Stosunki Międzynarodowe – International Relations
nr 4 (t. 51) 2015

ISSN 0209-0961
doi: 10.7366/020909614201513

The Role of Regional Organisations in the Interpretation and Implementation of the Responsibility to Protect. The Case of the African Union and Its Involvement in the Libyan Crisis[1]

Dorota Heidrich

University of Warsaw

Responsibility to Protect (RtoP or R2P), a term coined in 2001, remains one of the central concepts in debates about possible modification of the rules of the use of force for the protection of civilians in armed conflict and beyond. A decade after the conception of RtoP, the Secretary General (SG) of the United Nations published his report on the role of regional organisations in the implementation of RtoP. The report's findings are especially interesting in light of the involvement of the African Union (AU) in the Libyan conflict and of further consequences of these actions. The main research scope of the present paper is to determine the patterns of behaviour of regional organizations as regards their stance on mass human rights abuse and international crimes committed against the civilian population and on the subsequent question of the legitimacy of the use of force for the protection of the oppressed. The analysis deals first with RtoP's legal standing, which allows us to understand the nature of obligations for international actors that RtoP creates. The argumentation follows with the presentation of the SG's report and then moves to the AU's involvement in the Libyan crisis and other instances of mass atrocity crime in Africa.

Keywords: responsibility to protect, United Nations, African Union, regional organisation, Libyan conflict, mass atrocity crimes.

Introduction

In June 2011, the Secretary General (SG) of the United Nations (UN) presented to the General Assembly (GA) the report *The role of regional and subregional arrangements in implementing the responsibility to protect*. It was the third one in a series of studies on the responsibility to protect (RtoP or R2P). The 2011 document deals with a very

Dorota Heidrich – Ph.D., Institute of International Relations, University of Warsaw.

[1] The article is an amended version of the paper delivered at the 8th Pan-European Conference on International Relations (Warsaw, 18–21 September 2013).

important issue for RtoP: It attempts to provide answers and guidelines to the role that regional organisations (regional IOs) may and should play in framing and implementing RtoP. It goes without saying that regional arrangements, if used effectively, to the good of the citizens of their member countries, are better equipped to implement solutions and ideas. It is similarly obvious that not all regional arrangements are prepared and ready to act, and this is not only for logistical or financial imperfections but often for the lack of consensus between the members (which equally applies to universal organisations, such as the UN). 2011 was also marked by the UN Security Council's actions (authorisation of the use of force for the protection of civilians) towards Libya (and Ivory Coast).

The activities of the African Union (AU) (as well as of the League of Arab States and the Organisation for Islamic Cooperation) in resolving the Libyan crisis were tantamount. As some claimed, the Libyan case even led to a 'shift away from reliance on sovereign consent […] toward reliance on the consent of regional organisations in Security Council deliberations about the authorisation of military intervention to protect civilians'.[2] However, it is necessary to ask, whether the involvement of regional arrangements in Libya is a true proof of the conception of a new pattern of behaviour among regional organisations in situations when gross violations of human rights have occurred or are about to occur on the territory of their member states. This analysis claims that such predicaments are far-fetched; however it is a common pattern that regional IOs take a stand when mass atrocity crimes occur and – at least verbally – condemn the fact of their occurrence. Decisions about robust action are often difficult to reach; Syria for example has not seen much action from regional arrangements (League of Arab States, LAS) when diplomatic solutions failed. As simple (or as complicated perhaps) as it may seem, the major element lacking from decision making processes on behalf of oppressed populations is political will. In some cases, regional organisations are ready to become important agents in the decision-making process regarding the use of RtoP or measures in RtoP situations (e.g.: Kenya, Ivory Coast, Libya or recently Burundi), while in others it is the opposite (e.g. Syria). Presumably, the engagement of regional IOs largely depends on the interests of their member states and the actions that these interests generate. The latter does not only result from weighing the costs and benefits of outcomes of their future behaviour but also from their belief that certain actions in relevant situations are right while others are not.[3]

The present paper's main research scope is to analyse the roles regional IOs may play in further interpretation and implementation of RtoP in the light of the experience from the AU's involvement in the intervention in Libya.

---

[2] L. Glanville, 'Intervention in Libya: From Sovereign Consent to Regional Consent', *International Studies Perspective* 2013, Vol. 14, No. 3, p. 325.

[3] See: K. Sikkink, *The Justice Cascade. How Human Rights Prosecutions Are Changing World Politics*, New York – London: W. W. Norton & Co., 2011, p. 236.

The paper is structured in the following way: after the presentation of the conceptual framework, it offers an overview of RtoP. Extensive consideration is given to its current standing (Is it a legal norm? A moral rule of behaviour? A set of moral or political principles?) as this will be helpful in understanding whether international actors, among them regional IOs, have normative obligations resulting from RtoP. The analysis of RtoP presented in this paper aligns itself with extensive constructivist studies and research claiming that changing patterns of behaviour among regional organisations may result from norm evolution processes within the larger structure of the international community as well as within the structure's basic components.[4] The next part of the article focuses on the 2011 UNSG report on the role of regional arrangements in implementing RtoP and then on the African Union (AU) and its involvement in RtoP framing; this organisation's background and experience in reacting to mass human rights violations is, this paper argues, extremely important for the creation of the concept – at least some of RtoP roots can be traced back to the solutions to African problems undertaken by African actors. Later on, attention moves to the roles played by the AU in the Libyan crisis. The last part concludes on the findings, attempting to draw patterns of the regional arrangements' involvement in RtoP framing and implementation in the context of current RtoP standing and with relation to future mass atrocity crimes cases.

Conceptual framework

The role of international organisations (among them, regional IOs) within the process of norm[5] evolution is significant. International organisations, as one of the many kinds of institutions[6] that facilitate norm evolution, are forums in which new concepts

[4] For more on international norm evolution, their meaning and impact on the international community and domestic law see: A. Florini, 'The Evolution of International Norms', *International Studies Quarterly* 1996, Vol. 40, No. 3, pp. 363–389; C. O'Faircheallaigh, *IR theory and domestic adoption of international norms*, "International Politics" 2014, Vol. 51, No. 2, pp. 155–176; A. P. Cortell, J. W. Davis, Jr., 'Understanding the Domestic Impact of International Norms: A research Agenda', *International Studies Review* 2000, Vol. 2, No. 1, pp. 65–87.; S. Zwingel, 'How do norms travel? Theorising International Rights in Transnational Perspective', *International Studies Quarterly* 2012, Vol. 56, No. 1, pp. 115–129; A. Wiener, 'Contested Meanings of Norms: A Research Framework', *Comparative European Politics* 2007, Vol. 5, pp. 1–17; A. Wiener, U. Puetter, 'The Quality of Norms is What Actors Make of It. Critical Constructivist Research on Norms', *Journal of International Law and International Relations* 2009, Vol. 5, No. 1, pp. 1–16; A. Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', *International Organization* 2004, Vol. 58, No. 2, pp. 239–275; M. Finnemore. K. Sikkink, *International Norm Dynamics and Political Change*, "International Organization" 1998, Vol. 52, No. 4, pp. 887–917. For human rights norms especially see: T. Risse, S. C. Ropp, K. Sikkink, *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999; T. Risse, S. C. Ropp, K. Sikkink, *The Persistent Power of Human Rights. From Commitment to Compliance*, Cambridge: Cambridge University Press, 2013; K. Sikink, *The Justice…*, *op. cit.*

[5] For the purpose of the present analysis, norms are understood as standards of appropriate behaviour for actors with a given identity. See: M. Finnemore, K. Sikkink, op.cit., p. 891.

