

**A CRITICAL ASSESSMENT OF THE POSSIBLE ROLE OF THE AFRICAN
UNION IN ACHIEVING THE RIGHT TO NATIONAL AND INTERNATIONAL
PEACE AND SECURITY IN AFRICA**

**Submitted in partial fulfilment of the degree
LL.M (Human Rights and Democratisation in Africa)**

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DECLARATION

I, Messèlo Boris-Ephrem TCHOUMAVI, declare that the present work is original. It has never been presented at any other University or Institution. Where other people's works have been used, references have been provided, and sometimes, quotations made. It is in this regard that I declare that this work is originally mine. It is hereby presented in partial fulfilment of the requirements of the Master's of Laws (LL.M) Degree in Human Rights and Democratisation in Africa.

Signature:

Date:

Supervisor

Signature:

Date:

DEDICATION

To the memory of Julien Tchoumavi, my Dad, who left us too early...

I would have loved you to read and comment on this essay... I wish you were here and I didn't need to dedicate this paper to your memory...but still your memory, like a guiding star, lights up my way. I will eternally miss you, Daddy.

To the memory of Ibrahima Fall, godfather and friend, whose commitment to Africa was admirable.

I will always be grateful for your faithful support at every step of my route.

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At some stages, I thought it was not possible. But we made it. God always cares!

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AU	African Union
AMIS	African Union Mission in Darfur
CFC	Ceasefire Commission
CMC	Conflict Management Centre
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
ECOSSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
IDPs	Internal Displaced Persons
JEM	Justice and Equality Movement
MAP	Millennium Action Plan
MINURSO	United Nations Mission for the Referendum in Western Sahara
MONUC	United Nations Organisation Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
NEPAD	New Partnership for Africa's Development
NGOs	Non Governmental Organisation
ONUB	United Nations Operation in Burundi
PRC	Permanent Representatives Committee
PSC	Peace and Security Council
RFI	Radio France Internationale
RECs	Regional Economic Communities
SLM/A	Sudan Liberation Movement/Army
STC	Specialised Technical Committee
UN	United Nations
UNAMSIL	United Nations Mission in Sierra Leone
UNMIEE	United Nations Mission in Ethiopia and Eritrea
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNOCI	United Nations Operation in Côte d'Ivoire

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CHAPTER 1: INTRODUCTION

1. Background to the study

All the peoples shall have the right to national and international peace and security. (...) For the purpose of strengthening peace, (...) States parties to the present Charter shall ensure that: (a) Any individual enjoying the right of asylum under article 12 of the present Charter shall not engage any subversive activities against his country of origin or any other State party to the present Charter; (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.¹

Despite the above obligation enshrined in the African Charter on Human and Peoples' Rights (ACHPR), to protect, promote and fulfil the right to peace and security that is binding on them,² African States are facing numerous armed conflicts. The African Commission on Human and Peoples' Rights (the African Commission) has already found a violation of the right to peace.³ In that case, the Commission has stated that 'the responsibility for protection is incumbent on the State',⁴ which has therefore the obligation to make sure that people's right to peace is not infringed, either by its own forces or by uncontrolled ones. The right to peace has therefore been recognised and interpreted by the relevant and authoritative monitoring body, the African Commission.

The African Union (AU) composed of all African states except Morocco has also committed itself to work towards peace and security in the continent.⁵ Most importantly, it has endorsed the ACHPR by committing itself to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁶ These provisions are binding not only on the States parties to the Constitutive Act of the African Union (the AU Act) but also upon the African Union itself, as an international organisation that enjoys international capacity. Indeed, the Constitutive Act of the African Union stands as the Constitution of the organisation.⁷ There should therefore be no doubt that the provisions of the AU Act bind the AU. However, no effective

¹ Article 23 ACHPR.

² In the SERAC case, the African Commission clearly stated that under the African Charter, governments are generally expected to respect, protect, promote and fulfil all rights (paras 43 and 44) See *The Social and Economic Action Center and the Center for Economic and Social Rights v. Nigeria* available at <<http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>> (accessed on 29 September 2005).

³ *Malawi African Association and other v. Mauritania* (2000) AHRLR 149 (ACHPR 2000).

⁴ As above, para 140.

⁵ Article 3 (f) Constitutive Act of the African Union.

⁶ Article 3 (h) Constitutive Act of the African Union.

⁷ J. Dugard *International law: a South African perspective* (2000) 27.

mechanism designed to ensure the fulfilment of the aims and accountability of international organisations exists.⁸

The reality on the ground is that Africa is facing a significant number of situations in which there is no peace. These situations violate the people's right to peace and security as protected under article 23 of the ACHPR. In 2000, it was estimated that 20 per cent of Africa south of the Sahara's population lived in countries that were facing war and low intensity conflict.⁹ There is therefore a need for assessing the AU institutional capacity to fulfil its constitutional obligation of protecting the people's right to peace and security.

2. Significance of the research

When dealing with international human rights law, one can see that the right to peace and security protected by article 23 of the ACHPR does not exist in any other binding international human rights instrument. Rather, it is protected in a non-binding document that is the Declaration on the Right of Peoples to Peace.¹⁰

The concern for peace and security is also found in the preamble and article 1 of the Charter of the United Nations that list them as objectives of the organisations rather than a right. But human rights documents have emphasised the need for international order¹¹ and outlawed propaganda for war.¹²

The regional human rights instruments are generally silent on the right to national and international peace and security. Neither the Inter American human rights treaties nor the European ones mention peace and security as a justiciable human right.

Moreover, the AU commitment to ensure human rights on the continent did not seem sufficient to the drafters of the AU Act. They have deemed necessary to insist on peace and security by devoting to it a separate provision of the AU Act. Indeed, peace and security are not only encompassed in the ACHPR that is referred to by the AU Act, but they are also dealt with as an entire aim of the organisation. That might be due to the fact that peace and security are not only seen as a human rights issue, but also as a political matter. The main organ in charge of prevention of violations of the right to peace within the AU is called the Peace and Security Council, while the one of the Organisation of the United Nations (UN) is merely called the Security Council. That shows the belief in a specific need for the achievement of the

⁸ V. P. Nanda 'Accountability of international organisations: some observations' *Denver Journal of International Law and Policy* (2005).

⁹ I. Elbadawi & N. Sambanis 'Why are there so many civil wars in Africa? Understanding and Preventing violent conflict' *Journal of African Economics* (2000).

¹⁰ The Declaration on the Right of Peoples to Peace, UN GA Res 39/11 (1984).

¹¹ Article 28 Universal Declaration of Human Rights.

¹² Article 20 International Covenant on Civil and Political Rights.

right to peace and security in Africa, as the ACHPR and the AU Act promise. On the other hand, it would be useful to explore a way to make the AU responsible and accountable enough for its possible failures to fulfil its international obligations, notably for its actions or even abstentions regarding the achievement of the right to peace and security on the continent.

In any event, both the specificity of the ACHPR regarding the right to peace and security and the emphasis put by the AU on such matters explain the need for investigating the extent to which the AU internal organisation can lead to the achievement of the right to peace on the continent.

3. Objectives of the study

The AU seems to have the mechanisms to prevent and to stop violations of the right to peace and security on the continent.¹³ However, the current situation shows that these violations are still taking place. It could consequently be interesting to look at the reasons for which the AU fails to reach its objectives.

This paper aims at assessing whether the AU can fulfil its supposed mission of maintaining peace and security in Africa from the ACHPR perspective, through its existing framework. In order to answer that question, it will be necessary to define as precisely as possible the right to peace and security provided for under the ACHPR. Then the relationship between the AU and the ACHPR will be analysed and I will make an analysis of the existing framework devoted to the safeguard of international peace and security within the AU. Lastly, I will try some recommendations in light of the shortcomings of the institution.

4. Research questions

In order to find out whether or not the AU can meet its objective of ensuring that the peoples of Africa enjoy their human right to peace, the meanings of such a right need to be clarified, in light of what the African Commission has decided in this regard. The legal position of the AU towards the African Charter will then be analysed. Before assessing whether the AU's framework can help it in achieving the realisation of the right to peace on the continent, I will show what it has done so far to this end.

5. Literature review

As formulated in the ACHPR, the right to peace and security is recognised by scholars as a fundamental need for Africa's development. The expression of this need often depends on the perspective from which

¹³ The AU has, amongst other things, a Peace and Security Council, which is in charge of promoting peace, security and stability in Africa as well as anticipating conflicts. It also has the Conference on Security, Stability Development and Co operation in Africa (CSSDCA). Similarly, the African Commission's role of 'promoting human rights' includes the creation of an atmosphere conducive to peace and security in the continent.

it is dealt with. Policy papers and declarations of international organisations declarations show a concern with peace and security in Africa.¹⁴

A number of scholars have dealt with that issue from a strategic and political perspective.¹⁵ They are aware of the challenges that the AU is facing in ensuring peace in Africa. They have looked at the political context that prevails in Africa and the ways of enhancing it in order to promote peace.¹⁶

There is a literature dealing with the contents of the ACHPR from a human rights law perspective. Viljoen has explained the meaning of the rights provided for under the ACHPR.¹⁷ In his commentary of the Charter of the United Nations, Simma devotes a part to the meaning of the expression 'international peace and security',¹⁸ used by the ACHPR as well. Although he does not define the concept from a human rights perspective, the interpretation he adopted can help in understanding the meaning of the terms in the ACHPR. In the same line, the African Commission has interpreted article 23 of the ACHPR.¹⁹

The capacity of the African Union to ensure peace and security on the continent has been discussed by some academics. Kindiki, for example, attempted an extensive and critical inventory of the normative AU framework intended for the protection of human rights.²⁰ Kindiki's paper is focused on the possibilities offered by the new AU Act that could lead to a better human rights protection. This new institutional framework suggests what the AU is supposed to do to make sure that people's right to peace and security is not infringed. Numerous papers show a certain hope carried by the AU in terms of peace and security on the continent.²¹

6. Delimitation of the problem

In attempting to look at the extent to which the African Union can achieve the right to peace and security in Africa, it is important to state that the primary duty-bearer is not the AU, but States parties to the

¹⁴ See, e.g., The Declaration on the Right of Peoples to Peace, UN GA Res 39/11 (1984); the OCDE DAC Guidelines on conflict, peace and Development Co operation (1997); Declaration of the year 2000 as the year of peace and solidarity, AU AHG (XXXV) (1999).

¹⁵ See, e.g., A. de Waal (2002) *Demilitarizing the mind: African agendas for peace and security*; M. Pugh & W. Sidhu (2003) *The United Nations and regional security Europe and beyond*.

¹⁶ As above.

¹⁷ F. Viljoen 'Introduction to the African Commission' in C. Heyns (ed) (2004) *Human Rights in Africa* (vol I) 392.

¹⁸ B. Simma (ed) *The Charter of the United Nations: a commentary* (2002) 40.

¹⁹ *Malawi African Association case*, n 3 above.

²⁰ K. Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security' *African Human Rights Law Journal* (2003) 3 97.

²¹ A. Tokunbo 'African Union and the challenge of continental peace' available at <<http://www.nigeriansinamerica.com/articles/184/1/Africa-Union-And-The-Challenge-Of-Continental-Peace>> (accessed on 29 August 2005).

ACHPR. The obligation to ensure human rights in general and the right to peace and security in particular is incumbent on the AU mainly by virtue of its Constitution and its own commitments.

