

**SOVEREIGNTY, INTERNAL DISPLACEMENT AND
RIGHT OF INTERVENTION: PERSPECTIVES FROM
THE AFRICAN UNION'S CONSTITUTIVE ACT AND
THE CONVENTION FOR THE PROTECTION AND
ASSISTANCE OF INTERNALLY DISPLACED PERSONS**

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***Abstract:** The end of the cold war and the beginning of the new millennium brought with it a new phase in state relations in Africa as more persons became forcefully uprooted from their homes and their rights violated with impunity due to intractable internal conflicts amidst the Westphalian notion of sovereignty which frowns at interference in the internal affairs of any state which was the fulcrum upon which the United Nations (UN) and Organization of African Unity (OAU) was founded. This new awakening has increasingly made perception of sovereignty to be people oriented. In the case of the Africa which is the crux of this paper, the eventual change from OAU to AU was significant as the coming into force of African Union's Constitutive Act and the Convention for the Protection and Assistance of Internally Displaced Persons climaxed major twist in the Africa's perception of sovereignty and the right of intervention in relation to internally displaced persons (IDPs) within the continent. This article examines briefly the historical evolution of the concept of sovereignty and the right of intervention and their implications in the African context, and being conceptual and doctrinal in approach it analyses the context and legality of the African Union's right of intervention arising from the regional treaties vis-à-vis the United Nations Charter with a view to vindicating the much celebrated 'decisive break from the past'. It concludes that African Union's current stance represents a bold and grandiose expression that is sincerely tailored towards ensuring effective human rights protection*

and humanitarian assistance for over 13 million internally displaced persons (IDPs) in Africa. Finally, the article contributes significantly to the scholarly debates surrounding right of intervention in relation to internal displacement as its resolution will in one or the other helps government and other stakeholders in their quest to curtail the scourge of intra and inter-state violence in Africa.

Keywords: *African Union, Sovereignty, Intervention, Internally Displaced Persons, State Responsibility*

INTRODUCTION

Internal displacement takes place within the territorial borders¹ over which sovereign states are endowed with indisputable autonomy and power that bars intervention by other states as underpinned in the Westphalia's notion of absolute sovereignty which is foundation on which the United Nations (UN) and the Organization of African Unity (OAU) was founded.² But recurring intra -state conflicts that followed the end of cold war and the dawn of the new millennium in the African continent reveals that the principle of sovereignty is shifting. The eventual transformation from OAU to the AU vividly attests to this concern.³ Today there is a gradual change from the non-interference stance following strict adherence to Westphalian notion of sovereignty and deeply entrenched in the erstwhile OAU Charter⁴ to “permissive” or “humanitarian” intervention brought by the African

¹ Roberta Cohen, “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” *Global Governance*, 10(2004)459-480 available at http://www.www.brookings.edu/.../2004/1001humanrights_cohen/cohenr_20041001.pdf [accessed on 17 December 2014]

² Tim Murithi, The African Union's Transition from Non- Intervention to Non –Difference: An Ad hoc Approach to Responsibility to Protect” IPG 1 (2009), 90 – 106 available at http://www.library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf [accessed on 10 October 2014]

³ George Mukundi Wachira, “Sovereignty and the ‘United States of Africa’: Insights from the EU” *Institute for Peace and Security Studies*, Paper 144, June (2007), 1-16; Stephaine Anne Fogwell, *The Legality of African Union's Right to Intervention*, LL.M., Dissertation, Faculty of Law, University of Pretoria, South Africa, April (2013), 3 available at http://www.repository.up.ac.za/.../37355/Fogwell_Legality_2013.pdf?sequence=1 [accessed on 13 February 2015]

⁴ Articles 2, 3 and 4 of the OAU Charter.

Union's Constitutive Act and reaffirmed by the Convention for the Protection and Assistance of Internally Displaced Persons in Africa⁵ especially in situations of internal displacement which has suddenly become the "new African dilemma".⁶The rationale for intervention and the extent it can be employed by the African Union to protect and assist victims of intermittent intra state war fare has been a subject of intense debate. The legality of the exercise of intervention within the African legal framework has also been questioned. Even with the entrenchment of the right of intervention in Africa, its application and enforcement has been cumbersome.

