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Sub-regional organisations and the responsibility to protect: A case for the localisation and normative repatriation of sub-regional authority for coercive measures

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Summary: *The adoption of the responsibility to protect by the United Nations General Assembly marked a key milestone in the advancement of human security and the international protection of human rights. The textual adoption by the UNGA, however, was skewed in favour of the world order as it existed at the adoption of the Charter of the United Nations. Key among the recommendations downplayed by the UNGA text is the place of regional and sub-regional organisations in the implementation of the responsibility to protect. The consequence has been that sub-regional organisations have often been sidelined and their position on conflicts overlooked by the United Nations Security Council in its authorisation of R2P-related interventions. This article utilises the differences between the original R2P concept and the R2P norm adopted by the UNGA as well as subsequent discourses and state practice flowing from these differences to argue for R2P's localisation in the African context and for the normative repatriation of the authority of sub-regional organisations to adopt coercive measures under R2P. The article uses the Economic*

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Community of West African States to illustrate the potential for sub-regional organisations to implement R2P when accorded the requisite regional and international support.

Key words: *sub-regional organisations; responsibility to protect; norm localisation; norm repatriation; peace and security*

1 Introduction

The inability of the United Nations (UN) to offer a timely and decisive response to avert the Rwandan genocide jolted the Organisation of African Unity (OAU) to acknowledge the UN's inadequacy and Africa's 'primary responsibility to protect the lives of its citizens'.¹

In respect of the response of the United Nations Security Council (UNSC) to situations of mass atrocities committed in territories of UN member states, a 2004 report of a UN High-Level Panel pointed out that the UNSC had been 'neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'.² A similar opinion persists among African leaders whose common position has been the following:³

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 the development of (internal) conflict situations, it is imperative that regional organisations, in areas of proximity to conflicts, are empowered to take action in this regard.

However, although the existence of 'regional' arrangements is permitted under chapter VIII of the Charter, the UNSC, which has the primary responsibility for the maintenance of international peace and security, is not obligated to utilise these for enforcement action (article 53(1)). Further, the prerogative of these arrangements to undertake enforcement action is subjected to UNSC approval, thus limiting their ability to act in deserving cases. Notwithstanding the misgivings against the UNSC highlighted above, the blueprint

1 African Union *Rwanda: The preventable genocide* (2000) ch 24 para 22, <https://www.refworld.org/docid/4d1da8752.html> (accessed 8 July 2019). See also S Gumedze 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 140.

2 United Nations Secretary-General (UNSG) *A more secure world: Our shared responsibility – Report of the Secretary General's high-level panel on threats, challenges and change* (2004) 65-66.

3 African Union *The common African position on the proposed reform of the United Nations: The Ezulwini consensus* (2005) 6.

adopting the responsibility to protect (R2P) proceeded to reinforce the *status quo*. This, therefore, calls to question what role regional and sub-regional organisations have in the maintenance of regional/sub-regional peace and security. This article seeks to answer this question with reference to sub-regional organisations and their involvement in R2P-related interventions.⁴

Of all sub-regional organisations the Economic Community of West African States (ECOWAS) has been the pioneer in R2P-related interventions at the sub-regional level⁵ having experienced the highest frequency of internal armed conflicts in Africa.⁶ Consequently, the peace and security framework of ECOWAS has been termed one of the best in Africa⁷ and is argued to have inspired the African Union (AU) to replicate the same at the regional level.⁸ This article, therefore, analyses the role played by ECOWAS in the implementation of R2P-related interventions with a view to drawing lessons from its interventions in The Gambia, Côte d'Ivoire and Mali in support of an enhanced role for sub-regional organisations in R2P implementation. These cases represent interventions conducted after the adoption of R2P at the UN level. The Gambian intervention represents an effective sub-regional intervention; the Côte d'Ivoire case brings out challenges of sub-regional intervention; while the Mali case represents an archetypal R2P intervention that involves national, sub-regional, regional and global actors working in concert for the protection of populations at risk. While interventions in some of these cases were in part motivated by a pro-democracy objective, their use in this article focuses primarily on the human protection imperative that underpinned their initiation.

4 'R2P-related interventions' is used in this article to refer to all interventions focused on the protection of populations at risk. This excludes interventions that are purely for the enforcement of democratic ideals with no underlying human security concerns.

5 M Belmakk *African sub-regional organisations in peacekeeping and peacemaking: The Economic Community of West African States (ECOWAS)* (2005) 3-4.

6 B Fagbayibo 'A politico-legal framework for integration in Africa : Exploring the attainability of a supranational African Union' PhD thesis, University of Pretoria, 2010 81.

7 As above.

8 B Nkrumah & F Viljoen 'Drawing lessons from ECOWAS in the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) 251.

2 The concept and norm of the responsibility to protect

2.1 The concept

The R2P was first articulated by the International Commission on Intervention and State Sovereignty (ICISS) which served as the norm entrepreneur.⁹ The report of the ICISS built on Deng's initial conceptualisation of 'sovereignty as responsibility'¹⁰ and presented two fundamental propositions.¹¹ The first was a redefinition of sovereignty from 'sovereignty as control' to 'sovereignty as responsibility'.¹² This made a state's primary sovereign responsibility that of protecting its population from massive violations of fundamental rights. The second was a proposition that where the state is unable or unwilling to discharge this responsibility or is itself the perpetrator, then the responsibility shifts to the international community which is under a duty to intervene to protect the populations at risk.¹³ Jointly, these two elements were presented as the core of what the ICISS termed the 'responsibility to protect' (R2P concept). In its purest sense, therefore, the R2P concept primarily was human security centred.¹⁴

The concept encompasses three key responsibilities, namely, the *responsibility to prevent* mass atrocities by addressing causes of internal conflict; the *responsibility to react* in the event of conflict by intervening using appropriate means including sanctions and, where necessary, military force; and the *responsibility to rebuild*, where military force is used, by assisting with recovery, reconstruction and reconciliation.¹⁵

9 A Bellamy 'The three pillars of the responsibility to protect' (2005) 20 *Pensamiento Propio* 40. The term 'norm entrepreneur' refers to an agent that takes the initiative to develop and promote the adoption of a normative idea. See A Bloomfield 'Norm antipreneurs and theorising resistance to normative change' (2016) *Review of International Studies* 1 3.

10 See, generally, FM Deng et al *Sovereignty as responsibility: Conflict management in Africa* (1996).

11 H Breakey *The responsibility to protect and the protection of civilians in armed conflicts: Review and analysis* (2011) 7.

12 Bellamy (n 9) 37.

13 International Commission on Intervention and State Sovereignty (ICISS) *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* (2001) XI.

14 Human security refers to security as the protection of the people as opposed to the protection of state apparatuses or territory (the security of the individual is the primary focus). See PH Liotta & T Owen 'Why human security?' (2006) *The Whitehead Journal of Diplomacy and International Relations* 37-39. See also United Nations General Assembly (UNGA) Resolution 66/290 (2012) para 3.

15 ICISS (n 13) 8.

With respect to resort to the use of military force, the ICISS proposed that it should only be undertaken under the *right authority*, which the UNSC was best suited to give.¹⁶ While the ICISS made proposals aimed at curing any mischief occasioning inaction or delay to act on the part of the UNSC, including proposals for constructive abstention¹⁷ as well as resort to the UNGA's 'Uniting for peace' procedures,¹⁸ what is key for this article, however, is the proposal by ICISS that regional and sub-regional organisations could be resorted to under chapter VIII of the UN Charter (for authorisation) subject to the organisations' seeking subsequent ratification from the UNSC.¹⁹

2.2 The norm

At the 2005 UN World Summit held at the Heads of State and Government level, the R2P concept was truncated and condensed into three paragraphs.²⁰ These were then unanimously adopted as a part of a resolution of the UNGA (Summit Outcome).²¹ The postulations contained in the Summit Outcome constitute what is here referred to as 'the R2P norm'.

The R2P norm comprises three pillars: The first limits the application of R2P to the commission or incitement of atrocity crimes (genocide, war crimes, ethnic cleansing and crimes against humanity);²² the second calls for international support for states' obligations under R2P; and the third requires international action to be undertaken through the UN.²³ Specifically, the third pillar requires that where pacific means have proven inadequate, coercive measures should be adopted under chapter VII of the UN Charter and only through the UNSC in cooperation with relevant regional organisations where appropriate (optional).²⁴

The concept as developed by the ICISS differs significantly from the norm as adopted in the Summit Outcome.²⁵ For instance,

¹⁶ ICISS 49.

