

**THE AFRICAN UNION AND THE RIGHT
TO PEACE AND SECURITY**

BY NIMATALIE A. OTHMAN

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THE AFRICAN UNION AND THE RIGHT TO PEACE AND SECURITY

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR
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BY

NIMATALIE A. OTHMAN

PREPARED UNDER THE SUPERVISION OF

DR ATANGCHO N AKONUMBO

**FACULTE DE SCIENCES SOCIALES ET DE GESTION
UNIVERSITE CATHOLIQUE D'AFRIQUE CENTRALE
YAOUNDE**

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DECLARATION

I, Nimatalie A. Othman, do hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

SIGNED:

**NIMATALIE A. OTHMAN
(STUDENT)**

SIGNED:

**DR ATANGCHO N AKONUMBO
(SUPERVISOR)**

28TH OCTOBER 2003

DEDICATION

**TO MY FAMILY FOR THEIR CONSTANT LOVE AND
SUPPORT**

My parents, Mr and Mrs O.N.R Othman

My sister, Markieu and family

My brother, Ridwan

and

My husband and soul mate, Gibriel.

**THEY ARE THE PILLARS IN MY TEMPLE OF
INSPIRATION**

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(J'EXPRIME MA GRATITUDE A MONSIEUR ABU KAREEM DIARRA
POUR M'AVOIR AIDE A OBTENIR LA PLUPART DES DOCUMENTS SUR L'UNION
AFRICAINNE)

MY APPRECIATION TO MY COLLEAGUES
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GIVING ME THE OPPORTUNITY TO FURTHER MYSELF.

ABBREVIATIONS

ACHPR	AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHT
AEC	AFRICAN ECONOMIC COMMUNITY
AU	AFRICAN UNION
CADSP	COMMON AFRICAN DEFENCE AND SECURITY POLICY
CEN-SAD	COMMUNITY OF SAHEL-SAHARAN STATES
CSSDCA	CONFERENCE ON SECURITY STABILITY DEVELOPMENT AND COOPERATION IN AFRICA
COMESA	COMMON MARKET FOR EAST AND SOUTHERN AFRICAN STATES
EAC	EAST AFRICAN COMMUNITY
ECCAS	ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES
ECOWAS	ECONOMIC COMMUNITY OF WEST AFRICAN STATES
ECOSOCC	ECONOMIC SOCIAL AND CULTURAL COUNCIL
ECDP	EUROPEAN COMMON DEFENCE POLICY
EU	EUROPEAN UNION
IGAD	INTER-GOVERNMENTAL AUTHORITY ON DEVELOPMENT
MCPMR	MECHANISM FOR CONFLICT PREVENTION MANAGEMENT AND RESOLUTION
NEPAD	NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT
OAU	ORGANISATION OF AFRICAN UNITY
PAP	PAN-AFRICAN PARLIAMENT
PSC	PEACE AND SECURITY COUNCIL
PSOF	PEACE SUPPORT OPERATION FACULTY
REC	REGIONAL ECONOMIC COMMUNITIES
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SRO	SUB-REGIONAL ORGANISATIONS
UMA	ARAB-MAGHREB UNION
UN	UNITED NATIONS
UNDP	UNITED NATIONS DEVELOPMENT PROGRAM
UNESCO	UNITED NATIONS EDUCATIONAL SOCIAL AND CULTURAL ORGANISATION

INTRODUCTION

Nimatalie A. Othman*

The rights of peace are as follows: firstly, the right to remain at peace when nearby states are at war...;secondly, the right to secure the continued maintenance of peace once it has been concluded...;and thirdly, the right to form alliances or confederate leagues of several states for the purpose of communal defence.

Immanuel Kant, The Metaphysics of Morals(1797)

A. BACKGROUND TO STUDY

One of the primary functions of the State is to provide security for its citizens within the Nation State and to ensure their protection from outside threats.¹ Furthermore, the State has a responsibility of creating a peaceful environment in which its citizens are able to enjoy all their rights and freedoms. In other words, this duty of the State translates into a right, for the citizens, to a peaceful and secure society. This right is given binding force within the African Charter on Human and Peoples' Rights (African Charter). Article 23 of the African Charter provides that:

(1)All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States.

(2) For the purpose of strengthening peace, solidarity and friendly relations, 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 in 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

The right to national and international peace and security (the right to peace and security) is a third generation right or peoples' right. This means that it requires some arms of action by the international community for its realisation quite apart from that placed on the State.² This study prefers to examine the protection of the right to peace and security from the perspective of the international community, namely the African Union (AU), which has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa.³ The two main organs specifically available for the protection of the right to peace and security in Africa, can be found in the Peace and Security Council (PSC) and the

* LLB(Canterbury), BL (Freetown), LLM Candidate (Pretoria) ; nima_othman@hotmail.com.

¹ Rugumamu (1993) SAPES Occasional Paper Series No.5, Harare quoted in Naigoo from Proceedings of the UNESCO-ISS Expert Meeting held in Pretoria, South Africa, 23-24 July 2001 7.

² Ajibola (1996) 'Human Rights Agenda for a Stable 21st Century', Lecture.

³ Kindiki (2003) 3 *African Human rights Law Journal* 101.

African Commission on Human Peoples Rights (ACHPR). These are arguably the most theoretically suited towards realising this right and incidentally, can be seen to represent the political and legal aspects of protection respectively. Due to the abundance of literature analysing these two bodies, this study prefers instead to consider a new initiative by the African leaders, a common defence and security policy that is to provide the outline by which the maintenance of peace and security is to be achieved.

B. STATEMENT OF RESEARCH PROBLEM

Despite the letter and spirit of the Constitutive Act (The Act), which provides the basis for the operation of the AU, there is uncertainty as to whether the AU is well equipped to deal with the protection of the right to national and international peace and security. The question being asked, therefore, is: Do the various structures and policies within the AU adequately ensure the protection of the right to peace and security?

C. LITERATURE REVIEW

Several authors have written on the conceptualisation of peace and security. The works of Galtung and the Bouldings are examined to assist with the concept of peace. Galtung, a renowned peace researcher, is credited with widening the definition of peace to include the concept of positive peace. With regard to the concept of security, reference is made to the United Nations Development Programme (UNDP) Report. It is instrumental in providing a concise conceptualisation that is widely accepted in the international arena.

Similarly there has been notable contribution towards the explanation of the *right* to peace and security, sometimes referred to simply as the right to peace. However, most of the literature tends to lack the in-depth analysis required of it. For example, Dawes questions the need for such a right⁴ and Alston considers the reasons for the lack of progress of the right to peace in international law.⁵ Crawford reveals the inconsistency in the definition of Peoples' regarding the right, and further looks at the justiciability of the right.⁶

The most comprehensive perusal of the right to peace within the African context, so far, is by Ouguergouz.⁷ He examines the background to the right in international law considering the question of its viability. He considers Africa's chosen solution to the dilemma over the right by

⁴ Dawes (1986) *Australian Law Journal* Vol. 60.

⁵ Alston (2000).

⁶ Crawford (1988).

⁷ Ouguergouz (2003).

explicit recognition in the African Charter. He further considers the content and subject of the right, and its implementation within the African human rights system. Ouguergouz opines, in reference to Article 23(2), that the implementation of the right to peace and security would seem to be accomplished by the States undertaking their obligations to prevent any subversive or terrorist activity on their territory.

This study is premised on the fact that the implementation of the right to peace and security should not be viewed in such restrictive terms. The African Charter itself advocates for an extensive interpretation of its provisions by making reference to other international and regional human rights instruments as interpretative aids.⁸ This study in a similar vein, therefore, goes beyond the explicit provisions in Article 23(2) to examine and evaluate the other modes of protecting the right through the available mechanisms within the AU. It looks at the proposed framework for a common African defence and security policy (CADSP) which is to act as a guiding feature for the PSC, through which States strive to achieve and maintain peace and security on the African Continent.

D. OBJECTIVES OF STUDY

The objectives of this study are as follows:

- [1] To conceptualise the right to peace and security
- [2] To evaluate the framework for a draft CADSP
- [3] To make recommendations for the better protection of the right to peace and security in the AU.

E. HYPOTHESIS

This study will test the following hypothesis:

- [1] The concept of the right to peace and security is not well defined.
- [2] The mechanisms under the newly established AU, most especially a CADSP, are not likely to adequately protect the right to peace and security.

F. SIGNIFICANCE OF STUDY

Peace and security in Africa is defined as the condition for elaborating the humanity of Africans and the promise of the place of Africa in economic reconstruction in the next century.⁹ Apart from being a recognised right in the African human rights system, it is also

⁸ Art 60 and 61 African Charter.

⁹ Campbell (2000) Occasional Paper No. 62 3.

present amongst the objectives and principles of the AU political agenda enshrined within The Act, with its attainment seen as the gateway to Africa's economic development. Furthermore, this undeniable synergy between the maintenance of peace and security and the attainment of development, also determines the realisation of other human and peoples' rights.¹⁰ Therefore, peace and security is of utmost importance in the current affairs of the continent and, a right being attached to peace and security adds extra weight to its attainment as it places a duty on other entities for its realisation. Notwithstanding this importance, the concept of the right to peace and security is still quite elusive and underdeveloped, a reality which is incomprehensible taking into consideration the infamous characteristic of the African continent for its political unrest and civil wars.

With 14 current internal conflicts, Africa hosts more than one third of the ongoing conflicts in the world.¹¹ The countries not engaged in civil wars are faced with civil and political unrests, refugee influxes, terrorism threats and attacks, the HIV-AIDS epidemic and other contagious diseases, high crime rates, and natural disasters to name a few. It is against this background that a study into the conceptualisation of the right to peace and security is warranted and, as well, the available mechanisms for its protection within the AU.

G. METHODOLOGY

The study looks mainly at secondary sources. The treaties and resolutions of the AU and the UN shall be considered. There is reference to books, journal articles, publications, written materials and conference papers. Finally, due to the topical nature of this study, there shall be reliance on up to date resources, such as the Internet and the various arms of the media.

The study attempts to clarify the parameters of the right to peace and security. This is essential because before one can protect a right one must know what that right entails. It is descriptive in the sense that it gives a factual account of the protection mechanisms provided for by the relevant organs of the AU and an analysis of their effectiveness. In summary, the study is descriptive, interpretative, analytical and prescriptive.

H. LIMITATIONS

Firstly, there is a limitation of material specifically covering the same perspective being pursued in this study, given that the CADSP is still in its preliminary stage. Secondly, pre-

¹⁰ Obasanjo (1993) *Security Dialogue* Vol.24(2) 197.

¹¹ Regehr 'Armed Conflicts Report 2003' <<http://ploughshares.ca/CONTENT/ACR/ACR00/ACR03->

assessment of the non-operational AU organs and policies, such as the PSC and CADSP is based solely on the provisions in the legal instruments establishing them. Thirdly, access to up to date documents from the various conferences and summits held by the relevant organs of the AU is problematic as most of them are not available on the Internet. Fourthly, the depth of study was greatly hindered due to the location of the researcher at the time of writing.