On the other hand, this paper will mainly look at the existing institutions devoted to realising the right to peace and security in Africa. It will analyse their functioning and try to see whether they can effectively lead to a state in which the right to peace and security would be respected, through the legal framework in which they are supposed to operate.

Terrorism has become an important issue in international affairs. The relationships between terrorism and security and its human rights implications have been stated.²² However, this research will not include terrorism because the extent to which it constitutes a threat to peace and security in the continent as a whole is less important than other political unrests like civil wars, for instance.

The issue of actual effectiveness of the action of the AU to promote and protect peace and security will not be the focus of this paper because it has much to do with very political and sociological matters that are not in question. However, since the law cannot exist in vacuum, such considerations will probably be raised incidentally. Nevertheless, this research will not be dealing with the roots of such effectiveness or lack of effectiveness.

7. Tentative outline of chapters

Chapter one of this paper introduces the matter and define the context in which it will proceed. It is a general presentation of the study.

Chapter two will be devoted to human rights within the African Union. The first part of this chapter will deal with the right to peace and security in particular. The legal position of the AU towards human rights in Africa will then be discussed.

Chapter three will be dealing with examples of the involvement of the AU in peace building on the continent.

Chapter four will present and assess the AU's framework intended to realise of peace and security in Africa.

Chapter five will be focussed on the specific programmes of the AU that have a peace and security component.

²² OAU Convention on the Prevention and Combating of Terrorism, adopted on 14 July 1999, entered into force on 6 December 2002, para 10.

Chapter six will draw conclusions and make recommendations.

CHAPTER 2: IS THERE A HUMAN RIGHT TO NATIONAL AND INTERNATIONAL PEACE AND SECURITY BINDING UPON THE AFRICAN UNION UNDER INTERNATIONAL LAW?

1. Introduction

Human rights have been classified into three basic categories, namely civil and political rights, economic, social and cultural rights and the rights labelled as those of the third generation. They are called either *solidarity rights*, *peoples' rights*, or *collective rights*. The right to international peace and security would belong to this last generation.²³ Although there should be no doubt that the peoples' right to international peace and security exists under the African system,²⁴ this issue raises a controversy in international human rights law in general, because this right is not included in any international or regional binding human rights instrument. There is therefore a need for establishing the existence of the right to peace under international human rights law and for demonstrating that the right to peace protected under the African Charter is not as such a recent innovation. The position of the AU as a duty-bearer will then be shown.

2. Background to and definition of the right to national and international peace and security

'Peace and security' is not a new expression. It already appeared in the Covenant of the League of Nations.²⁵ The Charter of the United Nations uses it in its article dealing with the purposes of the organisation.²⁶ Similarly, the AU Act mentions both peace and security as objectives of the organisation.²⁷ In these instruments, peace and security are dealt with as an aim to achieve, rather than a human right that people could claim.

The words 'peace and security' in the Charter of the United Nations mean more than absence of war.²⁸ They also imply 'the activity which is necessary for maintaining the conditions for peace.'²⁹ The term 'security' refers to a situation in which a positive and permanent action towards the reduction of likelihood of war is undertaken.³⁰ Based on article 103 of the Charter of the United Nations which requires the members states of the UN to give pre-eminence to their obligations under it, it is doubtful that the words

²³ Viljoen, n 17 above, 391.

²⁴ As n 1 above.

²⁵ The Covenant of the League of Nations (including amendments adopted to December, 1924), Preamble.

²⁶ Article 1 Charter of the United Nations.

²⁷ As n 5 above.

²⁸ Simma, n 18 above, 41.

²⁹ As above.

³⁰ As above.

'peace and security' in the African Charter and in the AU Act mean otherwise.³¹ At the very least, the sense of such an expression in the African context cannot be contrary to the UN Charter's one. The action to which the UN and the AU have committed themselves to is therefore both broad and ambitious.

The nature of such commitments has been discussed.³² However, it is my view that whether they are designed to have a political value or a legally binding one, these commitments are part of international treaties that are binding upon parties. There must be a move from a political responsibility of international organisations to a legal one, with regard to their core purposes.

Political commitments to the achievement of peace and security have been taken within the United Nations. Indeed, the Universal Declaration of Human Rights (Universal Declaration) seems to refer to that idea by using the terms 'order' when it provides that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'.³³ The Declaration of the Right of Peoples to Peace goes further by 'solemnly proclaiming that the peoples of our planet have a sacred right to peace'.³⁴ Besides, it 'solemnly declares that the preservation of the right of peoples to peace and the promotion of its implementation constitutes a fundamental obligation of each state'.³⁵

This declaration of the United Nation General Assembly indicates an important move towards dealing with peace as a right. Moreover, even though most instruments do not mention it as such, peace and security are a necessary prerequisite for the enjoyment of all human rights, as pointed out by the Universal Declaration.³⁶ If one applies the traditional characteristics of human rights enumerated by the Universal Declaration, the conclusion that peace fits in is easily reached. But before doing so, it should be established that peoples' rights can be human rights, as evidenced by the rights to environment or self determination. The argument according to which human rights are individual rights has demonstrable limits, given the inclusion of a number of collective rights in international human rights law treaties and their protection by the corresponding treaty bodies. With this respect, self-determination³⁷ and minority

³¹ By saying: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail', the Charter of the United Nations compels the African Charter and the AU Act to comply with its dispositions.

³² Simma, n 18 above, 40.

³³ As n 11 above.

³⁴ As n 10 above.

³⁵ As above.

³⁶ As n 11 above.

³⁷ As n 12 above, article 1; see also article 1 of the International Covenant on Economic, Social and Cultural Rights.

rights³⁸ are relevant illustrations of the recognition of collective rights as such under international law. Similarly, human rights can be defined as universal, inherent, and inalienable.³⁹

The Compact Oxford English Dictionary defines 'universal' as 'of, affecting, or done by all people or things in the world or in a particular group; applicable to all cases'.⁴⁰ That describes what concern people all over the world. In the case of the need for peace and security, one can argue that not all the peoples have the same understanding and feeling about how peaceful a particular situation is. People dealing with peace and security issues often evaluate the intensity of a breach of peace. For example, Elbadawi and Sambanis have distinguished between low intensity and high intensity conflicts.⁴¹ I would nevertheless argue that, from a human rights perspective, it is beyond question that all human situations are similar to one another. But, since human rights law seeks to establish a minimum standard, which can be applied all over the world, peace is considered universal. Moreover, the almost universal adherence to the UN Charter is a sign that peace is recognised as a universal need. More recently, the UN General Assembly has deemed that 'all people' are willing to strive to achieve peace.⁴²

The above-mentioned dictionary says that 'inherent' describes what exists in something as a permanent or essential attribute. The need for peace and security in human beings has been expressed as inherent by a number of social scientists and philosophers. Hobbes, for instance, has argued that it is inherent in human beings to seek peace:⁴³

Naturally every human man has right to every thing. The fundamental law of nature. And because of this condition of man... is a condition of war of every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to every thing; even to one another body. And therefore, as long as this right of every man to every thing endureth, there can be no security to any man, how strong or wise soever he be, of living out the time, which nature ordinarily alloweth men to live. And consequently, it is a precept, or general rule of reason, that *is every man ought to endeavour peace*, as far as he has hope of obtaining it...

³⁸ As n 12 above, article 27 of the ICCPR, which protects minority rights. The Human Rights Committee has emphasised, in its General Comment No 23, that individuals belonging to minorities should not be deprived of the right to enjoy their culture, together with their community.

³⁹ Universal Declaration, n 11 above, preamble.

⁴⁰ Available at <http://www.askoxford.com/concise_oed/universal?view=uk> (accessed on 24 September 2005).

⁴¹ Elbadawi & Sambanis, n 9 above.

⁴² As n 10 above.

⁴³ T. Hobbes *Leviathan* (1962)103 (M. Oakeshott, ed) 'Of the first and second natural laws, and of contracts' (Chapter 14).

That may be why the UN has qualified the fulfilment of the peoples' right to peace as a 'sacred duty'. It is also why peace is often considered inherent in all human beings- because human beings are born with reason. It is indeed reasonable 'to seek peace'; otherwise, organised human life is impossible.

'Inalienable' means what cannot be taken away from or given away by the possessor. Inalienable often refers to what cannot be bought and sold. Peace and security could hardly be a commodity or something people bargain for from a commercial perspective. Such values are not only difficult to weigh in terms of money, but also the idea of a people made to be a victim of war is difficult to accept.

Thus, one can say that the entitlement to 'social and international order'⁴⁴ and the Declaration on the Right of Peoples to peace show a significant awareness of a human right to peace and security. Besides, the fulfilment by peace of the basic characteristics of human rights confirms the logic of the drafters of the ACHPR who have included peace and security in that binding human rights instrument. But it was also a courageous step since such a right does not exist as such in any binding human rights instrument.

3. The right to peace and security under the ACHPR

The drafters of the African Charter included 'peace and security' at both the international and national levels as a human right. In doing so, they have made the African Charter the only binding human instrument that protects the right to peace and security as such. The African Commission held an individual country in violation of the ACHPR by failing 'to provide security and stability in the country'.⁴⁵ More precisely, it has found that states are obligated to protect their populations against attacks that have taken place in the course of an armed conflict.⁴⁶ In the *Malawi association case* also, the African Commission held that attacks on villages that took place during a conflict amounted to a violation of 'the right to live in peace and security'.⁴⁷ These two statements of the African Commission meet the definitions made above: the right to peace and security under the ACHPR has a meaning that is broader than the strict absence of armed conflict or war. It implies the need for a stable and secure environment. The obligation of states parties to abide by the ACHPR contains a duty to create an environment that is least likely to experience infringements of the right to peace and security. In that regard, the African Commission's interpretation is in accordance with Simma's reading of the UN Charter which defines peace as more than the mere absence of war, and the presence of conditions conducive to sustainable peace.⁴⁸ It is now necessary to establish the beneficiaries of such a right in order to look at how the different duty-bearers could be held responsible for violating it.

⁴⁴ As n 11 above.

⁴⁵ *Commission Nationale des Droits de l' Homme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) para 22.

⁴⁶ *Malawi African Association case*, n 3 above.

⁴⁷ As above, para 140.

⁴⁸ Simma, n 18 above, 41.

3.1 The right to peace and security holders

The right to peace is not designed to be exercised and enjoyed exclusively by individuals. There should be no doubt that peace and security in the sense of article 23 of the ACHPR are designed to be enjoyed by communities. Indeed, both the African Charter and the UN General Assembly deal with the right to peace and security as a peoples' right. The wording of the ACHPR and the Declaration of the Right of Peoples to Peace supports this. They provide that 'peoples' are entitled to peace. Besides, when interpreting the right to peace and security, the African Commission has considered groups of individuals as the ones who are entitled to the enjoyment of peace and security. For instance, Mauritania was held responsible for denial of the right to peace and security because it failed to prevent attacks on villages.⁴⁹

The problem that might arise when dealing with the right-holders is the meaning of 'people' that remains undefined under the ACHPR. The African Commission has itself refrained from defining *people*. Viljoen explains the possible meanings of such a word in the ACHPR by using a number of cases in which the African Commission adopted different understandings of the term *peoples*: it might refer to three realities that are, first of all, the population of an African country under colonial rule; secondly, the term might mean the citizenry of an independent state and thirdly, it might designate communities that share religious, ethnic or linguistic characteristic but which may not belong to the same state.⁵⁰ The conclusion Viljoen has reached shows that the African Commission's understanding of the notion of *people* is a flexible one. To make the scope of the right to peace as broad as possible, the best understanding of the term *people* is a 'group of individuals'.⁵¹ It would lead to a better protection of the entire population which can be a victim of infringement of peace and security; in fact, human rights law does indeed aim to protect people.

