51, pp. 6.

⁸⁰ For instance, the UNSC gave a tacit post facto approval in November 1992 to the deployment of military force in Liberia by ECOWAS. In the Resolution, the UNSC neither explicitly approved the use of force nor condemned it. See UNSC Resolution 788, 3138th Meeting, 19 November 1992, S/RES/788

Article 4(h). In the AU's *Roadmap for the Operationalization of the African Standby Force*, it is explicitly stated that "the AU will seek UN Security Council authorization of its enforcement actions."⁸¹ In the Burundi's crisis, the AU has requested UN's support regarding MAPROBU under its communiqué: it requested "the UN Security Council to adopt, under Chapter VII of the Charter of the United Nations, a resolution in support of the present communiqué".⁸²

2.5. IMPLEMENTING INSTITUTIONS

Before the establishment of the AU in 2000, the United Nations (UN) was the predominant, if not the sole player on matters of peace and security in Africa and it still plays a leading and active role in partnership with the AU.⁸³

The AU has taken numerous moves towards translating its commitment to intervention into life. In particular, it set up a relatively comprehensive normative and institutional framework known as the African Peace and Security Architecture (APSA), a mechanism for conflict prevention, management and resolution.⁸⁴ APSA builds on and improves the structures that the OAU had begun to establish in the twilight years of its existence. The AU PSC being the central pillar of the APSA others include Panel of the Wise, Continental Early Warning System (CEWS), African Standby Force (ASF), and the Peace Fund.⁸⁵ The major implementing institutions regarding intervention will be explained below.

I. THE AU ASSEMBLY

The AU Assembly is the supreme decision-making organ of the Union which is composed of the Heads of State and Government of all Member States of the AU, or their accredited

⁸¹ Paul D. Williams, December 18, 2015, "Special Report: The African Union's Coercive Diplomacy in Burundi" Available at: <https://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/> Accessed on July 2017.

⁸² Paragraph 15 of the communiqué

⁸³ Julian Brett, 2013 The inter-relationship between the African Peace and Security Architecture, the Global Peace and Security Architecture and Regional Initiatives; Security Council Report Working together for peace and security in Africa: The Security Council and the AU PSC (2011).

⁸⁴ Desmidt, S. 2016. *Peacebuilding, conflict prevention and conflict monitoring in the African Peace and Security Architecture*. ECDPM background note. March 2016

⁸⁵ APSA Impact Report 2015, p.17-32. The pace of development of the various components of APSA has been uneven but most of them are fairly close to being fully operationalized. The APSA is supposed to be complemented in its work by the African Governance Architecture (AGA). The AGA is the AU's normative and institutional framework for promoting, harmonizing and sustaining three specific 'shared values': democracy, good governance, and human rights.

representatives.⁸⁶ The Assembly meets at least once a year in an ordinary session and summons for an extra-ordinary meeting at the request of a Member State and at the approval of a two-thirds majority of Member States.⁸⁷ The decisions of the Assembly are made either by consensus or by a two-thirds majority of the Member States of the Union.⁸⁸ The Assembly is led by a Chairperson, elected from among the heads of state or government, for a period of one year.⁸⁹

The AU Assembly passes the final decision regarding the AU's right of intervention.⁹⁰ The AU Assembly decision in favor of intervention contains, *inter alia*, the following: decision on the existence of at least one of the grounds of intervention under Article 4(h) of the AU Constitutive Act;⁹¹ decision on the failure or inability of the target state to protect the population inside its borders from the crimes;⁹² decision on the applicability of non-military and/or military forcible measures;⁹³ and the framework within which the measures are to be implemented.⁹⁴

II. THE AU PSC

The PSC is the AU's standing decision-making organ for the prevention, management and resolution of conflicts.⁹⁵ It is designed to provide “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”⁹⁶

⁸⁶ AU Constitutive Act, *supra* note 88, art. 6(1) (2). AU Assembly Rules of Procedure r. 3.

⁸⁷ *Ibid* 1, art. 6(3); AU Assembly Rules of Procedure r. 5–14 (giving details of meetings of the Assembly); *see also* African Union Assembly of Heads of State and Government, Decisions on the Periodicity of the Ordinary Sessions of the Assembly, Assembly/AU/Dec.53 (III) (July 2004) (deciding, in its 2004 summit, that the AU Assembly should meet twice a year in ordinary session because of increased responsibilities in the face of the many challenges of the continent).

⁸⁸ *Ibid* art. 7(1).

⁸⁹ *Id* art. 6(4); AU Assembly Rules of Procedure, Rule 15.

⁹⁰ Compare PSC Protocol, *supra* note art. 7(1)(e), with AU Constitutive Act, *supra* note 1, art. 6 (2).

⁹¹ AU Constitutive Act, *supra* note 8, art 4(h).

⁹² *Ibid* art 4(a), (g), (h), (j)

⁹³ *Id*

⁹⁴ *Id* art. 4(m).

⁹⁵ The AU PSC Protocol, *supra* note 48, art 2(1)

⁹⁶ Bah, A. S; Choge-Nyangoro, E.; Dersso, S.; Mofya, B. and Murithi, T. 2014. *The African Peace and Security Architecture, A Handbook*. Friedrich Ebert Stiftung. 2014

The AU PSC is a permanent decision-making organ for the prevention, management and resolution of conflicts in Africa.⁹⁷ It is supported by the AU Commission, the Panel of the Wise, the Continental Early Warning System, an African Standby Force and the Peace Fund.⁹⁸

The PSC is composed of fifteen Member States which are elected by the AU Assembly. The election is based on the principles of equitable regional representation and rotation.⁹⁹ There are three members from central Africa, three members from east Africa, two members from the northern Africa, three members from south Africa, and four members from the west of Africa.¹⁰⁰ There is no provision regarding a permanent and non-permanent seat in the PSC, but all members are eligible for re-election and may serve for as many terms as is feasible. This means that although the PSC Protocol does not provide for permanent membership, “it is possible for a state to somehow attain the status of a quasi-permanent member through constant and uninterrupted reelection.”¹⁰¹

As per Article 4(h) of the AU Constitutive Act, the AU PSC is given the mandate to recommend intervention to the AU Assembly.¹⁰² Therefore, the organ is responsible to establish the occurrence of genocide, crimes against humanity, and war crimes in a Member State.¹⁰³ However, there is no procedure that can be utilized to establish the occurrence of the specified grounds of intervention.¹⁰⁴

Furthermore, the AU PSC should establish why and how the target state is unable and unwilling to guard the people inside its borders against the commission of the crimes under Article 4(h) of the AU Constitutive Act.¹⁰⁵ In addition, the Council’s recommendation needs to propose the kind of intervention to be authorized by the AU Assembly and consequently point out the specific

⁹⁷ PSC Protocol, *supra* note 48, art. 2(1); *see also* AU Constitutive Act, *supra* note 1, art. 5(2) (providing that the Assembly of the AU may decide to establish additional organs not provided for in the Constitutive Act).

⁹⁸ PSC Protocol, *supra* note 48, art. 2(2).

⁹⁹ *Ibid* art. 5(1) (“(a) ten members elected for a term of two years; and (b) five members elected for a term of three years in order to ensure continuity”).

¹⁰⁰ African Union Executive Council, Decision on the Election of Members of the PSC, EX/CL/Dec.78 (IV) (March 2004).