¹⁷ ICISS 51.

¹⁸ ICISS *The responsibility to protect: Research, bibliography, background* (2001) 159: The Assembly is authorised under the Uniting for Peace Resolution of 1950 to make recommendations on enforcement action when the Security Council is unable to take a decision, more so as a result of veto.

¹⁹ ICISS (n 13) 54.

²⁰ UNGA Resolution adopted by the General Assembly on 16 September 2005: 2005 World Summit Outcome (2005) 30 paras 138-140.

²¹ Bellamy (n 9) 42.

²² UNGA (n 20) para 138.

²³ UNGA para 139.

²⁴ As above.

²⁵ ICISS (n 13) 32-33; E Heinze 'Humanitarian intervention, the responsibility to protect, and confused legitimacy' (2011) 11 *Human Rights and Human Welfare* 23.

while the scope of the concept extended to situations such as state collapse, the norm restricted the scope to four atrocity crimes.²⁶ Of significance to this article, however, is that the norm makes the UNSC the only body mandated to authorise military intervention²⁷ with no mention of regional and sub-regional organisations as alternative sources of authority.²⁸ This leaves open the question of whether these organisations can rightly undertake coercive measures under R2P or whether the restriction of this mandate to the UNSC is binding on them.

2.2.1 *The responsibility to protect norm lacks normative prescription*

Although the R2P norm was adopted by a unanimous UNGA resolution and was re-affirmed by the UNSC in Resolutions 1674 of 2006,²⁹ 1894 of 2009³⁰ and 2150 of 2014,³¹ it remains shrouded in controversy as to whether it can be termed a legal obligation with prescriptive force, only a political concept or just an emerging norm.³² Notwithstanding R2P advocates' rhetoric of 'consensus', a genuine consensus on R2P cannot be said to exist beyond the policy community.³³ Grave reservations, scepticism and even hostility has been expressed towards R2P by scholars, policy makers, practitioners, civil society organisations as well as by states with a colonial history.³⁴ Against this background, therefore, the question arises as to whether R2P can be said to have been established as an international norm with prescriptive force.

From a legal perspective, outside the confines of a convention or treaty, a new international norm has normative prescription, once it is established as a rule of customary international law having achieved

26 ICISS (n 13) 32-33.

27 UNGA (n 20) para 139.

28 ICISS (n 13) 53; V Marusa *Regional organisations and the responsibility to protect: Challenging the African Union's implementation of the responsibility to protect* (2014) 11.

29 [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674\(2006\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1674(2006)) (accessed 8 July 2020).

30 As above.

31 http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF%7D/_res_2150.pdf (accessed 8 July 2020).

32 J Eaton 'An emerging norm – Determining the meaning and legal status of the responsibility to protect' (2011) 32 *Michigan Journal of International Law* 800; A Peters 'The Security Council's responsibility to protect' (2011) 8 *International Organisations Law Review* 7; S Marks & N Cooper 'The responsibility to protect: Watershed or old wine in a new bottle?' (2010) 2 *Jindal Global Law Review* 115.

33 N Crossley 'Is R2P still controversial? Continuity and change in the debate on "humanitarian intervention"' (2018) 31 *Cambridge Review of International Affairs* 431.

34 As above.

constant and uniform usage by states supported by *opinio juris*.³⁵ While the unanimous adoption of R2P at the UNGA is argued to have demonstrated the existence of *opinio juris* on the need to act in cases of mass atrocity crimes, subsequent inconsistencies in the conduct of states as well as in the application of R2P takes away from any consideration of R2P as an international norm with any prescriptive force.³⁶ In this regard, Evans argues that although R2P cannot be said to have attained the status of a rule of customary international law, it should be viewed as a new international norm on moral and political terms,³⁷ neither of which has any binding force.

With respect to the subsequent conduct of states at the UN level, various states are reported to have developed a 'buyer's remorse' soon after the summit endorsement of R2P and 'revolted' against R2P with some arguing against there having been any consensus on the normative status of R2P.³⁸ Consequently, states failed to adopt a subsequent report of the UNSG that sought to make R2P more prescriptive.³⁹ Further, the UN membership is argued to have demonstrated a reluctance to strengthen the institutional capacity of the UN with respect to R2P by implicitly rejecting a proposed establishment of a Joint Office for Genocide Prevention and R2P by declining to fund the proposal;⁴⁰ opposing the creation of an R2P-related early warning unit within the UN⁴¹ as well as by approving a paltry 25 officers in what was expected to be a standby police force for R2P implementation.⁴² Bellamy argues that this failure to strengthen the institutional capacity of the UN demonstrates the backtracking of states in their commitment, thus eroding the consensus on R2P.⁴³

With regard to how R2P has been applied in actual cases, Deitelhoff and Zimmerman argue that its role has been 'ambivalent at best' and that it has been used to further private interests but ignored in real crises, hence its application is crippled by selectivity and hypocrisy.⁴⁴ This has been reflected in the invocation and application of R2P

35 MN Shaw *International law* (2008) 75-76; Eaton (n 32) 767.

36 Eaton (n 32) 801; S Africa & R Pretorius 'South Africa, the African Union and the responsibility to protect: The case of Libya' (2012) 12 *African Human Rights Law Journal* 398.

37 G Evans 'R2P: The next ten years' in AJ Bellamy & T Dunne (eds) *The Oxford handbook on the responsibility to protect* (2016) 4.

38 G Evans 'The responsibility to protect: An idea whose time has come ... and gone?' (2008) 22 *International Relations* 288; AJ Bellamy 'Realising the responsibility to protect' (2009) 10 *International Studies Perspectives* 112.

39 Eaton (n 32) 800.

40 Evans (n 38) 288.

41 Bellamy (n 38) 112.

42 As above.

43 As above.

44 N Deitelhoff & L Zimmermann *Things we lost in the fire: How different types of contestation affect the validity of international norms* (2013) 7.

(or lack thereof) in the cases of Georgia, Myanmar, Burma, Libya and Syria, thus significantly impacting any notions of R2P having any normative force with respect to uniformity, objectivity and consistency in its application.⁴⁵ The above arguments demonstrate that R2P cannot be termed a norm in legal terms but rather an evolutionary norm in need of consolidation through consistent state practice.⁴⁶

From the perspective of international norm dynamics studies (on the diffusion of transnational norms), R2P is yet to evolve into an international norm. This requires the norm to have undergone three stages of what Finnemore and Sikkink refer to as the life cycle of a norm (emergence, norm cascade and internalisation).⁴⁷ From this perspective, the adoption of R2P by the UNGA established the critical mass support required for it to be said to have *emerged* as an international norm.⁴⁸ To be internalised, a norm requires to have acquired a taken-for-granted quality ‘that makes conformance with the norm almost automatic’.⁴⁹ The arguments proffered above on R2P’s want of usage rule out any possibility of R2P having been internalised, thereby leaving R2P in the norm cascade stage.

What happens at the norm cascade stage depends on whether one ascribes to the constructivist or the critical approach to norm diffusion. For constructivists, the second stage is a linear and conflict-free ‘norm acceptance’ stage, hence they expect a dichotomous outcome of either acceptance or rejection of the norm which itself remains static.⁵⁰ Acharya criticises this view as engaging in ‘moral proselytism’ which presents ‘global’ norms as inherently good and regional or sub-regional norms as innately bad, hence viewing any form of normative contestation⁵¹ as illegitimate.⁵² Critical approaches, however, view a norm as being dynamic throughout the norm cascade stage and emphasise the agency role of ‘norm

45 Crossley (n 33) 420; J Sarkin ‘The role of the United Nations, the African Union and Africa’s sub-regional organisations in dealing with Africa’s human rights problems: Connecting humanitarian intervention and the responsibility to protect’ (2009) 53 *Journal of African Law* 31.

46 S Gagro ‘The responsibility to protect (R2P) doctrine’ (2014) III *International Journal of Social Sciences* 74; Deitelhoff & Zimmermann (n 44) 7.