I. SUMMARY OF CHAPTERS

The study is divided into an introductory chapter and three subsequent chapters. The Introductory Chapter sets down the scope and objectives of the study. Chapter one considers the conceptualisation of the right to peace and security and its application within the international and African human rights systems. Chapter two examines the AU protection of the right to peace and security, focusing on the provisions of a framework for a draft CADSP. Chapter three consists of the evaluations, recommendations and conclusions.

CHAPTER ONE

CONCEPTUALISATION OF THE RIGHT TO PEACE AND SECURITY

1. Introduction

Peace has a remarkably high value in society, and the law of peace is part of the classical subdivision of international law. However, the right to peace and security as a legally enforceable human and peoples' right has yet to attain universal acceptance. This Chapter provides the background and conceptual framework for the right to peace and security. It attempts to define the internationally accepted concepts of peace and security and, considers the debate on whether they can be considered as human rights. Further, it examines the right to peace and security first within the international arena before narrowing down to focus specifically at the operation of the right with regard to its content and subject within the African human rights system.

1.1 THE CONCEPTS OF PEACE AND SECURITY

1.1.1 Peace

Peace is ordinarily defined as '*quiet, calm freedom from or cessation of war; civil order*'.¹² This classical definition of peace as the absence of war or hostilities no longer stands in international law.¹³ The proposal by the renowned peace researcher, Johan Galtung, that the 'negative' definition of peace, freedom from war, should be supplemented by a 'positive' definition, is now widely accepted as representative of the concept of peace.¹⁴ Positive peace incorporates:

'the conditions for peace-building, such as "harmony, co-operation and integration" with the need for peace-keeping, and the activities necessary to ensure the freedom from war or hostilities'.¹⁵

Also it is pertinent to note that earlier in 1975, at the Belgrade Conference of the International Committee of the Red Cross (ICRC), this broad view had been incorporated into a formal definition of peace. The positive values to be included in the concept of peace are

¹² Swannell (1992) *The Oxford Modern English Dictionary*.

¹³ Swanson (1991) *New York Law School Journal of International and Comparative Law* 319 referring to Bilder (1982) 11 *Bull Peace Proposals* 387 and Alston (1981) 11 *Bull Peace Proposals* 130. See also Boulding (1978).

¹⁴ See for example, the United Nations '*Seminar on the Relations that Exist Between Human Rights, Peace and Development*' ST/HR/SER.A/10 (1981), quoted in Dawes (Above n 4) 159 and The Harare Conference on Pan-Commonwealth Advocacy for Human Rights, Peace and Good Governance in Africa, Harare, Zimbabwe, 21-24 January 1999.

¹⁵ Dawes (Above n 4) 159 quoting Galtung (1985) 22 *Journal of Peace Research* 145.

integration, human fulfilment, freedom and social justice. Evident from this list are more or less the same set of values covered by the concept of human rights.¹⁶

1.1.2 Security

The ordinary dictionary meaning of secure is 'to be untroubled by danger or fear, to be safe' whilst security is 'the secure condition or feeling'.¹⁷ The traditional notion of security in international law was presented to mean the ability of the state to counter external threat and to maintain an absence of war. Similar to peace, the concept of security now transcends military considerations, a fact which is better illustrated by approaching security in a three dimensional manner, namely international (collective), national (State) and individual (human) security.

1.1.2.1 International/Collective Security

At the global level, collective security is one of the guiding principles of the United Nations Charter towards the maintenance of peace and security.¹⁸ In the aftermath of the Second World War, it was evident that no State was an island and that maintenance of international security required the cooperation of States collectively. This was especially relevant when viewed in the face of the ever-present threat of the use of nuclear weapons capable of transgressing boundaries and destroying whole nations. Indeed, no State could remain unaffected by a war of aggression between two other States possessing nuclear weapons.¹⁹ Therefore, in view of the increasingly pronounced global nature of the problem of security, it became apparent that international security could only be achieved through international cooperation and collective security actions aimed at maintaining peace.

1.1.2.2 National/State Security

National security is a concept with a long history dating back to the first establishment of nation States with the Treaties of Westphalia in 1648.²⁰ National security is defined as:

¹⁶ See Lodgaard, 'Human Security: Concept and Operationalisation', Director, Norwegian Institute of International Affairs <<http://www.hsph.harvard.edu/hpcr/events/hsworkshop/lodgaard.pdf>> (accessed on 6 July 2003) for criticism of this approach.

¹⁷ Swanell (Above n 12).

¹⁸ See Art 1 UN Charter (1945).

¹⁹ Vayrynen (1986) *Bulletin of Peace Proposals* Vol. 17 No 3-4, 395 states that 'no country can obtain security, in the long run, simply by taking unilateral decisions about its own military forces...security depends on the actions and reactions of potential adversaries'. He based his argument on the Palme Commission's Report (1985) which declared 'states can no longer seek security at each other's expense; it can only be obtained through cooperative undertakings'.

²⁰ See also the concepts advanced by Hobbes and Locke on the duties of States vis-à-vis security and citizens. Although in disagreement over what constitutes the law (or state) of nature, they find agreement that man submits to sovereign power to ensure his survival and protection, thus the *raison d'être* of a state is to provide security. Locke (1986) and Polin (1967) both summarised in Baah (2000) 12 and 16 respectively.

*[t]he nations' plan for the coordinated use of all the instruments of state power, non-military as well as military, to pursue objectives that defend and advance its national interests.*²¹

In other words, it is the State's capacity to defend its territorial integrity and its freedom to determine its own form of government. Over the years a shift has emerged from understanding security merely as 'State security' to that including the security of the people. This shift was prompted after the end of the cold war mainly by the consequences of the break up of the Soviet Union. The civil wars that gripped Eastern Europe caused a great number of civilian casualties and destruction of civilian property, formerly considered collateral damage. These events impelled the UN to reconsider the concept of national security to that incorporating the people's security, resulting in the development of a considerable amount of work on what is now known as human security. The operation of the concept of human security emerges in the collective security actions taken by the UN not only to revive the security of the State, but also the security of the people. Examples can be seen in the actions taken in Iraq (1991) in support of the Kurds in the north, and Shiite minorities in the south against the government. Similarly in Somalia 1992 and 1993, humanitarian enforcement action was taken in the absence of a functioning government. Also, examples can be drawn from the human security contingencies in the US-led intervention in Haiti in 1994 and the Australian-led East Timor operation in 1999.²² Unfortunately, the operation of the concept failed to extend to Rwanda in 1994 where over a million Tutsis and Hutu moderates were killed in the genocide.

1.1.2.3 Individual/Human Security

There remains to be reached a consensus on the concept of human security.²³ Due to the fluidity of the concept, there has emerged multi-dimensional accounts of human security that focus on people but differ in emphasis.²⁴ The restrictive view, championed by the likes of the Government of Canada, prefers to look at human security as freedom from fear of physical violence. Galtung redefines physical violence as either being structured (direct) or unstructured (indirect) violence. He explains that,

²¹ Dupuy (ed) *International Military and Defence Encyclopaedia* 2577, presented in the draft version of the 'Reference Curriculum on National Security' by the Working Group on Curriculum Development, meeting 10-11 December 2001 <http://www.isn.ethz.ch/wgcd/Ref_curricula/rc-national-security_GSP_2002-03-04.pdf>(accessed on 6 July 2003).

²² For case studies of these operations, See Thomas and Tow (2002) *Security Dialogue* Vol.33(2) 177
²³ For a synopsis of the development and different views on Human security, see Alkire, 'Conceptual Framework for Human Security' (Excerpt: Working Definition and Executive Summary) 16 February 2002 <<http://www.humansecurity-chr.org/activities/outreach/frame.pdf>>(accessed on 2 August 2003), and Lodgaard (Above n 16).

²⁴ See Naigoo (Above n 1) for his discourse on the neo-realistic and postmodernist approaches to human security which are based on the relevance of the State in the concept of human security.

*[w]here an actor commits the violence, it is personal or direct. Where there is no such actor it is structural or indirect. In the latter situation there may not be any person who directly harms another person in the structure. The violence is built into the structure.*²⁵

MacLean provides that environmental scarcity and mass migration are examples of structural violence.²⁶ As a result of this differentiation, some of the less liberally inclined authors on the subject, suggest that human security should be considered as freedom from only *man-made* physical violence (also known as direct violence).²⁷

The prevalent view, however, prefers to also consider the quality of life as a matter of security.²⁸ Obasanjo considers that:

*On the one hand, it includes conflict prevention, containment and resolution, and derives from common and collective continental security. On the other hand, it embraces all aspects of society – including economic, political and social dimensions of the individual, family, community, and local and national life. This means that the security of a nation must be construed in terms of the security of the individual citizen not only to live in peace but to have access to basic necessities of life, participate in freedom in the affairs of society, and enjoy fundamental human rights.*²⁹

The UNDP set the tone for all succeeding definitions by articulating a universal, preventive ‘people-centered’ approach that focused jointly on freedom from fear and freedom from want. In agreement with the extended view, it stated as follows:

*Human security can be said to have two main aspects. It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs or in communities. Such threats can exist at all levels of national income and development.*³⁰

It then identified seven separate components, which form threats to human security. Lodgaard elaborates on these as follows:

*[e]conomic security(assured basic income), food security(physical and economic access to food), health security (relative freedom from disease and infection), environmental security (access to sanitary water supply, clean air and a non-degraded land system), personal security(security from physical violence and threats),community security(security of cultural identity) and political security(protection of basic human rights and freedoms).*³¹

It is against this background that this researcher finds agreement with the assertion that human security is actually defined by the international human rights instruments, namely the

²⁵ Galtung (1969) 170.

²⁶ Maclean, G ‘The Changing Concept of Human Security: Co-ordinating national and Multilateral Responses’ <<http://www.unac.org/canada/security/maclean.html>>(accessed on 2 August 2003).

²⁷ Lodgaard (Above n 16).

²⁸ See Takasu Y ‘Toward effective Cross-Sectorial Partnership to Ensure Human Security in a Globalised World’ <http://www.mofa.go.jp/policy/human_secu/speech0006.html>(accessed on 23 September 2003), and Thakur in Harris and Mack (eds)(1997) 53.

²⁹ Obasanjo (Above n 10) 202.

³⁰ United Nations Development Programme (UNDP), *Human Development Report* (1994) <<http://www.undp.org/hdro/1994/94.htm>> (accessed on 6 July 2003).

³¹ See Lodgaard (Above n 16) and Weissberg, M ‘Conceptualising Human Security’(2001) *Swords and Ploughshares: A Journal of International Affairs online*<http://www.american.edu/sis/sword/Current_

Universal Declaration of Human Rights (UDHR) and its two protocols the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). These instruments provide for the basic guarantees for food, health, education, housing, protection of family, democracy, participation, rule of law and protection against enslavement, torture, cruel or inhuman or degrading treatment or punishment.³² The argument is that these are the same guarantees sought to be protected by the advocates for the extended view of human security. Therefore, widening the scope of human security only invites duplication of rights already existing as human rights in the international human rights instruments. Thus, there are constant proposals for ways to be sought to make human security less inclusive thus more feasible.