¹⁰¹ Amnesty International Document, *supra* note 10, p.38

¹⁰² PSC Protocol, *supra* note 48 art. 7(1)(e).

¹⁰³ *Ibid* art 7(1)(h)

¹⁰⁴ Girmachew Aneme, *supra* note 9, p.20

¹⁰⁵ AU Constitutive Act, *supra* note 8, arts. 4(g), (h)

actions to be taken.¹⁰⁶ Therefore, in case of military intervention, the recommendation should, *inter alia*, identify the kind of force to be employed and details of the budget and logistical requirements of the recommended military action.¹⁰⁷

III. THE AFRICAN STANDBY FORCE

The African Standby Force (ASF), is the other organ accountable to the AU PSC Council with the mandate of, *inter alia*, implementing the AU's right of intervention.¹⁰⁸ The ASF is a pool of sub-regional standby forces instituted by the five sub-regions, composed of the multi-dimensional force of police, military and civilians.¹⁰⁹ Each sub-region is projected to establish a standby force located in their countries of origin, ready for rapid deployment anywhere in Africa at appropriate notice.¹¹⁰

“The plan to build up ASF's competence for military intervention under Article 4(h) of the AU Constitutive Act is a step in the right direction as the extended reliance on the use of lead nations may invite unnecessary political factors and state interests. Among other factors, the legitimacy of military intervention under Article 4(h) of the AU Constitutive Act lies in the fact that it is a collective action rather than an action by a single state.”¹¹¹

IV. THE PEACE FUND

The PSC Protocol provides for the establishment of a Special Fund, known as the Peace Fund, with the intention of financing the activities of the AU aimed at maintaining peace and security on the continent, including intervention under Article 4(h).¹¹² The primary source of the Peace

¹⁰⁶ PSC, *supra* note 48, art. 7(1)(d), (j)

¹⁰⁷ *Ibid* art. 7(1)(d), (j); AU Assembly Rules of Procedure, *supra* note 35, r. 19(3).

¹⁰⁸ PSC Protocol, *supra* note 48 arts. 13(1),(3)(c),(5)

¹⁰⁹ These include: East African Standby Force (EASF), South African Standby Force (SASF), Central African Standby Force (CASF), North Africa Regional Capability (NARC) and ECOWAS Standby Force (ESF).

¹¹⁰ PSC Protocol, *supra* note 48 art. 13(1), at 18.

¹¹¹ Bjorn Moller, *The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa* 33 (Danish Inst. for Int'l Studies, DIIS Working Paper No. 2005/4), <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=18629&lng=en>

¹¹² PSC Protocol, *supra* note 48 art. 21(1) (stating that all operations directed by the PSC are envisaged to be supported by the Peace Fund under Article 13(3) of the PSC Protocol); art. 22(2) (providing that the Peace Fund was originally established under the OAU in 1993 under the 1993 OAU Conflict Prevention, Management and Resolution Mechanism).

Fund is the regular budget to the AU, known as the General Peace Fund.¹¹³ The other major category of the Peace Fund is the Special Contribution i.e. voluntary contributions from AU Member States, from the private sector and civil society as well as individuals in AU Member States, and donations from non-Member States.¹¹⁴ Donations and voluntary contributions from sources outside of Africa are accepted in so far as they are “in conformity with the objectives and principles of the Union.”¹¹⁵

Despite the declaration of AU Member States to support the Peace Fund and to increase the statutory contribution from the AU regular budget to the Fund,¹¹⁶ the AU budget in general and the Peace Fund in particular are in a constant state of shortage to finance the activities of the AU in the maintenance of peace and security on the continent.¹¹⁷

¹¹³ Rep. of the Chairperson of the Comm’n on the Status of the AU Peace Fund as at 31 December 2004, Advisory Subcomm. on Admin., Budgetary and Fin. Matters, Adv.S/Cttee.8 (VIII) (2005). As cited by G. Aneme pp.21

¹¹⁴ PSC Protocol, *supra* note 48 art. 21(2).

¹¹⁵ *Ibid* art. 21(3).

¹¹⁶ See Statement of Commitment to Peace and Security in Africa, Issued by the Heads of State and Gov’t of the Member States of the PSC of the African Union, PSC ¶ 8, PSC/AHG/ST.(X) (May 25, 2004) *available at* http://www.africa-union.org/News_Events/Calendar_of_%20Events/Lancement%20PSC/Statement.pdf.

¹¹⁷ Rep. of the Chairperson of the Comm’n of the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa, PSC, 9th Sess., paragraph 2, PSC/AHG/3(IX) (May 25, 2004), *available at* <http://www.peaceau.org/uploads/report-9th-en.pdf>.

CHAPTER THREE

3. The 2015 Burundi's Crisis and African Union's Intervention

3.1. INTRODUCTION

Protests and violence erupted in Burundi on April 2015, following the ruling party's announcement that the incumbent, President Nkurunziza, would seek a third term. The AU has since taken an active role in attempting to de-escalate violence and promote dialogue among relevant stakeholders. In the face of increasing violence, the AU deployed a variety of tools to create the necessary conditions for a political settlement of the crisis.

However, despite the AU's heavy involvement in Burundi, there is little to indicate that a peaceful resolution is in sight. Indeed, government security forces continue to engage in violence against the population and the emergence of armed groups is contributing to pervasive insecurity.¹¹⁸ Dialogue efforts between the government and the opposition in exile have yielded no tangible solutions, and attempts to send an AU military intervention have been rejected.

This chapter will discuss what kindled the crisis and the AU's remarkable interventions efforts.

3.2. The 2015 Burundian Crisis

In 2005, the political wing -National Council for the Defence of Democracy (CNDD)- and military wing - Forces for the Defence of Democracy (FDD) merged into a recognized political party, and appointed Pierre Nkurunziza to the presidency which was viewed as the symbolic end of the 12-year civil war.¹¹⁹

Ten years later, on 25 April 2015, CNDD-FDD announced that Nkurunziza would run for a third term, despite a constitutional two-term limit, which caused riots to broke out across the Burundian capital of Bujumbura. The ruling party argued that because Nkurunziza had been elected as the post-transitional president by indirect vote, as instructed by Article 302 of the constitution, he was eligible to seek an additional mandate, since the term limits discussed in

¹¹⁸ Human Rights Watch. (2016) Burundi: Abductions, Killings, Spread Fear. Available at <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear> accessed on May 2016

¹¹⁹ Y. Bouka, 2017, "Burundi: Between War and Negative Peace." Centre for Conflict Resolution, P.25

Article 96 address presidential election by universal suffrage.¹²⁰ Hence, the party considered him eligible for a third term.

The announcement sparked heats of protests in Burundi and was panned by different AU officials, while the PSC, of which Burundi was a member at the time, urged Burundians to calmly await the constitutional court decision on the matter.¹²¹ On 05 May 2015, amid much controversy, the Constitutional Court took sides with the president in a highly criticized decision.¹²² Riots and protests broke out again in neighborhoods of Bujumbura, which are known for anti-Nkurunziza views, and spread to the Northern provinces.¹²³ Nkurunziza was re-elected in June 2015 with a majority of votes, albeit in a highly boycotted election.