47 M Finnemore & K Sikkink ‘International norm dynamics and political change’ (1998) 52 *International Organisation* 892.

48 Deitelhoff & Zimmermann (n 44) 7.

49 Finnemore & Sikkink (n 47) 895.

50 Bloomfield (n 9) 4; Deitelhoff & Zimmermann (n 44) 1-2.

51 Contestation refers to the emergence of differences about the right interpretation and application or about the validity of a norm. See Deitelhoff & Zimmermann (n 44) 1-18.

52 A Acharya ‘How ideas spread: Whose norms matter? Norm localisation and institutional change in Asian regionalism’ (2004) 58 *International Organisation* 242.

takers', thus opening up the norm to contestation and change.⁵³ In the latter view, therefore, norm localisation⁵⁴ is presented as being critical in building normative congruence and, thus, helping to settle most cases of normative contestation.⁵⁵ This article adopts a critical approach in its analysis and argues that R2P is currently undergoing contestation, hence providing room for localisation.

Wiener argues that often, as is the case herein, the contestation involves the legitimacy of 'standardised procedures' for implementing norms (what Welsh refers to as procedural contestation)⁵⁶ and that such contestation is necessary for the regularisation of such procedures to strengthen the norm and for legitimacy.⁵⁷ Contestation with respect to R2P surrounds the procedure on how it should be implemented under the third pillar⁵⁸ and specifically, herein, whether regional and sub-regional organisations have the right to adopt coercive measures.

A key factor in norm contestation is the realisation that new norms do not seek application in a vacuum, hence they have to contend with legitimate pre-existing domestic normative, social and institutional orders.⁵⁹ Key in this respect, therefore, is any normative orders for regional and sub-regional intervention that were in existence prior to the emergence of R2P (cognitive priors).⁶⁰ The AU as well as sub-regional organisations (ECOWAS) had already adopted indigenous normative frameworks that allowed them to intervene in the territory of their members for human protection purposes way before the emergence of R2P.⁶¹ The implementation of R2P after its emergence, therefore, provided an opportunity for its localisation so as to ensure congruence with these pre-existing orders⁶² that

53 Acharya (n 52) 241; R Madokoro 'International commissions as norm entrepreneurs: Creating the normative idea of the responsibility to protect' (2019) 45 *Review of International Studies* 102.

54 Norm localisation refers to the reconstruction of foreign norms to tailor these to prevailing local traditions (cognitive priors) and identities (including collective identities). See Acharya (n 52) 239-240.

55 Acharya (n 52) 239.

56 J Welsh 'Norm contestation and the responsibility to protect' (2013) 5 *Global Responsibility to Protect* 365.

57 Bloomfield (n 9) 6; Deitelhoff & Zimmermann (n 44) 1.

58 J Welsh 'Norm robustness and the responsibility to protect' (2019) 4 *Journal of Global Security Studies* 53.

59 Acharya (n 52) 241; TR Eimer, S Lutz & V Schuren 'Varieties of localisation: International norms and the commodification of knowledge in India and Brazil' (2016) 23 *Review of International Political Economy* 451.

60 Acharya (n 52) 239-240.

61 A Acharya 'The R2P and norm diffusion: Towards a framework of norm circulation' (2013) 5 *Global Responsibility to Protect* 478; Evans (n 38) 289; A Alao *The role of African regional and sub-regional organisations in conflict prevention and resolution* (2000) 3-4.

62 Eimer, Lutz & Schuren (n 59) 451.

had arguably proven to be efficacious and were already considered legitimate in their pre-existing normative communities.⁶³

3 The place of sub-regional organisations in the implementation of the responsibility to protect

Regional and sub-regional organisations continue to play an ever-increasing role as front-line responders to mass atrocity crimes, more so in Africa.⁶⁴ In this respect, Bellamy and Williams acknowledge that some regional organisations have actually become 'important peacekeepers in their own right'.⁶⁵ They also point out that a strong partnership between the UNSC and regional (as well as sub-regional) organisations is crucial in guaranteeing effective responses to human protection crises.⁶⁶ However, the persisting question is whether the nature of this 'partnership' ought to allow sub-regional organisations to undertake coercive measures under R2P.

The ICISS pondered over the issue in the following terms:⁶⁷

In the mid-1940s, regional organisations were unquestionably subordinated to the authority of the UNSC. At the turn of the century, it is less certain whether the text of the Charter remains definitive on the issue of regional authority. Specifically, there are questions as to whether regional [and sub-regional] enforcement action under all circumstances continues to fall under the subordinate status of the UNSC covered by Article 53(1).

The ICISS argued that the UN Charter 'is a living instrument that has evolved over the years and will continue to do so', hence 'a literal reading of the Charter is no longer an accurate reflection of contemporary international law'.⁶⁸

63 Bloomfield (n 9) 8; UNSG *The role of regional and sub-regional arrangements in implementing the responsibility to protect: Report of the Secretary-General* (2011) 3 para 6. In this report the UNSG argued for norm localisation stating that the implementation of R2P should 'respect institutional and cultural differences from region to region' and that these regions are open to operationalise the principle in their own way.

64 Evans (n 37) 12; V Adetula, R Bereketeab & O Jaiyebo *Regional economic communities and peacebuilding in Africa: The experiences of ECOWAS and IGAD* (2016) 7 38; Alao (n 61) 3 10; B Bojang 'Protection of civilians in armed conflicts in West Africa' in D Kuwali & F Viljoen (eds) *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (2017) 321.

65 AJ Bellamy & PD Williams 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87 *International Affairs* (Royal Institute of International Affairs) 826.

66 Bellamy & Williams (n 65) 848.

67 ICISS (n 18) 168.

68 ICISS 170.

The UNSG, for its part, in its 2009 report to the UNGA pointed out that the UNSC has *primary* and not *total* responsibility for the maintenance of peace and security.⁶⁹ It added that some crimes under R2P may not necessarily be deemed to pose a threat to international peace and security such as to fall right within the UNSC's purview.⁷⁰ The UNSG, therefore, urged better modes of collaboration between the UN and regional as well as sub-regional arrangements and emphasised that this new collaboration ought to consider and be based on *capacity sharing* and not merely *capacity building*.⁷¹

The above essentially called for a rethinking of the relationship between the UNSC and regional as well as sub-regional organisations, with respect to the authority to impose coercive measures under R2P with the emphasis on the need to acknowledge the authority of regional and sub-regional organisations.

3.1 Interpretative approaches to sub-regional authority

Given the persisting need to place coercive measures by sub-regional organisations under R2P within the prevailing UN system, resort has been had to interpreting the requirement for UNSC authorisation in a manner that permits action by sub-regional organisations. This has given rise to two schools of thought around the temporal essence of the requirement: those that insist on the UNSC's approval prior to intervention ('green light' interpretation); and those that argue for intervention to proceed unless the UNSC specifically votes to halt it ('red light' interpretation).⁷²

The red light interpretation picks up from the UNSG's argument above that although the UNSC has the primary mandate to approve military interventions, such mandate is not exclusive.⁷³ Gagro argues that from state practice, even though the UNSC authorisation is most desirable, it no longer is regarded by the international community as an absolute must.⁷⁴ As an alternative, Gagro paints a picture of a legitimacy ladder at the top of which sits the UNSC. She argues that states show respect for this legitimacy ladder when considering intervention and have always climbed the necessary stairs in their respective circumstances. She then presents regional (including sub-regional) organisations as the second best authority which is lower in

⁶⁹ UNSG *Implementing the responsibility to protect: Report of the Secretary-General* (2009) 27 para 63.

⁷⁰ As above.

⁷¹ UNSG (n 69) para 65.

⁷² ICISS (n 18) 170.

⁷³ Gagro (n 46) 67.

