THE LEGAL FRAMEWORK FOR SUBREGIONAL HUMANITARIAN INTERVENTION IN AFRICA: A COMPARATIVE ANALYSIS OF ECOWAS AND SADC REGIMES

John-Mark Iyi*
Research/Teaching Associate, Webber Wentzel Scholar and PhD Candidate, School of Law, University of the Witwatersrand, Johannesburg

Abstract

The history of Africa in the 1990s is one of conflicts that reached their height in the Rwanda genocide of 1994. African subregional organisations like the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) have found themselves undertaking humanitarian military interventions not authorised by the United Nations Security Council (UNSC). The African Union (AU) has also shifted its paradigm from regime security to human security by constructing an interventionist legal framework which rests on African subregional organisations for its implementation. This paper examines the existing legal frameworks for humanitarian intervention under the constitutive documents of ECOWAS and SADC, and argues that, in terms of normative reach, there is a conflict between what is envisaged by the AU architecture and what actually exists in the SADC regime, particularly in relation to obtaining UNSC authorisation for humanitarian interventions in Africa. The paper calls for a review of the SADC regime to bring it in line with the AU architecture.

I Introduction

In the two decades after the Cold War, Africa has been plagued by several conflicts leading to atrocities in Liberia and Sierra Leone, and genocide in Rwanda and Darfur. Other conflict spots on the continent such as those in the Democratic Republic of the Congo (DRC) and Somalia have smouldered intractably and an uneasy calm seems to have settled over Ivory Coast just as Zimbabwe teeters on the precipice of anarchy. The poor response of the international community to the humanitarian catastrophes spawned by these and other theatres of conflict in Africa led the Organisation of African Unity (OAU) to rethink its traditional approach to conflict prevention, management and resolution as well as human rights protection on the continent since the beginning of the 1990s. In a radical departure from its age-old principle of non-intervention, the OAU's successor – the African Union (AU) – has adopted a more coercive approach to humanitarian intervention, moving from non-intervention to non-indifference.[1]

Under this new arrangement, the AU framework is presented as an overarching and superintending system in matters of humanitarian

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1 Article 4(h) of the AU Constitutive Act gives the organisation the right to intervene in a member state. See generally, Ben Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 807.

intervention. However, with a rather weak historical background and experience in humanitarian intervention, it appears that the AU will be relying more on the peace and security arrangements and human rights protection mechanisms in the various subregions on the continent. It presupposes the existence of subregional organisations with both legal and institutional frameworks and capacity for humanitarian intervention. However, not all the regions have developed such mechanisms; and where such arrangements exist, they have different levels of capability and their capacity to respond to gross human rights violations and complex humanitarian emergencies varies widely. It has, therefore, become imperative to examine some of these subregional organisations and their legal and institutional approaches to humanitarian intervention on the continent.

My aim here is to examine the legal and institutional framework for humanitarian intervention under the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS); how effective they have been in responding to the humanitarian intervention needs within the southern and West African subregions; and how their current legal regimes fit into the AU's peace and security architecture. I adopt a comparative perspective, drawing on ECOWAS' approach to humanitarian intervention while assessing how SADC's approach differs. I examine SADC's humanitarian intervention legal regime and call for a review of the SADC approach in order to bring it in line with that of the AU, which is hinged on having interventions on the continent handled by relevant regional and subregional organisations. I argue that this is a critical role for African subregional organisations necessary to achieving a cohesive continent-wide regional humanitarian intervention system. I argue that to realise this, the relevant subregional legal instruments of SADC need to be reviewed along with the mechanism for humanitarian intervention in the subregion. The new outlook should ensure that SADC can intervene in the internal affairs of member states to stop genocides, war crimes and crimes against humanity, or to halt humanitarian disasters and restore peace and security in the subregion. This will further enhance the critical roles subregional organisations play as building blocks for a cohesive regional humanitarian intervention system in Africa as a whole.

II Humanitarian intervention in a global context

The history of humanitarian intervention as a doctrine and the controversy surrounding it is well documented, and the voluminous literature on the subject cannot be reviewed here.[2] What is settled, however, is that its legal

[2] For a detailed analysis, see LB Sohn & T Buergenthal 'International protection of human rights' in John N Moore (ed) *Law and Civil War in the Modern World* (1974); Thomas M Franck & Nigel S Rodley 'After Bangladesh: The law of humanitarian intervention by military force' (1973) *American Journal of International Law* 275; Ian Brownlie *International Law and The Use of Force by States* (1963); Oscar Schachter 'The right of States to use armed force' (1984) 82 *Michigan Law Review* 1620; Jack Donnelly 'Human rights, humanitarian crisis and humanitarian intervention' (1993) 48 *International Law Journal* 4; Oliver Ramsbotham & Tom Woodhouse *Humanitarian Intervention in Contemporary Conflicts: A Reconceptualization* (1996); Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977); Stanley Hoffman *The Ethics and Politics of Humanitarian Intervention* (1996); Nicholas J Wheeler & J Morris 'Humanitarian intervention at the end of the Cold War' in F Rick & J

characterisation has remained tenuous both under customary international law and conventional law throughout much of its long history. Therefore I only touch on those aspects of the doctrine that have framed the debates relating to the focus of this paper and how they signpost our journey in exploring the subregional framework that exists in Africa, first as a testimony to where we are coming from; secondly, as evidence of where we are; and thirdly, as a compass for the direction in which we are headed.

Since the Treaty of Westphalia of 1648, the nation-state has remained the unit of political and legal organisation of the international system and it is expected to remain so for the foreseeable future. As subjects of international law, the regulation of interstate relations necessitated the development of concepts like *sovereignty*, whose meaning has remained as nebulous as its scope is controversial.[3] Similarly, its corollary – the legal equality of states – is even more capricious in its claim and place in international law.[4] Perhaps the most critical and, yet, often violated of these international law norms is the prohibition of the use of force.[5] So blatant and flagrant have been violations of this norm, both in the distant past and in recent memory, that some legal commentators have been forced to question its continued status, validity and

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Larjins (eds) *International Society After The Cold War* (1999); George Wright 'A contemporary theory of humanitarian intervention' (1988 – 9) 4 *Florida International Law Journal* 435; Fernando Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (1997); Michael W Reisman & Myres S McDougal *Memorandum upon Humanitarian Intervention to Protect the Ibos* (1968); Natalino Ronzitti *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985); Simon Chesterman *Just War or Unjust Peace: Humanitarian Intervention and International Law* (2001); J Holzgrefe & Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003); Jean-Pierre Fonteyne 'The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter' (1974) 4 *California Western International Law Journal* 203.

3 For discussions of the shifting meaning and scope of the concept of *sovereignty*, see L Oppenheim *International Law* (1905) 103; Michael Reisman 'Sovereignty and human rights in contemporary international law' (1990) 84 *American Journal of International Law* 866; Christine Ellerman 'Command of sovereignty gives way to concern for humanity' (1993 – 4) 26 *Vanderbilt Journal of Transnational Law* 346; James Crawford *The Creation of States in International Law* (2006) 26; Daniel Phillpott 'Sovereignty: An introduction and brief history' (1995) 48 *Journal of International Affairs* 353; Robert Jackson 'Quasi states, dual regimes and neoclassical theory: International jurisdiction and the Third World' (1987) 41 *International Organisation* 519; Stephen D Krasner *Sovereignty: Organised hypocrisy* (1999); Helen Stacy 'Relational sovereignty' (May 2003) 55(5) *Stanford Law Review* 2029; Helen Ruiz Fabri 'Human rights and state sovereignty: Have the boundaries been significantly redrawn?' in Philip Alston & Euan McDonald (eds) *Human Rights, Intervention and the Use of Force* (2008); Helmut Steinberger 'Sovereignty' in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law* (2000) Vol. IV; Paul Christopher 'Humanitarian intervention and the limits of sovereignty' (April 1996) 10(2) *Public Affairs Quarterly* 103. For a critical view of the encroachment on sovereignty, see Mohammed Ayoob 'Humanitarian intervention and state sovereignty' (2002) 6(1) *International Journal of Human Rights* 81.