[6] Institutions are here understood most broadly, following the definition proposed by John Duffield: international institutions may be defined as 'relatively stable sets of related constitutive, regulative, and

are discussed; states can express their views, doubts and reservations. Convergence of views between member states often could not be reached if it was not facilitated by international organisations. International organisations coordinate the actions of member states, frequently also involving non-members in cooperation. Another role of IOs in this area is the normative function – the organs of IOs make decisions (rarely legally binding *pro foro externo*) that set certain standards for member (or member and non-member) states. Finally, the officials of international governmental organisations (IGOs) or simply individuals taking floor during debates in IGOs' organs can play the role of 'norm entrepreneurs'[7]; how much stress is placed on certain issues in the agenda of an organisation will largely depend on the interests and charisma of international officials or presidents of relevant IO organs.

Regional organisations may provide universal or external concepts with regional ownership (especially when the contested norms are highly sensitive to regional culture, history or political situation), and that potentially is a strengthening factor for norm effectiveness.

As Martha Finnemore claimed in her seminal book *National Interests in International Society*, 'states are socialised to accept new norms, values, and perceptions of interest by international organisations'.[8] She understands international organisations as a form of the international system, a structure. This structure makes states socialised and as a result they adopt certain values and rules defined by the 'logic of appropriateness' (not necessarily excluding other logics, e.g.: of a 'rationalist' character, i.e. the 'logic of consequence')[9]. However, this pattern will apply to situations in which a norm is securely embedded and institutionalised within a relevant organisation. At the time of its evolution, in the phase when the norm is being contested, states' behaviour towards it may fluctuate thus influencing the structure in its attitude towards the norm. Evidently, the opposite may take place as well. In the absolute majority of international governmental organisations decisions are made through intergovernmental processes (not supranational). Therefore, the acceptance of a new norm by an organisation will – to a large extent – depend on the existence or non-existence of political consensus among the members. Some states will have the power to influence others, to build coalitions in favour of certain norms. If their arguments are strong enough, even in very controversial issues, the followers will follow the leaders. But if opposing groups have

---

procedural norms and rules that pertain to the international system, the actors in the system (including states as well as non-state entities), and their activities'. See: J. Duffield, 'What are international institutions?', *International Studies Review* 2007, Vol. 9, No 1, pp. 1–22 (pp. 7–8).

[7] 'Norm entrepreneurs' are individuals who initiate discussions about certain issues that are dear to them. They manage to convince international actors to promote certain ideas and later turn them to norms. Examples of such individuals are many; to name just two of them: Rafał Lemkin and his life's work on the prohibition of genocide; Henry Dunant, who facilitated the promotion of humanitarianism.

[8] M. Finnemore, *National Interests in International Society*, Ithaca–London: Cornell University Press 1996, p. 5.

[9] Ibidem, p. 29.

equally strong leaders, consensus is unlikely. However, even organisations that operate only at the interstate policy-making level are often able to present **their own** views, not necessarily aligning themselves with the views of their members. International organisations seen as bureaucracies use their own ability to orient action and create social reality which directs states' actions.[10]

The problem of evolution and acceptance of norms in the international community as well as the norms' influence has been one of the central issues of the constructivist research agenda. Summing this up, Gregor P. Hofman argues that a norm 'counts as accepted if it a) is salient in the discourse [national and international – comment DH], b) is also specifically applied – which at the international level would mean that reference is made to the norm in dealing with conflicts, e.g. in the Security Council – and c) the norm is institutionally embedded in international organisations'.[11]

The first indicator of norm acceptance suggested by G. P. Hofmann (salience in the discourse) should primarily be viewed on the state level. Extensive academic and theoretical debate (present in the case of RtoP) is important, but norms to be born in the international community must be endorsed by states. Debates on new norms in various international forums may reach different stages. According to M. Finnemore and K. Sikkink, through its evolution process the norm reaches a 'tipping point' when a 'critical mass' of states adopts it in the process of socialisation. The 'tipping point' marks the beginning of the 'norm cascade', when normative change begins as 'more countries begin to adopt new norms more rapidly'.[12] 'Norm cascade' leads to the third stage of norm evolution, that is internalisation.[13] The composition of the 'critical mass' necessary for the 'tipping point' to occur is not clear; however, M. Finnemore and K. Sikkink are most convincing when they vaguely but quite honestly admit: 'What constitutes "critical state" will vary from issue to issue, but one criterion is that critical states are those without which the achievement of the substantive norm goal is compromised'.[14] It is claimed that a third of the international community, including influential actors such as great powers, emerging powers or major regional powers, constitutes a 'critical mass'.[15]

By investigating the roles of regional IOs in norm evolution and acceptance, important conclusions may be drawn, allowing us to understand the dynamics of change in the actions of regional arrangements in relevant fields of activity.

---

[10] M. Barnett, M. Finnemore, *Rules for the World. International Organizations in Global Politics*, Ithaca–London: Cornell University Press 2004, p. 29.

[11] G. P. Hofmann, op. cit., p. 3.

[12] M. Finnemore, K. Sikkink, op.cit., p. 902.

[13] Ibidem, pp. 895 ff.

[14] Ibidem, p. 901.

[15] G. P. Hofmann, op. cit., p. 4.

Responsibility to Protect – birth, evolution and beyond[16]

The term Responsibility to Protect is rooted in the endeavours to find the right way to react to heinous international crimes and – more generally – systematic abuses of human rights during both peace and conflict. It became especially important after numerous failures of the international community to avert and halt the horrific events in a series of crises around the world in the 1990s, most notorious cases including Rwanda and Srebrenica. As a result of that inaction, the Kosovo case spurred an illegal (even if often regarded as legitimate) military operation of NATO. Based on good intentions, the operation ended with dubious results and brought about a serious question which can be summarised in the words of Kofi Annan: 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?'.[17] Doing too little and too late in Rwanda and Srebrenica was one of the reasons for some states to opt for a military intervention in Kosovo without the consent of the UNSC. A contradiction between state sovereignty/non-intervention and the idea that the international community had a certain duty to react in situations where civilians were being indiscriminately targeted and crimes occurred was perceived as a Gordian knot. There existed no clear pattern of facilitating the reconciliation of the two concepts. In its report of 2000, the International Independent Commission on Kosovo left no doubts that 'experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy. The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention'.[18]

In 2001, the government of Canada sponsored the report *Responsibility to Protect*, prepared by the International Commission on Intervention and State Sovereignty (ICISS). Its findings were based on the concept of 'sovereignty as responsibility'.[19]

---

[16] For more on evolution, operationalisation and the legal character of RtoP as well as on RtoP in the Libyan crisis see: D. Heidrich, 'Zasada odpowiedzialności za ochronę i możliwość jej praktycznego zastosowania. Casus Libii', *Stosunki Międzynarodowe – International Relations* 2013, Vol. 47, No. 1, pp. 167–190.

[17] Kofi Annan, *We the Peoples. The Role of the United Nations in the 21st century*, New York: United Nations, 2000, p. 48, available at: http://www.unmillenniumproject.org/documents/wethepeople.pdf, accessed on 12 October 2015.

[18] International Independent Commission on Kosovo, *The Kosovo Report. Conflict. International Response. Lessons learned*, Oxford: Oxford University Press, 2000, p. 10, available at http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf, accessed on 7 March 2014.