⁷⁴ Gagro 68.

the ladder and hence more accessible and preferable in authorising and effecting coercive measures under R2P.⁷⁵

Further support for the red light interpretation is found in the ICISS report where the Commission pointed out that recent practice showed that UNSC's approval could be sought *ex post facto*.⁷⁶ Examples given in that respect included the interventions undertaken by ECOWAS in Liberia and Sierra Leone which were retroactively sanctioned by the UNSC through Resolutions 788 of 1992 and 1132 of 1997 respectively. These, among other regional examples, have even been argued as providing evidence that intervention without UNSC authorisation is an emerging legal custom.⁷⁷

The UN High-Level Panel as well as the AU supported the idea that approval could be sought after the fact.⁷⁸ However, they qualified this as being applicable only in urgent cases. While the AU does not provide temporal specifications, the High-Level Panel proposed that authorisation should be sought after commencement of the intervention.⁷⁹

It is, however, argued in support of the green light interpretation that intervention without prior approval of the UNSC poses the risk of 'undermining the imperfect, yet resilient, security system created after the Second World War (WWII) and setting dangerous precedents for future interventions'.⁸⁰ This argument, however, fails to consider, among other factors, the need to adapt World War II-old systems to prevailing realities regarding the organisation of states and attendant security dynamics adopted at regional and sub-regional levels.⁸¹

3.2 Legitimacy as a basis for sub-regional authority

Alongside the interpretative arguments above lie arguments that place primacy on the legitimacy of sub-regional intervention regardless of any 'illegality' that may arise from a failure to obtain prior UNSC approval. The ICISS argued that 'in the blurred area where international custom is evolving or unclear, the notion of

75 As above.

76 ICISS (n 13) 54.

77 ICISS (n 18) 166.

78 UNSG (n 2) 85; AU (n 3) 6.

79 As above.

80 Bellamy (n 9) 40.

81 P Arthur 'Promoting security in Africa through regional economic communities (RECs) and the African Union's African Peace and Security Architecture (APSA)' (2017) 9 *Insight on Africa* 2. Other contentious issues against the system include the continued structuring of veto powers based on World War II power dynamics.

legitimacy takes on greater significance'.⁸² To echo this position, the High-Level Panel stated:⁸³

The effectiveness of the global collective security system ... depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy – their being made on solid evidentiary grounds and for the right reasons, morally as well as legally.

In this respect, the intervention by the North Atlantic Treaty Organisation (NATO) in Kosovo in 1999, for instance, was found to be 'illegal but legitimate' thus ensuring a victory for NATO when a resolution was presented in the UNSC seeking to declare its intervention a violation of international law.⁸⁴ Increasingly, therefore, some decisions about intervention may require the use of force without UNSC approval and the merits of each case will determine the legitimacy of such interventions.⁸⁵

To ensure that interventions are legitimate, regional and sub-regional organisations therefore need to ascertain that there is an objectively-perceived or actual humanitarian situation; undertake and demonstrate that reasonable efforts to reach a diplomatic or peaceful resolution have failed; and comply with the requirements of international humanitarian law in the conduct of their military interventions.⁸⁶ The sustainability of the protection measures adopted will also serve to legitimise such interventions. Also, the presence of a treaty instrument ratified by the subject state and bestowing on the regional or sub-regional organisation the right to intervene for human protection purposes will also serve as a critical legitimising tool.⁸⁷ Moreover, this serves as proof of grant of anticipatory consent to the intervening regional or sub-regional organisation.

The above arguments, therefore, make a strong case for the authority of regional and sub-regional organisations to undertake coercive measures under R2P in their own right to ensure the protection of populations at risk. Besides, the human protection imperative should always bend towards saving lives rather than to the prizing of anachronistic procedural hurdles.⁸⁸

⁸² ICISS (n 18) 170.

⁸³ UNSG (n 2) 66; G Evans 'From humanitarian intervention to the responsibility to protect' (2006) 3 *Wisconsin International Law Journal* 710.

⁸⁴ Draft UNSC Resolution, UN Doc S/1999/328 (26 March 1999); ICISS (n 18) 166-168.

⁸⁵ Bellamy (n 38) 125.

⁸⁶ ICISS (n 18) 170.

⁸⁷ As above.

⁸⁸ UNSG (n 69) 19 para 50.

3.3 The comparative advantage of sub-regional organisations

The ICISS acknowledged that neighbouring countries in the context of regional and sub-regional arrangements often have comparative advantages that make them better placed to take action in response to conflict than the UN.⁸⁹

To begin with, internal conflicts in states always tend to have negative spill-over effects, such as the inflow of refugees, which significantly impact neighbouring countries.⁹⁰ Second, conflict in one country always tends to spark related or resultant conflicts in neighbouring states. For instance, 'international terrorist groups prey on weak states for sanctuary', thereby posing security threats to neighbouring countries.⁹¹ Third, the close proximity of states within sub-regional organisations gives them a better appreciation of a conflict's dynamics, hence equipping them with knowledge on where and how to effect intervention measures.⁹² Lastly, the sharing of borders, joint regional institutions and trade makes sub-regional organisations better placed to effect economic sanctions imposed on countries experiencing conflict.⁹³ Sub-regional organisations' involvement in their formulation therefore assures their commitment to ensure that they are not breached.

The above factors give neighbouring states in sub-regional organisations (even more than regional organisations) a strong collective interest in swiftly and effectively putting an end to R2P-related conflicts. This interest, moreover, is sufficient to mobilise the necessary political will not only to act but to also to ensure the sustainability of the specific measures adopted in resolving the conflicts.⁹⁴

⁸⁹ ICISS (n 13) 53.

⁹⁰ As above; T Kabau 'The responsibility to protect and the role of regional organisations: An appraisal of the African Union's interventions' (2012) 4 *Goettingen Journal of International Law* 57.

⁹¹ UNSG (n 2) 14.

⁹² UNSG (n 69) 7; T Ajayi *The UN, the AU and ECOWAS – A triangle for peace and security in West Africa?* (2008) 8.

⁹³ UNSG (n 69) 11.

⁹⁴ ICISS (n 13) 54; UNSG *A vital and enduring commitment: Implementing the responsibility to protect: Report of the Secretary-General* (2015).

4 Implementation of the responsibility to protect in ECOWAS: Lessons from sub-regional intervention

ECOWAS was established under the Treaty of Lagos in 1975 and is currently made up of 15 states.⁹⁵ It has established various institutions that play different roles in the implementation of decisions that ideally fall under R2P. These include the Authority of Heads of State and Government (ECOWAS Authority) which is the highest decision-making body on peace and security matters;⁹⁶ the Mediation and Security Council (MSC) which takes all decisions on peace and security matters upon delegation from the ECOWAS Authority;⁹⁷ the Council of Elders who use their good offices to pursue pacific settlement of disputes;⁹⁸ and the ECOWAS Monitoring Group (ECOMOG) which is a stand-by military force and an early warning mechanism referred to as the Monitoring and Observation Centre.⁹⁹

ECOWAS is highly supranational, a factor that has largely contributed to the success of its decisions on peace and security.¹⁰⁰ Its decisional supra-nationalism that allows it to utilise a majority-based decision-making process¹⁰¹ as opposed to a consensus-based process has been critical in ensuring timely and decisive action.¹⁰² The democratic density¹⁰³ of ECOWAS is also a key facilitator of its effectiveness.

4.1 How the ECOWAS framework supports R2P implementation

Although largely put in place long before the emergence of R2P, the ECOWAS framework provides a sound basis for R2P implementation. This part examines how the framework provides room for the implementation of R2P's three core responsibilities.

⁹⁵ <http://www.ecowas.int/about-ecowas/basic-information/> (accessed 8 July 2020): Nigeria, Ghana, Senegal, Mali, Côte d'Ivoire, Liberia, The Gambia, Guinea, Guinea-Bissau, Sierra Leone, Niger, Cape Verde, Burkina Faso, Benin and Togo.

⁹⁶ 1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol on the ECOWAS Mechanism (PEM)) art 6.

⁹⁷ PEM (n 96) arts 4 & 10.

⁹⁸ PEM art 17.

⁹⁹ Revised Treaty art 58.

¹⁰⁰ Adetula, Bereketeb & Jaiyebo (n 64) 22.

¹⁰¹ Art 9(4) of Revised Treaty as read with art 9 of the PEM allows only four in a meeting of six states to make a decision to intervene in any one of ECOWAS' 15 states.

¹⁰² B Fagbayibo 'Article 4(h): A supranational perspective' in Kuwali & Viljoen (n 8) 130.

¹⁰³ The relative number of democratic regimes in a sub-region.