4 Edwin Dew Dickinson *The Equality of States in International Law* (1920).

5 Antonio Cassese 'Ex injuria, ius oritur: Are we moving towards the international legitimation of forcible humanitarian countermeasures in the world community?' (1999) 10 *European Journal of International Law* 23. However, Cassese subsequently reviewed the views expressed here and concluded that states had not abandoned their commitment to the prohibition on the use of force. See Antonio Cassese 'A follow-up: Forcible humanitarian countermeasures and opinion necessitatis' (1999) 4 *European Journal of International Law* 791; Karsten Nowrot & Emily W Schabcker 'The use of force to restore democracy: International legal implications of the ECOWAS intervention on Sierra Leone' (1998) 14 *American University International Law Journal* 321.

relevance as a rule of international behaviour.[6] Of course, there are those who believe that the normative framework on the use of force codified in Article 2(4) of the UN Charter in 1945 remains impregnable despite its seemingly battered and bloodied nose.[7]

The banner of humanitarian intervention has often provided justification for extra-legal behaviours by powerful states in the pursuit of less than humanitarian objectives. This was largely made possible due to the nature of the international legal order created in the post-World War II (WWII) scenario, where memories of the ravages of war and the search for global peace attenuated compromises that would otherwise not have been impossible. Thus, we have the UN Charter with all its promises of human dignity, freedom, peace and security for all humankind, yet it has failed to deliver on the most fundamental of these promises – human security and the enjoyment of human rights guaranteed in the plethora of international human rights instruments that have emerged since 1948. This is more so in the case of Africa, which has been at the receiving end of these violations: whether at the hands of their own atrocious governments or as a consequence of foreign-sponsored internal conflicts.

(a) Humanitarian intervention and cotemporary Africa

Very few of the wars that have been fought in Africa since their independence from colonising powers have been fought purely by and only for Africans. If anything, many of these conflicts often bore the hallmarks of foreign elements pursuing different agendas. Where such foreign influences have been absent, it has been because there have not been enough national interests at stake. Yet Africa had been abandoned to its fate in its darkest hours and moments of need of humanitarian intervention. From Congo to Angola, Rwanda to Liberia and Darfur, Africans have borne the brunt of a warped international legal order. The instances of foreign humanitarian interventions have almost always been shaped by the interveners' own political or economic interests. The US – Belgian intervention in the Congo had more to do with securing the strategic interest of the West in that region of Africa at the height of the Cold War than protecting the civilians; similarly, the more benign excuse of rescuing nationals advanced by the French in Rwanda after the genocide there had more to do with France covering her tracks of complicity in those she

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[6] Thomas Franck 'Who killed Article 2(4)? Or changing norms, governing the use of force by states' (October 1970) 64(5) *American Journal of International Law* 809; Thomas Franck 'What happens now?: The United Nations after Iraq' (2003) 97 *American Journal of International Law* 620; Tom J Farer 'The prospects of international law and order in the wake of Iraq' (2003) 97 *American Journal of International Law* 621; Ann-Marie Slaughter Burley 'International law and international relations theory: A dual agenda' (1993) 87 *American Journal of International Law* 205; Anthony C Arend *International rules: Approaches from international law and international relations* (1996).

[7] Professor Wippman, in particular, employs such figurative expressions in explicating the resilience of the Charter paradigm on the prohibition of the use of force. See David Wippman 'The nine lives of Article 2(4)' (2007) 16 *Minnesota Journal of International Law* 387; Louis Henkin 'The reports of the death of Article 2(4) are exaggerated' (1971) 65 *American Journal of International Law* 554; Jean Combacaue 'The exception of the use of force in UN practice' in Antonio Cassese (ed) *The Current Legal Regulation of the Use of Force* (1986) 32.

had helped to train, arm and support in the events leading to the genocide than actually protecting the survivors of the genocide.[8] The case of Somalia underscores this better than other instances. What would otherwise have been a successful humanitarian intervention by the international community was truncated by the untimely withdrawal of the United Task Force (UNITAF), which was replaced by the Second UN Operation in Somalia (UNOSOM II) – even when all indications pointed to the peril inherent in such withdrawal. When compared with the intervention by the Economic Community of West African States Monitoring Group (ECOMOG) in Liberia, which lasted for over seven years, what this demonstrates is that when interventions by the international community do occur in Africa, there is often hardly enough motivation to stay the course.[9]

It was no surprise, therefore, that the OAU began to shift away from its traditional principled stance of non-interference, which had characterised most of its existence, towards a more people-protection-oriented policy of interstate relations on the continent. This was largely influenced by the relative success of the humanitarian interventions mounted by ECOWAS in the subregion in the wake of the crisis in Liberia and Sierra Leone, and the legal and institutional framework that consequently evolved.

As Libya shows, interventions in Africa in pursuit of foreign interests will not abate unless – and until – African regional and subregional organisations can respond effectively to conflicts on the continent. This in turn depends on the various African subregional groups developing the legal and institutional framework for such interventions. And it is urgent that this happens because, as Lesotho, Liberia, Libya and Sierra Leone show, only African states are likely to intervene in African conflicts purely on humanitarian grounds where there are no economic and political benefits to reap. For example, the US insisted that the Liberian crisis was an internal affair, but that same rule was not applied to Panama, the Philippines, Nicaragua or, recently, Libya.[10]

III Why African Subregional Organisations need a Humanitarian Intervention Mechanism

When the idea of intervention in the Liberian civil war was first mooted by ECOWAS in 1990, Guinea was one of the main objectors to the use of force to restore peace and security in Liberia. But this position was to change a few months later when hundreds of thousands of Liberian refugees fleeing the conflict besieged the Liberian – Guinean borders.[11] The Zimbabwean refugee crisis best demonstrates this in the SADC context today. As is well

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8 Linda Melvern *Conspiracy to Murder: The Rwandan Genocide* (2004) 243 – 4.

9 For example, Levitt asserts that '[I]t would be difficult to see any Western nation that would match the level of commitment of ECOWAS both in terms of human and material resources' in the intervention in Liberia and Sierra Leone, for example. See Jeremy Levitt 'Humanitarian intervention by regional actors in internal conflicts: The cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 375 (hereafter Levitt 'Humanitarian intervention by regional actors').

10 Ibid at 346.

11 For a detailed account of the Liberian crisis, see Margaret A Vogt (ed) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peace Keeping* (1992).

documented, the impact of the Liberian conflict on the entire West African region has been enormous.[12] More importantly, the destabilising effect on the social, economic and political life of the region was to last for another decade. Sierra Leone became the worst hit as the events in Liberia spilled over into its territory, creating a lucrative trade in so-called blood diamonds, fuelling a war economy in mineral resources and creating an unholy alliance between Liberian rebels and Sierra Leonean insurgents who took a cue from the Liberian conflict to start their own rebellion.[13] The amplitude of the conflicts in Angola, the DRC or Zimbabwe may not have reached the magnitude of the Liberian and Sierra Leonean experiences, but, like all wars of attrition, their impacts are no less significant for SADC as a region and more so for South Africa, which continues to attract high numbers of refugees from these countries. It shows the inextricable interdependence of our common security as a region and the need to find common solutions to the region's peace and security challenges.

A corollary to the above point is the inescapable reality of Africa's marginal position in global governance, especially within the decision-making organs of the UN. Outside the reference of centre – periphery economic exploitation, it is doubtful whether Africa matters to the world anymore – let alone that the human rights and security of its peoples should be of primary concern to the UN, or that the international community should allocate human and material resources to bring peace and stability to a troubled continent. There is overwhelming evidence of this disinterest in African conflicts in recent memory – Darfur, the DRC, Liberia, Rwanda, Somalia and Sierra Leone – to warrant elaborating on this further. The failure of the international community in Africa was captured well by Mohammed Ayoob:[14]

> [S]imultaneously, the low priority of that region [Africa] in the strategic calculations of the dominant coalition as compared to Europe or the Middle East explains the relative indifference of the "international community" to humanitarian crises in Africa.