In conclusion, peace now includes both negative and positive peace, meaning the absence of war and the presence of elements conducive to maintaining a stable environment.³³ And security has now evolved from classic territorial security to incorporate the security of the people in terms of their wants and needs and their quality of life.³⁴ These two concepts of peace and security seem to encompass such a wide range of issues that if a right were to be attached to their attainment, then the burden would prove to be indispensable.³⁵ It is especially true with regards to uncontrollable matters such as unstructured violence. Therefore, it would seem unrealistic to hold one accountable for it. Lodgaard in this regard states:

*[t]hat the concept of human security should not include natural disasters because state policy is future orientated and based on prevention and control, whereas natural disasters are beyond control... and unpreventable.*³⁶

Furthermore, the different dimensions of security are very interdependent. Buzan observes that individual security must be the basis for national security, and national security grounded in individual security must, in turn, contribute to international security.³⁷ Thus a holistic and concurrent approach, incorporating both nation and international entities, is required to ensure the achievement of peace and security. Having conceptualised the definitions of

Issue/1.pdf>(accessed on 6 July 2003).

³² Ramcharan (2002) 9.

³³ See the *International Peace Research Association Newsletter* 28 (April 1989) No. 2 5, quoted in Fried (1990) *Pace Yearbook of International Law* 42 describing positive peace as 'based on cooperative patterns of interaction, constructive patterns of human development and an equitable system of social justice'.

³⁴ Thomas(2000) 6.

³⁵ See Scheper (2002) who is of the opinion that the broadening of security concerns results in both positive (more applicability) and negative (over applicability) effects in the construction of security policy. Dimitrijevic in Symonides (1988) 62, finds the inclusion of various desirable values and goals stretches the concept of peace beyond recognition.

³⁶ See Lodgaard (Above n 16), where he states that the concept of human security should not include natural disasters because state policy is future orientated and based on prevention and control, whereas natural disasters are beyond the control of the state and are unpreventable.

³⁷ See generally, Buzan (1983).

peace and security it is important now, to examine what constitutes a human right so as to determine whether peace and security can be considered a human right.

1.1.3 The Right to Peace and Security as a Human Right

1.1.3.1 What is a Human Right?

Legally, a right is an entitlement to something. It is metaphysical in that it only becomes meaningful when denied or violated. A right exists in so far as there is prospect of establishing it in a legal process which enforces it. In this sense, every 'human interest' may become a right if the legal system of the State recognises it as such and it is legally enforceable.³⁸ Human rights are rights accruing to a person by the mere fact that they are human beings. They are rights derived from the inherent dignity of a person.³⁹ The contents of the International Bill of Human Rights constitute the comprehensive list of universally accepted human rights.⁴⁰ And explicit in all human rights instruments is the notion that 'all human rights are universal, indivisible, interdependent and interrelated'.⁴¹ However, this concept is based in theory rather than reality.

Initially there was a broad consensus on the values to be recognised as rights in the UDHR based largely on tradition and various international legal documentations established during the preceding century and a half. The addition of newly independent former colonial states, into the UN, marked the drive to recognise values, previously not perceived as such, as rights. The drive for recognition of solidarity rights of the third generation was foremost amongst them.⁴²

Since then, there has been ongoing debate, with strong proponents on both sides, on whether human rights are universal or culturally relative.⁴³ The relativist argument challenges the notion that any set of principles or beliefs can be capable of universal application. Basing

³⁸ Zupancic (2002) 'The Historical Evolution and the Modern Function of the Protection of Human rights', Lecture.

³⁹ See generally, McFarlane (1985) 3, Sanders (1991) *Human Rights Quarterly* 368, and Baah (Above n 20) 27. See also Dimitrijevic (Above n 35) who provides for the attraction of transforming values into rights as follows: 'if not expressed in terms of rights, the value of human rights... would still be present, morally supported and socially accepted, but not promoted to a higher degree of legal security and enforceability'.

⁴⁰ See, the Universal Declaration of Human Rights (UDHR) adopted by UN General Assembly in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both adopted in 1966.

⁴¹ Vienna Declaration and Programme of Action (1993) A/CONF.157/23, para 5.

⁴² See Vasak, 'For the Third Generation of Human Rights: The Rights of Solidarity', Inauguration lecture and Alston (1983) *Netherlands International Law Review* XXIX(3) 307 referred to in Crawford (Above n 6).

⁴³ See generally on Universalism v Cultural Relativism, Lindholt (1997) and Shestack (1998) *Human Rights Quarterly* Vol. 20.

their stance on the fact that different cultures espouse different philosophies and values concerning the human condition and, therefore, there cannot be a commonly or uniformly applicable theory of human rights. The African human rights system is testimony of this diversion from the established human rights norms. It recognises and gives binding force to third generation or peoples' rights (also known as solidarity or collective rights) in its African Charter.

1.1.3.2 The Right to Peace as a Human Right

The debate on whether peace can be considered a human right is based on two contentious grounds. Firstly, it is a third generation right or peoples' right, a concept that is yet to be universally accepted. Secondly, peace is a value incapable of being a human right. There is no need to go through the mundane procedure of trying to prove that peace can be elevated to the status of a human right. It is self-evident. If a human right is centred around the human dignity of a person and, a peaceful and secure environment provides the best guarantee for the protection of human dignity and, thus the achievement of human rights, then there is no reason why peace, itself, should not be a human right.

The argument against third generation or peoples' rights being considered human rights is based on two further grounds. First, human rights apply to individuals whereas the peoples' rights are collective. Second, human rights can be secured by the law whilst that is not the case for peoples' rights.

Whilst most international human rights instruments take the individual as the primary beneficiary of rights,⁴⁴ there are those who advocate for the inclusion of peoples' rights, based on the contention that the concept of human rights is a developing one which should encompass values of overwhelming importance to mankind.⁴⁵ This researcher, in partial agreement with the culturally relative camp, sees no reason why the norm cannot be extended to incorporate peoples' rights as a consequence of changing needs and developments of the times.

In answer to query on the justiciability of the right to peace and security, it is put forward that one can find the individual's right to peace and security implied within the UDHR. Arguably,

⁴⁴ The exceptions are: Peoples' Right to Self-Determination present in Article 1 of both the ICCPR and ICESCR and the Right to Development recognised as a Peoples' right by the Declaration on the Right to Development (GA Res. 41/128(1986) and affirmed at the World Conference on Human Rights in Vienna (Above n 41).

⁴⁵ For summarisation of this debate see, Joyce (1982) *Christian Century*.

Article 3 of the UDHR can be seen as an individual's right to peace and security,⁴⁶ whilst Article 28 as an extension of the right to embrace international dimensions.⁴⁷ It is further submitted that lack of justiciability is of no consequence. In international law, more often than not, it is the world opinion and pressure that ensures compliance with human rights, not the legal system. This fact is particularly relevant to the issue of peace and security, which is part and parcel of international relations and thus, more susceptible to political considerations and influences than to legal enforcement. Examples of this can be best seen in the African human rights legal system, where there has been general non-compliance with the recommendations, on human right violations, delivered by the ACHPR. This issue is not peculiar to Africa, for, the International Court of Justice's (ICJ) has also faced a similar fate. Its judgment ceding the Bakassi Peninsular to Cameroon has, until the time of writing this study, been ignored by Nigeria.⁴⁸ Therefore, having a legal enforcing system is not always a guarantee of rights.

Abi-Saab proposes three indices by which to test a legal norm:

- [1]the degree of consensus over the social value in question*
- [2]the concreteness of content*
- [3]and the existence of a follow up mechanism that operates as a continuous pressure for compliance.⁴⁹*

Admittedly, whilst the first and third elements are currently in existence, it is the second element which is currently lacking regarding the right to peace and security. However, this hindrance is surmountable with the correct political will and dedication.

In conclusion, this researcher submits that peace can be, and should be considered a human (peoples') right. Its value to society is definite. Its existence guarantees for the protection of other human rights, whilst its absence provides fertile ground for violation of human rights.⁵⁰ In essence, the universal elevation of peace and security to a human (peoples') right, simply depends on the political will of the international community and the various regional human rights systems. It appears that the priorities of the international community are misguided because the acceptance and explicit recognition of the right to peace should have preceded that of the right to development in the 1993 Vienna Conference. This opinion is made based

⁴⁶ Article 3 of UDHR: '*Everyone has the right to life, liberty and security of person*'.

⁴⁷ Article 28 of UDHR: '*Everyone is entitled to a social and international order which the rights and freedoms set forth in this declaration can be fully realised*'. See Pogge in Paul *et al* (1993) 333 for further analysis on possible implications of this provision.

⁴⁸ See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) Judgment (2002) ICJ 3 10 October 2002.

⁴⁹ Abi-Saab in Dupuy (ed) (1980) 160 referred to in Swanson(Above n 13).

⁵⁰ See generally, Baimu (2001) 1 *East African Forum on International and Comparative Law*. See also Art 55 of the UN Charter, The Preamble to UDHR and Preamble to ICCPR and ICESCR on the link between peace and human rights.

on the now widely accepted reality that peace and security is a prerequisite for the attainment of development.⁵¹

1.2 THE RIGHT TO PEACE AND SECURITY WITHIN THE INTERNATIONAL SYSTEM

1.2.1 The United Nations Human Rights System

The right to peace has been proclaimed in a number of non-binding international instruments, in the form of resolutions and declarations, adopted by the UN bodies and specialised agencies.⁵² A right to peace was specifically advocated for in the Kellogg-Brand Pact in 1929 and may be deduced from the Declaration on Principles of Friendly Relations (the Final Act of Helsinki) and many others. However, the first formal recognition of peace as a human right was in a 1976 Resolution passed by the Commission on Human Rights. Here it was stated that, '*everyone has the right to live in conditions of international peace and security*'.⁵³ Two years later the UN General Assembly 'Declaration on the Preparation of Societies for Life in Peace', recognised peace both as an individual and collective right. In 1984, the 'Declaration of the Right of Peoples to Peace' was adopted by the General Assembly, rendering it a collective right.⁵⁴ A further Resolution was passed the following year on the implementation of the provisions in the 1984 Declaration.⁵⁵ Despite these developments, the right to peace was seen just as a reaffirmation of certain general principles of international law.⁵⁶

The 1984 Declaration in particular received much criticism for being superfluous. It was seen as an attempt to make a value stronger by relying on the magic of declaring it a right. According to Dimitrijevic,

*The collective (peoples') right to peace, as advocated by the United Nations and formulated in the 1984 Declaration on the Right of Peoples to Live in Peace, does not have a clear legal meaning and cannot be translated into meaningful action.*⁵⁷

The 1980s saw much debate on the viability of the right to peace. There was great expectation amongst peace proponents that the right to peace would achieve the status of a human (peoples') right, an expectation that never materialised. Alston, however, finds no loss

⁵¹ The Act affirms this in recognising the need '*to promote peace, security and stability as a prerequisite for the implementation of Africa's development and integration Agenda*'. See Preamble to The Act, para 8. See generally, Galtung (1996).