METHODOLOGY

This article is a conceptual in nature. It is an analysis of existing international and regional instruments covering the subject of study. In this wise reliance shall be placed on primary sources such as the United Nations Charter, erstwhile OAU Charter, African Union Constitutive Act and the newly ratified Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Secondary sources including opinions expressed in legal treatise (journal/articles) will be relied upon in addition to internet sources.

An effective critical literature review has a necessary connection withits academic field. It involves written dialogue with other researchers.⁷ It is purely conducted for and supported by the works of academicians who published their materials in the relevant area of a prospective researcher.⁸ One of the qualities of a good critical literature review is to gather information about a particular subject from many sources.⁹ Thus, a critical literature review would be

⁵ Hereinafter simply called Kampala Convention.

⁶ Olivia Kokushubila Lwabukuna, "Internal Displacement in Africa: African Solutions to African Problems: Challenges and Prospects", *Journal of Internal Displacement*, Vol.1, No. 1, (2011), 131-141 available at <http://www.journalofinternaldisplacement.org>. [accessed on 30 July 2013]

⁷ WL Neuman, *Social research methods: qualitative and quantitative approaches*, 5th edn, Pearson Education Inc., Boston, 2003, p. 96.

⁸ Z O'Leary, *Researching real-world problems: a guide to methods inquiry*, Sage Publications Ltd., London, 2005, pp. 45-47.

⁹ C Patricia, F Ryan & M Coughlan, 'Undertaking a literature review: a step-by-step approach', *British Journal of Nursing*, vol. 17, no.1, 2008, p. 40.

considered to have created a firmer foundation for the advancement of knowledge. It would facilitate theory development, critique areas where a plethora of research existed and uncover areas where research is needed.¹⁰ Those who have made substantial progress in a particular stream of research are better positioned to tell others what they have learned, and where the field can most fruitfully direct its attention,¹¹ suggesting the significance of a critical literature review of research work.

Literature reviews are found in many places and are written for many reasons.¹² For instance, literature reviews are found in proposals for funding and for academic degrees, in research articles, in guidelines for professional and evidence-based practices, and in reports to satisfy personal curiosity.¹³ However, this paper explains the concept of literature reviews within the critical context of legal scholarship.

IDEA OF SOVEREIGNTY IN THE AFRICAN CONTEXT

Sovereignty as a principle in international law owes its origin to the Peace of Westphalia treaty signed in 1648 marking the end of the end of the 30 years European war.¹⁴ The basic underpinning principles embedded in this post war treaty emphasizes the equality and territorial independence of each state. In the words of Maogoto, the classic concept of sovereignty “was based on ‘an iron curtain like’ conception of the state that enshrined the external and internal

¹⁰ J Webster & RT Watson, ‘Analyzing the past to prepare for the future: writing a literature review’, *MIS Quarterly*, vol. 26, no. 2, June 2002, pp. xiii-xxiii, p xiii.

¹¹ Webster & Watson.

¹² A Bolderston, ‘Writing an effective literature review’, *Journal of Medical Imaging and Radiation Sciences*, vol. 39, 2008, pp. 86-92.

¹³ A Fink, *Conducting research literature reviews: from the internet to paper*, 2nd edn, Sage Publications, Thousand Oaks, Canada, 2004, pp. 20.

¹⁴ Fassue Kelleh, *The Changing Paradigm of State Sovereignty in International System*, (MA Thesis University of Kansas City-Missouri, 2012), 11 available at http://www.academia.edu/2080509/The_changing_paradigm_of_state... [accessed on 12 October 2014]; Biong Kuol Deng, “The Evolving Concept and Institution of Sovereignty: Challenges and Opportunities” *Asia Policy Brief*, No. 28, June (2010), 1-8 available at <http://www. www.ai.org.za/.../11/No-28.-The-Evolving-Concept-and...Sovereignty.pdf> [accessed on 13 October 2014]

autonomy of the States”.¹⁵ Sovereignty is a shield that insulate an independent state as legal entity from internal and external interference or condemnation arising from its misconducts and atrocities committed within domestic terrain.¹⁶ It is defined in terms of “internal control and external autonomy”.¹⁷ More profoundly, from the jurisprudence of the International Court of Justice (ICJ) sovereignty was held to mean “the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relation with other states.”¹⁸

This principle which has been in continuous metamorphosis since its recognition in 1648 has not lost its essential character¹⁹ as it has been upheld by both treaty laws and customary international law. At the international level it was first re-echoed in the United Nations Charter which provides that the organization is “based on the principles of sovereign equality of member states”.²⁰ Intervention in the domestic affairs of member states by other state and by the United Nations itself is outlawed.²¹ Similarly, in the case of Africa, the erstwhile OAU Charter, the Constitutive Act 2000 and the Convention for the Protection and Assistance of Internally Displaced persons in Africa (Kampala Convention) firmly recognized the principle by reiterating it in their relevant provisions.