Secondly, a subregional security arrangement – both a legal and an institutional framework – is desirable, flowing from the AU's new peace and security architecture.[15] Although focusing on the capacity of the OAU, past recommendations have been intended for continental as well as subregional bodies to work towards creating an independent, African peace and security mechanism that would meet the needs of Africa.[16] And following from the above, the subregional peace and security arrangements are important

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12 'Thousands of refugees reportedly fled to Cote d'Ivoire' 6 January 1990 *BBC Monitoring 8 January 1990*; reprinted in M Weller *Regional Peace-keeping and International Enforcement: The Liberian Crisis* (1994) 34.

13 See by statement of the OAU Representative in UN Doc S/PV.33138 1992.

14 Mohammed Ayoob 'Humanitarian intervention and state sovereignty' (2002) 6(1) *International Journal of Human Rights* 81 at 97.

15 The legal and theoretical framework of humanitarian intervention under the AU Constitutive Act is explored in this author's ongoing doctoral thesis.

16 Ibid.

components of the new peace and security architecture envisaged by the AU. The AU Peace and Security Council Protocol provides as follows:[17]

> The regional mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa. In this respect, the Peace and Security Council and the Chairperson of the Commission shall:
> (a) harmonise and co-ordinate the activities of regional mechanisms in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the Union.

This provision presupposes the existence of such subregional organisations as ECOWAS and SADC and calls for the alignment of their frameworks with that of the AU. As will be shown presently, this should open the way for subregional organisations like SADC that would want to create a legal framework for a right of humanitarian intervention within its subregion, since Article 4(h) of the African Union Constitutive Act already provides a template for such developments on the continent.

Thirdly, there is a global movement towards regional security arrangements, with regional organisations expected to play a more active role in the maintenance of peace and security within their regions.[18] This is obviously the case in the AU and ECOWAS. In the case of ECOWAS, the experiences in Liberia and Sierra Leone shaped the scope and content of the 1993 ECOWAS Revised Treaty and the 1998 Protocol Relating to the Establishment of the Mechanism for Conflict Prevention, Management, Resolution and Peace and Security. However, some commentators also argue that external influences from within and outside the continent rather than the hegemonic conceptions of certain countries within the region have in fact influenced the new security arrangements.[19]

In my view, this is highly doubtful because of the radical nature of the ECOWAS humanitarian intervention legal regime. In the first place, it is unlikely that there is any major power in the 'new' world order that would support the attempt by the developing world – let alone Africa – to roll back the Big Powers' regulation of the use of force in the current world order through the instrumentality of the UN (which is exactly what the ECOWAS new humanitarian intervention legal regime seeks to achieve), by "clawing back powers" from the UN Security Council (UNSC) in the areas of regulating the use of force and maintaining peace and security within the ECOWAS subregion. Moreover, the ECOWAS humanitarian intervention legal regime is very novel in nature because it is the only subregional organisation treaty that has codified a right of intervention to restore democracy – a concept general international law is not even agreed on as of yet, let alone being disposed

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[17] See Article 16(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002/2003; reprinted in Solomon Ebobrah & Armand Tanoh (eds) *Compendium of African Sub-regional Human Rights Documents* (2010) 24 (hereafter Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents*).

[18] See generally, Michael Pugh & Waheguru Pal Singh Sidhu (eds) *The United Nations and Regional Security: Europe and Beyond* (2003).

[19] Funmi Olonisakin & Jeremy Levitt 'Regional security and challenges of democratization in Africa: The case of ECOWAS and SADC' (1999) 13(1) *Review of International Affairs* 73 (hereafter Olonisakin & Levitt 'Regional security and challenges').

to permitting the use of force for its enforcement or its codification in a multilateral treaty or convention.

Furthermore, such "influence" could not have come from anywhere in Africa because of the OAU's long history of commitment to the principle of sovereignty and non-interference. Before its transformation into the AU in 2000 and the adoption of its Constitutive Act, the OAU had not even developed the legal framework that ECOWAS devised. Under its Article 4(h), the AU's Constitutive Act now provides for a right of intervention in cases of war crimes, crimes against humanity, and genocide. Yet, normatively, this does not even go as far as the ECOWAS provisions do. Moreover, in the case of the AU, there have been attempts to roll back the scope of the provisions on the right of humanitarian intervention by the introduction of amendments to the said Article 4(h).[20] Thus, the assertion that the authoritarian nature of most West African states during the ECOWAS interventions in Liberia and Sierra Leone undermined the objectives of the missions does not appear to find support amongst major writers on the subject. Many writers agree that, but for the need to build consensus, ECOWAS and ECOMOG would easily have overrun Charles Taylor's troops in August 1990 when the mission was first launched.[21]

Any analysis of subregional humanitarian interventions in Africa must take into account the fact that, because of the nature of the security threats that confront Africa today, i.e. intrastate rather than interstate conflicts, regional bodies should see the imperative to pursue and coordinate their approaches to human rights protection and regional peace and security – at least to the extent that it affects their neighbours and the stability of the region. This is necessary given the interdependence and interconnectedness of the modern world, which is characterised by the free flow of persons, materials, arms and ammunition across international borders. This interconnectedness is also reflected in the new AU and ECOWAS peace and security and humanitarian intervention legal regimes. It might well now be time for SADC to follow suit.

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[20] See Protocol on Amendments to the Constitutive Act of the African Union 2003 amending Article 4(h) of the African Union Constitutive Act thus: 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as *a serious threat to legitimate order* to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council' [emphasis added].

[21] For example, Wippman states that 'Nigeria did not simply impose its will on Liberia. It did not intervene unilaterally, or at a point when Doe's regime might still have been salvageable. More importantly, Nigeria has frequently had to compromise on ECOMOG's goals and tactics in order to maintain a consensus within ECOWAS for continued involvement within Liberia. But for this need to compromise, ECOMOG might well have overrun Taylor's force in August 1990. Indeed many of the fits and starts of the ECOWAS approach to Liberia – the on again, off again economic sanctions and the repeated efforts to accommodate Taylor despite his string of broken promises – demonstrate that ECOMOG had indeed been a community enterprise'; see David Wippman 'Enforcing the peace: ECOWAS and the Liberian civil war' in Lori Fisler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 192 (hereafter Wippman *Enforcing the Peace*). See also Levitt 'Humanitarian intervention by regional actors' op cit note 9 at 346 (approving this view).

IV African Subregional Organisations and Humanitarian Intervention: The Emerging Legal Architecture

The conflicts that plagued many African countries in the late 1980s and the 1990s revealed that African states were unprepared for the increase in such conflicts on the continent, and the violations of human rights and international humanitarian law that characterised most of them.[22] This is evident from the disparate approaches adopted by the different African subregional organisations, the divergent tools deployed by them to address the situations at hand, and the varied outcomes.[23] There were no meaningful regional security arrangements on the continent and crises like Chad and Sudan thrived on this lacuna.[24] This was probably owing to two main reasons: first, the Cold War had ended rather dramatically and quite unexpectedly. The second was that a regional security mechanism was not necessary in an era in which many of the totalitarian leaders as well as weak states were kept going by external support and financing, thus avoiding state collapse. All that changed from the early 1990s. Today, –[25]

> … alternative concepts of common security are being advanced because the collective security system envisaged in the UN Charter for the most part has failed to bring about international peace and security. This is particularly true with respect to Africa, which has been left to resolve its own conflicts, whether interstate (e.g., the DRC) or intrastate (e.g., Liberia, Sierra Leone, Guinea-Bissau and Lesotho).

The security arrangement designed by the West after WWII was born of their own experiences in the western hemisphere, and this explains why the arrangement has failed woefully in the DRC, Rwanda and Somalia: such measures were aimed at removing threats to international peace and security rather than intrastate conflicts.[26] So what kind of legal framework should underpin African subregional organisations like SADC and ECOWAS in seeking to respond to these challenges? We now examine the legal and institutional frameworks of these two regional bodies in this respect.

(a) SADC

Historically, SADC's origin is traceable to the formation of the Frontline States in 1974, and originally comprised Tanzania and Zambia.[27] At the height of the struggle for the political emancipation of the entire southern African

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[22] The normative clash between the UN Charter and the legal and institutional framework created by ECOWAS and the AU as a result of these experiences is explored in my thesis.