⁵² Art 1 of the UN Charter 1945 firmly establishes the basis for such a right.

⁵³ Marks (1981) 445.

⁵⁴ Declaration of the Right of Peoples to Peace (1984) GA Res. 39/11 UN Doc. A/39/L.14.

⁵⁵ Resolution on The Right to Peace (1985) adopted under the aegis of the International Year of Peace Program (109 in favour, 0 against, 29 abstentions).

⁵⁶ Ouguergouz (Above n 7) 338.

⁵⁷ Dimitrijevic (Above n 35) 64.

in the deterioration of relevance placed on the right to peace. He considers that *'the world is unlikely to be a less peaceful place as a result of the failure to find a meaningful formulation of the right to peace'*.⁵⁸

In the 1990s, Frederico Mayor, the Director-General of United Nations Educational, Scientific and Cultural Organisation (UNESCO) tried to revive the concept without success.⁵⁹ More recently, in 2002 the UN Commission on Human Rights adopted a Resolution on the 'Promotion of the Right of Peoples to Peace' wherein it declared *'that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State'*.⁶⁰ However the right to peace in the UN system remains solely a sacred right not a legally enforceable one.

1.2.2 The European and Inter-American System

The right to peace is not recognised as a human right within the European and Inter-American human rights systems. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and The American Convention on Human Rights (American Convention) tend to focus on first-generation rights, those of civil and political rights which are centered on the individual.⁶¹ Gradually, though, second-generation rights were also given more recognition.⁶² However, the six identified classes of third generation rights (collective rights), namely, the right to self-determination and equality rights, right to permanent sovereignty over natural resources, right to development, clean environment and peace and security, and, rights of minorities are yet to be included in their respective human rights conventions.⁶³

The reason for this psyche can be traced back to the gross violations of human rights during the Second World War, when individuals suffered at the hands of the majority, namely the Jewish minority *vis-à-vis* the democratically elected Nazi German regime.⁶⁴ Since then, any concept resembling a collective right was viewed in a negative light and thus avoided. The

⁵⁸ Alston (Above n 5) 292.

⁵⁹ Mayor, The Human Right to Peace, Declaration by the Director-General, United Nations Educational, Scientific and Cultural Organisation (UNESCO) Doc. SHS-97/WS/6(1997).

⁶⁰ Commission on Human Rights Resolution 2002/71, 56th meeting, 25 April 2002, E/2002/23-E/CN.4/2002/200.

⁶¹ European Convention, Adopted by the Council of Europe on 4 November 1950 in Rome (Entry into force: 3 September 1953) and American Convention (Pact of San Jose) Adopted by the Organisation of American States on 22 November 1969 in Costa Rica (Entry into force: 18 July 1978) respectively.

⁶² See in the European system: Protocol No1 to the European Convention (1954), European Social Charter (1961) and Additional Protocol to the European Social Charter (1988). Also in the Inter-American system: Art 26 of American Convention and Protocol of San Salvador (1988).

⁶³ Alston (Above n 42) 56.

⁶⁴ Heyns in Soateman (2001) 171 where he points out *'what is today called human rights is born out of common sense realisation that in order to achieve peace and progress, the causes of dysfunction in all forms must be removed'*.

fear being that a peoples' right may be used as an excuse to usurp and pose danger to individual rights. In this regard, Sieghart states, partly in reference to the Nazi Germany incident, that :

*[a]bstract concepts have in the past only too often presented great dangers to the enjoyment by individuals of their human rights and fundamental freedoms.*⁶⁵

However, it can be argued that even if the right to peace was proposed as an individual right, it would still be rejected as the European and Inter-American systems consider the enforcement of such a right to be unfeasible and unrealistic. A further fear is that the right to peace and security will leave States, especially the like of the United States of America in view of its aggressive foreign policy, open to endless litigation. Consider for example, the United States' attempts to avoid the jurisdiction of the International Criminal Court (ICC) by signing 180 bilateral treaties with States to ensure non-extradition of indicted United States citizens to the ICC.⁶⁶

Further reason for this state of affairs can be placed on the different priorities of the first and third worlds. Thus, Dimitrijevic states that:

*[t]he relevance placed on different aspects of human rights and peoples' rights is determined by ideological differences or in cultural relativism.*⁶⁷

He goes on to quote from Marks, that '*the West favour human rights, the East favour peace and the South development*'.⁶⁸ This division makes general sense but is in need of some modification. It must be acknowledged that there are sub-blocks within each block of States. These may be geographically associated with each other but have different priorities due to their level of political influence and development. Examples can be seen in the division between Western and Eastern Europe, North and South America in terms of political, economic, cultural and social values. This reality became even more pronounced in the Cancun Summit on World Trade 2003. The 'East' being referred to forms part of the Council of Europe and yet their interest in peace as a human right has not taken fruition in the European Convention. This can be explained by their relative lack of influence within the Council of Europe.

In a similar vein, one may ask how the UN, which consists of States from both the European and Inter-American systems, was able to pass a declaration (92 in favour, 0 against and 34 abstentions) recognising the right to peace when a majority of these States were so opposed to the idea. The answer lies partly in the fact that the declaration recognising the right is seen

⁶⁵ Sieghart (1998) 368.

⁶⁶ See Gutman, Bush's Arm-Twister, Newsweek The International Newsmagazine (Special Report) September 9, 2002 2-3.

⁶⁷ Dimitrijevic (Above n 35) 47.

⁶⁸ As above, quoting from Marks (1980) *Bulletin of Peace Proposals* XI (4) 339.

merely as proposing a sacred right, not a legally enforceable one, thus rendering it harmless.

Dimitrijevic explains that:

[I]t was difficult to vote against the declaration, which extorted governments to act for peace, and, vague and toothless as it was, contained no threat to anyone... The other reason was that...politically, there was a stronger presence of third world states disinclined towards individualism and its related interpretation of human rights, which brought them closer to the political East, the main champions of the declaration.⁶⁹

In conclusion, the present status quo in the European and American systems can be described, in the words of Dimitrijevic, as providing many individual rights which can be exercised with the view of defending peace and preventing national and personal involvement in war.

Having considered the status given to the right to peace in the UN human rights system and its lack of recognition within the European and Inter-American human rights human, the African human rights system will now be examined.

1.3 THE RIGHT TO PEACE WITHIN THE AFRICAN HUMAN RIGHTS SYSTEM

It is clear that peace is an aspiration common to all peoples and is at the centre of all concerns. The pre-occupation of African States with peace can be traced as far back as 1963, at the conference establishing the Organisation of African Unity (OAU). At that conference, a resolution was adopted promoting the denuclearisation of Africa, the withdrawal of foreign military bases and urging the Great Powers to sign a general disarmament treaty.⁷⁰ A year later, further undertakings were given by States not to manufacture or control nuclear weapons.⁷¹ These efforts culminated in the adoption of the African Nuclear-Weapon-Free Zone Treaty (The Pelindaba Treaty) in 1996 by African States, which makes the African Continent a Nuclear Free Zone. Over the years various legal instruments have been adopted and ratified, premeditated towards the achievement and maintenance of peace and security on the African continent. In furtherance of their convictions, the African leaders declared the year 2000 as the Year of Peace, Security and Solidarity in Africa, with dedications, somewhat unrealistically, made anew to eliminate armed conflicts in Africa by the end of that year.⁷²

⁶⁹ Dimitrijevic (Above n 35) 51.

⁷⁰ Resolution on General Disarmament adopted at the Summit Conference of Independent African States meeting in Addis Ababa (Ethiopia) from 22-25 May 1963.

⁷¹ Declaration on the Denuclearisation of Africa adopted by the Assembly of Heads of State and Government of the OAU meeting in ordinary session in Cairo (Egypt) from 17-21 July in 1964.

⁷² Declaration of the year 2000 as the Year of Peace, Security and Solidarity in Africa adopted by the Assembly of Heads of State and Government, 35th Ordinary session, Algiers 12-14 July 1999 AHG/Decl.2(XXXV).

The right to peace and security is given binding force as a peoples' right within the African Charter which was adopted in 1981 and came into force in 1986. In this regard, Africa is a step ahead of the European and Inter-American human rights systems and has succeeded in achieving what the UN could not. The right to peace and security is well justified when viewed in light of the effect of the repercussions of armed conflicts, direct or indirect, international or not, on the African Peoples. It shows that the African leaders were thinking progressively when they chose to elevate the right from the status of a mere value in society to that of an enforceable peoples' right. In the Grand Bay Declaration and Plan of Action, the African leaders affirmed that the right to national and international peace and security is a universal and inalienable right, which forms an integral part of fundamental human rights.⁷³ However, despite all these developments, one must also study the reality on the ground. The added value, if any, of having peace and security as a peoples' right must be determined.

1.3.1 The African Charter on Human and Peoples Rights and the ACHPR

The African Charter creates enforcement mechanisms for all recognised human and peoples' rights in the African human rights system. These mechanisms consist mainly of the African Commission on Human and Peoples' Rights (ACHPR) and the envisaged African Court on Human and Peoples' Rights (African Court). With regard to the African Court, 15 ratifications are needed for it to come into force, so far only nine States have ratified. The ACHPR has a promotional mandate and a dual protection mandate which consists of receiving communications and State reports.⁷⁴ Thus, it monitors the level of compliance with the provisions of the African Charter through State reports and as well as gives recommendations to the communications received.

The ACHPR has been the subject of much criticism.⁷⁵ Its state reporting mechanism is rendered almost redundant due to the fact that most States either submit their reports late or fail to do so altogether. Statistics of submission of reports to the ACHPR show : 9 States submitted regularly, 25 submitted with delay and 19 had submitted no report at all.⁷⁶ The ACHPR has, so far, provided two guidelines to assist in state reporting, the first of which was

⁷³ Grand Bay (Mauritius) Declaration and Plan of Action CONF/HRA/DECL(1) para 2, OAU Ministerial Conference on Human Rights in Africa, 12-16 April 1999, Grand Bay, Mauritius.

⁷⁴ See African Charter, Art 62 (state reporting) and Art 54 and 55 (State and non-State communications respectively).

⁷⁵ See 'Evaluation: The African Commission on Human and Peoples' Rights' <<http://www.humanrights.dk/upload/application/cdf466a6/afr.commanus.pdf>> (accessed on 12 October 2003) and Mutua, M 'The African Human Rights System: A critical evaluation' <http://hdr.undp.org/docs/publications/background_papers/MUTUA.pdf> (accessed on 12 October 2003).

⁷⁶ Report of the Interim Chairperson on the First Ministerial Conference of the African Union on Human Rights in Africa, Kigali, Rwanda, 5-9 May 2003, EX/CL/46(III) para 5.

too long and complicated and whose provision for the right to peace and security was interpreted thus, that:

*States should work for international and national peace and security in accordance with the principles of solidarity and friendly relations affirmed by the OAU and the UN Charters.*⁷⁷

To say that this is vague is a gross understatement. Even more discouraging are the second set of guidelines passed in 1998 which consisted of just two pages. The bottom line is that the ACHPR failed to use the given opportunity to elaborate on what is constituent of the right to peace and security.