3.2. The 'duty-bearers' of the right to peace and security

When there is a right, there must be mechanisms to provide the right-holders with it and ensure that it is exercised and enjoyed in a proper manner. In this sense, both the states and the African Union stand as 'duty-bearers' of the rights provided for under the ACHPR in general, and the right to peace and security in particular.

3.2.1 States-parties

Based on the long standing principle of *pacta sunt servanda* contained in article 26 of the Vienna Convention on the Law of Treaties (the Vienna Convention), 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁵² The ACHPR is in force and has been ratified

⁴⁹ *Malawi African Association case*, n 3 above, para 140.

⁵⁰ Viljoen, n 17 above, 392.

⁵¹ Viljoen has interpreted the use of the term 'people' in the SERAC case as meaning a 'group of individuals under the African Charter'.

⁵² Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980.

or acceded by almost all the African countries.⁵³ Therefore, there should be no doubt that states parties to the ACHPR are bound by it and must perform the obligations resulting from it, including insuring peace and security on the continent.

The Vienna Convention also applies to any treaty that stands as the constituent instrument of international organisation.⁵⁴ In this context, the commitments made in the AU constitutive Act bind the states parties to it. The emphasis such instrument puts on peace and security as an objective of the AU might be considered only as a political commitment; but most importantly, the AU Act has endorsed the ACHPR that is a clearly binding instrument by incorporating it into its constitution. In any event, the AU itself has to take action towards the fulfilment of its purposes.

3.2.2 The African Union

The legal status of the AU is central when discussing its obligations as a duty-bearer of the right to peace and security. How far the AU is bound by its Constitutive Act on the one hand, and by the ACHPR on the other hand, will then be analysed.

3.2.2.1 Legal status of the African Union

As an entity composed of states and established under international law,⁵⁵ the African Union can qualify as an international organisation entitled to legal personality under international law. This means that the AU 'is a bearer of rights and duties derived from international law'.⁵⁶ The consequences of the AU possessing international legal capacity are:⁵⁷

- The member-states of the AU are different from the AU, the international organisation that they have created. Their rights and obligations are distinct from one another.
- The AU is entitled to bring a claim in order to maintain its own rights under international law, as an international organisation.
- The AU is responsible or liable for the non-fulfilment of its obligations.

Based on the above, it is now necessary to establish the extent to which the AU is bound by the ACHPR and the human rights commitments that it made in its constitution. In fact, the AU Act refers to the UN Charter as an authority that is to be taken into account.⁵⁸ Article 52 of the UN Charter calls for the

⁵³ All the member states of the AU have ratified the ACHPR, except Morocco.

⁵⁴ Article 5 Vienna Convention.

⁵⁵ D. Akande 'International organizations' in M. D. Evans (ed) *International law* (2003) 270.

⁵⁶ As above, 272.

⁵⁷ As above, 274.

⁵⁸ Article 3 (e) AU Act.

establishment of regional arrangements to deal with any matters consistent with the purposes and principles of the United Nations. The AU does indeed fit into the definition of regional arrangements noted by Boutros-Ghali.⁵⁹ For him, a regional arrangement as meant by the UN Charter implies the existence of a treaty for the maintenance of peace, which is based on sociological solidarity, the geographical closeness, the factor of duration and an institutionalised organisation. The AU as it stands now meets all these requirements. It is therefore legitimate to say that the obligations of the AU can be read in light of the UN Charter. Most clearly, article 103 establishes the superiority of the UN Charter over any other international treaty.⁶⁰

3.2.2.2. The extent to which the AU is bound by the ACHPR

One of the sources of the law that regulates an international organisation is the text that creates it.⁶¹ As pointed out by Dugard, the constitutive treaties of international organisations can be seen as their constitutions.⁶² Therefore, there should be no doubt that the AU Act binds the AU.

In article 3 (h) of its Constitutive Act, the AU commits itself to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights [ACHPR] and other relevant human rights instruments'.⁶³ This means, at the very least that the AU has to work towards the realisation of human rights in Africa and must not do anything contrary to this goal. Alternatively, it could also mean that the AU is obligated to intervene under certain circumstances.

The question whether or not such a commitment provided for amongst the objectives of the AU was intended to be legally binding, is a matter of debate. In the case of the UN, Simma has argued that the place and the legislative history of article 1 of the Charter of the United Nations that deals with the purposes of the organisation, points towards that provision being binding. However, he ends by saying that the wording of that article is more appropriate to a political and moral orientation.⁶⁴ But interestingly enough, Simma argues that in any event, it must be kept in mind that a number of elements contained in article 1 of the UN Charter amount to customary international law, including respect for human rights.⁶⁵ Nevertheless, it is still debatable whether respect for all human rights enjoys the same level of protection under customary international law. It is beyond doubt that the prohibition of genocide or the freedom from

⁵⁹ B. Boutros-Ghali *Contribution a l'étude des Ententes Régionales* (1949) 22.

⁶⁰ See n 31 above.

⁶¹ Akande, n 54 above, 271.

⁶² Dugard, n 7 above, 27.

⁶³ As n 6 above.

⁶⁴ Dugard, n 7 above, 40.

⁶⁵ As above.

torture enjoy the status of rule of customary international law. However, rights such as the right to privacy or the right to food could hardly be protected as customary international law norms. But Simma enumerates also 'other breaches of peace' as infringement of customary international law.⁶⁶ The promotion and protection of human rights and the promotion of peace and security on the continent are listed as objectives of both the UN and the AU. In any event, the wording of article 3 of the AU Act is of assistance in determining the extent to which the parties to it have intended it to be bound by the ACHPR.

3.2.2.2.1 An obligation to *promote* peace and security in accordance with the ACHPR

The AU Act considers the promotion of human rights 'in accordance with the ACHPR and other relevant human rights instruments' as an objective of the organisation.⁶⁷ The meaning of the word *promote* might be controversial: should it be understood in the common sense, as provided for by the Vienna Convention,⁶⁸ or should it rather be read in accordance with the meaning of the ACHPR given by the African Commission?

Kindiki has argued that 'the AU has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa generally'. He then argues that the late incorporation of the African Commission into the AU framework for purposes of fulfilling its human rights obligations has been made in accordance with the ACHPR.⁶⁹ Therefore, it is accurate to read the provision of the AU Act in light of the already existing ACHPR. Moreover, this interpretation is in line with the relevant provision of the Vienna Convention, since it is made in the context of the AU Act and in light of the purposes of the AU itself.

The promotional mandate of the African Commission, the authoritative body of the AU in charge of interpreting the ACHPR, should be read in such a way that it participates in the global policy of the AU towards the realisation of the right to national and international peace and security. The African Commission has explained what it understands by 'promotion' of human rights:⁷⁰

...To promote the enjoyment of all human rights [is to] make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

⁶⁶ Simma, n 18 above, 41.

⁶⁷ As n 6 above.

⁶⁸ Article 31 of the Vienna Convention states that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

⁶⁹ Kindiki, n 20 above, 103.

⁷⁰ SERAC case, n 2 above. Although this was the meaning given to the obligation to promote that binds states-parties to the ACHPR, I would argue that the content of such obligation for the AU is, if not identical, at least, very similar. Indeed, the contents of such an obligation is very similar to the one assigned to the African Commission by the ACHPR.

Similarly, the ACHPR has explained what actions would amount to promotion of human rights within the mandate of the African Commission. This includes, among other duties, collection of documents, raising of awareness, dissemination of information and making recommendations to governments.⁷¹ The AU's duty to promote human rights is only one part of its obligation: It also has to protect them.

3.2.2.2 An obligation to *protect* peace and security in accordance with the ACHPR

The AU Act goes further than the ACHPR in terms of human rights functions. It assigns an obligation to *protect* human rights to the AU. Amongst these rights, there is the one to peace and security. As with the obligation to promote, the understanding of the obligation to *protect* will be drawn from the case law of the African Commission:⁷²

[The obligation to protect means] to protect the rights-holders against other subjects by legislation and provision of effective remedy. This obligation...requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere of framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.

From this, one can say that the obligation to protect peace and security consists of preventing breaches of peace and security from occurring by positive actions of the duty-bearer. The problem with the obligation to protect is that it implies an effective control of the duty-bearer over the rights holders. In the present case, since the AU does not have control over any African territory, it is difficult to make it a duty-bearer of the right to peace and security to which it committed itself.

However, when reading the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the Peace and Security Council Protocol),⁷³ it has to be noted that a number of provisions are indeed related to the idea of protecting peace and security by taking positive steps in order to prevent infringements from happening. Amongst those steps, it is for the Peace and Security Council, to implement an 'early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations'.⁷⁴ Additionally, article 3 (b) of the Peace and Security Council Protocol states that the role of such an organ is clearly to protect peace, in the Commission's sense of the term: 'The objectives for which the Peace and Security Council is established shall be to:...anticipate and prevent conflicts'.

⁷¹ Article 45 ACHPR.

⁷² SERAC case, n 2 above, para 46.

⁷³ The PSC Protocol was adopted on 9 July 2002 and entered into force on 26 December 2003; available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 2 October 2005).

⁷⁴ As above, article 2.

It must be kept in mind that the Peace and Security Council has been created in line with the AU Act to achieve one of the objectives of the organisation. The creation of such an organ demonstrates that the AU is aware of its human rights obligations. Moreover, the Universal Declaration is one of the guiding principles of the organ that the AU has created to deal with issues regarding peace and security.

There should be no doubt that the primary duty-bearers of the right to national and international peace and security under the ACHPR are the states which are parties to it. But the above-mentioned right is at the same time national and international. Moreover, the idea that the maintenance of peace and security as mainly an inter-state issue is uncertain with regard to Africa. On this continent, 'most conflicts are internal, and many inter-state conflicts arise overwhelmingly from the internal problems of one or more states'.⁷⁵ Since there is often a risk of contamination between internal and inter-state conflicts and *vice versa*, the argument of state sovereignty is of only modest help. Threats to peace and security must involve as soon as possible collective mechanisms, such as the action of the AU Peace and Security Council that is intended to play a preventive role in achieving the right to peace and security. It would now be interesting to explore mechanisms of ensuring accountability of the AU towards peace and security in Africa.

4. Possible accountability mechanisms

In light of the practice of the African Commission, it is beyond question that states parties to the ACHPR are kept responsible and monitored for their compliance with the above-mentioned treaty. However, the question as to how to ensure that the AU does not fail to act in accordance with its Constitution and the ACHPR remains open.

We do not know yet what the Court of Justice of the AU provided for under article 18 of the AU Act, will look like. It could create a mechanism to insure that actions, and even abstentions of the AU regarding situations in which there is a threat to peace and security, are dealt with in a proper manner. With this regard, the Protocol of the Court of Justice of the African Union had been opened to ratification. It provides that the Court has jurisdiction over 'any fact which, if established, constitutes a breach of an obligation owed...by the AU'.⁷⁶ This might have been a way of ensuring accountability of the AU or one of its particular organs. The problem that might have occurred relates to the eligibility to submit cases that is dealt with by article 18 of the above-mentioned Protocol. This problem could have been solved by allowing, under certain circumstances, non-governmental organisations that would be granted with observer or consultative status with the AU Economic, Social and Cultural Council to bring cases before the Court.⁷⁷

⁷⁵ A. de Waal *Demilitarizing the mind: African agendas for peace and security* (2002) 25.