[23] For an assessment of these initiatives, see Jeremy Levitt 'Conflict prevention, management, and resolution: Africa – Regional strategies for the prevention of displacement and protection of displaced persons: The cases of the OAU, ECOWAS, SADC and IGAD' (2001) 11(39) *Duke Journal of Comparative and International Law* 39.

[24] Olonisakin & Levitt 'Regional security and challenges' op cit note 19 at 68.

[25] Olonisakin & Levitt op cit 72.

[26] Ibid. The former colonial masters of some of these countries have also worked to undermine the capacity of African regional integration and their ability to develop their own security mechanism independent of the West. This is particularly so in the case of ECOWAS, where France instigated her former colonies to establish the Agreement on Non-aggression and Defence of 1977 to counter ECOWAS, thereby deepening the anglophone/francophone divide and rivalry within the region; see Olonisakin & Levitt at 69.

[27] Olonisakin & Levitt op cit 70.

region, the Frontline States took the view that, given South Africa's economic dominance, political liberation necessarily had an economic dimension.[28] The Southern African Development Coordination Conference (SADCC) was formally launched at the first SADCC Summit on 1 April 1980 in Lusaka, with Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe presiding.[29] SADCC's main objective was to focus on economic cooperation and integration in the subregion.[30] The organisation was transformed into the Southern African Development Community in 1992, with the main objective of fostering economic, political and security cooperation in the subregion.[31]

SADC's initial focus soon changed due to the advent of multiracial democracy in South Africa, and the emphasis moved from security to economic cooperation.[32] Like other regions of the continent considered as having high geo-strategic value, peace, security and human rights protection in southern Africa was largely a function of the prevailing Cold War ideological matrix. But SADC faced a new and somewhat challenging future when apartheid ended in South Africa, the Cold War ended, and the wars in Angola and Mozambique eased.[33] These events created new regional security permutations and a new legal order, and efforts to tackle the challenges faced by SADC had to be ingrained in its legal framework and institutional arrangements.

(i) Legal and institutional framework for humanitarian intervention in SADC law

As already mentioned above, SADC succeeded the defunct SADCC upon the entry into force of the SADC Treaty.[34] The Preamble of the Treaty states that its Members are committed, inter alia, to ensuring 'through common action, the progress and well-being of the people of Southern Africa'.[35] The organisation is committed to guaranteeing democratic rights, human rights and the rule of law in order to achieve development for its people.[36] It aims to pursue these aspirations within the framework of regional integration, and the harmonisation of national and regional policies in the context of the overall objectives of the African Economic Community and the AU.[37] Amongst the

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[28] Peter Meyns 'The Southern African Development Coordination Conference (SADCC) and regional cooperation in southern Africa' in Domenico Mazzeo (ed) *African Regional Organisations* (1984) 196. The controlling organ of the Frontline States was the Interstate Defence and Security Committee.

[29] Ibid.

[30] Ibid.

[31] See Articles 4 and 5 of the SADC Treaty infra note 34.

[32] Olonisakin & Levitt 'Regional security and challenges' op cit note 19 at 70.

[33] Ibid.

[34] The Treaty of the Southern African Development Community was adopted on 17 August 1992 and came into force on 30 September 1993. The Treaty, which all members have ratified, has undergone two amendments to date. Reference to the Treaty here is to the Consolidated Text of the Treaty of the Southern African Development Community, as amended 1992/3, reprinted in Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 17 at 339. The members of SADC are Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

[35] Preamble, SADC Treaty.

[36] Ibid.

[37] Ibid.

five principles of SADC are (i) solidarity, peace and security;[38] (ii) human rights, democracy and the rule of law;[39] and (iii) the peaceful settlement of disputes.[40]

To enable it fulfil the objectives listed in Article 5(1) of the Treaty, SADC can create the institutions and mechanisms necessary for the implementation of its programmes.[41] Member states are empowered by Article 22(1) to adopt protocols necessary in the different areas of cooperation, with such protocols providing for their scope, institutional arrangements for cooperation and integration.[42] Members of the organisation agree to cooperate in a broad range of areas including 'politics, diplomacy, international relations, peace and security'.[43] Curiously, the Treaty does not provide for peace and security in Article 4, which deals with the Principles of the organisation; nor does it mention peace and security as part of its objectives under Article 5 of the Treaty, which deals with the organisation's objectives.

From the point of view of SADC's aims and objectives, democracy, human rights, the rule of law and economic development rank high in the Treaty's priorities. Understandably, in a region that has seen the worst of the deprivation of human rights and human dignity as well as social, economic and political deprivation, these values should be of concern. It was also conceivable that regional peace and security were less of a priority than the harmonisation of the development progress in the subregion. It was probably thought that the body could subsequently work out the modalities for dealing with "incidental" matters like security within the framework provided by the Treaty.

Thus, in 1996, SADC established the Organ on Politics, Defence and Security Cooperation.[44] The Principles of the Organ provide for, inter alia, (c) the achievement of solidarity, peace and security in the region; (d) the observance of human rights, democracy and the rule of law; (g) military intervention of whatever nature to be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the OAU (now AU) and the UN.[45] The Communiqué released by the SADC Heads of State and Government when the Organ was established lists its objectives as being to protect the people of the region from anarchy, 'inter-state conflict' and 'external aggression'.[46] The Organ is also tasked with ensuring members –[47]

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38 Article 4(b).
39 Article 4(c).
40 Article 4(e).
41 Article 5(2)(c).
42 Upon approval by the Summit on the recommendation of the Council, such protocols become an integral part of the SADC Treaty; see Article 22(2), (3).
43 Article 21(3)(h).
44 Hereafter *The Organ*.
45 Extraordinary SADC Heads of State and Government Communiqué, Gaborone, Botswana, 28 June 1996.
46 SADC Communiqué op cit par (a).
47 SADC Communiqué op cit par (b) It is empowered to mediate in disputes and conflicts. See Paragraph (e).

> … cooperate fully in regional security and defense through conflict prevention management and resolution as well as cooperate fully in regional security and defense through conflict prevention, management and resolution.

The Organ is to preempt the outbreak of both internal and interstate conflicts through its early warning system and use of preventive diplomacy to avert budding conflicts.[48]

In the event of a conflict, 'punitive' measures should be a last resort and this should be determined by the Summit.[49] The Organ is also to promote peacekeeping as an important element of achieving peace and security.[50] The Organ is also to –[51]

> … develop a collective security capacity and conclude a Mutual Defense Pact for responding to external threats, and a regional peacekeeping within national armies that could be deployed in the region, or elsewhere on the continent.

Furthermore, the Organ is mandated to 'coordinate the participation of member States in international and regional peacekeeping operations'[52] as well as attend to extra-regional conflicts that have consequences for the southern African region.[53] The Organ was intended to be SADC's peace and security department and the Communiqué enabled it to evolve its own mechanism, with the necessary framework (both legal and institutional), in order to realise the objectives of peace and security in the subregion.[54] The crisis in Lesotho was the first time SADC's capacity and the Organ's ability to maintain peace and security was tested. It is not clear whether Botswana and South Africa followed SADC internal procedures, but the Organ had already been established and certainly formed the legal basis for such intervention.[55] The case of Lesotho was also the first time a pro-democratic intervention by a regional organisation in southern Africa would take place.[56] An assessment of the Lesotho intervention cannot be undertaken here. However, following the experiences of that intervention, SADC promptly moved to strengthen the legal framework of the Organ by adopting the Protocol of Politics, Defence and Security Cooperation.[57]

Article 11 of the latter Protocol sets out, in a very comprehensive manner, the security architecture of SADC and compares it with the provisions under ECOWAS law.[58] The Protocol provides for the following circumstances under which SADC may resort to humanitarian intervention: (i) extensive violence between sections of the population and the state or between sections of the