[19] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001), http://www.iciss.ca/pdf/ Commission-Report.pdf, accessed on 6 June 2012, which is most often associated with a Sudanese diplomat, senior fellow at the Brookings Institution and former high UN official, Francis M. Deng. In 1996, Deng co-edited the book: F. M. Deng, S. Kimaro, T. Lyons, D. Rothchild, I. W. Zartman (Eds.), *Sovereignty as Responsibility. Conflict Management in Africa*, Washington,

According to the ICISS Report, the understanding of sovereignty needed to shift from sovereignty as control to sovereignty as responsibility; state sovereignty implied the states' primary responsibility for the protection of their people: 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect'.[20] The document further added: 'It [the international community – comment DH] has a corresponding responsibility to provide innocent victims of internal conflicts and gross violations of human rights with essential protection and assistance'.[21]

The Report characterised RtoP as *a* **guiding principle** *for the international community of states.*[22] *Its foundations lay in* 'obligations inherent in the concept of sovereignty; the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; the developing practice of states, regional organisations and the Security Council itself'.[23] RtoP did not equal humanitarian intervention,[24] the former being defined as 'action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective'.[25] RtoP was presented as a much broader concept that humanitarian intervention; not only did it encompass direct reactions to gross violations of human rights (where the last resort would be the use of military force), it would also cover a whole range of activities under three different parts of RtoP, that is the responsibility to prevent, the responsibility to react and the responsibility to rebuild. The vision of RtoP, as presented in the ICISS report, left many questions open to later interpretation. They were mostly associated with the role of the UNSC and its veto blockage as well as with the criteria for coercive action. The idea to treat military enforcement measures as a last resort that should actually be avoided at every

D.C.: Brookings Institution, 1996. Focusing on Africa, the authors of the book introduced and explained the concept of 'sovereignty as responsibility', according to which sovereign states have a duty to protect their own citizens as they take primary responsibility for them. From among earlier framings of the concept, it is worth mentioning the report *Our Global Neighborhood* (prepared by the Commission on Global Governance in 1995), see: Report of the Commission on Global Governance, *Our Global Neighborhood*, Oxford: Oxford University Press, 1995; as well as Boutros Boutros Ghali's *Agenda for Peace*: 'The time of absolute and exclusive sovereignty (…) has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world', see: Report of the Secretary – General, *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, A/47/277 – S/24111, 17 June 1992.

[20] ICISS, op. cit., p. xi.

[21] Ibidem, p. xiii.

[22] Ibidem, p. xi.

[23] Ibidem.

[24] The Authors of the Report purposely use the term 'intervention for human protection purposes' instead of 'humanitarian intervention'. See: ibidem, p. 9.

[25] Ibidem, p. 8.

cost would make RtoP another soft solution to mass atrocity crimes, which would not change the fate of the oppressed. This argument does not suggest that the military component of RtoP should be its central part but rather that it should always be on the table to act as a potential deterrent. It must be noted, however, that the ICISS report did offer some options on how to interpret the most hotly debated issues, but as it turned out later, the tooth of the concept was blatantly blunted by the UN members.

The 2004 High-Level Panel on Threats, Challenges and Change Report *A More Secure World: Our Shared Responsibility* endorsed RtoP as 'an emerging norm',[26] but in its Outcome Document (paragraph 138 and 139) the 2005 UN Summit did not confirm the normative character of RtoP; it did not mention any **legal obligation** for the UN member states or the international community to take responsibility to protect civilians from international crimes (genocide, war crimes, ethnic cleansing and crimes against humanity).[27] It is more that clear that, according to the Document, any action of forceful character by the international community must be authorised by the Security Council. The stalemate caused by the veto power of the P5 would not authorise the UNGA to refer to the Uniting for Peace procedure, as suggested in the ICISS report. The regional arrangements' own forceful actions without a vote in the Security Council were not addressed by the Document ('we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate'). The importance of the Outcome Document was predominantly based on the fact that it was unanimously accepted by representatives of 191 nations and not on its legal character, as UNGA resolutions bear no legal character.

---

[26] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, 2004), paragraphs 202–203.

[27] 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. See: *World Summit Outcome Document*, 24 October 2005, A/RES/60/1.

The concept was later developed in the Reports of the present UN Secretary General (SG), Ban Ki-moon. His so far seven reports on RtoP[28] were followed by interactive debates in the UNGA.[29] The reports contain certain suggestions on how the RtoP could be implemented, what should be the procedures in each of its parts and structure the concept into three pillars: 1) the primary responsibilities of states for the protection of populations from mass atrocity crimes; 2) the international community's responsibility to assist states in fulfilling theirs; 3) the international community's role to use appropriate diplomatic, humanitarian and other peaceful means to protect civilians from mass atrocity crimes and to react in a strong and decisive manner, through the Security Council if states fail.[30]

The responsibility to protect or its language have been so far indirectly quoted several times by UN organs. Since 2006 the UNSC voted 25 resolutions that made reference to RtoP. In addition, six presidential statements contained similar language.[31] From these resolutions, Resolutions no. 1674 and 1894 on the Protection of Civilians in Armed Conflict and Resolution no. 1706 authorising the deployment of UN peace-keeping forces in Darfur made explicit reference to RtoP. From the other UNSC resolutions, Resolutions no. 1970 and 1973 on Libya need to be mentioned as well as resolutions on Cote d'Ivoire, Mali, Somalia, South Sudan, Central African Republic and others.[32] The concept has also been referred to by the UNGA and led to the creation of an institution entrusted with its promotion.[33]

---

[28] The first report, published on 12 January 2009, bore the title *Implementing the Responsibility to protect*. The second one came out in 2010 and was devoted to *Early warning, assessment and the responsibility to protect*. The third report on *The role of regional and subregional arrangements in implementing the responsibility to protect* was published in 2011 and will be discussed in detail later in the present analysis. The fourth report (2012) prepared by the SG touches upon the most debatable issue: *Responsibility to protect: timely and decisive response.* On 9 July 2013, the fifth report came out. It is titled *Responsibility to protect: State responsibility and prevention* and was discussed at an informal interactive dialogue in the General Assembly on 11 September 2013. The 2014 report (the sixth one) was published under the title *Fulfilling our collective responsibility: international assistance and the Responsibility to Protect.* The last report so far, the seventh one, was devoted to the implementation of RtoP (*A Vital and Enduring Commitment: Implementing the Responsibility to Protect*). The reports may be accessed on the UN website at http://www.un.org/en/preventgenocide/adviser/documents.shtml or on the ICRtoP website at http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents.

[29] For record of the meetings visit http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop.

[30] *Implementing the Responsibility to Protect*, Report of the Secretary-General, 12 January 2009, A/63/677, p. 2.

[31] *Key developments on the Responsibility to Protect at the United Nations from 2005–2014*, ICRtoP, http://responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop.

[32] For a full list on UNSC resolutions referring to RtoP see: *References to Responsibility to Protect (RtoP, R2P) in Security Council Resolutions*, ICRtoP, http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/5221--references-to-the-responsibility-to-protect-in-security-council-resolutions.

[33] For more on that see: *Key developments on the Responsibility to Protect…*, op. cit.

The role of regional arrangements within RtoP in the 2011 UNSG Report

As said before, the UN Secretary-General (SG) has been largely involved in the process of framing, implementing and promoting the RtoP concept. For the sake of the present analysis, it is crucial to have a closer look at the findings of the 2011 report, which concentrates on what regional organisations may do to turn the theoretical framework within RtoP into reality. It will also foster deeper insight into past activities of the African Union to see to what extent that organisation fits into the concept proposed by the Secretary-General.