For instance, the OAU Charter provides to the effect that its primary purpose is “to defend the sovereignty, territorial integrity

¹⁵ J.N. Maogoto, “Westphalian Sovereignty in the Shadow of International Justice?: A fresh Coat of Paint for a Tainted Concept” in T. Jacobsen *et al* (eds.), *Re-envisioning Sovereignty: The End of Westphalia*, (2008), 211;

¹⁶ Jeremy Sarkin, “The Role of the United Nations, the African Union and Africa’s Sub Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect” *Journal of African Law*, Vol. 53, No. 1, (2009), 4 available at <http://www.corteidh.or.cr/tablas/R21990.pdf> [accessed on 20 February 2015]

¹⁷ Mohammed Ayoob, “Humanitarian Intervention and State Sovereignty” *International Journal of Human Rights*, Vol.6, No.1 (Spring 2002), 81-102 available at <http://www. www.icrc.org/eng/assets/files/other/irrc-876-massingham.pdf> [accessed on 12 February 2015]

¹⁸ The Corfu Channel Case (1949) ICJ 39 at 43.

¹⁹ Deng, 1.

²⁰ Art. 1(1) of the UN Charter.

²¹ *Ibid.* Art. 2(4) and 2(7).

and independence of the African people”²² and in pursuit of this objectives, the organization covenants to affirm and uphold core principles such as “sovereign equality of all members states”, “non- interference in the internal affairs of states” and “respect for the sovereignty and territorial integrity of each state and for its inalienable right to independence existence”.²³

The collapse of OAU due to transformation and the birth of the African Union in 2002 do not diminish the influence of this African ‘new bride’. With respect to the AU Constitutive Act, it grants the concept of sovereignty its prime place not only by reasons of the restatement of the principles entrenched in the erstwhile OAU Charter, but unlike the OAU Charter where “ the rights of the OAU member states prevailed over those of their people”²⁴ the AU Constitutive Act being a “decisive break from the past”²⁵ struck a balance by the robust provisions on the principles that the new union affirms to uphold in securing the independence and territorial integrity of member states²⁶ while recognizing the need for intervention for the purposes of protecting the people ²⁷ especially against infringement bordering on human rights related issues.²⁸

In the same vein, the Convention for the Protection and Assistance of Internally Displaced Persons in Africa which came into force on 6th of December 2012 like its precursors (OAU Charter and AU Constitutive Act) could not afford to break from the above line of history as far the issue of reverence for sovereignty and inviolability of territorial borders is concerned. It affirms the principles of

²² Art. 2 of the OAU Charter

²³ *Ibid.* Art. 3.

²⁴ Joseph M. Isanga, “The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?” *Santa Clara Journal of International Law*, Vol. 11, Issue 2 (2013), 270 Available at: <http://digitalcommons.law.scu.edu/scujil/vol11/iss2/1>. [accessed on 10 December 2014]

²⁵ *Ibid.* 271.

²⁶ Articles 3 (b) and 4 (a), (b) of the African Union Constitutive Act 2000 (simply called Constitutive Act).

²⁷ *Ibid.* Art. 4(h).

²⁸ Three out of fourteen objectives and six out of its sixteen principles contained in the Constitutive Act are primarily people oriented- human rights related matters.

sovereignty engendered in the existing treaties which applies to State party of the Convention²⁹ but progressively recognizes intervention in gross violation of human rights such as war crimes, crimes against humanity and genocide.³⁰

It is crystal clear from the foregoing that while the main focus of traditional notion of sovereignty dating from the Westphalia era to present day focuses on securing the independence and territorial integrity of member states, current concerns in Africa arising from the recognition that intra-state conflicts poses serious threat to peace and security in the continent and the need for protection of people against human rights violations informed the growing shift from state centric perception of sovereignty to sovereignty as entailing responsibility to protect and assist citizens especially the vulnerable populations as can be gleaned from the combined provisions of African Union's Constitutive Act and the Kampala Convention (now legally binding).