Opponents of a third term cite term limits stipulated by Article 96 of the Constitution and adherence to the Arusha Accords, which ended the civil war fought from 1993 to 2005 by providing constitutional checks on monopolies of power by any one party or ethnic group and impose a two-term limit.¹²⁴

While the rallies were quickly crushed in rural areas, they stick around in the capital, and what started out as a serene protests turned into violent confrontations. Nonetheless, it was the failed coup attempt of 13 May 2017 (by Niyombare, former General Leonard Ngendakumana, and former Defence Minister Cyrille Ndayirukiye) that became a major turning point in the crisis and the interventions of regional actors.¹²⁵

While the AU had reacted tentatively to Nkurunziza's third term bid and the succeeding protests, it quickly condemned the coup attempt.¹²⁶ By the time President Nkurunziza was sworn in for his

¹²⁰ Ibid. p.21

¹²¹ African Union Commission. (2015) *AU Calls for Restraint in Burundi*. Press release, 26 April. Available at <http://www.au.int/en/newsevents/25807/au-calls-restraint-burund> accessed on May 2017 (for instance the AU Commission Chairperson Dr. Nkosazana Dlamini-Zuma had called for restraint and challenged the legitimacy of Nkurunziza's third term bid)

¹²² Vandeginste, S. (2015) 'Droit et Pouvoir au Burundi: Un commentaire sur l'arrêt du 4 mai 2015 de la cour constitutionnelle dans l'affaire RCCB 303' in Reyntjens F. et al. (eds). *L'Afrique des Grands Lacs: Annuaire 2014-2015*. Antwerp: University Press Antwerp.

¹²³ Y.Bouka. supra note 118 p.21

¹²⁴ Armed Conflict Location and Event Dataset (ACLED), May 2016. Country Report: Burundi Crisis Year one, p.3

¹²⁵ Ibid p.3

¹²⁶ African Union. (2007) *African Charter on Democracy, Elections and Governance*. Available at <http://www.achpr.org/instruments/charter-democracy/> Accessed on May 2017

third term, AU priorities had effectively and permanently shifted from the arguably illegal third mandate to fully focus on the question of civilian protection.

“The violence in this episode began with a coordinated and sustained attack by unidentified armed people against three military posts in the capital, Bujumbura, in the early hours of 11 December 2015.”¹²⁷ “In addition to sustained exchange of gunfire and explosions between the government security forces and the attackers, Burundian security personnel also engaged in retaliation; they reportedly rounded up and executed individuals suspected of involvement in the attack.”¹²⁸ Even by the government’s conservative accounting of the fatalities, a minimum of 87 people lost their lives at the end of what the Burundi government called ‘mopping-up operations’.¹²⁹ At the time, the fact-finding mission of the African Commission on Human and Peoples’ Rights (ACHPR) characterized the situation as demonstrating ‘escalating violence and violations of human rights’.¹³⁰

In addition to the death of key political and military figures, observers documented pervasive human rights abuses including extra-judicial executions that the ruling party’s youth group, the Imbonerakure, had infiltrated.¹³¹ Moreover, reported divisions in the army raised concerns about the possibility of an intensification of violence. Since the beginning of the crisis, approximately 1,400¹³² have died and close to 500,000 Burundians have fled to neighboring countries.¹³³

¹²⁷ Dersso, S. (2016) *To Intervene or Not to Intervene? An Inside View of the AU’s Decision-Making on Article 4(h) and Burundi*. Occasional Paper, Medford, MA: World Peace Foundation. P.3 Available at http://fletcher.tufts.edu/~media/Fletcher/Microsites/World%20Peace%20Foundation/Publications/AU%20Decision-Making%20on%20Burundi_Dersso.pdf Accessed on May 2017

¹²⁸ Ibid p.3

¹²⁹ Id

¹³⁰ African Commission on Human and Peoples’ Rights. 2016. “Press Release: Fact-Finding Mission of the African Commission on Human and Peoples’ Rights to Burundi (7 – 13 December 2015). Available at: <http://www.achpr.org/press/2015/12/d285/> Accessed on May 2016

¹³¹ African Union. (2015) *The African Union Strongly Condemns the Acts of Violence in Burundi*, Press release. Available at <http://www.peaceau.org/en/article/the-african-union-strongly-condemns-the-acts-of-violence-in-burundi> Accessed on May 2017

¹³² As per the UN 500+, according to ACLED 1,400+ and as per the government 700+ Available at [http://en.m.wikipedia.org/wiki/Burundian_unrest_\(2015-present\)](http://en.m.wikipedia.org/wiki/Burundian_unrest_(2015-present))

¹³³ Security Council, 2017 Responding to Burundi’s Crisis

3.3. AU's Involvement in Burundi's Crisis

The AU's engagement in Burundi can be divided into three types of interventions: mediation efforts, human rights monitoring and attempts to deploy security forces to maintain the peace in the country.¹³⁴ However, in every effort, the AU faced important obstacles that hindered its ability to have a significant impact on the crisis.

I. Mediation

As the crisis unfolded in 2015, the African Union called on the East African Community (EAC) to mediate between the government and the opposition.¹³⁵ The AU mediation efforts were unfulfilled by two crucial factors. First, the AU depended too heavily on the East African Community (EAC).¹³⁶ The AU delegated the management of the crisis to the EAC which for the first year of the crisis did not gain any traction in getting the government and opposition in exile around the negotiation table and nothing substantial was accomplished.¹³⁷

Moreover, the EAC remains divided about the way forward in Burundi.¹³⁸ The Rwandan government has often publically criticized President Nkurunziza's management of Burundi and has been accused by the UN of supporting Burundian armed groups, while Uganda and Tanzania seem more favorable to maintaining the status quo.¹³⁹ These differences have crippled EAC's mediation efforts on Burundi.¹⁴⁰

Secondly, the AU has failed to put forward a consistent figure to represent the organization through the crisis. "Instead, the AU has combined the use of high-level missions, special representatives and AU Chairpersons, at times on an ad hoc basis."¹⁴¹

¹³⁴ Y. Bouka, *supra* note 118, p.4

¹³⁵ *Ibid* P.25

¹³⁶ *Id* P.3

¹³⁷ *Id* (EAC appointed negotiator, Ugandan President Yoweri Museveni, who was received with a great deal of scepticism by the opposition and many observers. Museveni is no hallmark for democracy and was himself seeking another term as president of Uganda after 30 years in power.)

¹³⁸ *Id*

¹³⁹ African Union. (2015) *The African Union Strongly Condemns the Acts of Violence in Burundi*, Press release.

¹⁴⁰ Yolande B. *supra* note 118 p.3

¹⁴¹ RFI. (2015) B. Diarra, représentant spécial de l'UA au Burundi remercié, 6 April. Available at <http://www.rfi.fr/afrique/20150405-info-rfi-boubacar-diarra-representant-special-union-africaine-burundi-remercie-pierre-nkurunziza> Accessed on June 2017 (This started with the AU's inability to quickly fill the vacant Special Representative to the Great Lakes position. A few weeks before the crisis erupted, the AU discreetly

II. Monitoring

The AU could have been more fruitful in the de-escalation of violence in Burundi if it had been able to establish a fully functioning monitoring mechanism beforehand.¹⁴² With limited information about the dynamics of violence outside of Bujumbura, it remains difficult to truly assess the risk of full-blown conflict in Burundi.¹⁴³ The lack of systematic monitoring permitted the government to remain engaging in political violence and aided the unhindered emergence of non-state armed groups.¹⁴⁴