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48 SADC Communiqué op cit par (f).
49 SADC Communiqué op cit par (g).
50 SADC Communiqué op cit par (i).
51 SADC Communiqué op cit par (l).
52 SADC Communiqué op cit par (o).
53 SADC Communiqué op cit par (p).
54 SADC Communiqué op cit par (g).
55 Jeremy Levitt 'Pro-democratic Intervention in Africa' in Jeremy Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2010) 137 note 243 (hereafter Levitt 'Pro-democratic intervention in Africa').
56 Ibid.
57 The SADC Protocol on Politics, Defence and Security Cooperation was adopted on 14 August 2001 and entered into force on 2 March 2004 (hereafter *SADC Organ Protocol*).
58 SADC Protocol on Politics 138.

state, or if there is a conflict between the state or its armed paramilitary forces and a section of the population;[59] (ii) when there is a threat to the authority of the legitimate government;[60] (iii) in the case of a civil war or an insurgency;[61] or (iv) if there is a conflict in a state which threatens the peace and security of other member states or the region.[62] The Summit is only to employ the use of force as a last resort and, in doing so, it is obliged to seek the approval of the UNSC and comply with Article 53 of the UN Charter.[63] Unlike both the AU and ECOWAS, it makes provisions for UNSC authorisation and that it cannot undertake humanitarian intervention without UNSC approval under Article 53 and Chapter VIII generally. In contrast to the SADC Protocol, both the AU and ECOWAS regimes seem to deliberately reject the old order under Article 53 of the Charter.

Moreover, given the SADC experience in Lesotho where it intervened without UNSC authorisation, it remains to be seen whether SADC will follow these provisions in an emergency. The unauthorised intervention might be excusable on the ground that the Lesotho intervention occurred before the Organ's Protocol was adopted.

Another area of marked difference to both AU and ECOWAS laws is Article 15(1) of the Protocol. The said Article states that the Protocol in no way detracts from the commitment of members to both the UN and OAU (AU). Specifically, Article 15(2) provides that –[64]

> [T]his Protocol in no way detracts from the responsibility of the United Nations to maintain international peace and security.

These represent some of the areas in which SADC subregional security arrangements need to be brought in line and harmonised with the AU normative framework. This issue is addressed in subsequent sections of this paper.

(b) ECOWAS

When ECOWAS deployed its military forces on 4 August 1990 to intervene in the Liberian civil war, it became the first subregional organisation to unilaterally deploy a multilateral force to intervene in a member state's affairs with the aim of restoring peace and security and providing the environment for humanitarian assistance to take place.[65] The aim here is not to assess the

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[59] Article 11(2)(b)(i); such situations include genocide, ethnic cleansing and gross violations of human rights.

[60] Article 11(2)(b)(ii); the paragraph specifically mentions 'military coup' as an example of such a threat.

[61] Article 11(2)(b)(iii).

[62] Article 11(2)(b)(iv).

[63] Article 11(3)(d).

[64] Cf Articles 16 and 17 of the African Union Peace and Security Council Protocol and Article 10 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security 1999 reprinted in Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 17 at 203 (hereafter *ECOWAS Mechanism Protocol*).

[65] See ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90 on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia 7 August 1990, reprinted in M Weller (ed) *Regional Peacekeeping and International Enforcement: The Liberian Crisis* (1994) 67 (hereafter Weller *The Liberian Crisis*); Margaret Aderinsola Vogt 'The involvement of ECOWAS in Liberia's peacekeeping' in Edmond J Keller & Donald Rothchild (eds) *The New International Order: Rethinking State Sovereignty and Regional Security* (1996) 166 (hereafter Vogt 'The involvement of ECOWAS').

success or failure of that intervention or, indeed, subsequent interventions mounted by ECOWAS in the subregion, but to highlight the significance of the intervention itself.[66] First, the intervention demonstrates that, contrary to what was until then – and perhaps still is to some extent – the dominant view, African regional and subregional organisations are capable of carrying out large-scale military intervention to halt massive violations of human rights catastrophes and restore peace and security on the continent without necessarily waiting for the UN or the West.[67] Secondly, it marked the advent of a novel kind of intervention: that by a regional organisation aimed at halting humanitarian disasters albeit without UNSC authorisation.[68] Thirdly, it spurred African leaders on to rethink the future of human rights protection and the use of humanitarian intervention on the continent and thereby awakened in them a new consciousness that –[69]

> [T]he security, stability and development of every African country is inseparably linked with those of other African countries; [and that] … instability in one African country reduces the stability in all other African countries.

ECOWAS as well as SADC best demonstrate this. But, unlike ECOWAS, the approach by SADC has been less than proactive and forward-looking for reasons we shall explore presently.

(i) Legal and institutional framework for humanitarian intervention under ECOWAS law

ECOWAS was established in March 1975.[70] The primary objective of the organisation is the promotion of economic cooperation, integration and

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66 For an assessment of the intervention see Wippman *Enforcing the Peace* op cit 21 at 57 – 203; Sean D Murphy *Humanitarian Intervention: The United Nations in an Evolving World* (1996) 146 – 65; Thomas M Franck *Recourse to Force: State Action Against Armed Attacks* (2002) 155 – 62; Clement Adibe 'The Liberian conflict and the ECOWAS – UN partnership' (1997) 18(3) *Third World Quarterly* 471; Simon Chesterman *Just War or Just Peace?: Humanitarian Intervention and International Law* (2003)134 – 7; Max A Sesay 'Civil war and collective intervention in Liberia' (1996) 23(67) *Review of African Political Economy* 35; Abiodun Alao *The Burden of Collective Goodwill: The International Involvement in the Liberian Civil War* (1998); Margaret A Vogt (ed) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peace Keeping* (1992); Adekeye Adebajo *Liberia's Civil War: Nigeria, ECOMOG and Regional Security in West Africa* (2002); Herbert Howe 'Lessons of Liberia: ECOMOG and regional peacekeeping' (Winter 1996/7) 21(3) *International Security* 45; Clement Adibe 'The Liberian conflict and the ECOWAS – UN partnership' (1997) 18(3) *Third World Quarterly* 471.

67 Vogt 'The involvement of ECOWAS' op cit note 65 at 166. To be sure, ECOWAS received some assistance at a later stage in the conflict, but that the initiative was taken and that the intervention occurred at all were in themselves significant.

68 Comfort Ero 'ECOWAS and the subregional peacekeeping in Liberia' (1995) *The Journal of Humanitarian Assistance*, available at *http://www.jha.ac/1995/09/25/ecowas-and-the-subregional-peacekeeping-in-liberia/*, accessed on 20 June 2011.

69 Ibid, citing the Second Principle of the 1991 Conference on Security, Stability, Development and Cooperation in Africa.

70 'Treaty of the Economic Community of West African States concluded at Lagos on 28 May 1975' (1973) 12 *International Legal Materials* 996 (hereafter ECOWAS Treaty). The Treaty came into force provisionally on that same day for those states on whose behalf it was signed. Its member states include Benin, Cape Verde, the Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast (now Cote d'Ivoire), Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo, and Upper Volta (now Burkina Faso). Mauritania withdrew from the organisation in 2000.

development within the West African subregion.[71] ECOWAS adopted a Revised Treaty in 1993.[72] Although the maintenance of peace and security is not listed among the organisation's aims and objectives in Article 3, it forms part of its fundamental principles.[73] Its principles are to create a peaceful environment in the subregion, promote human and people's rights, and consolidate democratic governance within member states.[74] As part of its institutional framework for peace and security within the West African subregion, Article 58(f) provides for the establishment of a 'regional peace and security observation system and peacekeeping forces where appropriate'.[75] ECOWAS has previously had peace and security arrangements within the region, but since they were designed in the Cold War period, they mainly addressed extra-regional and interstate threats rather than intrastate and intraregional threats.[76]

Pursuant to the developments of the 1990s, the member states adopted the Framework Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. In the Framework, they set out a broad scheme relating to humanitarian intervention in particular and the maintenance of regional peace and security in general.[77] The Framework also provides for the establishment of an ECOWAS Mediation and Security Council that will take decisions on the use of force by ECOWAS to restore peace and security within member states.[78] ECOWAS will be able to use military force within member states whenever a situation –[79]

> (1) threatens to trigger a humanitarian disaster; (2) pose[s] a serious threat to peace and security in the subregion; (3) [follows] the overthrow or attempted overthrow of a democratically elected government.