⁷⁶ Article 19 Protocol of the Court of justice of the AU.

⁷⁷ Kindiki, n 20 above, 102.

However, this Court as such will not come into being because the Assembly of the AU decided to merge it with the upcoming African Court on Human and Peoples' Rights.⁷⁸ But the need for ensuring accountability of the AU is still very relevant.

In light of what happened in Rwanda concerning the passivity of the international community,⁷⁹ accountability for failure to act to ensure the enjoyment of the right to peace is also necessary. Another reason for this is that the AU has bound itself to protect the right to peace and security. The early warning system that the Protocol on the Peace and Security Council calls for could be used to this end. Besides, reports published by non governmental organisations involved in peace maintenance could be used as a means of assessment of situations of potential violations of peoples' right to peace and security.⁸⁰ As noted above, these organisations could be granted observer or consultative status with the organisation, in line with Kindiki proposal to provide them with such status with the AU Economic, Social and Cultural Council.

The current debate on the merger of the two Courts should include discussions on how to make the Court that will both have a human rights jurisdiction and be the Court of Justice of the AU, able to guarantee the fulfilments by the AU of its goal.

5. Conclusion

The peoples' right to peace and security is an established human right. Although its recognition at the international level may be deemed to be uncertain, the ACHPR has devoted an unambiguous provision to it. Since the AU is bound upon its Constitutive Act that has endorsed the ACHPR, it would now be worthwhile to look at how much and how far its framework allows it to realise peoples' right to peace and security. I will first analyse what the AU has done so far in ensuring that the peoples of Africa exercise and enjoy their right to peace and security as much as possible.

⁷⁸ AU Doc Assembly/AU/Dec. 83 (V).

⁷⁹ R. Dallaire *Shake hands with the Devil* (2003) 351.

⁸⁰ For example, International Crisis Group Reports that make recommendations on how to handle conflict situations or situations of potential conflicts. Available at <<http://www.crisisgroup.org/home/index.cfm>> (accessed on 27 July 2005).

CHAPTER 3: ASSESSMENT OF THE INVOLVEMENT OF THE AFRICAN UNION IN DEALING WITH PEACE AND SECURITY IN AFRICA: CASE STUDIES

1. Introduction

One of the purposes of the AU is to realise the right to national and international peace and security. The current situation of conflicts in Africa shows that this aim has not been achieved, as evidenced by the armed conflicts that have been taking place in some sub regions of the continent. To support this contention, African case-studies have been chosen. The conflicts in Côte d' Ivoire and Darfur will be used to illustrate the manner in which the AU has tried to realise the human right to national and international peace and security in Africa. Amongst the eight turmoil situations in which the involvement of the international community in the form of UN peace keeping missions,⁸¹ Côte d' Ivoire and Darfur have been chosen because the conflicts in these zones have emerged after the AU came into being on 26 March 2001.⁸² Consequently, the AU was supposed to play the role that had been assigned to it by its members-states. Since these conflicts are still going on, it will be difficult to reach a definitive conclusion about the effectiveness of the AU in achieving peace building but this paper will analyse what has been done so far. This analysis will be focused on the pre-15 October 2005 period, because this research has to be submitted by the end of October.

The action of the AU will be assessed in a comparative fashion against the methodology proposed by Boutros-Ghali to make the UN's capacity for preventive diplomacy, peace making and peace keeping more effective.⁸³ 'Preventive diplomacy is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur.'⁸⁴ Peacemaking refers to 'action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.'⁸⁵ These means are described by Simma as including negotiation, fact finding, mediation, conciliation, good offices, international tribunals and regional agencies.⁸⁶ 'Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that

⁸¹ There are currently UN peace keeping missions in Burundi (ONUB), Côte d'Ivoire (UNOCI), the Democratic Republic of the Congo (MONUC), Eritrea and Ethiopia (UNMIEE), Liberia (UNMIL), Western Sahara (MINURSO), Sierra Leone (UNAMSIL) and Sudan (UNMIS). See <<http://www.un.org/Depts/dpko/dpko/index.asp>> (accessed on 6 October 2005).

⁸² According to the *Report of the UN Secretary General on Côte d'Ivoire* (UN Doc S/2003/374), the armed conflict in Côte d'Ivoire erupted on 19 September 2002. According to the *Report of the International Commission of Inquiry to the Secretary General pursuant to resolution 1564 (2004)*, the conflict began in late 2002 and in the beginning of 2003. Therefore, these conflicts erupted while the AU Act was already in force (OAU CAB/LEG 23.15/Vol.IX paras 1-3).

⁸³ B Boutros-Ghali *An agenda for peace* (1995) 39.

⁸⁴ As above, 45.

⁸⁵ As above.

⁸⁶ Simma, n 18 above, 583. The list given by Simma is not exactly the same as the one of Chapter VI of the UN Charter.

expands the possibilities for both the prevention of conflict and the making of peace'.⁸⁷ For Boutros-Ghali indeed, these three steps represent the proper manner to address situations in which the enjoyment of the right to peace and security is threatened. For purposes of this paper, all these steps towards the realisation of peace will be labelled as *peace building*.

2. The crisis in Côte d' Ivoire and the role of the AU

After a brief presentation of the background to the current crisis, a review of the different steps that have been taken to end the turmoil will be presented, while highlighting what the AU has done or what it has not done to promote the right to peace and security.

2.1 Background to the Ivorian conflict

Côte d'Ivoire, a former French colony in West Africa became independent in 1960. For years, the country enjoyed political stability and relative prosperity. It therefore attracted numerous foreigners and investors. However, the death of the founding leader President Houphouët-Boigny was followed by a power struggle during which issues related to citizenship, nationality, landownership and eligibility for high political positions were manipulated to political ends. In 1999, a coup d'état led by General Guéi overthrew President Bédié who had taken over after President Houphouët-Boigny's death. This was the beginning of a period of instability that culminated in violent demonstrations between the supporters of the two main candidates in the 2000 presidential elections, in which two of the main political leaders, Mr Alassane Ouattara and the former serving President Bédié were prevented from participating. Eventually, the Supreme Court inaugurated President Gbagbo as the new president. He organised a forum for national reconciliation in October 2001. However, the recommendations of this forum were implemented on a selective basis. On 19 September 2002, the current conflict erupted between the government forces and a coalition of rebel movements known as the New Forces. Some of the main claims of the rebel movements that conducted the attacks were again related to citizenship, nationality, landownership and eligibility for high political positions.⁸⁸

2.2 Peace building initiatives

The Economic Community of West African States (ECOWAS) has taken steps towards a peaceful settlement of the conflict in Côte d'Ivoire. It has created a contact group that has started talks with the different parties in the conflict. This group was accompanied by the Chairman of the Commission of the African Union. However, the concrete steps that have been taken were conducted by ECOWAS. A ceasefire was signed under the auspices of ECOWAS that also appointed President Eyadéma of Togo to conduct talks in Lomé. On 1 November 2002, the Lomé talks resulted in a peace agreement called the

⁸⁷ Boutros-Ghali, n 83 above, 45.

⁸⁸ United Nations Mission in Cote d'Ivoire 'Cote d'Ivoire, MINUCI, background' available at <<http://www.un.org/Depts/dpko/missions/minuci/background.html>> (accessed on 6 October 2005).

Lomé Agreement that was not implemented.⁸⁹ They also resulted in the creation of a peace force for Côte d'Ivoire, the ECOFORCE that was tasked to ensure the implementation of the ceasefire agreement. The leaders of ECOWAS appealed to the AU and UN to help the sub regional organisation in solving the crisis in Côte d'Ivoire. They also asked the Chairman of ECOWAS, the African members of the UN Security Council and France to bring the issue before the UN Security Council.⁹⁰

France then invited all the Ivorian parties to a round table in Linas-Marcoussis. It resulted in the Linas-Marcoussis Agreement, a comprehensive peace agreement agreed to by all the parties.⁹¹ Moreover, the Linas-Marcoussis Agreement was endorsed by the UN Security Council acting under Chapter 7 of the UN Charter.⁹² This agreement provided for a transitional period and the establishment of the government of national reconciliation in charge of addressing issues relating to citizenship, nationality, landownership and eligibility for high political positions. It also created a follow up committee composed of representatives of the UN, AU, ECOWAS, the European Commission, the International Organisation of la Francophone Countries, the Bretton Woods Institutions, the Group of Eight countries, the European Union, a military representative of troop-contributive countries and France. However, the implementation of the Linas-Marcoussis Agreement encountered grave obstacles, such as a lack of cooperation on the part of the political actors.

ECOWAS, once again, took steps to facilitate the implementation of the Linas-Marcoussis Peace Agreement. A meeting held in Accra on 7 March 2003 adopted another peace agreement, which put in detail the manner in which the main agreement should be applied.⁹³ The Accra II Agreement is therefore a sort of complementary agreement taken in line with the Linas-Marcoussis Peace Agreement to further its implementation.

Later, to deal with the difficulties that Côte d'Ivoire was facing in implementing the Linas-Marcoussis Peace Agreement, ECOWAS and the UN organised a meeting in Accra. It resulted in the Accra III Agreement built upon the foundations of its predecessors.⁹⁴ As the text of the Agreement says, the meeting was convened by the standing ECOWAS President and the Secretary General of the UN.⁹⁵ This

⁸⁹ 'Accords de Lomé' available at <<http://www.presidence.ci/crise/lome.php>> (accessed on 5 October 2005).

⁹⁰ As above.

⁹¹ 'Linas-Marcoussis Agreement' available at <http://www.usip.org/library/pa/cote_divoire/cote_divoire_01242003en.html> (accessed on 5 October 2005).

⁹² UN Doc S/RES/1464/ (2003) para 1.

⁹³ 'Accords d' Accra II' available at <http://www.presidence.ci/crise/accra_2.php> (accessed on 5 October 2005).

⁹⁴ 'Accords d'Accra III' available at <http://www.presidence.ci/crise/accra_3.php> (accessed on 5 October).

⁹⁵ As above.

extensive involvement of UN organs and other international actors is evidence that at that stage the AU did not play a significant role. The Accra III Agreement was signed on 30 July 2004.

Despite all these efforts, the situation did not significantly improve. Consequently, the AU Chairperson decided 'to mandate President Thabo Mbeki of South Africa to undertake an urgent mission in consultation with the Chairperson of the AU Commission, with a view to promoting a political solution.'⁹⁶ That decision was endorsed by the AU Peace and Security Council.⁹⁷ Since then, President Mbeki, acting on behalf of the AU, has visited Côte d'Ivoire numerous times and drafted a roadmap that was also endorsed by the Peace and Security Council of the AU (AU PSC).⁹⁸ He then convened a number of meetings that resulted in the signing of the Pretoria Agreement on 6 April 2005.⁹⁹ The Pretoria Agreement, signed under the auspices of the AU, is a text that goes further in implementing the Linas-Marcoussis Agreement. President Mbeki presented the report of his mediation in Côte d'Ivoire, on behalf of the AU, to the UN Security Council.¹⁰⁰ The AU PSC devoted its fortieth session to the situation in Côte d'Ivoire and renewed the mandate given to President Mbeki.¹⁰¹ Similarly, it decided 'to submit this decision to the United Nations Security Council to obtain its support'.¹⁰²

The African Commission, the quasi judicial organ of the AU charged with promoting and protecting human rights, also took actions towards peace in Côte d'Ivoire. The commissioners conducted a visit to the country from 25 to 29 April 2003. From 23 April to 1 May 2003, they undertook a fact finding mission to Côte d'Ivoire (*sic*).¹⁰³ The African Commission also issued a resolution dealing with the crisis to call upon the parties to comply with their commitments to the different peace agreements.¹⁰⁴

2.3 Assessment of the involvement of the AU

As one can see from the above peace building initiatives, ECOWAS was the main organisation involved in the search for a peaceful solution in Côte d'Ivoire. Although the Protocol establishing the AU PSC was already in force at the time the conflict started, the PSC did not take concrete steps by itself, to end it.