Quite apart from these facts, it lacks effective tools to ensure compliance with its recommendations thus rendering its findings meaningless. It is also surprising to note that since the establishment of the ACHPR in 1986, there has never been a communication alleging violation of the right to peace and security. In fact, the only time reference was made to the right was in the communications brought against Mauritania, whereby the ACHPR argued, by implication, that Article 23 could be used to protect the villages of black Mauritians against attacks.⁷⁸ The reason for the hesitancy in the bringing of communications and delivering of recommendations based on the right to peace and security, can be attributed to the right's strong connections with international relations and politics. Thus, Crawford sees a flaw in peoples' having such a right. He states:

*To say as Article 23 (does)...that 'peoples' have that right, even if in this context 'peoples' means the population of states as a whole, might appear to make a wide range of sensitive foreign policy questions justiciable in the African Commission of Human and Peoples' rights.'*⁷⁹

The general impression is that this right, though in existence, cannot be enforced. Nmeheille, thinking along slightly different lines, proposes that by the nature of Article 23, it would appear that States are in a better position to enforce a violation of the right to peace and security than individuals or groups. However, judging from past conduct, the likelihood of this happening is even more remote than individual communications. States are very reluctant to bring communications against each other before the ACHPR for diplomatic reasons. Consolation can be found, however, in the innovative stance taken by the ACHPR in applying other peoples' right provisions in the African Charter, in the landmark decision of

⁷⁷ Guidelines for National Periodic Reports, Second Annual Activity Report of the African Commission on Human and Peoples' rights (1988-89) ACHPR/RPT/2ND ANNEX XII para 9.

⁷⁸ Murray (2001) *African Human Rights Law Journal* Vol. 1(1) 3. See Communications No. 54/91,61/91 98/93,164/97-196/97,210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interfricaine des Droits de L'homme and RADDHO, Collectifs des Veuves et Ayants- droit, Association Mauritanienne des Droits de L'homme Vs Mauritania* in Compilation of the Institute for Human Rights and Development, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights (1999-2000) ACHPR/RPT/13TH, 161at para 140.

⁷⁹ Crawford (Above n 6) 62.

SERAC.⁸⁰ Perhaps with time one shall see a communication boldly based on Article 23 with an equally bold decision recognising its violation.

1.3.2 Content of the Right to Peace and Security

The African Charter limits the question of ensuring of the right to peace and security to two situations. States are to guarantee that individuals enjoying asylum on their territories do not engage in subversive activities against their State of origin or other State parties and, that their territories are not to be used as bases for subversive or terrorist activities against the people of any other State. Ouguergouz opines that

*[w]hilst these are inherent in the whole agenda of peace, they serve the notion of sovereignty and non-intervention in the internal affairs of Member States.*⁸¹

They simply form a fresh codification of a rule of general international law prohibiting subversive or armed terrorist activities.⁸² It is apparent that the duty of ensuring the right to peace and security should encompass more than those listed under Article 23(2). The African Charter should not have placed a limit on the mode of implementation as it overly simplifies the steps to be taken by the States for the protection of the right to peace and security.

Therefore, one must not take the explicit terms of the Article 23 as being comprehensive. Other means of implementing the right, apart from those provided for under Article 23(2), must be read into the African Charter as implicit. The implementation of the implicit duties in the African Charter should be undertaken bearing in mind what has already been determined as constituent of the accepted concepts of peace and security, as well as what having such a right entails. This teleological approach would suit the African Charter as it would advance the better protection of the right to peace and security, as well as those of other human and peoples' rights.

1.3.3 Subjects of the Right to Peace and Security

According to Ouguergouz, the word 'peoples' in the African Charter is a 'Chameleon-like' term,

[w]hose content is dependent on the function of the right concerned; it is the context in which the term is used that gives it its contours. In the African Charter, the people are therefore a social entity which varies in nature according to the right which is to be implemented.

⁸⁰ Communication No.155/96: *The Social and Economic Rights Action Centre and the Center for Economic and Social Rights Vs Nigeria* < <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>>(accessed on 12 February 2003).

⁸¹ Ouguergouz (Above n 7) 348.

⁸² As above, He further refers to: 'Declaration on the inadmissibility of intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty' GA Res.2131(XX) 21 December 1965 para 2, and the Resolution on the 3rd principle (non-intervention) which may be seen as codification of a customary principle, GA Res. 2625 (XXV) 24 October 1970.

The term 'Peoples' can be used to mean the State, the citizens forming a State, an identifiable group of people with certain common characteristic within a State, or persons within the geographical limits of an entity yet to achieve political independence or majority rule.⁸³ It would appear that Article 23 generally applies to all; people of the State taken as a whole, its different ethnic and political components taken individually or the State.⁸⁴ The peoples referred to in Article 23(1) can be considered to be either the peoples constituting the state or minority of people within the State. And in Article 23(2) the State can be considered the beneficiary of the right as well as the bearer of the duty.

1.4 CONCLUSION

Criticisms have been levelled at the African Charter, regarding its general inability to enforce its provisions without a court, and specifically that its provisions are not concrete enough to aid the enforcement of the right to peace and security.⁸⁵ Further, the situations in which States are to ensure the achievement of peace, solidarity and friendly relations, are not considered to be adequate. However, what must be understood is that the enforcement of the right to peace and security is not affected by a court-ordered system, but rather, by the pressure of public opinion.⁸⁶

Thus the reluctance in awarding legal status to the right to peace and security based on the uncertainty of their concrete realisation through the systems of law enforcement, is unwarranted. International law works differently. Having evolved from custom and general expectation, compliance under international law is usually achieved by pressure of world public opinion. Therefore, the mode of enforcement through ACHPR should not be relied upon exclusively. Instead, other avenues such as policies on conflict prevention and management and good governance, and the strengthening of State co-operation and friendly relations should be pursued.

The African human rights system has outdone the other existing regimes in its explicit recognition of the right to peace and security. However, the follow up, promotion and implementation of the right leaves much to be desired. Medina elaborates on the differences and interplay between promotion and protection of human rights in the following extract:

⁸³ Kiwanuka (1988) *The American Journal of International Law* Vol.82 100.

⁸⁴ Ougergouz (Above n 7) 352.

⁸⁵ Nmehielle (2001) 53 '*for practical purposes, it is difficult to see how Article 23(1) of the African Charter can be properly articulated in terms of enforcing the right of all peoples to national and international peace and security*'.

⁸⁶ Swanson (Above n 13) 322.

Protective measures play some sort of promotional role and usually more than a germ of protection can be traced in any promotional activity, for through promotion grows awareness, forming a sort of social control to discourage violations. Promotion is aimed at furthering the growth and development of rights. Protection in the broad sense is aimed at supervising the observance of rights by states through laws providing legal foundation and protection proper is the setting up and making use of mechanisms for the purpose of protection against violation.⁸⁷

A full analysis of the role of the AU in promotion and protection of the right to peace and security is beyond the scope of this study, which prefers to focus on the protection aspects only. The most recent initiative towards protecting the right to peace and security within the AU will be considered in the next Chapter.

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Medina, Do International Human Rights Laws Protect Women? in Mechanisms for Change 78 (on file with this researcher).

CHAPTER TWO

THE AFRICAN UNION AND A COMMON AFRICAN DEFENCE AND SECURITY POLICY

2. Introduction

This Chapter focuses on the latest initiative towards the maintenance of peace and security, namely, a proposed CADSP whose establishment is provided for within The Act.⁸⁸ Before embarking on a consideration of the proposed principles, objectives and organs of the CADSP, it is worthwhile to first examine the political background to the emergence of the AU and its general structures, so as to better understand the motivations behind the establishment of such a CADSP.

2.1 THE AFRICAN UNION AND THE CONSTITUTIVE ACT

The Assembly of Heads of State and Government of the Organisation of African Unity (OAU) declared the establishment of the AU at its fifth extra-ordinary session held in Sirte, Libya in March 2001. The Act of the AU entered into force on 26th May 2001 and has now replaced the OAU.⁸⁹ From first glance, there is a noticeable change in focus of the new Pan-African body in that its objectives reflect the current status of development on the African continent. Namely, quite apart from the maintenance of peace and security, there is also notable importance placed on the recognition and promotion of respect for human rights and the democratic system. This change of stance can be attributed to the experiences and lessons learned under the previous institution of the OAU.

The previous thirty years under the OAU were characterised by stunted economic development, failed attempts at peacekeeping and the gradual fragmentation of the African continent into three major blocks. Abass and Baderin term this fragmentation the '*sub-regionalisation of the continent's problems*'. They state that:

Thus, with 16 West African states gravitating decisively towards ECOWAS, SADC caring for 12 states, and most of the northern African countries moving towards the League of Arab States, there was little to convince the leadership of the OAU that the organisation was becoming fastly irrelevant in the political equation of the African continent'.⁹⁰

⁸⁸ Article 4(d) of The Act.

⁸⁹ The Constitutive Act of The African Union, July 2000.

⁹⁰ Abass and Baderin (2002) *Netherlands International Law Review* (2002) XLIX 12.

It was against this backdrop that Libyan President Muammar Ghaddafi convened the 1999 and 2000 Sirte meetings, which led to the Sirte Declaration and culminated in the creation of the AU. The basis of the AU policy towards peace and security, subject to further treaties or protocols as may be adopted, are contained in the principles and objectives of The Act. These and the organs of the AU will be considered briefly due to the abundance of literary material already available on them.⁹¹

2.1.1 The Organs of The AU

The permanent organs of the AU consist of the Assembly of the Union, The Executive Council, The Pan-African Parliament, The Court of Justice, The Commission, The Permanent Representatives Committee, The Specialised Technical Committees, The Economical, Social and Cultural Council, and The Financial Institutions.⁹² Ironically, none of these nine permanent organs were geared specifically to deal with issues of either peace and security or human rights. As a consequence of which, the two organs most suited to dealing with these issues, namely the ACHPR and the PSC, were later adopted in the Durban Summit of July 2002. This was pursuant to Article 5(2) of The Act which states that the organs of the Union shall include '*other organs that the Assembly may decide to establish*'.⁹³ However, it has been asserted that the ACHPR was incorrectly incorporated into the AU framework. It was an organ already existing under the OAU, therefore, it cannot be considered new. The correct approach should have been to incorporate it through Article 3(h) or alternatively to utilise the devolution processes under Article 33(1) and (3) of The Act.⁹⁴ Notwithstanding, its erroneous incorporation, the ACHPR is now part of the AU.

2.1.2 The Objectives of The AU

Fourteen objectives are set out in Article 3 of The Act designed to enhance political cooperation and economic integration. Those specifically dealing with issues of human rights and peace and security, include, that the Union shall '*promote peace, security and stability on the continent*',⁹⁵ '*promote democratic principles and institutions, popular participation and good governance*'⁹⁶ and '*promote and protect human and peoples' rights in accordance with*

⁹¹ See for example: Udombana (2002) *Indiana International and Comparative Law Review* 185, Udombana (2003) *George Washington International Law Review* 55, Udombana (2002) *American University International Law Review* 1178, Udombana (2002) *California Western International Law Journal* 69, and Magliveras and Naldi (2002) *International and Comparative Law Quarterly* Vol.51 415.