The challenges faced by the AU in effectively monitoring the situation in Burundi are the direct consequence of the Burundian government's 'stalling' tactics.¹⁴⁵ In June 2015, the PSC adopted a communiqué to dispatch a small number of human rights observers and military advisors not only to report on possible rights violation in the country but also to verify the disarmament of militias and armed groups.¹⁴⁶ While the Burundian government accepted the deployment, these observers and advisors faced many impediments in the execution of their duty as the AU was not able to lock a Memorandum of Understanding (MoU) from the government.¹⁴⁷ The AU monitors cannot, however, do the same outside the capital, thereby creating a significant knowledge gap about the human rights situation in Burundi. In October 2015 and in February 2016, the PSC attempted to increase the number of human rights observers and military advisors to 100 each, but government delays have continued to challenge the implementation of these measures.¹⁴⁸

Another vital monitoring instrument was the deployment of an African Commission on Human and Peoples' Rights (ACHPR) fact-finding mission from 7 to 13 December 201 with a mandate to investigate human rights violations and other abuses in Burundi.¹⁴⁹ There were expectations

recalled its special representative, Ambassador Boubacar Gaoussou Diarra, at the request of the Burundi government)

¹⁴² Y. Bouka, supra note 118 P.4

¹⁴³ Ibid

¹⁴⁴ Id

¹⁴⁵ Id

¹⁴⁶ African Union. (2015) *Beginning of the Deployment in Burundi of the African Union Human Rights Observers and Military Experts*, Press release, 22 July. Available at <http://www.peaceau.org/en/article/beginning-of-the-deployment-in-burundi-of-the-african-union-human-rights-observers-and-military-experts> Accessed on August 2017

¹⁴⁷ Y. Bouka, supra note 118 p.4

¹⁴⁸ Ibid

¹⁴⁹ Ibid Coincidentally, the group was in Bujumbura the weekend armed groups attacked four military camps around Bujumbura.

that the report would be ready by the January AU Summit to inform the AU actors weighing in on the African Prevention and Protection Mission in Burundi (MAPROBU) and the situation on the ground. While the ACHPR briefed the AU Commission chairperson during the summit, the report was not published until May 2016, thereby limiting the visibility and the impact of the report.¹⁵⁰

III. Security

Finally, the AU PSC attempted to stabilize the Burundi crisis and to provide protection to civilians through the deployment of the African Prevention and Protection Mission in Burundi (MAPROBU) peacekeeping mission. However, the deployment of peacekeeping troops was rejected by the government, describing it as an invasion force.¹⁵¹

3.4. AU's threat of forcible intervention for human protection purposes

The 'historic and unprecedented' decision that the AU's PSC took on 17 December 2015 is a groundbreaking move that appealed praise from advocacy organizations and incited the enthusiasm of many, including critics of the AU.¹⁵² The AU PSC expressly relied on Article 4(h) for the first time and decided in its communiqué to authorize the deployment of a 5,000 strong force named the African Prevention and Protection Mission in Burundi (known by its French acronym-MAPROBU).¹⁵³

Three factors made the AU PSC decision very unique. "Primarily, not once before had the AU resorted to Article 4(h) in respect to an emerging or ongoing crisis, in spite of the fact that other crises revealed episodes amounting to crimes against humanity or war crimes or both."¹⁵⁴ Secondly, "perhaps of even better significance, the AU PSC's 17 December communiqué was

¹⁵⁰ African Commission on Human and Peoples' Rights. (2016) *Report of the delegation of the African Commission on Human and People's Rights on its fact-finding mission to Burundi. 7-13 December 2015*. Available at http://www.achpr.org/files/news/2016/05/d218/achpr_report_fact_finding_eng.pdf Accessed on May 2017

¹⁵¹ Letter from Burundi's Minister of Foreign Affairs to the President of the African Union Commission, 23 December 2015. Available at: http://www.burundi---forum.org/IMG/pdf/lettre_burundi_ua.pdf Accessed on May 2017

¹⁵² International Crisis Group. 2016. "Statement of the AU Authorisation of a Peace Missions to Burundi," Available at: <http://www.crisisgroup.org/en/publication-type/statements/statement-on-the-au-authorisation-of-a-peace-mission-to-burundi.aspx> Accessed on June 2017

¹⁵³ African Union PSC. (2015) *Communiqué of the 565th Meeting of the PSC on the Situation in Burundi*. 17 December. Available at: <http://www.peaceau.org/uploads/psc.565.comm.burundi.17.12.2015.pdf> Accessed on April 2017

¹⁵⁴ Solomon Dersso. Supra note 126 p.2

also the first occasion wherein the AU proposed it would deploy troops with or without the blessing of the government of Burundi.”¹⁵⁵ And finally, “although timelines in AU decisions usually do not include threats of sanction for failure to comply, the communiqué was also exceptional in that it gave Burundi 96 hours to air its consent or face forcible intervention.”¹⁵⁶

3.4.1. Rejecting MAPROBU

One of the most essential meetings took place on January 29th, 2016 when the PSC met at the level of heads of state and government (the December 17th meeting had convened at ambassadorial level) to consider three issues: terrorism in Africa, the crises in South Sudan and Burundi.¹⁵⁷ UN Secretary-General Ban Ki-moon also attended the open session and applauded the PSC for sending a strong signal to the entire continent and the world that member states will not stand by while the violence in Burundi escalates and human rights abuses continue unpunished.¹⁵⁸

Most member states on the PSC, however, did not fall in with this view. The majority of them did not deem it fitting to send troops to Burundi short of the government’s consent and agreed it was prudent not to force the issue as they preferred a political settlement over the deployment of troops in order not to escalate the current crisis.¹⁵⁹ One question here is why the PSC needed to ask for Burundi’s consent to deploy, as Burundi has signed and ratified the Protocol creating the PSC, hence, it is legally bound to accept and implement any decision of this body.

The principal event of the summit was the AU Assembly meeting on January 30-31st, most of which took place in closed sessions involving heads of state and their small entourages. In order to authorize an Article 4(h) military intervention in Burundi, the Assembly would have needed the support of two-thirds of AU member states, a tall order, but the AU Assembly decided the conditions in Burundi did not warrant such a response.¹⁶⁰

¹⁵⁵ Ibid

¹⁵⁶ To (for instance the recent ones such as in Central African Republic and South Sudan.)

¹⁵⁷ Jan 29 communiqué

¹⁵⁸ UN Secretary-General, Ban Ki-moon. Available at <http://www.un.org/sg/statements/index.asp?nid=9425>
Accessed on July 2017

¹⁵⁹ Gambia’s President Yahya Jammeh and Tanzania’s Foreign Minister Augustine Mahiga made particularly strong statements against the need for MAPROBU, but they reflected a majority view in the room.

¹⁶⁰ AU Summit January 2016

On February 6th, after more than a week of additional discussion between senior AU Commission personnel and the PSC members, the AU released the final text of the Council's decision. Having taken note of Burundi's rejection of MAPROBU, the heads of state at this meeting emphasized the importance of "... continuing the inter-Burundi dialogue under EAC mediation led by Uganda but with AU support. The PSC (at the level of heads of state and government) on 29 January 2016 reversed the decision on the deployment of MAPROBU because it considers it premature to send such a force to Burundi. Instead, the Council decided to dispatch a high-level delegation 'to hold consultations' with the Burundi government 'as well as other stakeholders...on the inclusive Inter-Burundian Dialogue'."¹⁶¹

3.4.2. Does Burundi's Crisis fall under Article 4(h)

While the PSC decision of 17 December gave rise to a number of legal and institutional issues, perhaps the most crucial of these was whether Burundi did indeed manifest the imminent danger of the occurrence of the grave circumstances as envisaged under Article 4(h) of the Constitutive Act, which would warrant forcible intervention in the face of a refusal from Burundian government. As discussed in the previous chapter, forcible intervention under Article 4(h) is predicated on reasonable or *prima facie* evidence of actual occurrence or credible fear of imminent occurrence of the grave circumstances, which the Burundian government manifestly failed or was unable to address.