With respect to the responsibility to prevent, ECOWAS has adopted a continuum of peace-building measures that range from those aimed at preventing social and political upheavals to those aimed at building the capacity of member states emerging from conflict.¹⁰⁴ These include involvement in preparation, organisation and supervision of elections in member states;¹⁰⁵ observation of respect for human rights; as well as its active support for the development of democratic institutions.¹⁰⁶ Most importantly, the establishment of a decentralised early warning system¹⁰⁷ goes a long way in ensuring that ECOWAS has requisite prior information on potential triggers of conflict to enable it to provide timely assistance to member states in addressing the root causes of conflict.

Where the above fails, leading to conflict, ECOWAS is mandatorily required to intervene.¹⁰⁸ For a start, the ECOWAS Prevention Framework provides an elaborate and comprehensive mechanism for peaceful intervention through diverse preventive diplomacy initiatives.¹⁰⁹ Where pacific means fail, the mechanism for military intervention may be initiated by a decision of either the ECOWAS Authority or the MSC; on the initiative of the president of the ECOWAS Commission; or at the request of either a member state, the AU or the UN.¹¹⁰

Lastly, the ECOWAS mechanism makes explicit provision for the rebuilding and reconstruction of its member states after interventions. In this regard, ECOWAS requires all its financial institutions to develop policies to facilitate funding for reintegration and reconstruction programmes.¹¹¹ It further undertakes to supervise and monitor cease-fires through its observation missions;¹¹² to implement disarmament, demobilisation and reintegration programmes; as well as to resettle and reintegrate refugees and internally-displaced persons.¹¹³

It is worth noting, however, that while the ECOWAS framework largely commends itself to aspects of the R2P concept, it diverts from the strict boundaries of the R2P norm in the sense that it envisions

¹⁰⁴ PEM (n 96) ch IX.

¹⁰⁵ PEM art 42; Protocol on Democracy art 12.

¹⁰⁶ PEM (n 96) art 31.

¹⁰⁷ PEM arts 23 & 24.

¹⁰⁸ PEM art 40.

¹⁰⁹ 2008 ECOWAS Conflict Prevention Framework (Prevention Framework) para 1; Revised Treaty art 77(2)(iv) & (v)

¹¹⁰ PEM (n 96) arts 25 & 26.

¹¹¹ PEM art 42.

¹¹² PEM art 31.

¹¹³ PEM art 44.

a wide scope of situations warranting intervention and fails to make military intervention subject to the prior authorisation of the UN.

Nevertheless, ECOWAS acknowledges that although it acts on the basis of the sub-region's realities, it constitutes a building block and an integral part of the continental and global security architecture, and thus needs to work in partnership and in cooperation with the AU and the UN.¹¹⁴ For this reason, article 52 of the Protocol to the ECOWAS Mechanism requires ECOWAS to inform the UN of any military intervention undertaken.¹¹⁵ Additionally, the ECOWAS Mechanism consistently requires cooperation between ECOWAS, the AU and the UN mechanisms¹¹⁶ and goes to the extent of allowing the AU and UN to initiate the ECOWAS mechanism.¹¹⁷ This is a critical feature for any sub-regional enforcement actions under R2P.

4.2 ECOWAS' involvement in R2P-related cases

Since inception, ECOWAS has undertaken various successful interventions. This article focuses on interventions in The Gambia, Côte d'Ivoire and Mali. The focus in each of the cases is on events and steps taken in respect of the responsibility to react under R2P.

4.2.1 ECOWAS intervention in The Gambia (2016/2017)

The situation in The Gambia involved a contested presidential election in which the incumbent had rejected the results that had declared the opposition candidate the winner.¹¹⁸ This was despite the fact that ECOWAS, the AU and the UN had issued a joint statement declaring the elections as having been free and fair.¹¹⁹ This led to a political stand-off that saw Gambian refugees as well as the opposition candidate flee to neighbouring Senegal.¹²⁰

¹¹⁴ Prevention Framework paras 117 & 118.

¹¹⁵ Sarkin (n 45) 26: Sarkin argues that in practice there may be consultation and unilateral action by ECOWAS may only occur where there is no agreement. Notwithstanding this, the fact that the obligation is to *inform* rather than to seek prior authorisation means that ECOWAS can resort to the use of force in the absence of UNSC approval.

¹¹⁶ PEM (n 96) arts 41(b) & 52; Revised Treaty art 83.

¹¹⁷ PEM art 26.

¹¹⁸ T Gouegnon 'Yahya Jammeh loses to Adama Barrow in Gambia election' (2016), <http://www.aljazeera.com/news/2016/12/gambia-yahya-jammeh-loses-election-adama-barrow-161202130519550.html> (accessed 8 July 2020).

¹¹⁹ 'ECOWAS, AU and UN statement on the Gambian December 1 presidential election', <http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-gambian-december-1-presidential-election/> (accessed 8 July 2019).

¹²⁰ C Hartmann 'ECOWAS and the restoration of democracy in The Gambia' (2017) 52 *Africa Spectrum* 87 94.

The AU Peace and Security Council (PSC) condemned the incumbent's actions, stressed the imperative of dialogue and expressed the AU's determination to take all necessary measures to ensure that the will of the Gambian people as expressed in the elections was respected.¹²¹ It also acknowledged and expressed support for the efforts that were being made by ECOWAS.¹²² The ECOWAS Authority also issued a Communiqué in the same terms as the AU and requested the AU and UN's endorsement of its decisions as well as technical assistance in mediating the conflict.¹²³ This was followed by a statement by the president of the UNSC recognising the president-elect and commending the efforts being undertaken by ECOWAS and the AU to reach a peaceful solution.¹²⁴

In an attempt to secure pacific settlement, ECOWAS dispatched a high-level mission of heads of state, accompanied by the Special Representative of the UNSG for West Africa to attempt to reach a political solution.¹²⁵ No concession, however, was reached.¹²⁶

On the side-lines of the negotiations, ECOWAS was engaged in a contingency plan that involved the gathering of sub-regional troops in Senegal under the banner of the ECOWAS Mission in The Gambia (ECOMIG) in readiness to move into The Gambia should the situation so demand.¹²⁷ The mission's objective was to create an enabling environment for the enforcement of the election results and to ensure the safety of the population in the process.¹²⁸

In the meantime, in line with the decision of ECOWAS to seek the endorsement of the UN, Senegal (an ECOWAS and UNSC member at the time) drafted and presented a resolution to the UNSC for approval to use all means necessary to restore order in The Gambia.¹²⁹ However, the unanimous resolution adopted by the UNSC only passively welcomed the ECOWAS decision to intervene

¹²¹ AU 'Communiqué of the Peace and Security Council's 644th meeting held on 12 December 2016 in Addis Ababa, Ethiopia' 3.

¹²² As above.

¹²³ ECOWAS 'Final communiqué of the fiftieth ordinary session of the ECOWAS Authority of Heads of State and Government held on 17 December 2016'.

¹²⁴ UN 'Security Council statement says Gambian leaders must respect vote result, ensure peaceful transfer of power to president-elect' (2016), <https://www.un.org/press/en/2016/sc12650.doc.htm> (accessed 8 July 2019).

¹²⁵ ECOWAS (n 123) 7.

¹²⁶ As above.

¹²⁷ The Presidency, Republic of Ghana 'Press release: Ghana deploys troops to support ECOWAS Mission in The Gambia' (2017), <http://presidency.gov.gh/index.php/2017/01/18/ghana-deploys-troops-to-support-ecowas-mission-in-the-gambia/> (accessed 8 July 2019).

¹²⁸ As above.

¹²⁹ What's in blue 'Resolution on The Gambia' (2017), <http://www.whatsinblue.org/2017/01/resolution-on-the-gambia.php> (accessed 8 July 2019).

but expressed its ‘full support to ECOWAS in its commitment to ensure, *by political means first*, respect of the will of the people of The Gambia’.¹³⁰ Notably, the UNSC fell short of authorising the use of ‘all means necessary’,¹³¹ failed to issue the resolution under chapter VII of the UN Charter and did not declare the situation a threat to international peace and security, thereby creating uncertainty as to the basis upon which it was exercising its authority over the internal conflict.¹³²

Shortly after the resolution had been passed the ECOWAS troops crossed the border into The Gambia, leading to a political settlement for the relinquishing of power.¹³³ This was done notwithstanding the failure by the UNSC to authorise the use of military force and its insistence on the use of political means (first). The UNSC’s resolution, therefore, arguably served as a legitimising tool rather than dictating action by ECOWAS.