⁹⁶ AU Doc PSC/PR/Comm. (2004) (XIX), 8 November 2004, para 7.

⁹⁷ As above.

⁹⁸ AU Doc PSC/AHG/Comm (XXIII), 10 January 2005.

⁹⁹ 'Pretoria Agreement on the Peace Process in Côte d'Ivoire' available at <http://www.dfa.gov.za/docs/2005/pretoria_agreement.pdf> (accessed on 8 October 2005).

¹⁰⁰ 'Côte d'Ivoire: les Sud Africains s'expliquent', *RFI* 1 September 2005 available at <http://www.rfi.fr/actufr/articles/069/article_38269.asp> (accessed on 15 October 2005).

¹⁰¹ AU Doc PSC/AHG/ Comm (XL), 6 October 2005, para 3.

¹⁰² As above, para 14.

¹⁰³ *Sixteenth Annual Activity report of the African Commission on Human and Peoples' Rights* available at <http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity16_en.pdf> (accessed on 12 October 2005).

¹⁰⁴ ACHPR 72 Res 67 (XXXV) 04: Resolution on Côte d'Ivoire.

The explanation for that could be the inclusion within the overall AU peace and security framework of all the regional mechanisms for conflict prevention, management and resolution. For the purposes of this discussion on the role of the AU in the Ivorian crisis, the meaning of *regional mechanisms* will be the one provided for by article 1 of the PSC Protocol: 'African regional mechanisms for conflict prevention, management and resolution'. ECOWAS and its Defence and Security Commission fit into that definition, as a regional arrangement devoted to ensuring peace and security.¹⁰⁵ Indeed, the PSC Protocol states that 'the Regional Mechanisms are part of the overall security architecture of the Union'.¹⁰⁶ Therefore, one could argue that steps taken by ECOWAS in solving the Ivorian crisis were part of the efforts made by the AU. Additionally, it should be noted that the PSC Protocol empowers the PSC with the following mission:¹⁰⁷

[to] harmonize and coordinate the activities of regional mechanisms in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the Union.

But the critique is still relevant. One might well think that the AU gets the glory from what other have done on its behalf, without involving itself in concrete and significant actions. By itself, or through its main organ in charge of peace and security, the AU did not take very significant steps at the stages where early warning and preventive diplomacy were needed. During the peace making phases, the direct involvement of the AU came a bit late, although it has been quite effective. Indeed, the achievement of important steps in the peace process, such as the authorization of the candidacy of one of the opposition leaders, was a direct result of the mediation undertaken by President Mbeki on behalf of the AU.¹⁰⁸ There is therefore a move towards a more effective action of the AU in the field of peace building in Côte d'Ivoire.

3. The crisis in Darfur and the role of the AU

A brief exposé of the background to the current crisis in Darfur will be made. The action of the AU regarding this situation will then be assessed.

¹⁰⁵ Pursuant to the Treaty of ECOWAS, one of the fundamental principal is the maintenance of peace and security (article 4.e) To this end, a Commission in charge of political, judicial and legal affairs, regional security and immigration has been set up (article 22).

¹⁰⁶ Article 16.1.

¹⁰⁷ Article 16.1.a.

¹⁰⁸ 'Côte d'Ivoire: Gbagbo agrees to let rival stand in election rebels give cautious welcome' available at <<http://www.irinnews.org/report.asp?ReportID=46842>> (accessed on 12 October 2005).

3.1 Background to the conflict in Darfur¹⁰⁹

Darfur is a region situated in the western part of the Sudan. To understand the current conflict in Darfur, it must be known that the Sudan has been unstable for many years. Since its independence from the British-Egyptian rule in 1956, the Sudan has experienced only 10 years of democratic rule. For the rest of the time, it has been ruled by military regimes that seized power by means of *coups d'état*. It has faced a conflict between the North and the South for more than twenty years. Additionally, development has been unequal throughout the country and certain regions have felt neglected and excluded in the sharing of national wealth and government positions. The conflict in Darfur erupted at the end of 2003, as a result of problems related to landownership, identity-based tensions, desertification, availability of new arms and frustrations due to unequal participation in government and distribution of national assets. There are two rebel movements in Darfur: the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). The way in which the government reacted to the first attacks led to the crystallisation of ethnic identities in the region: since most of its military means were being used in the South, it has recruited combatants from local tribes but also from neighbouring countries, such as Chad and Libya. Arab militias called *Jenjaweed*, acting upon the orders and with the support of the State authorities have also been used. In the view to stop the conflicts, peace building initiatives were taken.

3.2 Peace building initiatives

In August 2003, President Deby of Chad invited representatives of the government and rebels movements to find a solution to the conflict. These talks took place 'in concert with the AU'.¹¹⁰ However, the JEM refused to join the negotiation process on the ground that Chad was not objective and independent enough to mediate in the crisis. The talks led to an agreement that provided for a ceasefire on 3 September 2003. Numerous rounds of negotiations were conducted by the Chadian mediation. They resulted in different peace deals: a humanitarian ceasefire agreement to which both rebel movements were parties on 8 April 2004 and, on 28 May 2004 in Ndjamena, all the parties to the conflict agreed on the modalities of a ceasefire.¹¹¹

The AU then started mediation. By the time the UN Commission of Inquiry on Darfur published its report, two protocols had been signed under the auspices of the AU following the Abuja talks that had began on 25 October 2004. One of the protocols concerned the improvement of the humanitarian situation, and the other, the enhancement of security in Darfur. They were signed on 9 November 2004.¹¹²

¹⁰⁹ United Nations *Report of the International Commission of Inquiry to the Secretary General pursuant to resolution 1564 (2004)*, 17.

¹¹⁰ P. Kagwandja 'Darfur: An African Union peace-keeping crucible?' available at <http://www.up.ac.za/academic/cips/Publications/KTP_Dr_Peter_Kagwanja_ICG.pdf> (accessed on 16 July 2005).

¹¹¹ As above.

¹¹² 'African Union Mission in the Sudan' available at <http://en.wikipedia.org/wiki/African_Union_Mission_in_Sudan> (accessed on 15 October 2005).

Most concretely, the AU set up a Ceasefire Commission (CFC) to monitor respect for the ceasefire agreement; at its thirteenth session, the PSC of the AU took note of what had been done to that end.¹¹³ The above-mentioned Commission as well as troops to protect it were actually sent to Darfur. That was the African Union Mission in the Sudan (AMIS). But, the situation demanded more than what the AU had done. It was accordingly decided to 'transform the said mission into a full-fledged peacekeeping mission'.¹¹⁴ And a more ambitious mandate was given to the AMIS by the seventeenth meeting of the AU PSC. Indeed, it was designed to be an affective peacekeeping mission. It calls upon the AMIS:¹¹⁵

- to monitor and observe compliance with the Humanitarian Ceasefire Agreement of 8 April 2004 and all such agreements in the future,

- to assist in the process of confidence building,

- to contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes, in order to assist in increasing the level of compliance of all Parties with the Humanitarian Ceasefire Agreement and to contribute to the improvement of the security situation throughout Darfur;

The AU PSC went further and assigning more precise tasks to the AMIS. The AMIS is to observe how the returning internal displaced persons (IDPs) are provided with security, including in neighbourhoods of the camps; it will also have to monitor the termination of aggressive acts between the parties; and its mission includes deterring armed groups from operating. The AMIS is empowered with observing effectiveness of the local police service and, most importantly, it has a clear mandate to protect 'civilians whom it encounters under imminent threats'.¹¹⁶

Currently, peace talks on Darfur are still taking place under the auspices of the AU. The Chairman of the AU, President Obasanjo of Nigeria, is hosting the talks in Abuja and the former Secretary General of the OAU, Dr Salim Ahmed Salim, is the AU Special Envoy for the Darfur talks and Chief Mediator.¹¹⁷

On the other hand, the African Commission published a number of press releases. It also undertook a fact finding mission to Darfur in July 2004 and wrote a report.¹¹⁸ These efforts of the African Commission should be seen as part of the efforts of the AU since the Commission is its arm for monitoring compliance with the ACHPR.

¹¹³ AU Doc PSC/PR/Comm (XIII), 27 July 2004.

¹¹⁴ AU Doc PSC/PR/ Comm (XVII), 20 October 2004, para 1.

¹¹⁵ As above.

¹¹⁶ As above.

¹¹⁷ AU Press Release n 013, 4 October 2005 'The AU Special Envoy for the Darfur Talks and Chief Mediator welcomes the Prime Minister of the Netherlands to the Sixth Round of the talks' available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 11 October 2005).

¹¹⁸ ACHPR Res 74(XXXVII) 05: Resolution on the human rights situation in Darfur, Sudan (11 May 2005).

Similarly, the Pan-African Parliament conducted a fact-finding mission to Darfur and published a report aimed at showing 'an objective and candid view on the realities on the ground' and making recommendations designated to inform the policies of the AU.¹¹⁹

3.3 Assessment of the role of the AU in the Darfur crisis

What the AU has done so far has been praised as 'a leadership role and engagement in addressing the situation in Darfur' by authoritative voices such as the Director of International Crisis Group for Southern Africa.¹²⁰ Moreover, the UN Secretary General has assessed the role the AMIS has played in Darfur as useful.¹²¹

If one applies the methodology that has been proposed earlier, the AU has been involved as such from the preventive diplomacy stage up to the peacekeeping one. The AU has taken part quite early in the negotiations process that corresponds to the preventive diplomacy stage. It then tried to create a cooperative atmosphere amongst the parties. Eventually, a peacekeeping mission has been deployed in the field. Currently, it is still involved in the different phases of peace building in the Sudan region of Darfur.

However, due to the insufficiency of resources in terms of logistics and finances, the AMIS has failed to be as effective as it could have been.¹²² This lack of resources has significantly impeded the effectiveness of the AMIS. In this regard, the French broadcasting RFI published an article pointing out that the insufficiency of funds had led to the decrease of the salaries of the members of the mission.¹²³ Nevertheless, the fact that the international community increasingly tends to consider the AU as a key partner in addressing the situation in Darfur shows a recognition that the AU can be an effective partner. The partnership between the UN and the AU in this regard is an evidence of that.

It is beyond debate that the role played by the AU in the peace building process in Darfur has been so far the leading one.¹²⁴ Its actual role has not met the hopes its creation had raised, but what it is doing in Darfur is a positive sign that it could be active and effective in achieving the right to peace on the continent, subject to a substantial increase of its resources and other improvements that will be addressed at the end of this paper.

¹¹⁹ AU Doc AU/PAP/CIRCR.CTTEE *Report of the Pan African Parliament Fact-Finding Mission on Darfur, the Sudan* available at <<http://www.pan-african-parliament.org/Archive/Documents/2005/PAP%20Sessions/rpt-darfur-eng.pdf>> (accessed on 13 October 2005).

¹²⁰ Kagwandja, n 110 above.

¹²¹ UN Doc S/2004/947 *Report of the Secretary-General on the Sudan pursuant to paragraphs 6 and 13 to 16 of Security Council Resolution 1556 (2004)*.