INTERNAL DISPLACEMENT IN AFRICAN CONTEXT

In Africa, due to internal armed conflicts, generalized violence and gross human rights violation countless number of persons has been forced to leave their homes in search of safety in other part of their country. This has made internal displacement “a new defining characteristics of Africa”³¹ even though, beyond African continent. The fate of victims of internal displacement are often than not precarious when considered against the backdrop of an existing class of vulnerable group called refugees whose flight has taken them beyond their own country's borders.

²⁹ *Ibid.* Preamble.

³⁰ *Id.* Art. 8(1).

³¹ Ekpa Shedrack, “From Voluntary Principles to Binding Precedent: African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa Comes into Force” *Journal of Law, Policy and Globalization*, Vol. 27, (2014), 19 – 23, available at <http://www.iiste.org/journal/index-php/JLPG/article/download/.../14659> [accessed on 23 October 2014]

To date, unlike refugee³² there is no internationally binding legal instrument or institution catering specifically for internally displaced persons. In the words of a learned scholar³³ the unfortunate predicament that has befallen internally displaced persons is because “they do not possess ideological or geo-political value”. Internally displaced at all material times do not cross borders into neighbouring countries, thereby making the negative effects more directly felt by their home countries alone. The absence of a single and dedicated international operational agency with IDPs responsibility has also compounded the hitherto inconsistent protection of internally displaced persons.³⁴

Notwithstanding these daunting negativities, recognition of the problem at the international level has brought with it legal advances for internally displaced persons with the introduction of the Guiding Principles on Internal Displacement in 1998.³⁵ The Guiding Principles restates by analogy existing norms expressed in international humanitarian and refugee laws as it synchronized all the grey areas in favour of protection and assistance of internally displaced persons.³⁶ It is indeed remarkable for being an international

³² Refugees are under the legal and institutional protection of the United Nations Convention for the Status of Refugees 1951 and its 1967 Protocol and the office of United Nations High Commissioner for Refugees (UNHCR) respectively; Admasu Alemayehu “The African Internal Displacement Problem and the Responses of African Union: An Examination of the Essential Features of the AU IDPs Convention” (LL.M/ Ph.D. Thesis, Faculty of Law, Addis Ababa University, 2010), 20; Flavia Zorzi Giustiniani, “New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa” *Denver Journal of International Law and Policy*, Vol. 39:2, (2011), 348, available at <http://www.djilp.org/wp-content/uploads/2011/08/05-Zorzi-Giustiniani.pdf> [accessed on 9 January 2015; Adeejat-Kubra Adenike Kolawole, “Towards the Evolution of Legal and Institutional Framework for the Protection of Internally Displaced Persons (IDPs) in Nigeria” *OIDA International Journal of Sustainable Development* 06.05 (2013), 141, available at <http://www.ssrn.com/link/OIDA-Intl-Journal-sustainable-Dev.html>. [accessed on 20 February 2014]

³³ Cohen, 459.

³⁴ B.S. Chimni, *International Refugee Law: A Reader*, (New Delhi: Sage Publications, 1999), 397.

³⁵ Consequent upon the appointment of Francis M. Deng as the UN Secretary General Representatives on Internally Displaced Persons in 1992.

³⁶ Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge: Cambridge University Press, 2004), 56-65; Id., 15.

standard setting norms, notwithstanding the fact that it is “only guiding and not binding” on any state.³⁷

African problems surely needs African solutions, starting with concerted determinations in 2006, the first binding instrument to proceed out of sub-regional arrangement on internal displacement emerged on the African scene. The Great Lakes Pact particularly the IDP Protocol is a restatement of the Guiding Principles in all facets. But unlike the Guiding Principles which is a voluntary precedent, the protocol binds Conference Party.³⁸

The first African IDP treaty marks a new hope for internally displaced persons in Africa.³⁹ The Kampala Convention as it is popularly known was signed on the 23rd October 2009 but came into force on the 6th December 2012. It comprises of twenty three (23) distinct but closely linked articles and it is couched round a progressive notion to engender a legal charter that will help in protecting and assisting internally displaced persons through the creation of an increased level awareness on the part of home government and the promotion of long lasting solutions. The preamble attests to the legal and political foundations of the convention,⁴⁰ by reiterating in detail the motivations behind the adoption of the Convention especially within the context of the prevailing security challenges that has befallen Africa.