The UNSG clearly stated in his third report:

> 'Fostering more effective global-regional collaboration is a key plank of my strategy for realising the promise embodied in the responsibility to protect. Protection is our common concern'.[34]

The role of regional arrangements in RtoP issues is limited in the Report by the traditional understanding of Charter provisions. Its Article 52 (2) reads: members of the UN 'shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council'. Yet, 'no enforcement action shall be taken without the authorisation of the Security Council'. As it will be demonstrated later in the course of the present analysis, the latter part of Article 52 (2) sheds light on the understanding of how the RtoP principle might be implemented in regional organisations, especially given that the AU had endorsed the decision allowing for an *a posteriori* SC authorisation of RtoP military operation (*Ezulwini Consensus*).

The 2011 UNSG report attempts to explain why regional arrangements are of interest to RtoP framing and implementation? The answer has been built on four arguments:

1. regional organisations are closer to the events that spur action so they are better informed on what to do in a particular situation of mass atrocities;
2. members of these organisations would often face serious consequences of the crises because of their proximity to them. The clearest example of that are influxes of refugees and the plight of internally displaced persons right outside the borders of the respective states. The magnitude of economic consequences and the possibility of spill-over effects also need to be considered;
3. often (but not always) the response to crises from regional institutions may be more effective, also because of the proximity to the crisis situation. What deserves attention is the fact that the effectiveness of regional organisations is important for future events. Norms, standards, institutions setting adds up to lesser vulnerability

[34] Report of the Secretary-General, *The role of regional and sub-regional arrangements in implementing the responsibility to protect*, A/65/877–S/2011/393, 27 June 2011, para. 4.

in the future. As the report points out: 'regional and sub-regional arrangements can encourage governments to recognise their obligations under relevant international conventions and to identify and resolve sources of friction within their societies before they lead to violence or atrocity crimes'.[35];

4. the nature of crimes covered by the RtoP agenda makes it necessary to consider the fact that non-state actors often participate in the hostilities. Being close to the crisis it is much easier to influence these actors' decisions and to hold them accountable.

The framing and implementation of RtoP by regional arrangements heavily depends on the regional context. As the SG report emphasises, 'the responsibility to protect is a universal principle. Its implementation, however, should respect institutional and cultural differences from region to region. Each region will operationalise this principle at its own pace and in its own way. (…) Regional, as well as global, ownership is needed'.[36] However, the Report notes that 'each region must move forward, step by step, to ensure that populations are more protected and that the risk of mass atrocity crimes recedes with each passing year'.[37]

As the 2011 Report points out, the capacity to avoid situations leading to mass atrocities can be of structural or operational character.[38] The former 'seeks to change the context from one that is more prone to such upheavals to one that is less so'.[39] The latter 'strives to forestall what appears to be an imminent threat of an atrocity crime'.[40] While regional and sub-regional arrangements have a commendable experience in operational prevention, it is less so as far as structural prevention is concerned. In order to change that, regional bodies need to focus on elaboration of 'norms, standards, and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity'.[41] It is equally important for regional arrangements to build 'preparedness and planning, which can make a difference in reducing the ill effects of man-made, as well as natural, disasters'.[42]

Regional arrangements' role in response to ongoing crises seems equally important. There are many possible ways of reaction. Diplomatic efforts, peacekeeping, ceasefire monitoring, humanitarian assistance, assistance to and protection of refugees and IDPs, referral of cases to the ICC, and – finally – the use of force are just a few that can be mentioned here,[43] but the actual action heavily depends on context-specific situations

[35] Ibidem, para. 17.
[36] Ibidem, para. 4.
[37] Ibidem.
[38] Ibidem, para. 21.
[39] Ibidem.
[40] Ibidem.
[41] Ibidem, para. 23.
[42] Ibidem.
[43] Ibidem, part V, *Timely and decisive response*, pp. 10–12.

and the member states' interests and behaviours as well as on a broader global context, as will be seen in the case of Syria.

Responsibility to Protect within the African Union structure

Africa's conflicts and internal tensions, disturbances in the 1990s, still before the creation of the AU, and later, at the beginning the 21st century, were characterised by the indiscriminate use of force against civilians, omnipresent violations of human rights norms and mass atrocity crimes. Innocent civilians were oppressed not only by legitimate governmental forces but also by warlords fighting for power, land, resources or goals that were difficult to define.

During the Cold War confrontation, local and regional disagreements and conflicts were frozen. When the bipolar world began collapsing, hostile political blocks fell apart, leaving their former proxies on their own, and conflicts erupting. Sierra Leone and Liberia wars, known for extremely cruel treatment of civilians, involving massive mutilations, conscription of children into the armed forces, sexual crimes being committed on a massive scale, were first signs of what was soon going to come. In the decade that followed the end of the Cold War, it was becoming more and more clear that armed conflicts in Africa would be one of the major obstacles to its future:

> 'No single internal factor has contributed more to the present socio-economic problems in the Continent than the scourge of conflicts in and among our countries. They have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people'.[44]

African leaders were becoming aware that the rest of the world will not help fight African scourges. As difficult as it may sound, the task was to put the fate of Africa in the hands of the Africans.

To face multifaceted new challenges, by means of its Constitutive Act of 7 November 2000 the African Union replaced the Organisation for African Unity (OAU), inheriting the OAU's mechanism that had been created to react to conflicts, among them the Mechanism for Conflict Prevention, Management and Resolution set up by means of 1993 Cairo Declaration.[45] The guiding rules for the Mechanism practically excluded

---

[44] *OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration)*, http://www.dipublico.com.ar/english/oau-declaration-on-a-mechanism-for-conflict-prevention-management-and-resolution-cairo-declaration/, accessed on 17 June 2012, para. 9.

[45] The Mechanism, as clearly indicated in the founding document, was to be guided 'by the objectives and principles of the OAU Charter; in particular, the sovereign equality of Member States, non-interference in the internal affairs of States, the respect of the sovereignty and territorial integrity of Member States, their

any forceful intervention in situations of grave violation of human rights. The notion of sovereignty has been the cornerstone of African international relations, even though it was a new and foreign concept to African states newly independent in the 1960s and later on.[46] Both internal and external sovereignty has been of utmost importance to African states, the latter being exalted through the principle of non-interference and *uti possidetis iuris*.[47] The time when the Mechanism was being set up was still a stage when African leaders were not ready to give away at least a small part of their sovereign power. Therefore, the primary objective of the Mechanism was conflict anticipation and prevention, not intervention. It was also entrusted with peace-making and peace-building functions. The Cairo Declaration refers to possible interventions in internal conflicts by stating that: 'in the event that conflicts degenerate to the extent of requiring collective international intervention and policing, the assistance or where appropriate the services of the United Nations will be sought under the general terms of its Charter. In this instance, our respective countries will examine ways and modalities through which they can make practical contribution to such a United Nations undertaking and participate effectively in the peacekeeping operations in Africa'.[48] The creation of the Mechanism was an important step in conflict management and resolution in Africa; however, as the events in Rwanda in 1994 proved, its capability to actually halt or avert internal conflicts and mass atrocity crimes was low. Only four times did the OAU, using the capacities of the Mechanism, decide to send peacekeeping missions to the countries of the region: two observers' missions to Rwanda in the years 1990–1993 (the first mission in Rwanda became operative before the Mechanism was set up), an observers' mission to Burundi (1993–1996) and an observers' mission to the Comoros (1997–1999).[49] In none of these cases, the presence of the missions helped to broker peace, Rwanda being the biggest failure.[50] Yet the Organisation did manage to successfully mediate in other conflicts, just to mention the Ethiopia–Eritrea war or the civil war in the Democratic Republic of the Congo. The overall achievements under the Mechanism must be evaluated with cautious criticism; nevertheless, the attempts

inalienable right to independent existence, the peaceful settlement of disputes as well as the inviolability of borders inherited from colonialism. It will also function on the basis of the consent and the cooperation of the parties to a conflict'. Ibidem, para. 14.