⁹² Art 5 (a) – (i) of The Act.

⁹³ Protocol Relating to the Establishment of the Peace and Security Council of The African Union, Adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 July 2002 (on file with this researcher).

⁹⁴ Abass and Baderin (Above n 90) 33.

⁹⁵ Art 3(f) of The Act.

⁹⁶ Art 3(g) of The Act.

the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁹⁷

2.1.3 The Principles of The AU

A perusal of the principles similarly confirms the importance placed on the maintenance of peace and security. The AU is to function with the:

'establishment of a common defence policy for the African continent',⁹⁸ the 'peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly',⁹⁹ the 'prohibition of the use of force or threat of use of force among Member States of the Union',¹⁰⁰ 'the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity',¹⁰¹ 'the peaceful co-existence of Member States and their right to live in peace and security',¹⁰² 'the right of Member States to request intervention from the Union in order to restore peace and security',¹⁰³ 'respect for democratic principles, human rights, the rule of law and good governance',¹⁰⁴ 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities',¹⁰⁵ and the 'condemnation and rejection of unconstitutional changes of governments'.¹⁰⁶

It has been noted that whilst the objectives declare the aspirations of the AU, it is the principles that may well become part of its legal corpus. This was applied in the former OAU where principles formed the main process by which the OAU embarked on lawmaking.¹⁰⁷ Therefore, it is not surprising that Article 4(d), which states that the AU shall function in accordance with the *'establishment of a common defence policy for the African Continent'*, is in the process of being realised.

2.2 A COMMON DEFENCE AND SECURITY POLICY

2.2.1 Background

The idea of a common defence policy for Africa can be traced back to Kwame Nkrumah, who considered the establishment of an African High Command, in his landmark proposal for a United States of Africa. Back then, the idea did not find strong support as the African States were just emerging from colonial experience and whose priorities were on the maintenance of State sovereignty. With the change in political landscape since the end of the Cold War,

⁹⁷ Art 3(h) of The Act.

⁹⁸ Art 4(d) of The Act.

⁹⁹ Art 4(e) of The Act.

¹⁰⁰ Art 4(f) of The Act.

¹⁰¹ Art 4(h) of The Act.

¹⁰² Art 4(i) of The Act.

¹⁰³ Art 4(j) of The Act.

¹⁰⁴ Art 4(m) of The Act.

¹⁰⁵ Art 4(o) of The Act.

¹⁰⁶ Art 4(p) of The Act.

¹⁰⁷ Maluwa (2000) 12 RADIC 201 referred to in (Above n 90) 14.

which was one of the factors that militated against the original idea of an African High Command, and the current degenerated state of affairs on the continent, the States are no longer averse to the idea.

It is against this background that the Assembly of Heads of State and Government emphasised the need for a CADSP, during the July 2002 inaugural Summit of the AU in Durban, South Africa. Thereafter, a request was made for the establishment of a group of experts to examine all aspects related to the establishment of such a CADSP and for their recommendations to be submitted at the subsequent ordinary session. In line with the recommendations, an expert meeting was convened in March 2003, which resulted in the preparation of a document entitled *FRAMEWORK FOR THE DRAFT COMMON AFRICAN DEFENCE AND SECURITY POLICY* (The Framework). The Framework was considered at the second AU summit in Maputo, July 2003. Further consultations are now being carried out on it with the view of finalising it for the subsequent session of the AU Assembly of Heads of State and Government.

The need for a CADSP is inherent in the objectives of The Act, particularly Articles 3(a) to (h), as well as, in Article 4(d) of The Act. Furthermore, Article 3 of The Protocol establishing the PSC provides that the objectives of the PSC shall include *'the development of a Common Defence Policy for the Union, in accordance with Article 4(d) of the Constitutive Act'*. It also provides in Article 7, that one of the powers of the PSC shall be to *'implement the Common Defence Policy of the Union'*.

2.2.2 Definitions and Scope of The Framework

The Framework provides working definitions of the meaning of “defence” and “security” as well as what are perceived as the common security threats to Africa. It is heartening to note that the definition given for “defence” was geared towards encompassing,

[b]oth the traditional, military and state-centric notion of the use of the armed forces of the state to protect its national sovereignty and territorial integrity, as well as the less traditional, non-military aspects which relate to the protection of the people's political, cultural, social and economic values and ways of life'.¹⁰⁸

The inextricable linkage between national security, regional security and that of the whole African continent is acknowledged. With regards to the definition of security, there is also a shift from the traditional state-centric notion to one more multi-dimensional, embracing such issues as:

[h]uman rights; the right to participate fully in the process of governance; the right to equal development as well as the right to have access to resources and the basic

¹⁰⁸ The Framework, May 2003 (on file with this researcher) para 5.

*necessities of life; the right to protection against poverty; grave health conditions; protection against natural disasters, as well as ecological and environmental degradation.*¹⁰⁹

The common security threats, which undermine the maintenance and promotion of peace, security and stability on the continent, are listed as either internal or external. The internal threats consist of Inter-State Conflicts/tensions; Intra-State Conflicts/tensions; unstable Post-Conflict Situation; Humanitarian factors resulting from war which in turn engender insecurity and Other circumstances (namely proliferation of small arms, pandemic diseases such as HIV/AIDS, environmental degradation, and violent and urban crimes).¹¹⁰ The external threats to Africa's Continental security are listed as possibly including:

*External aggression, including the invasion of an African country; International conflicts and crises with adverse effects on African regional security; Mercenarism; International terrorism; Globalisation and unfair international market rules; The accumulation, stockpiling, proliferation and manufacturing of weapons of mass destruction, particularly nuclear weapons, chemical and bacteriological weapons, unconventional long-range and antiballistic missiles; Cross-border crimes such as drug and human trafficking (which may constitute a threat at the regional and national levels).*¹¹¹

It appears that the common threats facing the African continent are insurmountable due to their wide spectrum. Thus a very complex network of cooperation as well as foresight and strategic planning on the part of the African states is a necessity.

2.2.3 Objectives and Goals of The Framework

If the objectives and goals of the Framework are anything to go by, then it would seem that the drafters tried to envisage all possible uses that can be drawn from having a common defence policy. With the result that there is constant overlapping of issues. The main essence of the objectives ensure '*collective responses to both internal and external threats to Africa in conformity with the principles enshrined in The Act*'. By the establishment of the CADSP, it is hoped that it shall enable the achievement of the objectives of The Act, especially those relating to defence and security matters which are contained in Articles 3 and 4 of The Act. These include: defending the sovereignty, territorial integrity and independence of the AU Member States; the peaceful resolution of conflicts; prohibition of the use of force amongst Member States; non-interference in the internal affairs of Member States; the right of the AU to intervene in a Member State in respect of grave circumstances; and, peaceful co-existence and the right of Member States to live in peace and security.¹¹²

¹⁰⁹ (Above n 108) para 6.

¹¹⁰ (Above n 108) para 9 (i) – (v).

¹¹¹ (Above n 108) para 10 (a) – (g).

¹¹² (Above n 108) para 13.

The CADSP is to be used as a *'tool for the simultaneous enhancement of defence co-operation between and amongst African States and also the consolidation of national defence at the same time'*.¹¹³ It shall be accomplished *'through training of military personnel; exchange of military intelligence and information; development of a military doctrine and the building of collective capacity'*.¹¹⁴ The desired outcome being that it will eliminate suspicion and rivalry and promote mutual trust and confidence among African States. In the same vein, it is to provide for transparency and clarity on national defence and security policies. It shall be cost effective, eliminating unnecessary national expenditure on defence and security, thus allowing for the efficient re-allocation of resources to address the most threatening challenges to defence and security.

In general, the CADSP will *'advance the cause of integration in Africa and safeguard the common values, fundamental interests and the independence and integrity of individual States, sub-regions and the continent'*;¹¹⁵ *'promote a culture of peace and peaceful co-existence among AU Member States and within the regions'* and *'foster an emphasis on the non-use of force, such as preventive diplomacy, negotiation, and the use of good offices, persuasion as well as mediation, conciliation and adjudication'*.¹¹⁶

The other objectives include enhancing the capacity for, and co-ordination of, early action for prevention, containment, management, resolution and elimination of conflict. This shall include, the deployment and sustenance of peacekeeping missions and thus, promote initiatives that will preserve peace and development in Africa.¹¹⁷

It is also instrumental that the objectives include the harmonisation of national legislation and executive actions on defence and security matters, this will enhance the capacity of the AU to develop and promote common policies in other areas such as foreign relations and trade, and ensure the defence of the continent and the strengthening of its negotiating skills. Most notable are the objectives to establish and operationalise the African Standby Force as provided for in The PSC Protocol and the encouragement of the conclusion and ratification of non-aggression pacts between and amongst African States and the harmonisation of such agreements. In addition, a landmark inclusion for Africa, is the objective to enforce the precepts of the ACHPR and promote the acceptance of minimum standards of human rights.

¹¹³ (Above n 108) para 14.

¹¹⁴ (Above n 108) para 16.

¹¹⁵ (Above n 108) para 17.

¹¹⁶ (Above n 108) para 19.

¹¹⁷ (Above n 108) para 18.

A framework shall be provided for humanitarian action to ensure that international humanitarian law is applied during conflicts between and among African States; to develop the doctrine related to refugees and internally displaced persons; delineating the legal parameters for African Civil Society to function with regard to conflict prevention, management and resolution; for post conflict peace building; and, for ensuring that international environmental standards are maintained during periods of conflict.

2.2.4 Principles and Values of The Framework

The principles informing the CADSP include the principles contained in Article 4 of The Act. These generally concern the prohibition of use of force, the right to intervene, the rejection of unconstitutional changes of government, rejection of terrorism and subversive activities and the enabling of peaceful environment by adhering to democratic principles, rule of law, human rights and good governance.

2.2.4.1 The Prohibition of Use of Force

This principle has a general application in international law and can only be deviated from in exceptional situations provided for in the UN Charter.¹¹⁸ In The Act, there is provision for the right to intervene in certain circumstances which shall be considered below.

2.2.4.2 The Right to Intervene in Member States

The right to intervene applies in two scenarios. The first concerns intervention by the AU pursuant to a decision by the Assembly in respect of grave circumstances. These are listed as war crimes, genocide and crimes against humanity.¹¹⁹ In an amendment to The Act, there is the new ground of a '*serious threat to the legitimate order for the purpose of restoring peace and security*'.¹²⁰ Viewed from another angle, this addition appears to be merely a further attempt to ensure the protection of States from unconstitutional changes of government. Baimu and Sturman, in agreement, state that:

[o]n closer inspection.....it becomes clear that this amendment is not intended to protect the individuals but to entrench the regimes in power.¹²¹

The second concerns Member State requesting for intervention in order to restore peace and security.¹²² It may seem contradictory that there are provisions within Article 4 of The Act for both non-intervention and the right to intervene. Infact, there is constant debate on how to

¹¹⁸ See Chapter VII, UN Charter 1945.