¹²² As above.

¹²³ 'Darfour: Les soldats de la Paix Africains a court d'argent' *RFI* 27 August 2005 available at <http://rfi.fr/actufr/articles/068/article_38203.asp> (accessed on 17 October 2005).

¹²⁴ Kagwandja, n 110 above.

4. Conclusion

From the above case studies, one can say that the AU has not achieved the enjoyment of the right to national and international peace and security in Africa. In Côte d'Ivoire, its role could have been more significant in terms of early involvement, in line with its obligation to protect the human right to peace and security. The mediator it empowered has nevertheless achieved, in its name, important steps towards a political situation to the conflict. In Darfur, what it has done so far does not constitute a complete solution to the conflict, but there is hope that it will achieve peace through the ongoing talks it is undertaking. At least, it is doing something with respect to its obligations. However, it has an institutional potential that is far from being fully used to its supposed ends. This institutional potential belongs to its organs as well as its programmes.

CHAPTER 4: HOPES FOR THE FUTURE: ORGANS OF THE AFRICAN UNION DESIGNED TO ACHIEVE THE RIGHT TO NATIONAL AND INTERNATIONAL PEACE AND SECURITY IN AFRICA

1. Introduction

The AU has been provided with the relevant architecture in order to perform its obligations. As demonstrated in previous chapters, the maintenance of national and international peace and security is one of the most important obligations of the AU. Kindiki has criticised the failure of the AU Act to assign precise human rights functions to the nine organs that it established. Kindiki's view suggests that, although they are clearly protected as a human right, peace and security are rarely dealt with as such. In fact, there is a peace and security aspect in the tasks given by the AU Act to some of its organs.¹²⁵ In this regard, the Assembly is in charge of directing the Executive Council in the 'management of conflicts, war and other emergency situation and the restoration of peace'.¹²⁶ This task involves *de jure* the Executive Council in conflict management. The latter is also in charge of humanitarian action.¹²⁷ The other organs to which the AU Act has given clear tasks have mainly functions that consist of supporting the Assembly and the Executive Council by performing administrative activities.¹²⁸

As the African Commission has already done, the upcoming African Court could play a more effective role by addressing peace and security as a human right in a proper legal manner, particularly by making clear remedies in case of violation. This chapter aims to analyse how the organs of the AU can participate, in accordance with the Act and their own regulations, in the realisation of the right to peace and security on the continent.¹²⁹ A particular emphasis will be put on the Peace and Security Council of the AU that has raised great hopes within the international community,¹³⁰ as it seems to be the main organ designed to achieve the right to peace in Africa.

¹²⁵ Article 5.1 of the AU Act has created nine permanent organs. However, it assigns defined functions only to four of them, which are the Assembly, the Executive Council, the Permanent Representative Committee and the Specialised Technical Committees.

¹²⁶ Article 9.1(g) AU Act.

¹²⁷ Article 13.1(e) AU Act.

¹²⁸ The Specialized and Technical Committees are empowered with the missions of preparing projects, following up decisions and other administrative missions. The Permanent Representatives Committee has to prepare the meetings of the Executive Council and to work on its instructions.

¹²⁹ However, the role of the upcoming African Court will not be looked at; this has been done under the heading 'Possible Accountability Mechanisms' in chapter 2.

¹³⁰ UN Press Release SG/SM/9327 AFR/944 'African Union's Peace and Security Council powerful tool for conflict prevention, Secretary-General says at inauguration ceremony' available at <<http://www.un.org/News/Press/docs/2004/sgsm9327.doc.htm>> (accessed on 29 August 2005).

2. The Peace and Security Council of the AU

The importance of the PSC of the AU is evidenced by the fact that such an organ has been incorporated into the framework of the AU through an amendment of the AU Act.¹³¹ This Protocol includes a new article 20 (bis) in the AU Act.¹³²

There is hereby established, a Peace and Security Council (PSC) of the Union, which shall be the standing decision-making organ for the Prevention, Management and Resolution of conflicts.

The functions, powers, compositions and organisation of the PSC shall be determined by the Assembly and set out in a Protocol related thereto.

Although the Protocol on Amendments to the AU Act is not yet in force, the PSC Protocol entered into force. The PSC was launched on 25 May 2004 and raised hopes within the international community.¹³³

2.1 Missions, composition and powers

As the 'standing decision-making organ for the prevention, management and resolution of conflicts',¹³⁴ the PSC of the AU appears to be the main organ of the organisation designed to promote and protect the right to national and international peace and security. Its support structure includes the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund.¹³⁵ Its objectives consist merely of the promotion of peace by means of peace building activities, such as anticipation of conflicts, resolution of conflicts, and development of a common defence policy. It also has to support 'democratic practices, good governance and the rule of law ...human rights ..., respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'.¹³⁶

This is a significant recognition of the close link between human rights in general and peace and security. On the one hand, peace appears as a result of respect for human rights in general. On the other hand, it is a pre-requisite for respecting human rights. The PSC should not neglect the human rights-based approach to peace and security. Too often, it is forgotten that peace and security constitute, in themselves, a human right that must be taken seriously. The PSC has a wide mandate that shows how much the right to peace and security is linked to other issues.

¹³¹ Protocol on Amendments to the Constitutive Act of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, not yet in force.

¹³² As above, article 9.

¹³³ As n 130 above.

¹³⁴ PSC Protocol, n 73 above, article 2.

¹³⁵ As above.

¹³⁶ As above, article 3.

The guiding principles of the PSC are those contained in the AU Act, the UN Charter and the Universal Declaration

. Amongst them, the Protocol has specified ‘the right of the AU to intervene in a Member State pursuant to a decision of the Assembly’ under certain circumstances¹³⁷ and ‘the right of Member States to request intervention from the Union in order to restore peace and security’.¹³⁸

The composition of the PSC is subject to criteria that encompasses the merit of member states commitment to the AU, to peace building and conflict management at the regional and continental levels as well as to constitutional governance and human rights.¹³⁹ In this regard, the PSC seems to be, at least theoretically, an organ with a highly selective membership that is intended to inspire legitimacy, authority and confidence by the quality of its members. Since it can demand urgent actions, the participants in the meetings of the PSC can be Permanent Representatives, Ministers or Heads of States so as to allow it to carry out its mandate more easily.

The powers of the PSC of the AU have been assigned with the view of empowering it to meet its objectives. They comprise, amongst others, undertaking peace building activities, authorising the deployment of peace keeping missions, recommending intervention to the Assembly and harmonising the activities of the regional mechanisms with those of the AU.¹⁴⁰

Most importantly, the decisions of the PSC of the AU are binding upon the member states as stated in article 7.3 of the AU PSC Protocol that states that ‘the Member States agree to accept and implement the decisions of the PSC, in accordance with the Constitutive Act’. This article is almost identical to article 25 of the UN Charter¹⁴¹ that has been interpreted as the source of the binding nature of the decisions of the UN Security Council.¹⁴² Therefore, the PSC has a powerful means to have its decisions executed. The power to impose sanctions on member states that has been assigned to the Assembly of the Union by article 23 of the AU Act can also be a way of enforcing the decisions of the PSC. It could also be very quick in reacting, as every member of the PSC has to be present, ‘at all times’,¹⁴³ in the AU.

¹³⁷ As above, article 4.j.

¹³⁸ As above, article 4.k.

¹³⁹ As above, article 5.

¹⁴⁰ As above, article 7.

¹⁴¹ ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter’.

¹⁴² Simma, n 17 above, 458.

¹⁴³ PSC Protocol, n 73 above, article 8.1.

2.2 Structure

The PSC of the AU comprises a Panel of the Wise, a Continental Early Warning System and an Armed Force.

2.2.1. The Panel of the Wise

The creation of a Panel of the Wise within the PSC of the AU seems to be inspired by the idea that the elders enjoy a particular influence that might be put forward in order to achieve peace building. This is in line with the ACHPR that refers many times to the African traditional values which must be taken into account in its interpretation.¹⁴⁴

The role of the Panel of the Wise is to support the efforts made by the PSC in conflict prevention. It is composed of five African persons who have contributed significantly to the achievement of peace. They must be 'highly respected'.¹⁴⁵ The functions of the Panel of the Wise are to advise the PSC and to undertake any appropriate action aimed at promoting peace.

Such an instrument could be very useful, subject to the effectiveness of the Continental Early Warning System.

2.2.2 The Continental Early Warning System

To prevent breaches of the right to national and international peace and security from happening, article 12 of the PSC Protocol establishes a Continental Early Warning System. It is composed of an Observation and Monitoring Centre called 'the Situation Room', and of the Observation and Monitoring Units of the regional mechanisms.¹⁴⁶

The task of the Continental Early Warning System is the collection and analysis of data, and the creation of credible early warning indicators. To perform its duties, the Continental Early Warning System has to collaborate with member states and NGOs. This unit is very important for what it could do in terms of preventive diplomacy to be initiated for alerting and giving advice to the relevant decision-making organs.

¹⁴⁴ ACHPR, articles 17, 18 and 29.

¹⁴⁵ PSC Protocol, n 73 above, article 11.

¹⁴⁶ As above, article 12.

2.2.3 The African Standby Force

The African Standby Force is the military arm of the PSC. Its aim is to enable the PSC to fulfil its mission concerning the deployment of troops in peace support and peace keeping missions or interventions.¹⁴⁷

The African Standby Force has a mandate which includes protection of human rights in case of gross violations as well as 'preventive deployment' to keep conflicts from escalating or contaminating the neighbourhood.¹⁴⁸

Similar to the UN Security Council,¹⁴⁹ the AU PSC has a Military Staff Committee that is in charge of advising it on military issues related to the maintenance of peace and security. The organisation of the PSC is quite impressive and could thus lead to a more peaceful continent. Although the PSC is the main organ of the AU in charge of peace and security, other organs can play a role in the realisation of the right to peace and security on the continent.

3. The Assembly of the Union

The Assembly is composed of the Heads of States and Governments and usually meets once a year. It is the supreme organ of the AU. As such, it is in charge of 'determining the common policies of the Union'.¹⁵⁰ In line with article 31 of the Vienna Convention,¹⁵¹ Akande has stated that the objects and purposes of an international organisation enjoy special importance in interpreting its constitutive treaty.¹⁵² Based on those of the AU, one can therefore argue that the policies of the Union must point towards the maintenance of peace and security. Most precisely, the AU Act empowers the Assembly 'to give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace'.¹⁵³

In fact, the Assembly has often dealt with issues related to peace and security. For instance, at its Fifth Ordinary Session, the Assembly 'fully commit[ed] itself to ownership of Africa's direction and development, including on the basic issues of ... peace and security...'.¹⁵⁴ Similarly, it adopted a *Declaration on the review of the Millennium Declaration and the Millennium Development Goals* in which it undertook to improve investment and development by promoting peace and security through the

¹⁴⁷ As above, article 13.

¹⁴⁸ As above.

¹⁴⁹ Article 47 UN Charter.

¹⁵⁰ Article 9.1 (a) AU Act.

¹⁵¹ Vienna Convention, n 68 above, article 31.

¹⁵² Akande, n 54 above, 280.

¹⁵³ As n 126 above.