Although it may be argued, from a human security perspective, that the ECOWAS intervention pre-empted a foreseeable lapse into conflict and the potential commission of atrocity crimes (earlier expressed by the UNSG Special Adviser on the Prevention of Genocide following statements that incited ethnic violence by the incumbent),¹³⁴ the intervention falls short of compliance with the R2P norm’s procedural standards. This is because the intervention was largely aimed at enforcing democratic ideals and the military deployment was not specifically authorised by the UNSC. Although it has been argued that the UNSC did not specifically prohibit military intervention and that the loose but strategic wording of the resolution that emphasised a solution ‘*by political means first*’, indirectly expressed support for the possibility of a military solution,¹³⁵

130 UNSC Resolution 2337.

131 UN ‘Provisional record of the Security Council 7866th meeting of 19 January 2017: Peace consolidation in West Africa’ (2017): Comments made by some UNSC member states after the passing of the resolution specifically made it clear that the approval was not an authorisation for the use of force.

132 C Kreß & B Nußberger ‘Pro-democratic intervention in current international law: The case of The Gambia in January 2017’ (2017) 4 *Journal on the Use of Force and International Law* 242.

133 P Williams ‘A new African model of coercion? Assessing the ECOWAS mission in The Gambia’ (2017), <https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/> (accessed 8 July 2019); Office of the Spokesperson for the UNSG ‘Note to Correspondents - Joint declaration on the political situation in The Gambia’ (2017), <https://www.un.org/sg/en/content/note-correspondents/2017-01-21/note-correspondents-joint-declaration-political-situation> (accessed 8 July 2019).

134 M Nouma ‘Note to correspondents – Statement by Special Adviser on the Prevention of Genocide’ (2016), <https://www.un.org/sg/en/content/sg/note-correspondents/2016-06-10/note-correspondents-statement-special-adviser-prevention> (accessed 27 August 2019).

135 Kreß & Nußberger (n 132) 244.

it is only when viewed from the eyes of the broader *R2P* concept that the attributes above may be argued as falling within the ambit of *R2P*.

The fact that Senegal was at the forefront of the intervention in The Gambia has been argued as having been motivated by political ends¹³⁶ more than the need to enforce any normative ideals.¹³⁷ Worth noting, however, is the strategic location of Senegal which encloses The Gambia within its territory; the fact that over 45 000 refugees had already entered Senegal; and the fact that Senegal was the only West-African country in the UNSC, which informed Senegal's lead role.¹³⁸ Even so, the fact that the decision to intervene was taken collectively at the sub-regional level went a long way in sheltering The Gambia from any negative impacts of any self-interest on the part of Senegal.¹³⁹ However, such self-interest arguably is imperative in the successful implementation of *R2P* when channelled along objectively-identifiable legal grounds for action coupled with a multilateral decision-making system.

The ECOWAS intervention in The Gambia goes to show that sub-regional organisations are better placed to act in a timely and decisive manner to ensure peace where coercive means are necessary and where the UNSC is reluctant or does not regard such situations as commanding themselves to coercive measures.

4.2.2 ECOWAS intervention in Côte d'Ivoire (2011)

Côte d'Ivoire had since 2002 endured a longstanding civil war between its southern and northern regions. The conflict that informed this intervention erupted after the incumbent President, Laurent Gbagbo (Gbagbo) rejected the results of the 2010 presidential elections in which Alassane Ouattara (Ouattara) was declared the winner.¹⁴⁰ Gbagbo contested the results before the Constitutional Council alleging fraud in departments in the northern region.¹⁴¹ The Council, which was supportive of Gbagbo, annulled results from

¹³⁶ Williams (n 133); Hartmann (n 120) 94. These include the failure of the 'Senegambia' confederation talks with The Gambia and the incumbent's longstanding support for separatist movements in Southern Senegal's Casamance region.

¹³⁷ Williams (n 133).

¹³⁸ <http://www.un.org/en/sc/members/elected.asp> (accessed 8 July 2019).

¹³⁹ F Mugisha & G Mittawa 'Multilateral intervention: The AMISOM experience' in Kuwall & Viljoen (n 8) 266.

¹⁴⁰ X Rice 'Conflict looms over Ivory Coast while poll-loser Gbagbo refuses to cede control' (2010), <https://www.theguardian.com/world/2010/dec/06/ivory-coast-election-stalemate-gbagbo> (accessed 8 July 2019).

¹⁴¹ ECOWAS 'Final communiqué on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire (7 December 2010)'.

seven northern departments and proceeded to declare Gbagbo the winner.¹⁴² Two separate inaugurations took place, for Gbagbo in the south and for Ouattara in the north, resulting in a political impasse marred by acts of violence.¹⁴³

ECOWAS and the AU endorsed the election results as declared by the electoral commission, recognising Ouattara as the legitimate President-elect and called on Gbagbo to respect the will of the people and to yield power.¹⁴⁴ They both proceeded to impose sanctions on Côte d'Ivoire.¹⁴⁵ The UNSC welcomed these decisions and expressed support for the efforts in promoting dialogue.¹⁴⁶ It moreover reiterated the readiness of the UNSC to impose targeted sanctions to all obstructing the peace process or committing serious violations of human rights.¹⁴⁷

In an attempt to arrive at a peaceful resolution, ECOWAS and the AU undertook separate mediation efforts with both failing to procure a truce.¹⁴⁸ ECOWAS proceeded to threaten to use 'legitimate force' in a bid to force a settlement.¹⁴⁹ However, this decision was contradicted by that taken by the AU's PSC a month later calling for a peaceful resolution and putting in place its own high-level panel to pursue a political solution.¹⁵⁰ This only served to further the existing impasse.¹⁵¹

Presented with the above conflicting positions, the UN chose to downplay the position of ECOWAS by only *taking note* of it while emphasising the AU's political approach.¹⁵² Pursuant to this, ECOWAS recalled its resolutions and instead appealed to the UNSC to impose stiffer targeted sanctions and to also strengthen the mandate of UN

142 J James 'Ivory Coast poll overturned: Gbagbo declared winner' (2010), <http://www.bbc.com/news/world-africa-11913832> (accessed 8 July 2019).

143 BBC 'Ivory Coast crisis as presidential rivals both sworn in' (2010), <http://www.bbc.com/news/world-africa-11919256> (accessed 8 July 2019).

144 AU 'Communiqué of the AU PSC of its 252nd meeting held on 9 December 2010'; ECOWAS (n 141).

145 As above.

146 UN 'Security Council press statement on Côte d'Ivoire' (2010), <https://www.un.org/press/en/2010/sc10105.doc.htm> (accessed 8 July 2019).

147 As above.

148 ECOWAS (n 141); ECOWAS 'Final communiqué of the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire held on 24 December 2010' paras 10-11; UN 'Côte d'Ivoire chronology of events : Security Council report' (2017)'.

149 As above.

150 AU 'Communiqué of the AU PSC of its 259th meeting held on 28 January 2011'; Marusa (n 28) 30.

151 E Abatan & Y Spies 'African solutions to African problems? The AU, R2P and Côte d'Ivoire' (2016) *South African Journal of International Affairs* 4.

152 UNSC Resolution 1975.

Operation in Côte d'Ivoire (UNOCI)¹⁵³ to enable them use all means necessary to protect civilians.¹⁵⁴

The UNSC proceeded to impose an arms embargo on Côte d'Ivoire as well as targeted sanctions against Gbagbo and his associates.¹⁵⁵ The UNSC also extended its prior authorisation to UNOCI (and the supporting French forces) to use all means necessary to protect civilians.¹⁵⁶ The duo intervened using force, with the assistance of pro-Ouattara fighters, leading to the surrender of Gbagbo.¹⁵⁷

In addition to the above measures, it is argued that the adoption and use of the CFA franc and the use of a single central bank among ECOWAS member states made it easy for ECOWAS to impose sanctions on Gbagbo's government.¹⁵⁸

The fact that special advisers to the UNSG on genocide and R2P had expressed concern over 'the possibility of genocide, crimes against humanity, war crimes and ethnic cleansing in Côte d'Ivoire'¹⁵⁹ placed the conflict under R2P, thus necessitating international action. The UNSC declared the situation a threat to regional peace and security and called for action under chapter VII of the UN Charter in its authorisation of intervention by the UNOCI.¹⁶⁰ Although the conflict also sought to enforce democracy, the overwhelming human security concerns justified intervention even though the UNSC fell short of directly invoking R2P.