Just Cause is the primary criterion that must be fulfilled before the AU can decide on forcible intervention. According to the AU Constitutive Act, intervention for human protection purposes is justified only in response to genocide, war crimes and crimes against humanity. At the time of the 2016 summit, the AU PSC did not present or adequately articulate a strong case capable of convincing member states of the existence of such large scale loss of life or grave circumstances as per the requirements of Article 4 (h) of the AU Constitutive Act.¹⁶²

¹⁶¹ final text of the Council's decision Available at: <http://www.peaceau.org/uploads/571-psc-com-burundi-29-1-2016.pdf> Accessed on June 2017

¹⁶² Armed Conflict Location and Event Data Project, *Burundi Local Data on Recent Unrest (26 April 2015-31 January 2016)*. Available at <http://www.crisis.acledata.com/update-burundi-local-data-on-recent-unrest-26-apr-2015-31-january-2016/> Accessed on May 2017 (Two factors contributed for this. First the beginning of 2016 saw a drastic reduction of violence in Burundi compared to December. secondly, with the failure of the ACHPR mission to complete its report before the AU Summit. And finally the Burundian government accepted calls by the Ugandan

The second consideration is related to the requirement of last resort. This entails, in the words of ICISS report that “[e]very diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored” before resorting to an armed intervention.¹⁶³ Concerning the proposed deployment of MAPROBU short of Burundi’s consent, PSC member states expressed the view that there was room for working out the Burundi crisis through dialogue,¹⁶⁴ hence implying that diplomatic and non-military avenues had not been entirely and sufficiently carried out.

Paul Williams observed that, “the main drivers behind this communiqué were the reports of escalating violence that the AU was receiving from the field and anxiety that the existing mediation plan was failing to produce the desired progress.”¹⁶⁵

Therefore, in framing the decision of the PSC to deploy MAPROBU based on Article 4(h), those who crafted the 17 December 2015 PSC communiqué seemed to have “opted for erring on the side of caution when they deemed that the conditions in Burundi demonstrated risks of grave circumstances and warranted preventive intervention even without consent.”¹⁶⁶

3.4.3. Status of MAPROBU

Some senior Burundian officials were jubilant in declaring the demise of MAPROBU after the PSC meeting on January 29th. For example, Nkurunziza’s special adviser on communications, Willy Nyamitwe, “pronounced MAPROBU dead and even showed the world how he would

government to convene a dialogue for the first time since the July 2015 presidential election which gave the impression that the government was indeed addressing the insecurity by engaging in an inclusive and genuine dialogue, which in turn challenged the argument that a force was needed to promote dialogue.)

¹⁶³ ICISS supra note 17

¹⁶⁴ Solomon Deresso supra note 126 P.7 Indicating the possibility of such avenue, Steve McDonald rightly observed that, “*the only way to engage Nkurunziza constructively is in private, exploring with him ways in which to address the crisis...possibly with a trusted party like former [Tanzanian] President [Jakaya] Kikwete or perhaps a senior South African figure, all individuals who[m] Nkurunziza trusts.*”

¹⁶⁵ Williams, Paul. 2016. “Special Report: The African Union’s Coercive Diplomacy in Burundi,” *IPI Global Observatory*. Available at: <http://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/> Accessed on May 2017

¹⁶⁶ Solomon Dersso, supra note 126, p.3

celebrate. He went on to question why the AU would bother to send a delegation to Burundi when the government's position was already known.”¹⁶⁷

However, it's important to recall that the December 17th communiqué authorized MAPROBU for an initial period of six months and neither its subsequent decision on January 29th nor the AU Assembly decision un-authorized the mission.¹⁶⁸ Rather, the PSC subsequently decided its deployment would be premature and the Assembly said that there was no current basis for an Article 4(h) military intervention in Burundi. “This means that MAPROBU's deployment prospects, while significantly diminished, hinge, once again, on a high-level dialogue between the government of Burundi and the AU delegation.”¹⁶⁹

“In sum, there might yet be scope for a MAPROBU deployment, either as a result of the efforts of the AU high-level delegation, or to help implement any agreement that might emerge from the inter-Burundi dialogue. In this sense, ensuring real progress in the inter-Burundi dialogue might resurrect MAPROBU, although perhaps not in the form it was originally articulated.”¹⁷⁰

¹⁶⁷ Willy Nyamitwe, Nkurunziza's special adviser on communications. Available at: <https://twitter.com/willynyamitwe/status/693482709960753152> Accessed on July 2017

¹⁶⁸ Williams Paul. Supra note 164

¹⁶⁹ Ibid

¹⁷⁰ Ibid

CHAPTER FOUR

4. Analysis of AU's Intervention: Aspiration versus Reality

4.1. Introduction

This is the crux of the study, it analyses the challenges faced by the AU in its attempts to implement peace and stability measures in Burundi. This chapter will bring to light some of the vulnerabilities of the AU PSC and why its aspiration to intervene poles apart from its commitment.

The threat of an Article 4(h) intervention was always going to prove difficult to implement. In generic terms, the credibility of such threats can be enhanced if they are communicated clearly and consistently (the more actors voicing their support, the better), if the coercer has a reputation for following through by balancing sovereignty and non-indifference, if the member states stand in unity and if they possess the required material capabilities.

4.2. Balancing the principles of sovereignty and non-indifference

AU Member States continue to highlight (more or less explicitly) national and regional political objectives in the face of prospective military interventions in their country.¹⁷¹ Despite the fact that principles of non-indifference exist in the foundational documents of the AU, when they stand facing prospective military intervention by the AU, they solidly uphold the principle of sovereignty and protect their own national interests as well as regional political objectives.¹⁷² Some observers have therefore noted a discrepancy between the AU's ambition to prevent and resolve conflicts, and the political willingness to do so.¹⁷³

Some of the elements from the PSC Protocol which would restrain the AU tendency to respond to a certain conflict are the respect for the sovereignty and territorial integrity of Member States (Art. 4(e)) and the principle of non-interference by any Member State in the internal affairs of

¹⁷¹ Desmidt, S. *Supra* note 83 p.37

¹⁷² Y. Bouka, *supra* note 118

¹⁷³ International Crisis Group (ICG). 2016b. *The African Union and the Burundi Crisis: Ambition versus Reality*. Briefing 122. Africa. 28 September 2016

another (Art. 4(f)).¹⁷⁴ The restraining and compelling principles of the AU Constitutive Act and the PSC Protocol are weighted against each other before deciding whether or not to tackle a conflict and how.