The AU, apparently taking its cue from ECOWAS, has adopted similar provisions on the right to undertake unilateral military intervention in the territory of member states in grave circumstances, namely genocide, war crimes and crimes against humanity.[80]

The ECOWAS Protocol on Conflict Management drew much of its substance from the Protocol on Mutual Assistance on Defence which, until

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71 See Article 2 of the ECOWAS Treaty. Article 4 of the same Treaty creates the institutions of ECOWAS and does not provide for security, reflecting that it was not as major a concern for member states in 1975 as economic development was 25 years after independence.

72 This was based on of a Committee of Eminent Persons' recommendations to review the 1975 Treaty. See Decision A/DEC.1015190, Treaty of ECOWAS, available at *http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en*, accessed on 21 August 2011.

73 See Article 4(e) of the ECOWAS Revised Treaty reprinted in Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 17 at 185.

74 Ibid, Article 4(f), 4(g) and 4(j) of the ECOWAS Revised Treaty.

75 ECOWAS Revised Treaty Article 58((3) provides for the details on this to be worked out in the relevant protocol. See Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 17 at 190.

76 See the *Protocol on Mutual Assistance* infra note 82.

77 See Levitt 'Pro-democratic intervention in Africa' op cit note 55 at 95.

78 Ibid.

79 See paragraphs 46(i), (ii) and (iii) of the Framework, cited in Levitt 'Pro-democratic intervention in Africa' op cit note 55 at 95.

80 See Article 4(h) of the AU Constitutive Act. See Jeremy Levitt (ed) *Africa: Mapping New Boundaries in International Law* (2010) 120. Both the Inter-American Democratic Charter of 2001 and the SADC Organ have provisions for intervention, but both instruments provide that UNSC authorisation is required for such intervention.

1999, was the most comprehensive ECOWAS Protocol on security.[81] But, unlike the Mutual Defence Pact, which could only be activated by request from a threatened or transgressed member state, under the new Mechanism, ECOWAS is empowered to take responsibility for regional collective security including cases of intrastate conflicts that meet the threshold set out by in the relevant protocols.[82] Under the Mutual Assistance on Defence Protocol, ECOWAS could only undertake the 'interposition' of its troops between two warring member states in an interstate conflict.[83] But the lessons of trying to apply this Protocol to the conflicts in Liberia and Sierra Leone were that it exposed the weaknesses and limitations of its provisions because it showed that it only allowed for the use of force to repel external aggression or to quell an externally sustained internal conflict: it did not provide for the use of force in a crisis in a member state that was purely domestic in nature.[84]

Thus, by virtue of Article 18(ii), it was illegal for ECOWAS to intervene where the crisis was 'purely internal'.[85] Although it remains debatable whether both crises were still 'purely internal' within the terms of Article 18(ii) when there were allegations that Burkina Faso, Cote d'Ivoire and Libya were involved in the Liberian crisis; and Liberia itself was involved in the case of Sierra Leone. It was against this background that ECOWAS adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution Peacekeeping and Security. The Mechanism aims at reshaping ECOWAS from a collective self-defence (North Atlantic Treaty Organization/NATO- and UN-Article-51-style alliance and peacekeeping operations) framework, to a Chapter VIII type of framework. [86] In fact, it is a transformation of the security philosophy of the subregion from the classic self-defence notion to something novel, something never seen before in any regional or subregional organisation: the idea of interdependent, indivisible and interrelated security.

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81 Muhammed Tawfiq Ladan *Introduction to ECOWAS Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security* (2009) 326 (hereafter Ladan *Introduction to ECOWAS Law*).

82 See Articles 16, 17 and 18(i) and (ii) of the ECOWAS Protocol Relating to Mutual Assistance on Defence, 29 May 1981, reprinted in Weller *The Liberian Crisis* op cit note 65 at 23 (hereafter *Protocol on Mutual Assistance*) The emphasis under this Protocol was on repelling extra-regional aggression and interference or meddling by superpower politics relating to the Cold War. This is borne out by Article 18(ii), which forbids ECOWAS from intervening if the crisis was 'purely internal', thus showing the commitment in the 1960s, 1970s and 1980s to the dominance of the concept of absolute sovereignty and non-interference in matters within a state's domestic jurisdiction; cf paragraph 46 of the ECOWAS Framework for Establishing the Mechanism and Article 10 of the *ECOWAS Mechanism Protocol* op cit note 64.

83 See Article 17 of the *Protocol on Mutual Assistance*.

84 Ladan *Introduction to ECOWAS Law* op cit note 81 at 327.

85 See Christine Gray *International Law and the Use of Force* (2000) 213.

86 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security adopted at Lome in Togo on 10 December 1999; ECOWAS Doc A/P10/12/99, available at *http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en*, accessed on 20 December 2011, also reprinted in Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 34 at 203 (hereafter *ECOWAS Mechanism Protocol*). See Ladan *Introduction to ECOWAS Law* op cit note 81 at 327.

The principles of the new Mechanism underscore the reorientation of the security architecture in ECOWAS. The Mechanism recognises that socio-economic development, human security and the security of states are 'inextricably linked'.[87] The Mechanism also highlights the importance of democracy and the entrenchment of democratic institutions as part of its principles.[88] Members commit to the protection of 'fundamental human rights and freedoms and the rules of international humanitarian law'.[89] Article 3(a) provides that the objective of the Mechanism includes the prevention, management and resolution of intra- and interstate conflicts, in accordance with the provisions of paragraph 46 of the Framework of the Mechanism. The Mechanism is also to be employed to implement Article 58 of the Revised Treaty, which deals with peace and security, as well as other instruments and decisions relating to peace and security within the subregion.[90] Thus, by virtue of Article 3(h), ECOWAS can deploy both civilian and military forces for the purpose of maintaining or restoring peace within the subregion.

The Protocol creates a Mediation and Security Council[91] as one of the four major institutions of the Mechanism. This Council is responsible for making decisions on matters of peace and security in the subregion as well as for implementing the Mechanism.[92] The Council is solely responsible for –[93]

> … authoriz[ing] all forms of intervention and decid[ing] particularly on the deployment of political and military missions.

The Mechanism also creates the ECOWAS Cease-fire Monitoring Group (ECOMOG) as one of the supporting institutions.[94] ECOMOG is described as a –[95]

> … structure composed of several Stand-by multi-purpose modules (civilian and military) in their countries of origin and ready for immediate deployment.

ECOMOG has the role of peacekeeping and restoration of peace;[96] humanitarian intervention in support of the prevention of humanitarian disaster;[97] enforcement of sanctions including embargo;[98] preventive deployment;[99] and peace-building, disarmament and demobilisation.[100] There is no doubt about the intrusive nature of this Mechanism.

The Mechanism could be activated by, inter alia, –

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87 Article 2(a) *ECOWAS Mechanism Protocol* op cit note 86.
88 *ECOWAS Mechanism Protocol* Article 2(c).
89 *ECOWAS Mechanism Protocol* Article 2(d).
90 *ECOWAS Mechanism Protocol* Article 3(b) and (c).
91 *ECOWAS Mechanism Protocol* Article 4.
92 *ECOWAS Mechanism Protocol* Article 10(a).
93 *ECOWAS Mechanism Protocol* Article 10(c). This contrasts sharply with SADC which differs to the UNSC in authorising the use of force within its subregion.
94 *ECOWAS Mechanism Protocol* Article 17(c).
95 *ECOWAS Mechanism Protocol* Article 21.
96 *ECOWAS Mechanism Protocol* Article 22(b).
97 *ECOWAS Mechanism Protocol* Article 22(c).
98 Article 22(d) op cit note 86.
99 *ECOWAS Mechanism Protocol* Article 22(e).
100 *ECOWAS Mechanism Protocol* Article 22(f).