However, it is argued that the proactiveness of the UN was not entirely altruistic but was driven by French interests.¹⁶¹ France, the former colonial power of Côte d'Ivoire and a permanent member of the UNSC, is argued to have had a regime-change agenda given Gbagbo's stand for the economic interests of his country¹⁶² and,

¹⁵³ UNSC Resolution 1933: UNOCI had been deployed by the UN after the 2002 Ivorian conflict as a peacekeeping force in Côte d'Ivoire and was supported by French forces.

¹⁵⁴ UN (n 148).

¹⁵⁵ UNSC Resolution 1975.

¹⁵⁶ UNSC Resolution 1975 para 6.

¹⁵⁷ UN (n 148).

¹⁵⁸ K Chitiyo 'Ivory Coast: Africa's democracy lesson' (2011), <http://www.bbc.com/news/world-africa-13092437> (accessed 12 October 2019).

¹⁵⁹ F Deng & E Luck 'Statement attributed to the UN Secretary-General's special advisers on the prevention of genocide and the responsibility to protect on the situation in Côte d'Ivoire' (2011), <https://www.un.org/en/genocideprevention/documents/media/statements/2011/English/2011-01-19-O%20SAPG,%20Special%20Advisers%20Statement%20on%20Cote%20d'Ivoire,%2019%20Jan%202011.pdf> (accessed 10 October 2019).

¹⁶⁰ UNSC Resolutions 1933, 1967 & 1975.

¹⁶¹ Abatan & Spies (n 151) 6.

¹⁶² A Little 'Q&A: Ivory Coast crisis' (2011), <http://www.bbc.com/news/world-africa-11916590> (accessed 12 October 2019).

further, given France's interest in re-establishing French influence in Francophone Africa.¹⁶³ Although Bellamy and Williams argue that 'regional arrangements played a crucial "gatekeeping" role in defining the problem and terms of engagement',¹⁶⁴ this is not entirely correct. Statements made by ECOWAS and the AU only provided a pretext for UN action. There is no record of any consultation by the UN with either the AU or ECOWAS in determining the terms of engagement in the conflict. France's undue influence in the decision to intervene and the execution of the intervention, therefore, overshadowed the UN's impartiality while dwarfing any role by ECOWAS or the AU.¹⁶⁵

Additionally, 'the lack of unity of response, duplication of efforts' and the AU's contradiction of the position adopted by ECOWAS undermined their effectiveness in resolving the conflict at the regional level, thus necessitating the UN's involvement.¹⁶⁶ However, it is worth noting that while ECOWAS gave room for the participation of a representative of the Chairperson of the AU Commission in all its meetings on Côte d'Ivoire,¹⁶⁷ the AU failed to reciprocate this. Arguably, therefore, the AU's failure to coordinate its response with ECOWAS undermined the leadership role of ECOWAS and its ability to achieve a timely and amicable settlement.

This intervention contributes numerous lessons while equally bringing to fore challenges associated with sub-regional intervention. The first is the demonstration that sub-regional organisations are in a better position to enforce targeted sanctions as seen from the UN's request to ECOWAS members to help enforce its sanctions.¹⁶⁸ Second, joint sub-regional entities such as a sub-regional currency and a central bank are instrumental in the enforcement of targeted economic sanctions. Lastly, there is a need for closer cooperation between sub-regional and regional organisations in the implementation of R2P to ensure the adoption of concerted measures that will enjoy greater international legitimacy and have a better chance of achieving timely settlements of R2P-related conflicts.¹⁶⁹ In this regard, the principle of subsidiarity is recommended in the hierarchical sequencing of

163 B Plett 'Did UN forces take sides in Ivory Coast?' (2011), <http://www.bbc.com/news/world-africa-13004462> (accessed 12 October 2019).

164 Bellamy & Williams (n 65) 837.

165 As above.

166 Abatan & Spies (n 151) 5; K Striebinger 'Coordination between the African Union and the regional economic communities' (2016) 14.

167 See all the communiqués of the ECOWAS Authority above.

168 UNSC Resolution 2045 para 8.

169 Arthur (n 81) 15; Alao (n 61) 29.

interventions with sub-regional organisations acting first and resort to the UN as a last call.¹⁷⁰

4.2.3 ECOWAS intervention in Mali (2012)

The conflict in Mali presents what R2P envisions as a situation where a state is unable to discharge its responsibility to protect. The conflict began as a push/rebellion by civilian separatist movements in Northern Mali for self-determination but was later replaced by Islamic extremism and the commission of war crimes by Islamist rebel groups that took control of the region.¹⁷¹ The inability of the Malian government to effectively combat the rebellion led to mutiny and a coup against President Amadou Toure prompting the UNSC and ECOWAS to respond to the crisis.

ECOWAS committed to taking all necessary measures to guarantee the protection of affected populations and to assist Mali in safeguarding its sovereignty and territorial integrity.¹⁷² In this regard, it succeeded in negotiating with the military junta for the restoration of constitutional order and the installation of an interim civilian government. It achieved this through a mix of negotiation through a high-level delegation¹⁷³ and the threat of general political/diplomatic, economic and financial sanctions against the Mali state as well as through individual sanctions against the military junta's leaders.¹⁷⁴ This, therefore, provided room to focus on the insurgency by rebels.

Despite efforts by ECOWAS at mediating the rebellion, the insurgency could not be contained. ECOWAS, therefore, resolved to adopt a military solution of deploying troops to Mali under the banner of 'ECOWAS Mission in Mali' (MICEMA).¹⁷⁵ Although this decision received the endorsement of the AU,¹⁷⁶ various stakeholders in the

¹⁷⁰ Striebinger (n 167) 17; K Aning & S Atuobi 'Application of and responses to the responsibility to protect norm at the regional and sub-regional levels in Africa: Lessons for implementation' in The Stanley Foundation (ed) *The role of regional and sub-regional arrangements in strengthening the responsibility to protect* (2011) 13.

¹⁷¹ Human Rights Council, 'Situation of human rights in the Republic of Mali' (3 July 2012) para 2 read with art 8 of the Rome Statute; UNSC Resolution 2085.

¹⁷² ECOWAS 'Final Communiqué – 40th ordinary session of the Authority of Heads of State and Government' (16-17 February 2012) para 14; ECOWAS 'ECOWAS statement on the situation in the North of Mali' (19 March 2012).

¹⁷³ ECOWAS 'Final Communiqué from the extraordinary summit of ECOWAS Heads of State and Government' (27 March 2012) para 14.

¹⁷⁴ ECOWAS 'Communiqué – Emergency mini-summit of ECOWAS Heads of State and Government on the situation in Mali' (29 March 2012).

¹⁷⁵ See ECOWAS Summit Communiqués of 26 April 2012 (para 21); 3 May 2012 (para 13) and 28-29 June 2012 (para 25).

¹⁷⁶ AU 'Communiqué of the PSC 316th Meeting' (3 April 2012).

region were opposed to a military solution, key among them being Mali's interim leadership.¹⁷⁷ Other core countries, such as Algeria and Mauritania, are also reported to have been opposed to the decision.¹⁷⁸ This, when coupled with the fact that the Islamic militants had extensive military experience and sophisticated equipment, dealt a blow to the ability of ECOWAS to muster sufficient political, military and financial capacity to go through with the deployment. ECOWAS, therefore, was compelled to seek UNSC's authorisation and support for an international force to intervene in Mali.¹⁷⁹

The UNSC, however, was reluctant to approve the use of force despite the decision having received the AU's endorsement and despite the UN having been part of all ECOWAS meetings leading up to the decision to intervene militarily. This was also despite receiving a direct request from Mali's interim leadership for intervention.¹⁸⁰ Having received the request by ECOWAS in June,¹⁸¹ the UNSC delayed the approval until December under the bureaucratic pretext of requiring 'additional information' from ECOWAS and the AU.¹⁸² Even when the UNSC finally authorised intervention through an Africa-led Support Mission in Mali (AFISMA), it withheld the provision of logistical and financial support, only expressing its 'intention to consider' providing the support upon being furnished with additional implementation details.¹⁸³ In the end, what was authorised was an 'unfunded' and logistically-unsupported mission to Mali, thus lending credence to the view that 'AFISMA had clearly been set up to fail'.¹⁸⁴ A donors' conference had to be held by the AU and ECOWAS for contributions towards the Mission.¹⁸⁵ The lack of

¹⁷⁷ D Francis 'The regional impact of the armed conflict and French intervention in Mali' (2013) *NOREF Report* 7-8.