¹⁵⁴ AU Doc Assembly/AU/Dec. 74 (V).

strengthening of its ability in peace building and the operationalisation of the Continental Early Warning System and the African Stand-by Force.¹⁵⁵ The Assembly also adopted a Declaration on the Inter Sudanese talks on Darfur.¹⁵⁶ The Assembly's involvement in peace and security issues is evidenced by the African Union Non-Aggression and Common Defence Pact that it has adopted to guarantee a more peaceful continent, amongst other goals.¹⁵⁷

One can argue that the Assembly is not intended to be directly involved in concrete actions regarding the maintenance of peace and security on the continent. Rather, it is a political body that adopts declarations and decisions; that is it decides policy directing by other organs and member states. Under article 23 of AU Act, the Assembly is empowered to impose sanctions on any member state that does not conform to its decisions. With regard to peace and security, such a power should be used when it is necessary, in order to ensure that the peoples of Africa enjoy their right to peace. For example, in Darfur, it has been established that the government and the *Jenjaweed* militias act in close relationship.¹⁵⁸ The Assembly could have used article 23 of the AU Act to stop what was going on there.

4. The Executive Council

The Executive Council is the council of ministers of the AU. It meets twice a year and brings together the ministries of foreign affairs of the member states or any other ministry, depending on the matter at issue.¹⁵⁹

The Executive Council is responsible the Assembly in the field of peace building,¹⁶⁰ and often meets just before the Assembly, which then adopt what it proposes. For example, just before the Fifth Ordinary Session of the Assembly, it specified criteria for granting observer status and for a system of accreditation within the AU.¹⁶¹ Regarding peace and security matters, the Executive Council adopted the Report of the Chairperson on conflict situations in Africa in which it urged the Commission of the AU to take a particular course of action.¹⁶²

¹⁵⁵ AU Doc Assembly/AU/Decl. 1 (V).

¹⁵⁶ AU Doc Assembly/AU/Decl. 3 (V).

¹⁵⁷ Adopted on 31 January 2005 in Abuja, Nigeria; not yet in force.

¹⁵⁸ UN Commission of Inquiry on Darfur, n 109 above, para 77.

¹⁵⁹ Article 10 AU Act.

¹⁶⁰ As n 126 above.

¹⁶¹ AU Doc EX.CL/Dec. 230 (VII).

¹⁶² AU Doc EX.CL/Dec. 225 (VII).

The Executive Council of the AU has its own powers, but is responsible to the Assembly. It considers matters referred to it and at the same time, is in charge of monitoring the carrying out of decisions of the Assembly. In this regard, it often deals with peace and security matters.

5. The Pan African Parliament

Although the AU Act does not assign specific tasks to the Pan African Parliament, Kindiki argued that a human rights mandate could be inferred from the powers and mandate entrusted to it.¹⁶³ Indeed, the Protocol that the AU Act referred to in its article 17.2 makes this clear.¹⁶⁴ Pursuant to the Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament (Pan African Parliament Protocol),¹⁶⁵ one of the objectives of the of the Parliament is to promote human rights, as well as peace and security on the Continent.¹⁶⁶

The Pan African Parliament is a consultative organ that only has advisory powers. It is therefore supposed to be more involved in the welfare of the peoples of Africa it represents by making strong recommendations and lobbying for solving conflicts in Africa. It can also be a venue for discussing what the Assembly hesitates to say, for purposes of formulating courageous and innovative solutions to the infringements of peoples' rights to peace and security.

The Pan African Parliament should be vested with the right to set up Commissions of Inquiry because it is the only organ that claims to represent directly the peoples of Africa. This should be a powerful tool to ensure that the AU performs its duties in the proper manner, ultimately in the name of African peoples.

6. The Economic, Social and Cultural Council (ECOSOCC)

As an advisory organ composed of different social and professional groups of the Member states of the AU, the ECOSOCC is a forum that aims to allow the African civil society to participate in the activities of the AU. This can be inferred from its objectives and functions.¹⁶⁷

In terms of achieving human rights, including peace and security, education is a powerful tool. This is clearly stated by the Universal Declaration of Human Rights that presents education as the means of

¹⁶³ Kindiki, n 20 above, 101.

¹⁶⁴ 'The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto'.

¹⁶⁵ Adopted in Sirte on 2 March 2001; entered onto force on 14 December 2004; available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 1 October 2005)

¹⁶⁶ Article 3 Pan African Parliament Protocol.

¹⁶⁷ Pursuant to article 2 of the Statutes of the ECOSOCC of the AU, the objectives of Council include, amongst other things, the promotion of dialogue between all the segments of the people of Africa, the creation of partnerships between civil society and government on the one hand, and between civil society and the AU, on the other. Article 7 provides that one of the functions of the ECOSOCC is to promote popularisation and popular participation for purposes of realising the vision of the AU.

realising the ideals it contains.¹⁶⁸ The mission of the ECOSOCC includes educational activities. It should therefore adopt an approach to peace and security that does not exclude or neglect the human rights education aspect. For example, the ECOSOCC could campaign to promote the ideal of the human right to national and international peace and security, in accordance with the AU Act.¹⁶⁹

Since the ECOSOCC has only been launched in March 2005,¹⁷⁰ there is still a way to go to be really able to assess its commitment to the fulfilment of the AU's obligation to promote peace and security on the continent.

7. The Commission

As the Secretariat of the AU,¹⁷¹ the Commission is in charge of the day to day running of the institution. Since the realisation of peace and security on the continent is one of the purposes of the AU, its secretariat has been provided with the relevant machinery for meeting that aim.

Within the Commission of the AU, there is a Peace and Security Directorate that the Commissioner for Peace and Security heads. He is assisted by a Director who manages the Directorate on a day to day basis. In view of realising peace and security on the continent, the objectives of this directorate are to:¹⁷²

ensure early signing, ratification and operationalisation of the Protocol on the Peace and Security Council; coordinate, harmonise and promote peace and security programmes of the RECs, establish an efficient early warning system supportive of rapid response of the union; develop a common African Defence and Security policy; engage in mediation and resolution of conflicts; enhance the capacity of the AU, and contribute towards strengthening capacities of the stakeholders in conflicts prevention, management and resolution.

The Peace and Security Directorate is supposed to contain three divisions: a Conflict Management Centre (CMC), a Peace Support Operation Division and a Secretariat. As one can infer from its name, the Conflict Management Centre aims at handling the conflict situations. As such, it is the active side of the Peace and Security Council. The CMC is divided into an Early Warning Unit and a Conflict Management and Resolution and Post Conflict Unit.

¹⁶⁸ Indeed, the last paragraph says: '...shall strive by teaching and education to promote respect for these rights...'

¹⁶⁹ In its article 3(e), the AU Act refers to the Universal Declaration as an instrument to take into account when dealing with its objective of enhancing cooperation. I argue that its relevance is not limited to this only aim.

¹⁷⁰ 'Launching of the Economic, Social and Cultural Council of the African Union' available at <<http://www.africa-union.org/organs/ecosocc/home.htm>> (accessed on 18 October 2005).

¹⁷¹ Article 20 AU Act.

¹⁷² 'Peace and Security Directorate' available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 17 October 2005).

The Peace Support Operation Division also consists of two units, namely the Peace Support Operation Units and the African Standby Force and Staff Committee Unit. This division is in charge of practical undertakings such as deployment of observers and establishment of liaison offices.

The Strategic Security Issues Unit and the Project Management Team constitute the support structure of the Directorate. They also stand as the secretariat of the Peace and Security Council.

The Commission of the AU is provided with a potentially very effective tool for peace building. The CMC could be very proactive in preventive diplomacy through its Early Warning Unit. The Conflict Management and Resolution and Post Conflict Unit could be a useful means for peace making. Similarly, the Peace Support Operation Division is designed to undertake peace keeping where necessary.

8. Permanent Representatives Committee (PRC) and Specialised Technical Committee (STC)

When reading the provisions of the AU Act dealing with the PRC and the STC, one can say that they only have support functions. They are both in charge of preparing meetings of the Executive Council.¹⁷³ They cannot take binding decisions. However, as they support an organ that is involved in peace building, they may have a role to play.

9. The African Commission on Human and Peoples' Rights

The African Commission was incorporated into the AU framework by the Assembly at its first Ordinary Session.¹⁷⁴ It has a very clear mandate regarding human rights, which consists of promoting and protecting them.¹⁷⁵ With regard to the right to national and international peace and security in particular, the meaning given to these terms above imply obligations to create an atmosphere conducive to peace and security as well as to prevent violations from happening and to stop violations that are already happening. The African Commission also has to bring to the attention of the PSC any matter relevant to its functions.¹⁷⁶

The African Commission has conducted a number of visits and fact finding missions in countries that were facing conflicts.¹⁷⁷ In the same vein, it declared a country in breach of its obligation to ensure that its people enjoy their right to peace and security.¹⁷⁸ These actions are part of the promotional and the protective mandate that the African Commission enjoys. Parallel to that, they may be classified as part of

¹⁷³ Articles 15 and 21 of the AU Act.

¹⁷⁴ Kindiki, n 20 above, 103.

¹⁷⁵ As n 71 above.

¹⁷⁶ PSC Protocol, n 73 above, article 19.

¹⁷⁷ As n 103 above.

¹⁷⁸ *Malawi Association case*, n 3 above.

the AU's efforts in preventive diplomacy and, quite revolutionary, a judicial approach to peace and security as a human right. Hopefully, the establishment of the Court within the AU will overcome the limitations the Commission faces in terms of the binding nature of its decisions and its political influence.

10. Conclusion

In saying that the PSC of the AU is a 'powerful tool for conflict prevention',¹⁷⁹ the UN Secretary General was right. It does indeed represent a complete machinery to achieve the human right to national and international peace and security through preventive diplomacy, peace making and peace keeping. In the same vein, many of the organs of the AU can play a role in promoting or protecting the right to peace in Africa. To this end, there is a need for making the awareness of peace and security as a human right as extensive as possible. The human rights based-approach to peace and security should be promoted within the AU because it is an important right. The programmes of the AU that are or contain an aspect devoted to realising the right to peace and security deserve to be considered.

¹⁷⁹ As n 130 above.

CHAPTER 5: THE PROGRAMMES OF THE AFRICAN UNION AND THE HUMAN RIGHT TO NATIONAL AND INTERNATIONAL PEACE AND SECURITY

1. Introduction

In line with its objectives, as listed in the AU Act,¹⁸⁰ the AU is running two 'special programmes',¹⁸¹ namely the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) and the New Partnership for Africa's Development (NEPAD). Both programmes are intended to lead to a better Africa. They encompass an aspect devoted to peace and security, even though the approach they have adopted is not purely human rights-based. The CSSDCA has adopted a human security approach and the NEPAD, what I call a multidisciplinary one. The CSSDCA has adopted four main areas, which are security, stability, development and cooperation. It deals with them taking account the fact that:¹⁸²

Security should be seen as in its wholesomeness and totality including the right of peoples to live in peace with access to the basic necessities of life, while fully enjoying the rights enshrined in the African Charter on Human and Peoples' Rights and freely participate in the affairs of their societies; and bearing in mind that Africa's security and that of its Member States are inseparably linked with the security of all African peoples.

For its part, the NEPAD has a Peace and Security Initiative that consists mainly in institutionalising dedication to its core values which include respect for human rights, good governance as well as democracy. Indeed, this approach to peace and security stresses the link between peace and democracy, good governance and respect for human rights in general.