[46] Hélène Gandois, *Sovereignty as responsibility or African regional organizations as norm-setters*, SAID workshop: "Beyond Sovereignty II: Global Regionalism: Africa, Americas, Europe", BISA annual conference, University of Saint Andrews, 20 December 2005, p. 9.

[47] Ibidem.

[48] *OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration)*, op.cit., para. 16.

[49] I. Popiuk-Rysińska, 'Działalność instytucji międzynarodowych na rzecz pokoju i bezpieczeństwa Afryce', in: J. J. Milewski, W. Lizak (Eds), *Stosunki międzynarodowe w Afryce*, Warszawa: Wydawnictwo Naukowe Scholar, 2002, p. 321.

[50] W. Lizak, *Regionalny system bezpieczeństwa w Afryce*, in: E. Haliżak, R. Kuźniar, G. Michałowska, J. Symonides, R. Zięba (Eds), *Stosunki międzynarodowe w XXI wieku*, Warszawa: Wydawnictwo Naukowe Scholar, 2006, p. 784.

undertaken by OAU states' leaders showed growing engagement and interest in the continent's future. Additionally, the experience gained by the OAU helped to realise the ideas on which the AU's architecture was later based.

The Preamble to the Constitutive Act of the African Union repeats the language of the Cairo Declaration: 'the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda'.[51] In line with that statement, the lacking elements of protection of the population were added to the newly set up organisation. The idea of 'sovereignty as responsibility' was partly reflected in the AU's Constitutive Act. By means of its Article 4.h the Union has the right 'to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council'. This provision constitutes a cautious reflection of the new understanding of sovereignty. Cautious, because it must be read together with the intact principles of the organisation such as sovereign equality of the member states and non-intervention. As Armstrong M. Adejo put it, there exists the impression that the establishment of the African union amounted to merely giving the OAU a fresh coat of paint, without the desirable inner structural changes with regard to intervention for humanitarian purposes.[52] The AU, however, with its Peace and Security Council, has been given a legal framework for military and non-military interventions for humanitarian purposes, which theoretically should bring to reality a security culture of non-indifference to Africa.

An important step in the AU's endorsing the language of the Responsibility to Protect was the Common African Position on the Proposed Reform of the UN of 7–8 March 2005, known as the *Ezulwini Consensus*.[53] Its part B contains direct reference to the principle and reads that the authorisation of the use of force by the SC must not 'undermine the responsibility of the international community to protect'. It goes on that: 'Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take

---

[51] *Constitutive Act of the African Union*, 07.11.2000, http://www.au.int/en/content/constitutive-act-african-union, accessed on 14 July 2012. See also: *Protocol on Amendments to the Constitutive Act of the African Union*, http://www.au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf, accessed on 14 July 2012.

[52] Armstrong M. Adejo, 'From OAU to AU: New Wine in Old Bottles?', *African Journal of International Affairs*, 2001, Vol., 4, No. 1–2, p. 137.

[53] *The common African position on the proposed reform of the United Nations: "The Ezulwini consensus"*, Ext/EX.CL/2 (VII), 7–8 March 2005, available at: http://responsibilitytoprotect.org/files/AU_Ezulwini%-20Consensus.pdf, accessed on 5 August 2014.

actions in this regard. The African Union agrees (…) that the intervention of Regional Organisations should be with the approval of the Security Council; **although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action** [emphasis added]'. The obligation of states to protect their citizens was also quoted, but the document emphasises that this obligation 'should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states'. The *Consensus* touched upon the question of legality of the use of force in protection of civilians. It is very clearly stated that force will be used legitimately in self defence and in line with the provision articulated in Article 4(h) of the Constitutive Act of the African Union.

Endorsement of the RtoP by the African Union organs can also be traced in the African Commission on Human and Peoples' Rights, which passed Resolution 117 in November 2007 on Strengthening the Responsibility to Protect in Africa.[54] The resolution itself was dedicated to the Darfur conflict and the AMIS mission, but RtoP was quoted as well.

Examples of AU actions on behalf of RtoP implementation in Africa. Libya and beyond

The last decade of the AU's history brings examples of the organisation's actions, which may be useful in the discussion on African involvement in RtoP implementation.

One of the success stories of AU involvement in internal conflicts was the African Union Mission in Burundi (AMIB), deployed in 2003, still before the UNGA Summit endorsed the RtoP principle. This operation was the first intervention with the use of force upon the consent of the state in question wholly initiated, organised and implemented by the African Union.[55] What is especially interesting here is that the United Nations was not willing to get involved in the volatile Burundi and that is when the African leaders made a move.

Another example of the AU's involvement in conflict situations, although of a different nature, was the diplomatic engagement in Kenya in 2008. African leaders (especially the then president of Ghana, John Kufuor, who at that time also served as the acting Chairperson of the African Union) formally requested the former UN Secretary-General, Kofi Annan, to mediate between the parties to the Kenyan conflict. According to Loyd Axworthy, the Kenyan case should be regarded as an example of RtoP use in practice, even if the term was not really used by Kofi Annan, the UN or

---

[54] *Resolution on Strengthening the Responsibility to Protect in Africa, The African Commission on Human and Peoples' Rights*, Brazzaville, Republic of Congo, 15 – 28 November 2007, available at http://www.achpr.org/sessions/42nd/resolutions/117/.

[55] T. Kabau, 'The Responsibility to Protect and the Role of Regional Organizations: an Appraisal of the African Union's Interventions', *Goettingen Journal of International Law*, 2012, Vol. 4, No. 1, p. 64.

the AU.[56] What is important is that diplomatic and non-violent means (the ICC role) were used in order to restore peace and order in Kenya by brokering a deal between the clashing candidates for presidency. A claim that a pattern of AU involvement in crises in Africa could be built on the Kenyan case would be far-fetched: what if parties to a conflict are not so much willing to cooperate with an outside mediator and the AU? Late reaction or lack thereof in such crises as Ivory Coast, South Sudan, Libya, the DRC is partly a solution to the puzzle. The first one being an example of wrongly understood cautiousness or 'collective hesitancy', as Thomas G. Weiss put it,[57] left civilians alone in the face of the crimes being committed both by the forces under the command of the outgoing president Laurent Gbagbo and the incoming president Alassane Ouattara.

The AU's involvement in the Libyan crisis was from the very beginning marked by strong opposition to any forceful solutions. The principle argument against military intervention proved to be of prophetic nature: African leaders feared that the use of the military would lead to overthrowing the regime, which would in turn be contrary to the AU's principles enshrined in its Constitutive Act and the (the AOU's) Lomé Declaration on Unconstitutional Changes in Government (2000),[58] both prohibiting unconstitutional changes in government. The AU's decisions were long based on the belief that Gaddafi should take part in negotiating peace and – perhaps only later – step down. AU representatives even held discreet contacts with leaders of African states in order to determine whether any country would receive Gaddafi should he go into exile. One of the proposals went as far as to let Gaddafi reside within Libya under the protection and guard of the AU. There was no proposal from any AU country whatsoever to send the military (as the coercive measure of deploying a peacekeeping force) to monitor the ceasefire that the AU had proposed.[59] For the opponents of the military solution to the crisis, it was equally important to avoid the spill-over effect of the disorder brought by internal shift of power in Tripoli (which proved to be prophetic too, after all).