- an internal conflict that threatens to trigger a humanitarian disaster[101]
- an internal conflict that poses a serious threat to peace and security in the subregion[102]
- in the event of serious and massive violations of human rights and the rule of law, and[103]
- in the event of an overthrow or an attempted overthrow of a democratically elected government.[104]

The omnibus clause provides that the Mediation and Security Council can decide on any situation in which they deem it necessary to apply the Mechanism.[105] In defining the relationship between ECOWAS and the UN in respect of use of force for the maintenance of peace and security within the subregion, Article 52(3) provides as follows:

> In accordance with Chapters VII and VIII of the United Nations Charter, ECOWAS shall inform the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism.

This is quite unlike what we have under SADC, which prohibits use of force without UNSC approval. ECOWAS have since adopted several Protocols dealing with specific subject matters relating to the legal and institutional aspects of its framework for dealing with regional peace and security.[106]

V A Comparative perspective of SADC and ECOWAS' humanitarian intervention regimes

Although the regional security arrangements of ECOWAS and SADC do not vary much in terms of their textual content, the two bodies have had varied historical experiences and applications. SADC could not create its Organ for Defence, Peace and Security until the transition to multiracial democracy in South Africa.[107] These historical experiences have also influenced how the regional hegemons behaved in both West and southern Africa respectively, and how ECOWAS and SADC and their Organs function.[108] The problem of contested hegemony between South Africa and Zimbabwe within SADC has negatively affected the effectiveness of SADC in tackling regional security issues in countries like Angola, the DRC and Zimbabwe itself, whereas the regional hegemony of Nigeria in ECOWAS is hardly disputed – or at least grudgingly tolerated.[109]

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[101] *ECOWAS Mechanism Protocol* Article 25(c)(i).
[102] *ECOWAS Mechanism Protocol* Article 25(c)(ii).
[103] *ECOWAS Mechanism Protocol* Article 25(d).
[104] *ECOWAS Mechanism Protocol* Article 25(e).
[105] *ECOWAS Mechanism Protocol* Article 25(f).
[106] See Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security 2001/2008 reprinted in Ebobrah & Tanoh *Compendium of African Sub-regional Human Rights Documents* op cit note 34 at 231.
[107] Olonisakin & Levitt 'Regional security and challenges' op cit note 19 at 75.
[108] Olonisakin & Levitt op cit 76.
[109] Ibid. See Willie Breytenbach 'Failure of security co-operation in SADC: The suspension of the Organ for Politics, Defence and Security' (2000) 7(1) *South African Journal of International Affairs* 86.

Quite unlike ECOWAS, at the institutional level, there is no political consensus within SADC on the role that the latter should play in internal conflict situations.[110] There is still a strong cleavage to the concept of *sovereignty* rather than gravitating towards a pooling together of sovereignties in a supranational, subregional decision-making organ.[111] And despite the recognition of the need to promote a democratic ethos and institutions and human rights within the region, the Organ's Protocol stops short of granting a right of humanitarian intervention to the body in humanitarian crises as was the case recently in Zimbabwe, for example.[112] This failure to provide for more coercive measures to stop humanitarian crises is perhaps the most fundamental difference between the ECOWAS and SADC approaches to subregional security and the resolution of humanitarian crises in their respective subregions. This also accounts for the vast difference in the outcomes of conflicts in both subregions. It only takes a comparison of the situations in the DRC and Zimbabwe to potentially explosive Togo and Cote d'Ivoire to come to this conclusion.

In relation to the AU's goals of a progressive development of a continent-wide humanitarian intervention regime in Africa in the spirit of providing African solutions to African problems, the SADC law on humanitarian intervention as contained in its Organ's Protocol is, unlike ECOWAS, in reverse.[113] Although SADC law allows for humanitarian intervention aimed at halting genocides, war crimes and crimes against humanity as well as preventing coups d'état or threats to constituted authority, it permits such intervention only when authorised by the UNSC.[114] The Organ is only permitted to resort to the use of force for humanitarian intervention after exhausting all avenues of political settlement available under the AU and UN frameworks in accordance with Chapter 53 of the UN Charter.[115]

As Jeremy Levitt rightly points out, such provision would present a problem where the AU, under its new intervention framework, decides to undertake a humanitarian intervention without UNSC authorisation for fear of being blocked by a veto or due to unwarranted delays.[116] Going by this SADC law, SADC member states would be legally prohibited from participating in such AU missions except if they had been approved by the UNSC.[117] Levitt argues that, since all members of the AU – including SADC members – have undertaken to implement the Constitutive Act of the AU and its relevant protocols, they are expected to amend any conflicting subregional instruments accordingly;

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[110] Patricia Taft & Jason Ladnier Realizing Never Again: Regional capacities to protect civilians in violent conflicts' (January 2006) *The Fund for Peace* 19 (hereafter Taft & Ladnier *Realizing Never Again*).

[111] Ibid. For an analysis of the SADC framework and approach to regional peace and security, see generally Naison Ngoma *Prospects for a Security Community in Southern Africa: An Analysis of Regional Security in the Southern African Development Community* (2005).

[112] Ibid.

[113] Jeremy Levitt 'The Peace and Security Council of the AU: The known unknowns' (2003) 13 *Transnational Law and Contemporary Problems* 134 (hereafter Levitt 'The Peace and Security Council of the AU').

[114] See Article 11 *SADC Organ Protocol* op cit note 57.

[115] See Levitt 'The Peace and Security Council of the AU' op cit note 113 at 13; Principle (g) of the SADC Communiqué. See also Article 11(3)(d)(i) of the *SADC Organ Protocol* op cit note 57.

[116] Levitt 'The Peace and Security Council of the AU' op cit note 113 at 134.

[117] Ibid.

if they do not amend them, instruments such as SADC's would be overridden by the AU Constitutive Act.[118]

Given the problems associated with UNSC procedures, it will probably be difficult – or at least a drawback – for SADC when the veto becomes a stumbling block in the future. Yet it is not clear why the SADC Protocol did not take the AU Constitutive Act and its provisions into account. With the capacity of SADC members like South Africa, it would be expected that SADC would form a critical component of the AU's overall security architecture; this means that SADC should make the effort to harmonise and coordinate its subregional legal regime relating to humanitarian intervention with the AU's in order to avert areas of potential conflict in approaches between the two bodies, and also to reflect the new trends at the AU.

However, it should be noted that, notwithstanding that its legal and institutional framework is less proactive in comparison with ECOWAS in respect of deploying coercive measures, SADC has made significant progress – more than that of other subregions (arguably with the exception of ECOWAS and its military wing, ECCOMOG) – on the continent in its bid to establish a standing military command for the southern African subregion as part of the African Standby Force. Nonetheless, the challenge remains as to whether South Africa would be willing to deploy its military and logistics capacity when the need for humanitarian intervention in the region so demands.[119]

In terms of practice in the area of humanitarian intervention, ECOWAS and SADC have different pedigrees. Save for its intervention in the DRC and Lesotho, both of which were low-key and relatively short-lived, SADC has no history of humanitarian intervention if one compares it with ECOWAS.[120] This is an irony, given the numerous humanitarian crises yearning for intervention within the SADC region. As pointed out above, this deficit owes itself less to a lack of capacity than to a lack of political will and the need to build political consensus amongst old regimes within the SADC decision-making process.[121]

Even the 1998 intervention in Lesotho was mired in controversy.[122] However noble the objectives of the intervention, it was severely criticised. Within South Africa, critics viewed the intervention in Lesotho as a pretext for South Africa to pursue its own national interests and, therefore, as illegal.[123] The aim of the intervention, according to South Africa, was to counter the activities of the Lesotho Defence Force and protect critical infrastructure in Lesotho, including the Katse Dam, which was of commercial importance to South Africa.[124] The legal basis advanced by SADC was that the intervention was at the request of the legitimate government of Lesotho. It argued that the

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[118] Levitt 'Humanitarian intervention by regional actors' op cit note 9 at 135.
[119] Taft & Ladnier *Realizing Never Again* op cit note 110 at 19.
[120] Ibid.
[121] Ibid.
[122] For an assessment of the intervention, see Roger Southall 'SADC's intervention into Lesotho: An illegal defence of democracy?' in Oliver Furley & Roy May (eds) *African Interventionist States* (2001) 153 – 171 (hereafter Southall 'SADC's intervention into Lesotho').
[123] Southall op cit 159.
[124] Ibid.