³⁷ Walter Kalin, “Flight in Times of War” (2001), 646; Lauren Groth, “Engendering Protection: An Analysis of the 2009 Kampala Convention and Its Provisions for Internally Displaced Women”, *International Journal of Refugee Law*, Vol. 23, No. 2 (2011), 227, available at <http://www.ijrl.oxfordjournals.org> [accessed on 7 December 2014]; Olivia Kokushubila Lwabukuna, “Reflections on the Possibility of a Comprehensive Framework for the Protection of IDPs in Africa’s Great Lakes Region” (LL.D. Thesis, Faculty of Law, University of Pretoria, South Africa, 2012),86, available at <http://www.repository.up.a.za/bitstream/handle/2263/28365/Complete...pdf...9> [accessed on 10 July 2013]; Muhammed Tawfiq Ladan, “National Framework for the Protection of Internally Displaced Persons (IDPS) in Nigeria”, Paper presented at A Workshop for Judges and Kadis on Refugee Law, National Judicial Institute, Abuja-Nigeria, 20 April (2013), 14, available at http://www.abu.edu.ng/publications/2013-05-18-180015_3901.docx [accessed on 21 December 2014]

³⁸ The initial members are Uganda, Kenya, Democratic Republic of Congo, Republic of Congo, Central African Republic, Tanzania, Sudan and Angola.

³⁹ Ekpa.

⁴⁰ Abebe, 46.

The Convention provides for the protection of the sovereign rights and territorial integrity of member states even as it allows intervention in furtherance of human rights protection and humanitarian assistance in deserving circumstances.

It defines internally displaced persons and internal displacement in similar manner with the Guiding Principles.⁴¹

Internal displacement is an African new dilemma because out of the world's 33.3 million internally displaced persons (IDPs) by the end of 2013, Sub-Saharan Africa account for 12.5 million, while three of the countries that account for 63 percent of the world total are also from the continent.⁴²

EMERGING RIGHT OF INTERVENTION IN THE AFRICAN CONTEXT: RATIONALE AND PARAMETERS

The stern notion of sovereignty is gradually shifting way for intervention. The African Union's Constitutive Act and the Kampala Convention are clear testament of the gradual change. However, the term 'interference' is nowhere defined in these regional treaties despite numerous references made to it.

The right to intervene once construed as unnecessary incursion into the terrain of sovereignty of states described as "*domaine reserves*" is provided for in article 4 (h) of the AU Constitutive Act which is to the effect that:

"...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."

Member states are also vested with the right to request for intervention from the Union for the purposes of restoration of peace and order in their territory.⁴³

⁴¹ Id. Art. 1(k); Art. 1(l) of Kampala Convention.

⁴² Internal Displacement Monitoring Centre (IDMC), Global Overview 2014: People Internally Displaced by Conflict and Violence, Geneva, May (2014), 9.

⁴³ Art. 4(j) of the Constitutive Act.

Similarly, the Kampala Convention provides that:

*“The African Union shall have the right to intervene in a Member State pursuant to a decision of the Assembly in accordance with Article 4(h) of the Constitutive Act in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity”.*⁴⁴

Like the Constitutive Act, the Kampala Convention also respect the right of member states engulfed in serious intra-state conflicts to request for assistance for purposes of attaining enduring solutions for victims by providing that:

*“The African Union shall respect the right of States Parties to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act and thus contribute to the creation of favourable conditions for finding durable solutions to the problem of internal displacement”.*⁴⁵

Drawing from the forgoing, intervention can be sought at two distinct levels, firstly out of the Union’s own volition and secondly at the request of member state. However, rather than allowing individual member state who may be guilty of perpetuating violence to frustrate intervention, the Constitutive Act and the Kampala Convention in articles 4(j) and 8(2) beautifully employed the use of the phrase “Member States” and “State Parties” respectively in superimposing the overall authority of the Union to decree intervention over the firm exclusive preserve of the State concerned who as a matter of logic will never request from the Union forceful intervention against its own acts.⁴⁶ The current AU’ stance as authoritatively portrayed

⁴⁴ Art. 8(1) of the Kampala Convention. See also the Protocol on Amendments to the Constitutive Act adopted in February 2003 (not yet in force) which amends Article 4(h) by adding at the end of the sub paragraphs the sentence “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”.