With the escalating conflict in place, the international community called on Colonel Gaddafi's regime numerous times to end all hostilities against civilians. The regime largely ignored the calls. His unwillingness to fulfil the requirements of the SC resolution

---

[56] L. Axworthy, A. Rock, 'R2P: A New and Unfinished Agenda', *Global Responsibility to Protect*, 2009, Vol. 1, No. 1.

[57] T. G. Weiss, 'RtoP Alive and Well after Libya', *Ethics and International Affairs*, 2011, Vol. 25, No. 3, p. 289.

[58] *Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government* AHG/Decl.5 (XXXVI), http://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm, accessed on 5 August 2015.

[59] A. de Waal, 'African roles in the Libyan conflict of 2011', *International Affairs*, 2013, Vol. 89, No. 2, pp. 372–373. Nevertheless, Africa did not speak with one unanimous voice about Libya. Some countries (e.g., Niger, Chad) feared the 'Libyan Pandora's box', as President Déby of Chad called it. Others (e.g., Sudan, Ethiopia) strongly opposed Gaddafi and were even ready to accept him being forcefully ousted of power.

1970[60] (February 26, 2011) was more than obvious. The situation in the country was bringing more and more humanitarian concerns, and the Libyan leader's speech in which he threatened to 'cleanse' the country 'house by house' of the 'cockroaches' (the opposition) made the situation look alarming. Having been given clear support from the Arab League (the decision of 12 March 2011 to call for an imposition of a no-fly zone over Libya), on 17 March 2011 the Security Council passed resolution 1793.[61] Acting under Chapter VII of the Charter, the SC authorised UN members to take all necessary measures to protect civilians and civilian populated areas under threat of attack, including Benghazi. The authorisation expressly excluded foreign occupation of Libyan territory. The imposed no-fly zone for the protection of civilians was to be executed by UN member states' aerial armed forces. The resolution was not accepted unanimously; however, to the surprise of the African media and the AU itself, all three African non-permanent members of the UNSC (South Africa, Nigeria and Gabon) voted yes. Abstentions came from Russia, China, Germany, Brazil and India. It is difficult to be sure today what the reasons were for the African members to vote in favour of the resolution, but it seems that they counted on a mixed solution, implemented by military intervention and diplomatic actions of the AU. South Africa, Niger and Gabon took a clear risk voting in favour of resolution 1973, as 'the words "all necessary measures" threatened to negate the AU initiative, being open to very flexible interpretation'.[62] Serious controversies shed dark light on the operation and intentions were being questioned when it became clear that the intervention might have gone beyond the authorisation of the SC (military ground personnel sent by the intervening countries). The circumstances of the killing of the Libyan leader also left the observers with little hope that the humanitarian purpose was the one that led the international community to pass resolution 1973. Still, after the air strikes against Libya started, the AU was pressing for a diplomatic solution. The main point of criticism as regards that proposal was that Gaddafi was not excluded from negotiating the peace. In paragraph 7, the AU's peace plan put forward on 10 March 2011 contained four points, which were later called 'the road map':

> 'The current situation in Libya calls for an urgent African action for: (i) the immediate cessation of all hostilities, (ii) the cooperation of the competent Libyan authorities to facilitate the timely delivery of humanitarian assistance to the needy populations, (iii) the protection of foreign nationals, including the African migrants living in Libya, and (iv) the adoption and implementation of the political reforms necessary for the elimination of the causes of the current crisis'.[63]

---

[60] *Security Council Resolution 1970 (2011)*, 26 February 2011, S/RES/1970 (2011).

[61] *Security Council Resolution 1973 (2011)*, 17 March 2011, S/RES/1973 (2011).

[62] A. de Waal, op. cit., p. 368.

[63] *Report of the Chairperson of the Commission on the activities of the AU High Level ad hoc Committee on the Situation in Libya*, Peace and Security Council, 26 April 2011, PSC/PR/2(CCLXXV).

Even though the document did not speak clearly about the role of Gaddafi, the common feeling was that, if the AU's 'roadmap' is implemented, he shall be part of the peace talks and only later, after forming a national unity interim government, he would be pressed to step down. The participation of Colonel Gaddafi in the negotiations was absolutely unacceptable to the opposition but also to some of the outside actors (especially the United States, France and the United Kingdom). Not surprisingly, the Libyan opposition rejected the AU's March peace proposal and any solutions with Gaddafi as part of the scenario.[64] Since the AU's peace efforts were not in line with the NATO operation and the Western initiatives to end the hostilities (even when Libya had been suspended by the Arab League in its membership, the leaders of the AU kept declaring there was need for a peaceful solution and opposed any military action), the African solution was not taken into account as a viable option. On 19 March 2011, the French president organised a widely publicised 'summit for the support of the Libyan people', and its date coincided with the date of the meeting of the AU ad hoc high-level committee set up to implement the roadmap (scheduled to be held in Nouakchott, Mauretania). AU leaders interpreted the timing of that meeting as a snub to them and few of them participated. Moreover, the Nouakchott meeting was to be followed by a high-level visit to Tripoli, but since the same day the enforcement of the no-fly zone by 'the coalition of the willing' began, the African delegation was informed that the trip would not be possible, unless they would travel on their own risk.

The impression among African leaders was that the AU was being marginalised in international efforts to end the Libyan war, especially that on 29 March another international conference was organised in London. None of the AU leaders took part, even though other regional organisations were represented. That feeling proved quite true, since finally the African way to solve the Libyan crisis was not considered. The intervention was seen in Africa as a Western way to bypass international constraints. African voices, alarmed by the unfolding events, were perhaps the loudest but not the only ones. For example, the Arab League Secretary General, Amr Moussa, bitterly stated: 'What is happening in Libya differs from the aim of imposing a no-fly zone, and what we want is the protection of civilians and not the bombardment of more civilians'.[65]

By and large, the AU's approach to the Libyan crisis shed serious doubts about what role the organisation wishes to play in promoting protection mechanisms in situations of clear threat to the civilian population. Despite the existence of solutions envisaged

---

[64] G. Grant, *Libya and the African Union: Right in Principle, Wrong in Practice*, "The Telegraph", 12 April 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8445465/Libya-and-the-African-Union-Right-in-Principle-Wrong-in-Practice.html, accessed on 12 August 2013.

[65] S. Erlanger, 'Sarkozy Puts France at Vanguard of West's War Effort', *The New York Times*, 20 March 2011, http://www.nytimes.com/2011/03/21/world/europe/21france.html?_r=0, accessed on 17 July 2013.

by its Constitutive Act[66] and decisions made by its own organs,[67] the AU preferred to stick to diplomatic solutions and push for an action plan with the involvement of Gaddafi. This stance may have been seen as not suiting the circumstances on the ground and left the impression that what Africa wanted for Libya was not protection of the civilian population but rather a careful preservation of the *status quo ante*, with a ruthless dictator as one of the parties to diplomatic negotiations.[68] However, it must be emphasised that it was the forceful regime change and the fact that ground forces were sent to support one of the warring parties that was detrimental to the whole project.