“A deeper examination of the decision-making processes by the AU in Burundi highlights the difficult balance between the principles of non-indifference and sovereignty and shows that AU Member States are reluctant to set a precedent that goes against the political objectives and against the consent of a host state. Especially as regards military intervention there is a strong tendency to uphold the principle of sovereignty and adhere to the consent of the host state.”¹⁷⁵

Although diplomatic interventions and mediation efforts are less dependent on the consent of the recipient country, there are examples of it playing a role there too. For instance, the deployment of an election related mission, as a diplomatic intervention, by the AU in a country facing elections depends on the invitation, i.e. consent of the government.¹⁷⁶

Theoretically speaking, the AU have not only the ability but also the mandate to deploy the essential instruments to respond to a wide variety of violent conflicts however practice shows otherwise in particular if the consent of a recipient member states is missing.¹⁷⁷ As such, the willingness and ability to deploy peace-keeping missions is dependent on this balance between sovereignty and non-indifference.

The objection by the government of Burundi to deploy a 5,000 strong AU force via the EASF, despite the original agreement in the PSC, was a clear rebuff of the principle of non-indifference.¹⁷⁸ The escalation of tensions and violent incidents in Burundi initially prompted strong efforts by both the AU and the East African Community (EAC). The AU as a whole was divided over the situation in Burundi and on the question of finding the balance between non-indifference and sovereignty. Many AU member states favored a less confrontational and interventionist approach than the more proactive PSC.¹⁷⁹

¹⁷⁴ PSC Protocol, supra note 48 art.4 (e), (f)

¹⁷⁵ Desmidt, S. Supra note 83. p.37

¹⁷⁶ Id

¹⁷⁷ Id

¹⁷⁸ Id p.38

¹⁷⁹ ICG supra note 151

4.3. Solidarity amid Member States

The other challenge that emerged when tabling MAPROBU in the AU Summit was that Member States failed to maintain a public show of unity.¹⁸⁰ According to some observers, the decision-making process around the deployment of a mission in Burundi highlighted the lack of consistency between the AUC and the PSC, where the AUC was seen as having overstepped its boundaries.¹⁸¹

Thus, the Burundian government exploited on internal divisions among AU Member States by consistently prioritizing EAC's decisions and leadership, or lack thereof, over the AU recommendations.¹⁸² This reflects Burundi's opportunistic understanding of the dynamics of the balance of power among member states.¹⁸³ Unless AU Member States genuinely unite and speak with one voice, the AU would not be able to perform its tasks as a continental organization.

4.4. African states preferring political dialogue over intervention

The issue of lack of will to engage militarily in a country is a serious political issue and requires primary attention.¹⁸⁴ Therefore, for the AU to intervene militarily, it was mandatory to have accord among African states on the type of intervention.

Potentially, there are various political reasons for choosing diplomatic intervention over military. For starters, a state might be believed to have the ability to handle a conflict situation on its own; there might be little or no danger of further escalation of the violence to a grave circumstance falling under Article 4(h); or there might have been a significant level of de-escalation in the conflict recently.¹⁸⁵ In general, the AU is famous for its tendency not to get involved in internal affairs, heeding the principle of sovereignty, even if there is a potential for escalation.

¹⁸⁰ Ibid p.1

¹⁸¹ Desmidt S. Supra note 83 p.38

¹⁸² ICG, supra note 151 p.1

¹⁸³ Gnanguênon, A. (2014) Cooperation between the Africa Union and Regional Economic Communities: a challenge for the operationalisation of the APSA, *Dakar Forum*. Available at <http://www.dakarforum.org/wp-content/uploads/2015/08/Cooperation-between-the-African-Union-and-the-Regional-Economic-Communities-a-challenge-for-the-operationalisation-of-the-APSA-Gnanguenon.pdf> Accessed on June 2017

¹⁸⁴ M Wight *Diplomatic investigations: Essays in the theory of international politics* (1966) p.122.

¹⁸⁵ Desmidt S. Supra note 83. p.38

Despite potentially solid arguments not to intervene in a violent conflict, larger AU member states remain relatively more insulated from diplomatic interventions, statements condemning a certain situation or escalation of conflict or mediation efforts.¹⁸⁶ .

4.5. Inadequate resources

Credible threats also require the material capabilities to carry them out. The institutional capacity of the AU to deploy MAPROBU over a short term seems very unlikely, even if the AU had Burundi's consent. The AU's ambitions have not been backed with the funds necessary for independent and determined actions.¹⁸⁷ So, was the AU ready to conduct an Article 4(h) intervention in Burundi? On Burundi, the AU's contingency planning was led by the Eastern Africa Standby Force (EASF). Declared operational in December 2014, the EASF has yet to deploy its composite regional force but it would probably have been able to generate a force if Burundi's government had consented to MAPROBU's deployment. Indeed, the EASF's contingency planning was based solely on the assumption that Burundi's government would accept MAPROBU.

There is also the issue of logistical support. If the AU Assembly had authorized MAPROBU's deployment, either with or without the consent of Burundi's government, it would have needed external donors to assist the mission logistically. In its December 17th communiqué, the PSC had explicitly asked for such UN support in the event of a consensual MAPROBU deployment.¹⁸⁸

¹⁸⁶ Desmidt S. Supra note 83. p.39

¹⁸⁷ Williams, Paul. Supra note 80

¹⁸⁸ PSC Communiqué

CHAPTER FIVE

5. Conclusions and Recommendations

5.1. Conclusion

Noting the ineffectiveness of the OAU and from the frustration of relying on the UN to deal with the raging conflicts in Africa, African leaders, through the new continental organization, the African Union (AU), opted for a new approach spelled out in objectives and principles aimed at *inter alia* addressing effectively the issue of conflicts and human rights in Africa. In this regard, the drafters of the AU Constitutive Act came up with the brainchild of endowing the AU with the right of intervention in Member States in some particular circumstances. Hence, in accordance with paragraphs (h) and (j) of Article 4 of the AU Constitutive Act, the AU has the right to intervene within Member State(s) in case of “grave circumstances, namely: war crimes, genocide and crimes against humanity” or, at the request of Member States, “in order to restore peace and security.” Through these provisions, the AU shifted from the non-interventionist (indifference) policy of the OAU to an interventionist (non-indifference) policy.

The AU’s interventionist policy, the first of its kind for regional organizations, enshrined in the foregoing provisions (Article 4(h) and (j)) is worth being highly praised. Arguably, an effective implementation of this right would benefit primarily African people and States and ultimately the international community at large. However, despite the likely positive aspects, one cannot help but point out that the AU’s right of intervention as provided for under Article 4 (h) of the AU Constitutive Act would hardly be compatible with existing normative international law on the use of force if exercised without either the consent of the State concerned or the Security Council’s authorization. In fact, under the collective security system laid down under Chapter VII of the UN Charter it is up to the Security Council to take enforcement actions, including military intervention, against a State in case of a threat to the peace, a breach of the peace and an act of aggression. In the implementation of this responsibility, the Security Council has the legal power to resort to regional organizations and to authorize them to exert such responsibility on its behalf. It is in this perspective that Chapter VIII of the UN Charter regulating the actions of regional organizations clearly indicates in its Article 53 (1) that “no enforcement action” such as

the use armed force can be undertaken by a regional organization “without the authorization of the Security Council.” Hence, as it stems from this article and as the international law at large stands today, no other UN organ, namely the UN General Assembly and *a fortiori* regional organizations, is entitled to stand for or substitute the Security Council and undertake or authorize military intervention whatever the circumstance and legal basis. This means that a military intervention undertaken by regional organizations is only lawful when it is authorized by the Security Council and not by any other organ of the UN or entity.