⁴⁵ *Ibid.*, Art. 8(2)

⁴⁶ Ben Kioko, “The Right of Intervention under the African Union’s Constitutive Act: From Non-Interference to Non-Intervention” *International Review of Red Cross*, Vol. 85, No. 852, December (2003), 817 available at http://www.icrc.org/eng/assets/files/other/irrc_852_kioko.pdf [accessed on 12 December 2014]

from the above provisions stemmed from the failure of the OAU to stop gross and massive violation of human rights in the past⁴⁷ because human rights protection was sincerely “an afterthought” to the OAU.

Interventions that can genuinely obstruct or limit sovereignty are those predicated on humanitarian intervention. Humanitarian intervention has been severally defined. It means “the protection by a state or a group of states of fundamental human rights, in particular the right of life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon authorization by the relevant organs of the UN nor upon invitation by the legitimate government of the target state”.⁴⁸ This definition may not find expression within African notion of intervention which is not solely dependent on United Nations Security Council’s approval.

Humanitarian intervention defined as “coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to halt gross and heinous violations of human rights or international law”⁴⁹ is in consonance with African prescription.

Arising from the above exposition, intervention in the African context in order to find meaning within the provisions of both the African Union’s Constitutive Act and the Kampala Convention ought to be one that is tailored to satisfy the primary objectives of union as typified in the these treaties.⁵⁰

Intervention from the perspectives of these regional treaties is not to be undertaken only by the African Union and “not by a state or

⁴⁷ African history is replete of mass atrocities, namely the Idi Amin excesses in Uganda, Rwandan genocide etc.

⁴⁸ Don Kritsiotis “Reappraising Policy Objections to Humanitarian Intervention” *Michigan Journal of International Law*, No. 19, (1998), 1005 at 1021 available at <http://www.litigation-essentials.lexisnexis.com/webcd/app?action=...> [accessed on 21 February 2015]

⁴⁹ *Ibid.*

⁵⁰ Art. 3 of the Constitutive Act and Art. 2 of Kampala Convention respectively.

coalition of states”⁵¹ to achieve their self-centred interest. Ayoob rightly posits that “the intrinsic objectives of intervention is far too valuable to be held hostage to the norm of state sovereignty”⁵² and that justifies its precedence over principle of sovereignty.

QUESTIONING THE LEGALITY OF THE AU’S RIGHT OF INTERVENTION

The right of intervention benevolently struck into the jurisprudence of human rights law in Africa has been under the sledge hammer of criticisms owing to the perceived affront to the powers of the United Nations. Does the UN Charter recognise the right of one state to interfere with the domestic affairs of another state under the guise of ‘intervention’ or ‘assistance’?

A quick glance at Article 2 (1), (4) and (7) of the UN Charter will suggest that the African Union is ‘on a new voyage of its own’ as the prescribed right of intervention in the Act is amenable to attract the strong disapproval by the UN Charter which out rightly ban the “use of force against the territorial integrity and independence of any state” either by member states or its own agencies. However a closer scrutiny of the last phrase of paragraph 7 of article 2 reads “but this principles shall not prejudice the application of enforcement measures under Chapter VII”. Does the AU right of intervention approximates to enforcement measures that is “collective use of force” within the meaning of Chapter VII? Certainly not, enforcement measures envisioned here can only be undertaken by the UN as foremost supranational union only and not by any other entity. What is more, Chapter VII can only be invoked in situations of inter-state crisis as opposed to the intra -state conflicts which informed the AU’s profound intervention stance. It is only justified where the interference (the use of force) is a valid exercise of the right of self-defence⁵³ or consequent upon prior authorization sought from the Security Council of the United Nations.⁵⁴

⁵¹ Ayoob, 83.

⁵² *Ibid.* Ayoob, 84.

⁵³ Art. 51 of the United Nations Charter.

⁵⁴ *Ibid.* Art. 53(1).

The gradual shift from non-interference to permissive intervention was accentuated by the drive to stem the tide of crisis ravaging the continent with all its attendant trans-boundary effects which are capable of provoking serious threat to international peace and order. To this extent it might be argued also that what the African Unions seeks to achieve through prescription of the right of intervention is consistent with the purposes of United Nations. Even though this interpretation will open more flood gates to intense human rights violations all in the smokescreen of humanitarian intervention that is better imagined than desired.⁵⁵ It does not throw to the dust bins the proclivity that such intervention could achieve positive result after all.

The obligation of member states to refrain from the use of force under article 103 of the UN Charter takes precedence over the right of intervention provided for under article 4 (h) and article 8(1) of the Constitutive Act and the Kampala Convention respectively and to that extent, their apparent inconsistency with the supranational restrictions in the UN Charter is no longer doubtful.