¹¹⁹ (Above n 100).

¹²⁰ Art 4 of The Act (Amendment) Adopted by the Assembly of Heads of State and Government, Extraordinary Session, February 2003.

¹²¹ Baimu and Sturman (2003) *African Security Review* 12 (2) 43.

¹²² (Above n 101).

draw the line between the right to intervene and the time-honoured customary international law principle of non-intervention, the manifestations of which were most recently seen in the US invasion of Iraq in March 2003. However, upon closer scrutiny the provision of the non-intervention in Article 4 of The Act substantially differs from that of Article 2(7) of the UN Charter. In Article 4(g), there is reference to '*non-interference by any Member State in the internal affairs of another*', whilst Article 2(7) states '*nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State*'. Therefore, it is apparent that within The Act the prohibition is placed on the Member States instead of the AU itself, which allows the AU to intervene in the above prescribed circumstances.¹²³

2.2.4.3 The Rejection of Unconstitutional Changes of Government

The principle on the Unconstitutional changes of government¹²⁴ was earlier formulated in the 'Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government'.¹²⁵ Article 30 of The Act states that governments which come to power through unconstitutional means, shall not be allowed to participate in activities of the AU. The aim of the provision is to serve as a deterrent for conflicts, one of the sources of which is unconstitutional changes of government. It has since been used against Madagascar. However, though theoretically sound, the practical effectiveness of the principle is questionable. For example, since the suspension of Madagascar from the AU, several other unconstitutional changes of government have taken place. In the year 2003 alone one failed and four successful Coup d'états took place. The overthrows were in Central African Republic (March), Equatorial Guinea (May), Sao Tome (July) and Guinea Bissau (September) and the attempt was in Mauritania (August). Nevertheless the African leaders remained firm on the principle. At the second AU summit held in Maputo, July 2003, the self-proclaimed President of the Central African Republic, Francois Bozize, was not invited.

2.2.4.4 Rejection of Terrorism and Subversive Activities

This principle is based on the condemnation and rejection of acts of terrorism and subversive activities.¹²⁶ An addition was made to Article 4 of The Act to include the '*prohibition of any Member State from allowing the use of its territory as a base for subversion against another Member State*'. These two principles incidentally correspond to the duty placed on States

¹²³ Abass and Baderin (Above n 90) 14. For further discourse on the subject see, Cilliers and Sturman (2002) *African Security Review* 11 (3) 29, and Baimu and Sturman (Above n 121) 37.

¹²⁴ (Above n 106).

¹²⁵ The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, OAU, Doc. AHG/Decl.5, July 12 2000.

¹²⁶ (Above n 105).

under Article 23(2) of the African Charter in the implementation of the right to national and international peace and security. These principles also highlight the ongoing trend in intra-state conflicts whereby foreign territories are used to attack into neighbouring States.¹²⁷ This was the case with the Rwandan rebel group, the Revolutionary Patriotic Front (RPF) based in Uganda, and the Sierra Leone's Revolutionary United Front (RUF) which used Liberia and Guinea Conakry as sanctuaries.

2.2.4.5 Democratic Principles, Human Rights, Rule of Law and Good Governance

The principle on respect for democratic principles, human rights, the rule of law and good governance, is symbolic of the positive peace approach. It is now recognised that transparent and democratic governments are more likely to invest in non-violent processes of solving internal conflicts thus the establishment of an environment with the existence of such principles provide the best form of conflict prevention. Therefore, it can be said that the 'prevention is better than cure' philosophy is the driving force behind this principle.¹²⁸

In addition, the CADSP is formed by the following principles and values:

[i] The indivisibility of the security of African States: the security of one African State is linked to the security of other African States, and the continent as a whole.

[ii] The traditional African principle and value of equal burden-sharing and mutual assistance;

[iii] The symbiotic relationship that exists between security and development in Africa.

[iv] The fundamental link that exists between stability, human security, development and cooperation, in a manner that allows each to reinforce the other;

[v] Subject to the generally accepted norms of free speech, African States shall not engage in, or allow non-state entities to engage in any actions, that incite or intend to incite individuals or groups in the territory of other African countries to violence, which actions amount to propaganda for war or advocate hatred based on race, ethnicity, gender or religion.

[vi] The plight of African refugees and internally displaced persons shall be given due consideration.

[vii] Finally, the strengthening of links with the UN pursuant to Article 8, which stipulates a role for regional organisations in the maintenance of international peace and security.¹²⁹

These principles, specific to the Framework, spell out the importance of solidarity and cooperation between member states, whilst reminding them of the inextricable link between security and development. They touch on crucial issues such as refugees and the internally displaced and, in possible connection to refugees, the need to curb transnational subversive activities. Finally, there is inclusion of importance of interaction with the UN.

¹²⁷ This was recognised as one of the crimes of Aggression recognised in the United Nations General Assembly Resolution on Definition of Aggression, Resolution 3314(XXIX) of 14 December 1974.

¹²⁸ For efforts being taken in consolidation of this principle see, Report of the Interim Chairperson on the proceedings of the African Conference on Election, Democracy and Good governance, Executive Council, Third Ordinary session, Maputo, 4-8 July 2003, EX/CL/35(III).

2.2.5 The Building-Blocks of The Framework

2.2.5.1 General Instruments of OAU/AU

In line with the states objectives and principles, the CADSP plans to make use of a number of existing inter-governmental defence and security instruments at the continental level, as building blocks to inform ongoing efforts to formulate and implement the CADSP. These include: The Convention for the Elimination of Mercenaries in Africa,¹³⁰ The African Nuclear-Weapon-Free Zone Treaty (the Treaty of Pelindaba),¹³¹ The Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement of Hazardous Wastes Within Africa,¹³² The Bamako Declaration on an African Common position on the Illicit Proliferation, Circulation and trafficking of Small Arms and Light Weapons,¹³³ The Algiers Convention on the Prevention and Combating of Terrorism and the Algiers Plan,¹³⁴ The Kempton Park Plan of Action on a Landmine-Free Africa,¹³⁵ and The African Charter on Human and Peoples' Rights.¹³⁶

The following, are also considered important to the framework: The Protocol to the African Charter on Human and Peoples' Right on the Establishment of an African Court on Human and Peoples' Rights,¹³⁷ The African Charter on the Rights and Welfare of the Child,¹³⁸ The Declaration of the Assembly of Heads of State and Government of the OAU on the Political and Socio-economical Situation in Africa and the Fundamental Changes Taking Place in the World,¹³⁹ The Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution,¹⁴⁰ The Grand Bay (Mauritius) Declaration and Plan of Action,¹⁴¹ The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government,¹⁴² The Declaration and Plan of Action on Drug Abuse and Illicit Trafficking Control in Africa,¹⁴³ The Abuja Declaration on HIV/AIDS Tuberculosis and Other Related Infections Diseases,¹⁴⁴ The

¹²⁹ (Above n 108) para 28.

¹³⁰ Adopted July 1977.

¹³¹ Adopted 1998.

¹³² Entry into force May 1994.

¹³³ Adopted December 2000.

¹³⁴ Entered into force December 2002.

¹³⁵ Adopted May 1997.

¹³⁶ Entered into force October 1986.

¹³⁷ Adopted June 1998.

¹³⁸ Entered into force November 1999.

¹³⁹ Adopted 1990.

¹⁴⁰ Adopted 1993.

¹⁴¹ Adopted April 1999.

¹⁴² Adopted July 2000.

¹⁴³ Adopted July 1996.

¹⁴⁴ Adopted April 2001.

Abuja Declaration on Roll Back Malaria in Africa,¹⁴⁵ Declaration on the Code of Conduct on Inter-African Relations,¹⁴⁶ The OAU Convention Governing Specific Aspects of Refugee Problems in Africa,¹⁴⁷ The Cairo Agenda for Action,¹⁴⁸ The African Charter for Popular Participation in Development,¹⁴⁹ The Conference on Security, Stability, Development and Cooperation in Africa,¹⁵⁰ and The New Partnership for Africa's Development.

Due regard is also given to the various UN instruments on the rights of women, 'whose relevance cannot be over-emphasised'. It is assumed that the recent adoption of the Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa at the AU Summit in Maputo, July 2003, shall also be taken into consideration in The Framework.

The wide array of instruments the CADSP plans to refer to, have gone beyond military considerations to include all aspects of societal matters. This alone, is a huge achievement in terms of conceptualisation and with the correct implementation mechanisms to accompany it, as well as the political will of States, it could be very successful. For the purposes of this study only a few of the above instruments will be considered. These include The Mechanism for Conflict Prevention, Management and Resolution (MCPMR), The Conference on Security, Stability, Development and Cooperation (CSSDCA), and The New Partnership for Africa's Development (NEPAD).

2.2.5.2 The MCPMR, The CSSDCA and NEPAD

The MCPMR was established by The Cairo declaration adopted by the OAU in 1993. It has been incorporated as one of the organs of the AU, pending the ratification and entry into force of The PSC. Its primary objective is the anticipation and prevention of conflicts, and it makes provision for peacekeeping missions where conflicts have already occurred. A peace fund was established to finance the MCPMR's activities.

The CSSDCA adopted by the Assembly of Heads of State and Government in Lome in 2000, is a comprehensive response to the multi-faceted challenges of defence and security in Africa. It is based on four concerns (also referred to as "calabashes"), namely Security, Stability, Development and Cooperation. The elements of the Security calabash consist of the following: strengthening of the MCPMR, establishing effective cooperation and

¹⁴⁵ Adopted April 2000.
¹⁴⁶ Adopted June 1994.
¹⁴⁷ Adopted September 1969.
¹⁴⁸ Adopted June 1995.
¹⁴⁹ Adopted February 1990.
¹⁵⁰ Adopted 2000.

harmonisation between the OAU and the UN, adoption of confidence building-measures, endorsing the Early Warning System, implementing of Ready Contingents for possible deployment by UN, eliminating illicit proliferation and trafficking of arms, and, monitoring the implementation of the Algiers Decision declaring 2000 as the year of Peace, Security and Stability in Africa.

NEPAD, through its peace and security component, sets out to promote long-term conditions for development and security and, to build the capacity of African institutions for early warning and the enhancement of their capacity to prevent, manage and resolve conflicts. In particular, African leaders have pledged themselves to joint responsibility for strengthening mechanisms for conflict prevention, management and resolution at the regional and continental levels, and to ensure that these mechanisms are used to restore and maintain peace. Additionally, the NEPAD 'Declaration on Democracy, Political, Economic and Corporate Governance', provides for the establishment of an African Peer Review Mechanism (APRM) on the basis of voluntary accession. The declaration spells out the institutions and processes that will guide future peer reviews, based on mutually agreed standards, democracy and political, economic and corporate governance. At the time of writing this study, 16 countries had ratified the instrument. Ghana is the first State to agree to be subjected to evaluations, the overseeing of which shall be done by a group six 'eminent persons' before the end of the year 2003.¹⁵¹

2.2.5.3 The Sub-Regional Organisations

In Addition to the listed building blocks, the CADSP aims to cultivate greater cooperation with the instruments and mechanisms at the sub-regional level. These sub-regional organisations, which are essentially economic-orientated, have made various efforts to establish common policies on defence and security issues and, consequently, a number of instruments have been adopted and mechanisms established to coordinate regional defence and security policies. These exist within ECOWAS (Economic Community of West African States), IGAD (Inter-Governmental Authority on Development), SADC (Southern African Development Community), UMA (Arab-Maghreb Union), the EAC (East African Community), CEN-SAD (Community of Sahel-Saharan States) and COMESA (Common Market for East and Southern African States).