The AU seems to have vaguely and skilfully dodged the authorization of the Security Council as far as military intervention is concerned and as required by Article 53 (1) of the UN Charter. None of its major texts, namely the AU Constitutive Act and the PSC Protocol, subjects the exercise of such a right of intervention in case of “grave circumstances” to a prior authorization of the UN Security Council when the AU may need to resort to military intervention. The omission of the Security Council’s authorization was presumably, to avoid the shortcomings of relying on such authorization.

It is also true, on the other hand, that a strict reliance on the operation of the collective security system of the UN for the protection of human lives may result in the deaths of thousands of people rather than damage (say a violation of the law) which would result from the violation of the UN Charter through an unauthorized intervention. In fact, in some cases the Security Council has demonstrated its inability or unwillingness to effectively discharge the role expected of it and in other cases it has not acted within the reasonable time to save thousands of human lives from being exterminated. In such circumstances should other international law actors (States and regional organizations) fold their arms and watch the macabre scenes all for the sake of respecting international legal norms? Obviously the international moral conscience does not allow this; they hence call those actors into action. Therefore, a military intervention in such circumstances of an inability or unwillingness on the part of the Security Council to save threatened human lives is said to be legitimate. However, the legitimacy of the intervention does not transform it into a legal one. In the same vein, the AU’s right of intervention pursuant to ‘grave circumstances’ stemming from, among other things, the frustration of the Security Council’s inaction with regard to African conflicts may be considered as being legitimate but would still remain illegal as long as the AU would intervene militarily without the Security

Council's authorization. *De lege lata*, a military intervention by the AU in a Member State in case of the described grave circumstances is subject to prior authorization by the UN Security Council; should the latter fail or refuse to intervene, then the AU, pursuant to a decision by the AU Assembly, has the duty to intervene in order to stop the ongoing situation. But even under this last possibility the AU is still under a duty to seek at least a *post facto* authorization from the Security Council.

When we come to Burundi's case, the AU has kept a busy agenda on Burundi since the beginning of the crisis. From its attempts to maintain the Arusha agreements as the foundation of the process, to pushing for the deployment of 5,000 peacekeepers known as MAPROBU to maintain security in Burundi, many efforts have been made to create the necessary environment for dialogue between key Burundi stakeholders involved in the current crisis.

The AU's intervention attempt that has been praised as a step toward stability and peace is in reality evidence of the AU's weakness vis-à-vis its members, as it clearly shows the limited ability of the AU to respond effectively to crisis. As an organization that on paper seeks the well-being of its population, the AU has not done enough in this crisis to prove its commitment to its principles of non-indifference.

Despite all its challenges, the AU's continued involvement, pressure and work with international partners have had some positive impact on the crisis. At critical moments, AU PSC communiqués have been followed by sharp decreases in violence and positive movements, albeit short-lived, on the part of the regime. But the AU's limited ability to have greater influence on the Burundi crisis, despite its heavy involvement, has highlighted the vulnerabilities in the AU Peace and Security Architecture, which is likely to have consequences for future AU involvements on the continent.¹⁸⁹

Currently, the Burundian government continues to take advantage of the AU's ad hoc and decentralized nature of engagement and keep on dictating its conditions without offering the necessary space for constructive dialogue towards a political resolution.

¹⁸⁹ Since the beginning of the Burundi crisis, and under its cover, other countries have changed their constitutions, some more strategically (Rwanda), and others in clear violation of Charter for Democracy (Congo-Brazzaville) with no consequence from the AU.

5.2. Recommendation

- It is important to remark that the practice of the AU as far as military intervention in case of grave circumstances is concerned is so far not sufficient to conclude the actual exercise of the right of intervention as envisaged under Article 4 (h) of the AU Constitutive Act. Hence, I forward the following recommendations.
- The lack of practice may not be grounded in the lack of circumstances falling under the application of Article 4 (h) but rather in the limited capacity of the AU to carry out such an intervention. Therefore, members should strengthen the capacity of The AU, especially the ASF- financially and logistically- and make it ready to be deployed when the circumstance requires it.
- Secondly, the ‘words’ used in the AU’s texts is of a nature which contributes to the non-implementation of Article 4 (h). In accordance with Article 4 (h) of the AU Constitutive Act (this is also the case of the Protocol on Peace and Security), the AU does not have the ‘responsibility to intervene’ or the ‘legal obligation to intervene’ but rather it has a ‘right to intervene’ which it can exercise or not, as the case may be. From the wording of its texts, the AU is does not seem to be under any legal obligation to intervene under the described circumstances but rather it enjoys a discretionary power to decide when and how to intervene or simply not to intervene. So, the AU ought to come up with an interpretation or amendment making intervention a responsibility when the circumstances require it to do so.
- The AU’s intervention is a reactive measure and not a preventive one. However, the AU should put a great deal of emphasis on preventive measures.
- Finally, the AU must balance the need to intervene with respect for sovereignty of states. The AU must not allow claims of sovereignty and independence made by the governments of member states to inform, and perhaps, cloud its decision. Emphasis should be placed on the plight of the people who are being exploited, displaced and forced into homelessness and/or exile, maimed, and killed by violence in these countries.

REFERENCES

A. Books

- Antonio Cassese, (2005), *International Law, Second edition*, Oxford, Oxford University Press
2005.
- Bah, A. S; Choge-Nyangoro, E.; Dersso, S.; Mofya, B. and Murithi, T. 2014. *The African Peace and Security Architecture, A Handbook*. Friedrich Ebert Stiftung. 2014
- BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 86–87 (2000), University of Wales Press.
- Kioko, B. (2003).The right of intervention under the African Union’s Constitutive Act: From non-interference to intervention. Vol. 85 No 852.
- Kunschak, M. 2006. The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorization? *South African Yearbook of International Law* 31, 195-208.

B. ARTICLES

- African Policy Brief (APB). Missing the Target: The African Union’s Mediating Efforts in Burundi. Yolande Bouka No.15 2016
- Armed Conflict Location and Event Data Project, *Burundi Local Data on Recent Unrest (26 April 2015-31 January 2016)*. Available at <http://www.crisis.acledata.com/update-burundi-local-data-on-recent-unrest-26-apr-2015-31-january-2016/>
- Armed Conflict Location and Event Dataset (ACLED). Country Report: Burundi Crisis Year one. May 2016 .
- Bjorn Moller, *The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa* 33 (Danish Inst. for Int’l Studies, DIIS Working Paper No. 2005/4), <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=18629&lng=en>
- Bouka, Y. 2016. “*Missing the Target: The African Union’s Mediating Efforts in Burundi.*” Egmont Africa Policy Brief. 15 June 2016

Counting Gains, Filling Gaps: Strengthening African Union's Response to Human Rights Violations Committed in Conflict Situations. Amnesty International Document. (Amnesty International Document from here on).

Kuwali 'The end of humanitarian intervention: Evaluation of the African Union's right of intervention'. African Journal on Conflict Resolution. Vol.9 No.1 2009.

Dersso, S. (2016) *To Intervene or Not to Intervene? An Inside View of the AU's Decision-Making on Article 4(h) and Burundi*. Occasional Paper, Medford, MA: World Peace Foundation.

Desmidt, S. 2016. *Peacebuilding, conflict prevention and conflict monitoring in the African Peace and Security Architecture*. ECDPM background note. March 2016

Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* PP.137–145 (1999).