On 17 December 2015, the AU's Peace and Security Council (PSC) for the first time in AU history[69] invoked Article 4 (h), stipulating for the right of the Union to intervene militarily in a member country pursuant to a decision by the Assembly in situations of 'grave circumstances, namely: war crimes, genocide and crimes against humanity' referring to the situation in Burundi.[70] Ban Ki-moon warned the UNSG on 16 December 2015: 'The country is on the brink of a civil war that risks engulfing the entire region'.[71] In reaction to the situation on the ground (at least 400 people killed since April 2015, when protests against president Nkurunziza's third term in office began; nearly 3,500 people arrested in the midst of the political crisis; at least

---

[66] The AU decided not to invoke Article 4(h) of its Constitutive Act, even though circumstances on the ground were definitely 'grave'. The inaction was very much similar to the one with regard to Sudan (Darfur), when the Assembly refused to consider any forceful action without the consent of the government in Darfur. The final deployment of AU forces, later substituted by the hybrid operation organized with the UN, was insufficient for the protection of civilians from atrocity crimes.

[67] On 25 March 2011 the African court on Human and Peoples' Rights ordered provisional measures against Libya in the case *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*. It ordered that Libya 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter on Human and Peoples' Rights or of other international human rights instruments to which it is a party'. The Libyan government was also ordered to report to the Court on the steps taken in response to the Order. This verdict, however, had no implementing capacity, as its enforcement depended on the AU'a capacity so the Libyan government completely ignored the Order. See: *In the matter of African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Libyan Arab Jamahiriya*, Application no. 004/2011, Order for Provisional Measures, African Court on Human and Peoples' Rights, http://www.african-court.org/en/images/documents/Orders-Files/Copy%20of%20Order%20for%20provisional%20measures%20Appl%2004-2011%20(2)-Copy.pdf, p. 7.

[68] An argument strongly rejected by Jean Ping, the then Chair of the African Union Commission. See: J. Ping, 'African Union role in the Libyan crisis', *African Union Monitor*, issue 563, 15 December 2011, http://www.pambazuka.org/en/category/aumonitor/78691, accessed on 15 July 2013.

[69] 'The only previous time Article 4(h) has been invoked by the AU Assembly was in support of the trial of the former President of Chad, Hissene Habre, on charges of political killings and torture of thousands of civilians between 1982 and 1990'. P. D. Williams, *Special report: the African Union's Coercive Diplomacy in Burundi*, IPI Global Observatory, 18 December 2015, http://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/, accessed on 10 November 2015.

[70] Peace and Security Council Communiqué, PSC/PR/COMM.(DLXV), para. 13 (ii).

[71] 'Opening remarks at End-of-Year press conference', Secretary-General Ban Ki-moon, UN Headquarters, 16 December 2015.

220,000 people have so far fled the country[72]), the PSC threatened to launch a military force (African Prevention and Protection Mission in Burundi, MAPROBU) of up to 5,000 personnel to '(a) prevent any deterioration of the security situation, monitor its evolution and report developments on the ground; (b) contribute, within its capacity and in its areas of deployment, **to the protection of civilian populations under imminent threat** [emphasis added]; (c) contribute to the creation of the necessary conditions for the successful holding of the inter Burundian dialogue(…); (d) facilitate (…) the implementation of any agreement the Burundian parties would reach (…); and (e) protection of AU personnel, assets and installations'.[73] The government in Bujumbura was given 96 hours to express their consent to the operation. An opposite reaction would lead to the deployment of the force without the consent of Burundi.[74] The initial response from the Burundian government was strongly negative, with the spokesperson for the Burundian president warning that the government 'will prevent foreign troops from entering its [Burundi's – DH] borders'.[75] At the time of writing it was not clear whether lack of cooperation on the part of the Burundian government would lead to coercive action by the African forces (composed perhaps of the Eastern African Standby Forces, which became operational at the end of 2014). In its Communiqué the PSC requested the UNSC to support the PSC's decision by voting a resolution based on Chapter VII of the UN Charter. 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 authorisation of its enforcements actions'.[76] The Charter Provisions are clear about the exclusive right of the UNSC to take decisions on the coercive use of force, so is the 2011 UNSG on regional arrangements with RtoP as well as other international documents and international law doctrine. One of the justifications for possible MAPROBU deployment (protection of civilians) clearly indicates that the African Union has decided that time is ripe to authorise missions focused on preventing further escalation of the crisis threatening the civilian population. Whether this kind of action will be effective will largely depend on the willingness of the AU Assembly, which needs to authorise the decision to deploy military units to Burundi.[77] Even though the PSC 'has the potential to become a significant autonomous actor' within the AU, the power in the organisation 'remains in the hands of member

[72] 'Burundi: We will not allow foreign troops to enter', Al-Jazeera, 18 December 2015, http://www.aljazeera.com/news/2015/12/burundi-rejects-african-peacekeeping-force-soil-151219091828582.html, acessed on 28 December 2015.

[73] Peace and Security Council Communiqué, op. cit., para. 13 (ii).

[74] P. D. Williams, op. cit. Interestingly, 'Although Burundi was a member of the PSC – and was actually its designated chair for December 2015 – the council utilized Article 8(9) of the *Protocol Relating to the Establishment of the PSC* (2002) to ask the Burundian delegation to remove themselves from the chamber during the substantive deliberations on this issue'. Ibidem.

[75] *Burundi: We will not allow foreign troops to enter*, op. cit.

[76] *Roadmap For The Operationalization Of The African Standby Force*, African Union, ADDIS ABABA, 22–23 March 2005, EXP/AU-RECs/ASF/4(I). See also: ibidem.

[77] P. D. Williams, op. cit.

states and not institutional structures'.[78] The current Burundi case may also be a stress test to the endurance and stability of the AU's institutional framework for protection of civilians in situations of mass atrocity crimes.

However, for effective implementation of RtoP by regional arrangements, the whole international community needs to work out a scheme in which these arrangements have a true role to play. Declarations on their significance in SG reports are not enough. The UNSC must genuinely rely on the knowledge and know-how of regional institutions. For that to happen, the latter need to be truly committed to understanding sovereignty not as control but as responsibility and to be ready to react to large-scale human rights abuses in a timely and decisive manner.

Conclusion

Little consensus now exists on the legal character of RtoP and the level of its influence, and the concept remains a subject of hot debate.[79] Contestation makes RtoP alive, not dead as some have claimed.[80] To say this does not infer that RtoP content, interpretation and implementation raises no serious doubts but rather that RtoP should be looked upon as something that invigorates the debate on what the obligations of states towards their citizens are and what the international community can and should do to protect civilians whose rights are massively violated. As the constructivist theories suggest, norm contestation is an inherent process of their evolution and final anchoring in the international legal system. Undoubtedly, a part of RtoP principles bears legal connotations; there is universal agreement that states have a duty to protect their people from genocide, crimes against humanity, war crimes and ethnic cleansing. The contested part refers to the roles of the international community if state authorities manifestly fail their duties. In this area RtoP is 'in competition with other norms that carry incompatible instructions. (…) [T]he competition can have two kinds of outcomes: one of the contestants prevails absolutely and the other disappears; or the competitors can coexist (…) for long periods'.[81] In the case of RtoP, the competing norms – absolute state sovereignty vs. erosion of state sovereignty that gives way to forceful action of the international community in situations of atrocity crimes – surely will not coexist.

[78] N. Zähringer, 'Norm evolution within and across the African Union and the United Nations: The Responsibility to Protect (R2P) as a contested norm', *South African Journal of International Affairs*, 2013, Vol. 20, No. 2, p. 191.

[79] For more on the understanding of the concept of RtoP and its legal character see, for example: Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge: Cambridge University Press, 2011, and Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *The American Journal of International Law*, 2007, Vol. 101, No. 1, pp. 99–120.