intervention was mounted in order to prevent the overthrow of a democratically elected government by a military coup.[125]

SADC relied on Article 5 of the Protocol on Politics, Defence and Security Cooperation which empowers the regional body to use force within the territory of a member state in cases of widespread violence between segments of the population, between the population and armed or paramilitary forces, where there is a threat to the legitimate government, or if the crisis could threaten the peace and security of other member states.[126] But the document had not been ratified at the time of the intervention, and so could not provide the legal basis for such intervention – thereby forcing South Africa to modify its position by seeking to rely on customary international law.[127] This intervention is similar to ECOWAS's interventions in Liberia and Sierra Leone where, although the Mutual Assistance Defence Pact and the Non-Aggression Protocol were already in force, there was no existing clear legal provision for such intervention in 'purely internal' conflicts.[128] What it demonstrates is that if SADC, like ECOWAS, could muster the political will, it could rise to the challenge without waiting for UNSC approval or help when conflict within a member state poses a threat to the entire region. Indeed, it is arguable that, notwithstanding the provisions requiring UNSC authorisation for humanitarian intervention under SADC law, waiting to obtain such approval for intervention in Lesotho – such as in ECOWAS in Liberia and Sierra Leone – would almost make humanitarian intervention by subregional organisations in Africa near impossible: not only because of the cumbersome procedure and the politicking at the UNSC and all the national self-interest baggage it brings, but also because of the real likelihood of a veto by one of the permanent members whose considerations may be far removed from the peace and security concerns of the African subregional body.

Herein lay one of the strongest arguments for a redistribution of authority between the UNSC and regional organisations in the use of force.[129] Rather than bicker over the legality of unilateral humanitarian intervention by SADC, its member states could take the lessons the intervention offers and reform its legal and institutional framework for humanitarian intervention. This will help SADC tackle future situations like Angola and the DRC and avoid the legal conundrum – just as ECOWAS did in the wake of the Liberian intervention and the questions of legality that generated.[130] At any rate, it is conceded that the SADC intervention in Lesotho represents an 'excellent

[125] A view strongly favoured by Botswana and Zimbabwe. See Southall 'SADC's intervention into Lesotho' op cit note 121 at 162.

[126] See Article 5 of the Gaborone Communiqué op cit note 45.

[127] See Southall 'SADC's intervention into Lesotho' op cit note 122 at 166 – 7.

[128] See Christine Gray *International Law and the Use of Force* (2000) 212; Weller *The Liberian Crisis* op cit note 65 at 67; Thomas Franck *Recourse to Force: State Action against Threats and Armed Attacks* (2002) 156; Simon Chesterman *Just War or Just Peace* (2001) 137; Sean D Murphy *Humanitarian Intervention: The United Nations in an Evolving World* (1996) 160 – 1.

[129] This argument is explored extensively in the author's ongoing doctoral thesis.

[130] Southall 'SADC's intervention into Lesotho' op cit note 122 at 169. ECOWAS was quick to reform its laws in its 1993 Revised Treaty and the *ECOWAS Mechanism Protocol*.

model'[131] of humanitarian intervention, and could just as well have generated instant customary international law for the subregion.[132]

One of the most important lessons ECOWAS took away from the controversy surrounding the legality of its intervention in Liberia and Sierra Leone without UNSC authorisation was the vacuum or, at best, the ambiguity existing in the ECOWAS peace and security legal regime as a basis for humanitarian intervention within the subregion. ECOWAS advanced with the view that it needed a constitutive document that spelt out in clear terms that, should it be faced with the Liberian/Sierra Leone scenario in the future, members had assigned to the body a right of intervention within a codified instrument. This would help the body to avoid the initial dilemma faced by the ECOWAS Standing Mediation Committee in finding a legal basis for recommending intervention, and which subsequently confronted the Authority of ECOWAS Heads of State and Government when it had to decide on the use of force without UNSC authorisation.

It should be noted that, although ECOWAS had the Mutual Defence Pact and other similar Cold War and the Protocols inspired by the Non-Aligned-Movement era, the 1990s were different times; and ECOWAS realised that, with the changing world order, the region had to prepare for the challenges ahead. The first step on the road was to draft a humanitarian intervention legal regime that draws not only on the historical experiences of member states, but also on ECOWAS practices, in order to produce a document that would serve as the charter for future interventions in the subregion. This, no doubt, creates friction between the regional customary international law practice of ECOWAS, its conventional rules in this respect, and the UN Charter and general international law on the subject. Nonetheless, just as the attacks of 11 September 2001 on the US redefined the scope of Article 51 of the UN Charter, ECOWAS has maintained the right to use force within the subregion if it became necessary – without the authorisation of the UNSC.[133] More recently, the wisdom in this legal instrument would have proved useful if ECOWAS had had to intervene in Cote d'Ivoire.

The Authority of Heads of State and Government had reason to reiterate its determination to invoke the instrument as a legal basis for the use of force in Cote d'Ivoire to restore peace and security and enthrone democracy if necessary. Although the instrument expressly refers to the overthrow or threatened overthrow of a democratically elected government as one of the conditions for the use of force, it is arguable that such a situation would include the failure of a defeated incumbent president to relinquish power – as was the case in Cote d'Ivoire.[134] And the instrument would also have proved useful in the post-election constitutional crisis in Togo in 2005, although it never became necessary to invoke it. That there was such a pact was a constant reminder and perhaps an inducement for the parties to the

[131] Wippman *Enforcing the Peace* op cit note 21 at 179.
[132] Levitt 'Humanitarian intervention by regional actors' op cit note 9 at 351.
[133] This theme is explored in the author's ongoing doctoral thesis.
[134] See the ECOWAS Protocol on Democracy and Good Governance op cit note 17.

Togo case to defer to the regional body in finding a solution to the crisis. This experience is particularly important for SADC in view of events of the last decade within the subregion, particularly in Zimbabwe, but increasingly also Angola. It is often more of lack of capacity and resources to act than a feeling of legal obligation that makes subregional organisations turn to, or want to wait for, external help – especially from the UN. Such help often comes late and is laced with the economic, political or national interests of the major powers.[135] ECOWAS intervened in Liberia and Sierra Leone without waiting for the UNSC for resources and, as such, felt little or no constraints, legal or otherwise, in proceeding with its planned intervention. Despite not having a clear legal framework for the intervention at the time, ECOWAS responded to the crisis as demanded by the exigencies of the situation.

VI Conclusion

In the past, many African states were not disposed towards Kwame Nkrumah's idea of a United States of Africa and an African High Command. Moreover, during the Cold War, security on the continent was construed in terms of interstate relations, and most African states served the interests of their erstwhile colonial masters who helped keep them in power.[136] Since the end of the Cold War, almost all the conflicts in Africa have been intrastate rather than interstate; often, the UN has shown only a half-hearted commitment to resolving these conflicts.[137] However, given the AU's new interventionist legal framework, it is pertinent to examine the legal and institutional frameworks of subregional organisations on the continent based on past experiences in the West and southern African subregions, and how the existing legal frameworks of ECOWAS and SADC have shaped and affected their ability to undertake humanitarian interventions. It has also emerged that, given the AU's Constitutive Act, some of the provisions of SADC law may in fact conflict with the implementation of AU intervention efforts because of the difference in approach to the relationship with the UNSC on the use of force. This calls for a revision of SADC law to harmonise it with that of the AU. What the events in Zimbabwe demonstrate is that the future of humanitarian intervention in Africa depends largely on the continent's subregional organisations. The stronger and more effective a subregional organisation, the better its chances of responding to humanitarian crises within the parameters set by the AU – namely genocide, war crimes and crimes against humanity. The converse is also true, however, as demonstrated by SADC.

[135] NATO's intervention in Kosovo is a clear example.
[136] Olonisakin & Levitt 'Regional security and challenges' op cit note 19 at 67.
[137] Marrack Goulding 'The United Nations and conflicts in Africa since the Cold War' (April 1999) 98(391) *African Affairs* 156.