Girmachew Aneme, 'The Institutionalization of Cosmopolitan Justice: The Case of the African Union's Right of Intervention', *MJIL Humphrey Supplement*, Vol.22 (2013) PP.5

Gnanguênon, A. (2014) *Cooperation between the Africa Union and Regional Economic Communities: a challenge for the operationalisation of the APSA*, *Dakar Forum*. Available at <http://www.dakarforum.org/wp-content/uploads/2015/08/Cooperation-between-the-African-Union-and-the-Regional-Economic-Communities-a-challenge-for-the-operationalisation-of-the-APSA-Gnanguenon.pdf>

Greg Puley 'The responsibility to protect: East, West and Southern African perspectives on preventing and responding to humanitarian crises'. (2005) available at:

http://www.humansecuritygateway.com/documents/AJCR_EndOfHumanitarianIntervention_EvaluationAUsRightOfIntervention.pdf

<http://www.responsibilitytoprotect.org/files/ploughshares.pdf>

IANSA, OXFAM & SAFERWORLD AFRICA'S MISSING BILLIONS: INTERNATIONAL ARMS FLOWS AND THE COST OF CONFLICT (2007) *available at* http://www.oxfam.org/en/policy/bp107_africas_missing_billions

International Commission on Intervention and State Sovereignty. 2001. “The Responsibility to Protect,” Available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

International Crisis Group (ISG). 2016b. *The African Union and the Burundi Crisis: Ambition versus Reality*. Briefing 122. Africa. 28 September 2016

M Mwanasali ‘From non-interference to non-indifference: The emerging doctrine of conflict prevention in Africa’ in J Akokpari et al (eds) *The African Union and its institutions* (2008)

Special Report: The African Union’s Coercive Diplomacy in Burundi. December 18, 2015 by Paul D. Williams Available at: : <https://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/>

Stelios Michalopoulos & Elias Papaioannou, *The Long–Run Effects of the Scramble for Africa* 1–2 (Nat’l Bureau of Econ. Research, Working Paper No. 17620, 2011) *available at* <http://www.nber.org/papers/w17620.pdf>

TIM MURITHI, “The African Union’s Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect?” IPG I, 2009.

Williams, Paul. 2016. “Special Report: The African Union’s Coercive Diplomacy in Burundi,” *IPI Global Observatory*. Available at: <http://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/>

Willy Nyamitwe, Nkurunziza’s special adviser on communications. Available at: <https://twitter.com/willynyamitwe/status/693482709960753152> Accessed on July 2017

Y. Bouka , BURUNDI: BETWEEN WAR AND NEGATIVE PEACE. Centre for Conflict Resolution 2017. P.17-33.

C. Laws policy instruments and other official documents

African Commission on Human and Peoples' Rights. (2016) *Report of the delegation of the African Commission on Human and Peoples' Rights on its fact-finding mission to Burundi. 7-13 December 2015*. Available at

http://www.achpr.org/files/news/2016/05/d218/achpr_report_fact_finding_eng.pdf

African Commission on Human and Peoples' Rights. 2016. "Press Release: Fact-Finding Mission of the African Commission on Human and Peoples' Rights to Burundi (7 – 13 December 2015)". Available at: <http://www.achpr.org/press/2015/12/d285/>

African Union PSC. (2015) *Communiqué of the 565th Meeting of the PSC on the Situation in Burundi*. 17 December. Available at:

<http://www.peaceau.org/uploads/psc.565.comm.burundi.17.12.2015.pdf>

African Union Assembly of Heads of State and Government, Decisions on the Periodicity of the Ordinary Sessions of the Assembly, Assembly/AU/Dec.53 (III) (July 2004)

African Union Commission. (2015) *AU Calls for Restraint in Burundi*. Press release, 26 April. Available at <http://www.au.int/en/newsevents/25807/au-calls-restraint-burund>

African Union Executive Council, Decision on the Election of Members of the PSC, EX/CL/Dec.78 (IV) (March 2004).

African Union. (2007) *African Charter on Democracy, Elections and Governance*. Available at <http://www.achpr.org/instruments/charter-democracy/>

African Union. (2015) *Beginning of the Deployment in Burundi of the African Union Human Rights Observers and Military Experts*, Press release, available at:

<http://www.peaceau.org/en/article/beginning-of-the-deployment-in-burundi-of-the-african-union-human-rights-observers-and-military-experts>

African Union. (2015) *The African Union Strongly Condemns the Acts of Violence in Burundi*, Press release. Available at <http://www.peaceau.org/en/article/the-african-union-strongly-condemns-the-acts-of-violence-in-burundi>

AU Assembly Rules of Procedure *supra* note

AU PSC Communiqué, 17 December 2015. Available at:

<http://www.peaceau.org/uploads/psc.565.comm.burundi.17.12.2015.pdf>

Boutros-Ghali, Boutros (1992),

Final text of the Council's decision Available at: <http://www.peaceau.org/uploads/571-psc-com-burundi-29-1-2016.pdf>

Human Rights Watch. (2016) Burundi: Abductions, Killings, Spread Fear. Available at <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear>

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) [hereinafter THE RESPONSIBILITY TO PROTECT].

International Crisis Group. 2016. "Statement of the AU Authorisation of a Peace Missions to Burundi," Available at: <http://www.crisisgroup.org/en/publication-type/statements/statement-on-the-au-authorisation-of-a-peace-mission-to-burundi.aspx>

Julian Brett, *The inter-relationship between the African Peace and Security Architecture, the Global Peace and Security Architecture and Regional Initiatives* (2013); Security Council Report *Working together for peace and security in Africa: The Security Council and the AU PSC* (2011).

Letter from Burundi's Minister of Foreign Affairs to the President of the African Union Commission, 23 December 2015. Available at: http://www.burundi-forum.org/IMG/pdf/lettre_burundi_ua.pdf

Peace and Security Directorate, AFRICAN-UNION.ORG Available at: http://www.african-union.org/Structure_of_the_Commission/depPEACE%20AND%20SECURITY%20DIRECTORATE.htm.

Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Centre for Human Rights, Pretoria, 2012.

Rep. of the Chairperson of the Comm'n of the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa, PSC, 9th Sess. PSC/AHG/3(IX) (May 25, 2004), available at <http://www.peaceau.org/uploads/report-9th-en.pdf>.

Rep. of the Secretary-General's High-Level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565, ¶ 198, 207 (Dec. 2, 2004), *available at*:
<http://www.un.org/secureworld/report2.pdf>.

Statement of Commitment to Peace and Security in Africa, Issued by the Heads of State and Gov't of the Member States of the PSC of the African Union, PSC ¶ 8, PSC/AHG/ST.(X) (May 25, 2004) *available at* http://www.africa-union.org/News_Events/Calendar_of_%20Events/Lancement%20PSC/Statement.pdf.

The 2005 World Summit Outcome, A/RES/60/1, 24 October 2005,

The AU PSC Jan 29 communiqué

The Common African Position on the Proposed Reform on the United Nations: "The Ezulwini Consensus," Mar. 8, 2005, Ext/EX.CL/2 (VII)

U.N. General Assembly, Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields, U.N. Doc. A/60/L.1, 138-140 (Sept. 15, 2005)

U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, 48, Millennium Report, (Apr. 3, 2000) (Kofi A. Annan), *available At*:
<http://www.un.org/millennium/sg/report/>.

UN Secretary-General, Ban Ki-moon speech. Available at:
<http://www.un.org/sg/statements/index.asp?nid=9425>

UNSC Resolution 788, 3138th Meeting, 19 November 1992, S/RES/788