However, from the standpoint of ‘internal legality’ by which we mean within the African systems, the validity of right of intervention in the Constitutive Act and the Kampala Convention cannot be profusely questioned. Member States of the African Union by ratifying both the Constitutive Act and the Kampala Convention, agrees to contract in advance that the territorial integrity of their respective states would no longer be inviolable in face of mass atrocities signalling “a shift from sovereignty as a right to sovereignty as a responsibility”.⁵⁶

Granted that the AU’s collective right of intervention is caught up in the web of illegality erected by the UN Charter, can the same spite of illegality be extended to the permissive or submissive intervention

⁵⁵ Fogwell, 18; In the Corfu Channel Case involving United Kingdom v Albania -Merits (1949) ICJ Reports 4, the ICJ refused to be swayed by such outrageous interpretation that is capable of foisting on the international community a situation of extreme hopelessness.

⁵⁶ Dan Kuwali, “The End of Humanitarian of Intervention: Evaluation of the African Union’s Right of Intervention” *African Journal on Conflict Resolution*, Vol.1, Issue 1 (2010), 52, available at <http://www.ajol.info/index.php/ajcr/articles>. [accessed on 13 February 2015]

based on consent and invitation of concerned member states under article 4(j) and 8(2) of the Constitutive Act and the Kampala Convention respectively? The right of each member state to seek intervention from either the United Nations as an apex international institution or the African Union in particular is not outlawed by article 2(4) which is an outright ban on the use of force. Collective right of intervention envisaged by the African Union as reiterated in the two regional instruments above is no more than an aggregation of individual rights of Member States of the Union, to this extent there is no justifiable reasons for the heavy sledge hammer on Africa's ambitious and highly celebrated efforts.

CONCLUDING REMARKS

The right of intervention envisioned in the African Union's Constitutive Act and the Kampala Convention is in response to African known peculiarity. It does not authorise or encourage tacitly unilateral action by a single state⁵⁷ as the right is only exercisable only by the African Union as an institution. By this fear of deliberate abuse will not arise.

The overall objectives behind the right is not in any way in conflict with the core ideals of the United Nations⁵⁸ in spite of the perceived inconsistencies. The expression of this right in purely African context greatly attests to the fact that state sovereignty which ought to be interpreted in the light of the changing dynamics of the new world order is gradually changing more particularly as the evolving right of intervention approximates with the protection contemplated in the idea of responsibility to protect (R2P).⁵⁹

It is apt to point out that the conditions that will legitimize interventions are clearly spelt out, namely, war crimes, crimes against humanity and genocide. These thresholds exemplify a synergy that covers all atrocious violations that are inconsistent

⁵⁷ Art. 4(g) of Kampala Convention.

⁵⁸ Art. 24 of the United Nations Charter.

⁵⁹ Kuwali, 48.

with rules and principles of the traditional branches of international law (International Human Rights Law, International Humanitarian Law and International Criminal Law) are covered. There is no need to further dissipate energy on the nexus of the African Union's branded right of intervention to situations of internal displacement in the continent which is essentially one case among many where violations vilified by international law is rampant.

Despite the soaring ascendancy of the African model of right of intervention, its implementation and application is still plagued by some stifling challenges such as inadequate funding and lack of necessary political will. Intervention using military action is cost intensive. In this regard we recommend preventive diplomacy aimed at stemming the tide rather than outright adoption of curative therapy in the form of intervention which may not yield the desired result.⁶⁰

Traditional notion of sovereignty which predominates Africa's history of treaty making still lingers, however the wave of force of change is making it to shift steadily in favour of human rights protection and humanitarian assistance especially in relation to vulnerable groups like internally displaced persons, a radical "break from the past" is conversely antithetical to the growth of African fragile democracies.⁶¹

Finally, the right of intervention encapsulated in the African regional treaties as analyzed in this article clearly shows that for the sake and interest of the African people earnestly perplexed by intra state conflicts, the traditional notion of sovereignty currently undergoing a gradual transition ought to continue until an utopia is attained.

⁶⁰ Ibid. 59.

⁶¹ Helene Gandois, "Sovereignty as Responsibility: Theory and Practice in Africa" Department of Politics and International Relation, University of Oxford, available at http://www.ww.academia.edu/152155/Sovereignty_as_responsibility_Theory_and... [accessed 15 October 2014]

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