[80] See for example: D. Chandler, 'The R2P Is Dead, Long Live the R2P: The Successful Separation of Military Intervention from the Responsibility to Protect', *International Peacekeeping*, 2015, Vol. 22, No. 1; M. Kersten, 'The Responsibility to Protect doctrine is faltering. Here is why', *The Washington Post*, December 8, 2015.

[81] A. Fiorini, op. cit., p. 367.

One must give way to another. It remains to be seen which one wins the race. If new understanding of sovereignty wins universally, what will the symptoms of that result be? When will one know that absolute sovereignty has universally become an obsolete concept? That needs to be learnt by legal standing of the obligation of the international community to take responsibility to protect. For the moment, RtoP as a whole (both elements – the responsibilities of states and the responsibility of the international community to act when states fail) does not have a legal basis. The responsibility to protect may be called an international principle, a rallying call/cry but not a legal norm. Therefore, the claim that regional arrangements (as well as universal organisations, i.e. the UN) have a legal duty to take action accordingly to the RtoP scheme would be based on false predicaments. Their member states have legal obligations concerning protection of their populations from international crimes, but it remains an open question what happens if member states manifestly fail to do so. Theoretically, regional organisation's reactions should be complementary to states' inaction, but in reality their actions will depend on various circumstances on the ground.

The analysis conducted using the three indicators of norm evolution presented by G. P. Hofmann leads to the final conclusion that RtoP 'is experiencing low-to-moderate acceptance in the community of states, while at the same time its individual components remain controversial to varying degrees'.[82] The controversial part is mostly concentrated on issues of the application of the third pillar.[83]

Emphasis must also be placed on whether the responsibility to protect has reached a tipping point by being accepted by a critical mass of the international community. By now, in the UNGA informal debates on RtoP only about a third of the member states' representatives expressed their views on RtoP,[84] which means that the majority of states in the world do not even express their opinions about the concept.

Perhaps it is necessary to go back to what Alex Bellamy, drawing attention to the fact that while states' interests and politics still dominate the behaviour of actors in international relations, such principles like RtoP can influence them, interestingly observed:

> 'RtoP's principal role has been to contribute to the establishment of habits of protection among UN member states, through the aligning of protection goals with state interests and identities, and, through that, to influence changes in the international context surrounding the commission of genocide and mass atrocities. In this capacity, RtoP helps influence the extent to which calls for action might be translated into positive action,

[82] G. P. Hofmann, op. cit., p. 29 ff.

[83] Ibidem, p. 30.

[84] During the latest (seventh) informal debate – held in September 2015 – '69 Member States and one regional organization delivered statements on behalf of 89 States, which is the highest number of States to participate since 2009'. See: *Summary of the seventh General Assembly dialogue on the responsibility to protect,* International Coalition for the Responsibility to Protect, http://responsibilitytoprotect.org/General%20Assembly%20Dialogue%20Summary%202015%20Final(1).pdf.

> by increasing the likelihood not only that there will be such calls but also that they will resonate among actors who accept that they have a responsibility to protect foreign populations when they can'.[85]

Regional organisations have a role to play in RtoP evolution and interpretation. As the present article argues, new norms need international organisations to develop, and since RtoP can be traced to Africa, the AU is an IO that has all the potential to continue its efforts to develop the understanding of RtoP. It remains to be seen whether the AU will put strong emphasis on RtoP or whether it will move in the direction of further conceptualisation of the concept of 'protection of civilians'.[86] The AU's PSC has the potential to become 'an important tool of socialisation, especially in terms of how new members on the Council accept new norms'.[87] With the latest decision of the PSC on the threat to deploy force to Burundi, the AU may be attempting to build a new culture of responsibility to protect.

The involvement of regional arrangements in implementation of RtoP remains an important challenge after the crisis in Libya. The intervention did not help promote the concept in regional organisations in the South. Some member states of these IOs perceived the overstretching of the UNSC's mandate that resulted in the regime change in Libya as a threat to their sovereignty; few of them confirmed their previous scepticism about RtoP, others moved a couple of steps back. It also brought about initiatives among strong or moderate opponents of RtoP wishing to modify the concept; Brazil presented its idea of 'Responsibility while Protecting'[88] and China – 'responsible protection'.[89] By and large, being exposed to political debates among their members and in connection with global developments regional organisations have presented differing stances on RtoP after Libya.

The need for a strong partnership between the UN and relevant regional organisations in reactions of the international community to mass violations of human rights can be drawn from the Libyan experience and numerous other cases, including Kenya and Guinea.[90] Alex Bellamy and Paul D. Williams call this role of regional IOs the

---

[85] Alex J. Bellamy, 'The Responsibility to Protect: Added value or hot air?', *Cooperation and Conflict*, Vol. 48, No. 3, pp. 333–357 (p. 352).

[86] N. Zähringer, op. cit., p. 192.

[87] P. D. Williams, 'The Peace and Security Council of the African Union: Evaluating an embryonic international institution', *Journal of Modern African Studies*, 2009, Vol. 47, No. 4, p. 612, quoted in N. Zähringer, op. cit., p. 192**.**

[88] J. Welsh, P. Quinton-Brown, V. MacDiarmid, *Brazil's 'Responsibility While Protecting' Proposal: A Canadian Perspective*, http://www.responsibilitytoprotect.org/index.php/crises/178-other-rtop-concerns/4915-jennifer-welsh-patrick-quinton-brown-and-victor-macdiarmid-ccr2p-brazils-responsibility-while-protecting-proposal-a-canadian-perspective, accessed on 10 December 2015.

[89] R. Zongze, 'Responsible Protection: Building a Safer World', *China International Studies*, 2012, Vol. 34, May/June.

[90] A. Bellamy, P. D. Williams, 'The new politics od protection? Cote d'Ivoire, Libya and the responsibiity to protect', *International Affairs*, 2011, Vol. 87, No. 4, p. 848.

'gatekeeper role'.[91] For Bellamy and Williams, the evident benefit from the involvement of regional arrangements in 'RtoP situations' is 'providing avenues for increased activism on human protection while (theoretically) enduring that the Security Council acts in a manner that is consistent with regional norms and interests'.[92] However, as the scholars suggest, this kind of gatekeeping is fraught with at least two dangers: firstly: 'forum shopping' to find regional organisations whose views are in line with the decision making body at the UN.[93] Secondly, what happens if members of a relevant regional organisation block decisions made at the UNSC (Lebanon voting against action or even presidential statement in the case of Syria, while it supported the decisions about Libya)? If any of these cases, the 'gatekeeping role' would turn into a 'blocking role'. Should the Security Council in such instances turn to other regional IOs (if that is possible) or perhaps should it override the blockage? Whatever the response of the UNSC is, not considering the regional views means disrespect for the rule of ownership, which should be present in decisions about regions simply because it gives these decisions more legitimacy and may take into consideration regional values and ideas, the knowledge of which is missing in the global forums. Although valuable, the arguments given by Bellamy and Williams don't actually provide a concrete answer to the question on roles for regional IOs in RtoP promotion and implementation. The conundrum that they describe is nothing but a vicious circle; this time it is not the SC itself that is blocked and could perhaps be unblocked by regional IOs, but it is the regional arrangements that for a variety of reasons (political, strategic, economic, etc.) act as spoilers. The future of cooperation between the UN and regional arrangements in the field of RtoP is a must but is it truly feasible?

[91] Ibidem.
[92] Ibidem.
[93] Ibidem.