¹⁷⁸ Although not ECOWAS members, both countries were strategic to the resolution of the conflict given their influence over the northern part of Mali as well as their interest in the spill-over effect in the form of returning extremists. See W Lacher 'The Malian crisis and the challenge of regional security cooperation' (2013) 2 *International Journal of Security and Development* 3.

¹⁷⁹ ECOWAS 'Communiqué of the ECOWAS Commission on the situation in Mali' (7 June 2012) para 7.

¹⁸⁰ UNSC Resolution 2071.

¹⁸¹ AU 'Communiqué – Peace and Security Council 323rd Meeting' (12 June 2012) para 16.

¹⁸² UNSC 'Security Council Press Statement on Mali' (18 June 2012); UNSC Resolution 2056 para 18; UNSC 'Security Council press statement on Mali' (10 August 2012); UNSC Resolution 2071 para 6.

¹⁸³ UNSC Resolution 2085 para 21; Compare this to the nature of logistical and financial support provided to the UN's own mission (MINUSMA) established to succeed AFISMA. See, eg, paras 7, 10, 12, 13, 14 & 15 of UNSC's Resolution 2100.

¹⁸⁴ A Oluwadare 'The African Union and the conflict in Mali: Extra-regional influence and the limitations of a regional actor' (2014) 3 *African Journal of Governance and Development* 18; UNSC 'Report of the Secretary-General on the situation in Mali' (26 March 2013) para 46.

¹⁸⁵ ECOWAS 'Final Communiqué Extraordinary Session of the Authority of ECOWAS Heads of State and Government' (19 January 2013) paras 20-21.

unqualified support from the UNSC from inception hence impacted the deployment and effectiveness of AFISMA.

Following the deepening of the insurgency due to the delays in the approval and deployment of AFISMA, Mali's interim leadership was compelled to seek France's military assistance.¹⁸⁶ The French-led offensive against the rebellion, with subsequent assistance from the AFISMA troops, saw an end to the insurgency and gave room for the establishment of a stabilisation mission.

While the Mali case highlights the timely quality of sub-regional intervention as well as the importance of regional organisations deferring to the leadership of sub-regional organisations, as demonstrated by the AU's consistent support for and endorsement of ECOWAS measures, it also reveals challenges of multilateral military action in the context of the strict limits of the R2P *norm*. Some of the lessons it holds for sub-regional intervention include the following:

- (i) Financial capacity is crucial for military intervention, hence there is a need for sub-regional organisations to focus on and strengthen their individual capacity to finance their missions.
- (ii) Sub-regional organisations need to have a clear financing framework where a military operation is beyond both their military/logistical and financial capacity.

The resolution of the Mali conflict is argued as being an archetypal R2P *norm* implementation case with respect to obtaining the UNSC's prior authorisation before the deployment of military force.¹⁸⁷ While the 'Mali case' allows for action, especially in instances where sub-regional organisations are lacking in capacity to intervene on their own, its effectiveness will require a clear framework regulating how the UNSC should handle requests received from sub-regional organisations for approval of military intervention, for human protection purposes. The framework should detail, among other things, the specific roles and obligations of each of the multilateral actors in executing the specific intervention. This will ensure certainty in the process and facilitate timely action.

5 Conclusion

Human security sits at the core of R2P (the R2P *concept*). For this reason, the concept prized the protection of populations at risk over any procedural bureaucracies based on the world order as it existed

¹⁸⁶ M Caparini 'The Mali crisis and responses by regional actors' (2015) Working Paper Norwegian Institute of International Affairs 9-10.

¹⁸⁷ Nkrumah & Viljoen (n 8) 262 345; UNSC Resolution 2085 para 17.

in 1945 at the adoption of the Charter of the UN. The realities of the post-Cold War era organisation of states highlight an increasing role for regional and, even more so, sub-regional organisations in the maintenance of sub-regional peace and security. This underscored the recommendation by ICISS to confer authority on regional and sub-regional organisations to adopt coercive measures under R2P. The recommendation, however, was omitted under the R2P *norm* in favour of the continued preservation of the special privileges of hegemony held by a few states, more so, the permanent veto-bearing members of the UNSC and protected under the UN Charter.

The result has been the perpetuation of an inherently unequal international security system where a few states have the exclusive privilege of deciding when another state ceases to benefit from the protection afforded by principles of sovereign equality and non-interference under the pretext of R2P. This has given leeway for the use of R2P to mask ulterior motives for intervention as well as for the obstruction of decisive action in situations meriting the invocation of R2P based on the geopolitical and strategic interests of the few states rather than the imperative of human security. The former was the case in NATO's UNSC-sanctioned intervention in Libya while the latter has been demonstrated by Russia's more than nine vetoes against attempts by the UNSC to adopt coercive measures in Syria's years-long conflict.¹⁸⁸ Proposals for constructive abstention, resort to UNGA's Uniting for Peace procedures and proposals for a 'responsibility not to veto' have fallen flat, thus necessitating better democratised and human security-focused alternatives. The role of sub-regional organisations in this regard therefore is key and can no longer be ignored or downplayed.

As demonstrated by intervention actions undertaken under ECOWAS and discussed herein, sub-regional organisations possess unique comparative advantages over regional and international actors which make their enhanced involvement (including the adoption of coercive measures) central to effective R2P implementation. While the R2P *concept* acknowledges this, the R2P *norm* does not.

Fortunately, the R2P *norm* lacks normative prescription. As an emerging norm, therefore, R2P is subject to the rigours of normative contestation and change that are attendant to the norm cascade stage where R2P currently finds itself. As part of the norm localisation process, therefore, R2P is compelled to seek congruence with

¹⁸⁸ *The Guardian* 'Russia uses veto to end UN investigation of Syria chemical attacks' (2019), <https://www.theguardian.com/world/2017/oct/24/russia-uses-veto-end-un-investigation-chemical-attacks> (accessed 29 October 2019).

domestic cognitive priors, key among them being the practice of the sub-regional use of coercive measures for human protection purposes.

The need for international legitimacy of sub-regional intervention, however, demands that norm localisation goes an extra step to produce bottom-up feedback (normative repatriation) that will lead to the modification of R2P at the international level¹⁸⁹ to make provision for the authority of sub-regional organisations to adopt coercive measures under R2P. In this respect, therefore, international norm creation and implementation ceases to be a top-down one-way street process¹⁹⁰ and embraces a dynamic norm diffusion process that allows room for norm localisation and repatriation rather than proselytism and the supplanting of domestic cognitive priors. Only such a process can guarantee the successful development of R2P into a prescriptive international norm while ensuring its legitimacy, local appropriateness, stability and endurance.¹⁹¹

In the meantime, the red-light interpretation of the need for the UNSC's approval coupled with the imperative of ensuring the legitimacy of interventions provide a basis for sub-regional adoption of coercive measures under R2P. This, however, needs to be tempered with a close cooperation between sub-regional organisations, regional organisations as well as the UN to guarantee objectivity in decision making. Such cooperation, however, should be based on sovereign equality, capacity sharing and will as well as requiring the UNSC's subsequent ratification, albeit until sub-regional coercive authority is officially adopted as part of the R2P norm at the international level.

¹⁸⁹ A Acharya 'Norm subsidiarity and regional orders: Sovereignty, regionalism, and rule-making in the Third World' (2011) 55 *International Studies Quarterly* 96; Bloomfield (n 9) 8.

¹⁹⁰ Acharya (n 61) 471; Eimer, Lutz & Schuren (n 59) 470.

¹⁹¹ Acharya (n 52) 242; Deitelhoff & Zimmermann (n 44) 3; L Zimmermann 'Same same or different? Norm diffusion between resistance, compliance, and localization in post-conflict states' (2016) 17 *International Studies Perspectives* 105.