If one discusses the legal status of such programmes within the AU, it will be difficult to reach a clear conclusion. They are neither organs of the organisation, nor 'operational agencies' entrusted with the management and operation of programmes and funds for financial, technical, and other forms of assistance' in a particular field.¹⁸³ In the case of the UN for example, the operational agencies that are in charge of running specific programmes have been created by the General Assembly and enjoy a certain level of autonomy that can be seen in their own organisational sub-structure for decision making and daily management.¹⁸⁴ By contrast, the CSSDCA Solemn Declaration establishes, as implementation mechanism, a Standing Conference. Additionally, the Chairman of the Commission of the AU has been requested to make the necessary administrative arrangements to create, within the Commission, a Unit in charge of implementing and monitoring the decisions of the CSSDCA.¹⁸⁵

¹⁸⁰ Article 3 AU Act.

¹⁸¹ 'Special Programmes' available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 22 October 2005).

¹⁸² CSSDCA Solemn Declaration AHG/Decl.4 (XXXVI).

¹⁸³ Simma, n 18 above, 222.

¹⁸⁴ As above.

¹⁸⁵ As n 182 above.

Although the NEPAD is organised within the framework of the AU with its own Secretariat that is overseen by the Assembly of the AU, the question of its legal nature also remains not well-defined.

The aim of this chapter is to assess the possible role of these programmes in the achievement of the right of people to national and international peace and security, as they intend to do.

2. The CSSDCA

I will present the CSSDCA, it will then be criticised.

2.1 Presentation of the CSSDCA

The CSSDCA is a 'policy development process'¹⁸⁶ of the AU designated to create a more secure and peaceful Africa. De Waal has characterised it as an attempt to set up a security community.¹⁸⁷ His definition of security community is based on the one made by Deutsch.¹⁸⁸ This definition captures a security community by identifying a level of cooperation that is high enough to prevent war and insecurity from occurring amongst an association of states. Indeed, the CSSDCA fits into that definition.

The purposes of the CSSDCA are largely informed by a human security-based approach. The CSSDCA aims to promote peace and security through respect for human life and dignity. Its approach clearly includes the fight against unconstitutional changes of governments, respect for human rights, democracy and the rule of law, good governance as well as actions towards the economic and social development of Africa. The CSSDCA goes into details in what it considers to be the requirements to prevent Africa from facing conflicts. It acknowledges the link between peace and security in every individual state and continental peace and security. It then enumerates the problems of refugees, small arms and light weapons, terrorism, racism, extremism in religion and nationalism and HIV/AIDS as sources of concern that should be addressed.¹⁸⁹

In their Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (MOU), the Heads of States and Government agreed to a set of core values which include, amongst other things, the inseparableness between the security of each African country and the security of the

¹⁸⁶ As n 181 above.

¹⁸⁷ De Waal, n 75 above, 20.

¹⁸⁸ As above, 13. De Waal comments: 'Breaking away from the realist conception of international relations, which held that states pursue their interests in an anarchic international order in which armed conflict is inevitable, Deutsch argued that community is possible at the international level. He believed that is possible for different countries to engage in social, economic and political interaction that made war between them unthinkable. This can be seen as a form of regional non-militarism: the dismantling of the capacity to engage in militaristic governance at a regional level.'

¹⁸⁹ As n 182 above.

continent as a whole and the carrying out of free and fair elections.¹⁹⁰ They committed themselves to implement these core values by 'develop[ing] a collective continental architecture for promoting security and inter-African relations that goes beyond the traditional definition and embraces...human security, ...good governance, ...democracy, ...human rights,'¹⁹¹ The implementation machinery of the CSSDCA has been merged with the one of the AU.¹⁹²

2.2 Assessment of the CSSDCA

The agenda of the CSSDCA is very ambitious. The most interesting element in its approach to peace and security is the emphasis it puts on the close relationship that such concept has with other issues such as human security, good governance, democracy and other human rights.

However, it suffers from vagueness in the implementation mechanisms the MOU has tried to establish.¹⁹³ Moreover, there is a lack of information on what it has done so far.¹⁹⁴ On the other hand, its ambitions and goals are quite similar to those of the AU PSC.¹⁹⁵ The problems that would probably arise are a conflict of competence between these organs and some confusions in what each of them has to do, that could result in not doing anything. Therefore, there is a risk of overlapping in the actions of these organs that needs to be addressed. For now, it has been regarded as a failure in attempting to create an African security community.¹⁹⁶

3. The NEPAD

The NEPAD, 'a programme of the AU created by Africans for Africans and implemented by Africans'¹⁹⁷ will be looked at with particular attention to what it can do towards the realisation of the right to national and international peace and security in Africa through its Peace and Security Initiative.

¹⁹⁰ Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 23 October 2005).

¹⁹¹ As above.

¹⁹² As n 182 above.

¹⁹³ As above.

¹⁹⁴ If one looks at the website of the AU, the page devoted to the CSSDCA does not show much information on the actions of the CSSDCA. The latest information relates to conferences that took place in 2002.

¹⁹⁵ As n 134 above.

¹⁹⁶ De Waal, n 75 above, 49.

¹⁹⁷ As n 181 above.

3.1 Presentation of the NEPAD

The NEPAD is the result of the merger of two plans aimed at Africa's renaissance, the Millennium Action Plan (MAP) created by President Mbeki of South Africa and the OMEGA Plan conceived by President Wade of Senegal. At its 37th Summit, the OAU Assembly adopted the strategic framework document.¹⁹⁸

The NEPAD is led by a Head of States and Government Implementation Committee (HSIC). There is also a Steering Committee that is composed of representatives of the Heads of State. It then has a secretariat that runs the programme daily.

The part of the NEPAD dealing with the programme of action is labelled as the 'strategy for achieving sustainable development in the 21st century'.¹⁹⁹ This part is divided into three main sub-parts that are, first, 'conditions for sustainable development'; second, 'sectoral priorities' and, lastly, 'mobilising resources'.²⁰⁰ The Peace and Security Initiative is part of the conditions for sustainable development. It is dealt with in close relationship with the Democracy and Political Governance Initiative.

The Peace and Security Initiative aims to promote a long-term environment for peace and development. It also seeks to build the capacity of the African institutions for early-warning, conflict prevention, management and resolution. It is designed to promote the adherence of African leaders to the core values of the NEPAD. It aims at institutionalising such a commitment.

The implementation machinery of the Peace and Security Initiative is the same as the one of the NEPAD as a whole. I so argue because there is no provision for such a mechanism for specific areas of the programme.

3.2 Assessment of the role of the NEPAD regarding peace and security

What the Peace and Security Initiative has accomplished so far is not very significant, if one reads the NEPAD Annual Report 2004/2005. Indeed, what this report highlights in terms of concrete actions towards the realisation of the right to national and international peace and security is mainly the launch of the AU PSC. The Report talks about a number of meetings that dealt with the objectives of the NEPAD,

¹⁹⁸ E. Baimu 'Human rights mechanisms under NEPAD and the African Union: Emerging trends towards proliferation and duplication' available at <http://www.chr.up.ac.za/centre_publications/occ_papers/occ15.html> (accessed on 19 April 2005).

¹⁹⁹ 'The New Partnership for Africa's Development' available at <[file:///C:/Documents%20and%20Settings/NEW/Desktop/NEPAD.htm#The Peace, Security, Democracy, and Political Governance Initiative](file:///C:/Documents%20and%20Settings/NEW/Desktop/NEPAD.htm#The%20Peace,%20Security,%20Democracy,%20and%20Political%20Governance%20Initiative)> (accessed on 20 October 2005).

²⁰⁰ As above.

including peace and security. Still, it has to be noted that the NEPAD published an African Post-Conflict Reconstruction Policy Framework in June 2005.²⁰¹

4. Conclusion

The CSSDCA and the NEPAD share the same goals as the AU itself. Potentially, they are organised in such a way that they can lead to a better enjoyment of the right to peace and security. Moreover, the approach that these programmes have adopted seems more favourable than the one the PSC takes into account, as an effective method to deal with peace and security. However, their legal statuses need to be established, and there is a need for making them more effective by avoiding duplications of the functions within the AU. In any event, one should notice that the functions of these programmes in terms of peace and security are already supposed to be fulfilled by other organs of the AU. One could therefore ask what in terms of peace and security are these programmes for?

²⁰¹ NEPAD *African Post-Conflict Reconstruction Policy Framework* available at <http://www.nepad.org/2005/aprmforum/PCRPolicyFramework_en.pdf> (accessed on 27 October 2005).

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

1. Conclusion

The ACHPR protects peoples' right to national and international peace and security. The concern African leaders have about peace and security led to their inclusion as an aim of the new continental organisation, the AU. However, national and international peace and security are not always considered and addressed as human rights.

The AU, as an international organisation has undertaken to realise the full enjoyment of human rights in line with the ACHPR. It has also committed itself to realise peace and security on the continent. These commitments have resulted in the AU being bound to act in a manner that can lead to the realisation of peoples' human right to national and international peace and security. This means that the AU is obligated to achieve a condition in which there is no war in Africa; this implies more than the mere absence of war, however. The AU should promote policies that are conducive to the eradication of the possibility of breaches of the right to peace and security. Indeed, the obligation of the AU regarding the human right to peace and security comprises both obligations to promote and to protect.

So far, the AU has tried to realise the right to peace and security in Africa. In Côte d'Ivoire and in Darfur for example, the AU has been seen as an active participant in the efforts to have the right of people to live in peace respected. However, it has not been able to prevent violations from occurring, as it should have done. It is important to note that its involvement has suffered from a lack of resources.

However, there are hopes for the future, given the AU's framework designed for the full realisation of the right of people to live in peace. When measuring what the AU can potentially do regarding peace and security in Africa against Boutros-Ghali's methodology for peace building, one realises that the AU has the relevant organs for preventive diplomacy, peace making and peace keeping. In this regard, the PSC could be an effective organ. However, there is a lack of effectiveness in implementing what the instruments provide.

The AU has, however, been involved in trying to achieve peace and security by creating programmes to advance these ends. These programmes have not done much so far, but they have the potential to help build a more peaceful continent.

There are still some problems that need to be addressed to make the AU more likely to meet its objectives. Apart from the lack of resources, the AU has to deal with its framework to make it more economical and effective. When looking at the overall structure of the organisation, there is a sense that some organs and programmes have the same fields of competence, goals, and powers regarding peace and security, for instance the CSSDCA and the PSC. There is a risk of overlapping in the activities of a number of organs.

Another problem is the approach that the AU takes when dealing with peace and security. I would call for a human rights-based approach to peace and security. Peace and security are often addressed as a political matter rather than a human rights issue. It must be understood that all the breaches of peace constitute a violation of human rights under the ACHPR. The PSC should ensure that peace and security are dealt with as something people are bound to achieve. The upcoming Court of Justice of the AU should be used properly to that end.

The AU could be an effective instrument for ensuring the full enjoyment of the right of peoples to live in peace and security with such improvements as here suggested. One must be aware, however, that it is the UN Security Council that has the primary responsibility for the maintenance of international peace and security.

2. Recommendations

The action of the AU towards the full enjoyment of the people's human right to live in peace needs to be improved by the leaders of the AU and supported by the international community. These recommendations will be addressed to them.

2.1 To the AU

- Adopt a human rights-based approach to peace and security and raise awareness about it;
- Make the AU accountable to the upcoming Court of Justice for what it does or fails to do;
- Analyse its framework in view of saving resources by merging the organs and the programmes that are intended to play the same role;
- Create a system whereby its activities can be funded, promoted and reinforced by member states.

2.2 To the international community

- Contribute towards the funding of the activities of the AU regarding the realisation of the right to peace;
- Ensure that the collaboration between the AU PSC and the UN Security Council are sufficiently effective, particularly in terms of early warning and sanctions.

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