¹⁵¹ See Bertrand, J 'African Union (AU) Summit in Maputo, Peace and Stability dominate the agenda' The Courier ACPEU No. 199 July August 2003 <http://europa.eu.int/comm/development/body/publications/courier199/en/en_004.pdf> (accessed on 12 October 2003).

2.2.6 The Organs of The Framework

The organs of the CADSP shall consist of a number of frameworks for defence and security existing in Africa at the continental and regional/sub-regional levels. At the continental level, these include, the Assembly of the AU and the PSC. At the regional/sub regional level the peace and security mechanisms of the regional economic groupings shall be used.

2.2.6.1 The Assembly of Heads of State and Government

The Assembly is the supreme organ of the AU, which deals with threats to Africa's collective defence and security. It shall give directions to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace.¹⁵² The Assembly will also monitor policies and decisions of the AU, as well as ensure compliance by all Member States. Any Member State that fails to comply with the decisions and policies of AU will be in danger of sanctions, which will include, 'the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'. In addition, there is provision for the delegation by the Assembly, of any powers and functions to any organ of the AU. Although the Pan-African Parliament (PAP) established pursuant to Article 5(1)(c), is poised to play a critical role in conflict management; wherein it will promote peace, security and stability in the continent and make recommendations towards contributing to the attainment of the objectives of the AU; and, draw attention to the challenges facing the integration process in Africa, including strategies for dealing with them.¹⁵³ The PSC is the appropriate organ to which the Assembly will delegate its powers relating to peace and security.

2.2.6.2 The Peace and Security Council

The PSC shall, once it enters into force, replace the Cairo Declaration. At the time of writing this research, only 19 States had ratified The Protocol, whilst 27 states are needed for it to enter into force. The PSC deals with the enforcement of those principles pertaining to the maintenance of peace and security. It is so stated in the Preamble to The Protocol in the following words:

Desirous of establishing an operational structure for the effective implementation of the decisions taken in areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction.

Based on the model of the UN Security Council, this new body shall be consisted by 15 members elected in rotation. They shall pass resolutions and send troops on the ground,

¹⁵² Art 9(1)(g) of The Act.

¹⁵³ Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, OAU Doc. EAHG/Dec.2(v), CM/2198 (LXXIII)(Feb. 2001).

based on two-thirds majority, no veto power exists to hinder decision-making. A Standby Force and a Military Staff Committee shall assist in the providing troops and give advise respectively.¹⁵⁴ A notable characteristic of the PSC is that it introduces a Panel of the Wise comprised of five personalities of the continent, who are apolitical but recognised for their moral authority. They shall advice the PSC on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa.¹⁵⁵ There is also provision for an Continental Early Warning System (an idea carried forward from the MCPMR and CSSDCA).¹⁵⁶

The PSC proposes for the harmonisation of the regional mechanisms for conflict with that of the AU and seeks close cooperation with the ACHPR.¹⁵⁷ The relationship between the PSC and the ACHPR is one of utmost importance. The Protocol provides that the PSC 'shall seek close co-operation' with the ACHPR in all matters relevant to the mandate and objectives of the PSC. Furthermore, the ACHPR is obliged to bring to attention the attention of the PSC, 'any information relevant to the objectives and mandate of the PSC'¹⁵⁸. With the close collaboration of these two institutions, the ACHPR is given more "teeth". The PSC can provide the much needed political pressure for the compliance of recommendations from the ACHPR. A critical analysis of the PSC has already been undertaken and shall not be repeated here.¹⁵⁹

2.3 CONCLUSION

A sustainable peace and security order across Africa requires the establishment of a 'security community' in Africa.¹⁶⁰ That is, a community that transcends international boundaries in which settlement of disputes by anything other than peaceful means is unthinkable. Prevailing internal peace is an essential precondition for such an inter-state security order. Example of current security communities in the world include Western Europe, North America and the majority of South East Asia. A common defence policy is arguably a substantial step towards achieving this paradigm, however, there is concern that it is an endeavour beyond the African leaders.¹⁶¹ The realisation of the aspirations put forward in the framework for the draft CADSP will largely depend on the constructiveness of the

¹⁵⁴ For full details see, The framework document of the African Standby Force and The Military Staff Committee, 12-14 May 2003, Addis, AU Exp/ASF-MS/2(1), which was consequently adopted by the Third Session of African Chiefs of Defense Staff.

¹⁵⁵ Art 11 of The PSC Protocol.

¹⁵⁶ Art 12 of The PSC Protocol.

¹⁵⁷ Art 19 of The PSC Protocol.

¹⁵⁸ As above.

¹⁵⁹ Aullo, 'The African Union and Conflict Management' October 2002 (on file with this researcher). Also see Kindiki (Above n 3) 11.

¹⁶⁰ Schoeman, 'The African Union as an emerging security community', paper presented at ISSUP and CEMIS (SANDF) training college, Pretoria, July 2002.

¹⁶¹ 'The African Union and Peace and Security', Issues Paper for the AU Symposium prepared by InterAfrica Group/Justice Africa, March 2002<<http://www.uneca.org/adfiii/auissuepn3/htmW>>(accessed

interpreters of The Act and, the political will and commitment of African leaders. This is because even the most elegantly formulated legislation can, by itself, achieve nothing without proper and dynamic implementation by the relevant institutions. Therefore, much will depend on the implementation of the provisions of the CADSP once it enters into force.

CHAPTER THREE

EVALUATIONS AND CONCLUSION

3. Introduction

The first Chapter conceptualised the right to peace and security, the second Chapter focused on the provisions of the framework for the draft CADSP, and this concluding Chapter provides the evaluation and recommendations for the AU, generally, and the framework, specifically, in relation to the protection of the right to peace and security.

3.1 EVALUATIONS

3.1.1 General: The African Union

The AU as an organisation has some inherent defects in its set up and functioning which, if not rectified, may affect its potential to be effective in carrying out its objectives and principles.

The first institutional barrier is that only three of the fourteen organs of the African Union, are in operation, namely the Assembly, the Executive Council and the ACHPR. The PSC was adopted in the first AU summit in Durban, South Africa and is awaiting ratification by the prescribed number of states before coming into force. The Protocols establishing a the Pan African Parliament and the Court of Justice are similarly on hold.¹⁶² A draft Protocol for the Economic, Social and Cultural Council (ECOSOCC) has been prepared and is still to be adopted.¹⁶³ The financial institutions are yet to be established. Thus, the current state of the AU institutions is a preliminary hindrance in itself to the effective working of the organisation.

The second shortcoming is the creation of too many bodies, with some having overlapping functions. For example, the AU makes provision for the Court of Justice, whilst there is already in existence a Protocol Establishing an African Court on Human and Peoples' Rights. So far, the interrelation of these two bodies has not been specified, whilst there is continuous debate on whether to merge them or not.¹⁶⁴ When these courts come into existence,

¹⁶² Protocol of The Court of Justice of The African Union, adopted by the 2nd Ordinary session of the Assembly of the African Union, Maputo, July 2003 (Assembly/AU(II)Rev.1).

¹⁶³ Draft State of the Economic, Social and Cultural Council of the African Union <<http://www.sarpn.org.za/documents/d0000353/index.php>>(accessed on 12 October 2003).

¹⁶⁴ See Viljoen and Baimu 'Courts for Africa: Considering the co-existence of the future African Court of Justice and the African Court of Human and Peoples' Rights (unpublished, on file with this researcher).

pursuant to either the evolution or devolution process, one would find unnecessary overlapping which in turn will affect their efficiency.

The third problem is the issue of funding. Experience from the OAU era saw several institutions and policies becoming redundant due to lack of financial resources. If one considers that the AU now has more bodies than its predecessor, one can already foresee a problem ahead. Already there are reports that the AU is strapped for cash, with 10 members facing the threat of sanctions for not paying their dues.¹⁶⁵

Apart from the institutional shortcomings in the AU, there is an emerging political divide amongst the Member States in terms of visions and policies for the continent. The revisionist States headed by the likes of South Africa and Senegal are those pushing for the reform of the African continent based on dramatic moves towards respect for good governance and human rights. Whilst the non-revisionist States such as Libya, Zimbabwe (and possibly Uganda) call for democratic values to be reconsidered in the terms of the specificity of the African continent. For an organisation that is pledging 'unity', this trend of having differences on the most basic of issues such as visions for the way forward, is not only disheartening but might prove to be a thwarting factor for the achievements of the aims for Africa. With regard to the AU's role in protecting the right to peace and security; the current structures are in place in terms of both legal and political organs.

3.1.1.1 Legal Mechanisms in the Protection of the Right to Peace and Security

A quasi-judicial ACHPR to provide recommendations on communications and an envisaged court to pass binding judgements on human rights violations committed by States. However, the ACHPR's shortcomings are noted and it would need to go through an overhaul for its efficiency to be improved. The provisions on the proposed African Court also have hindering factors. For example, States at the time of ratifying the Court's Protocol have the option to withhold consent on being subjected to individual or NGO cases.¹⁶⁶ Bearing in mind that most of the communications against States have been brought by either individuals or NGOs, this automatically blocks out the bulk of cases.

Therefore, with the Commission's shortcomings and the impending Court's restrictions, the legal implementation of the right to peace and security appears grim. Furthermore, the African Charter has added to this bleak state of affairs by being evasive on who constitute

¹⁶⁵ Mutume, G 'African summit seeks new drive for peace' <<http://www.africarecovery.org>>(accessed on 19 March 2003).

¹⁶⁶ Art 34(6) African Court Protocol.

the 'People' in peoples' rights and restrictive on the modes of implementation for the right to peace and security.

3.1.1.2 Political Mechanisms in the Protection of the Right to Peace and Security

The political mechanisms generally include the principles and organs of the AU. The principles of the AU are on the right track. The imposition of the right to intervene under the prescribed conditions, the rejection of unconstitutional changes of government and, the relevance placed on good governance and human rights are commendable. What remains to be seen is the actual implementation of these provisions in practice. The combined efforts of the PSC, the peace and security component of NEPAD and its APRM policy, the ECOSOCC as well as the PAP, when they all eventually come into force, hold good promises for the continent. As long as they are well-coordinated with respect to each others' functions and do not suffer the fate of previous organs in terms of financial insufficiency.

The PSC guided by a CADSP and with a Standby Force at its disposal, could be a powerful weapon in the guarantee of the right to peace and security.

3.1.2 Specific: The Framework

The whole idea of a CADSP is a brilliant one. The inter-relatedness of conflicts and destabilising elements means that most threats are trans-boundary, thus warranting the need to harmonise the continent's response to them. The Framework, from its objectives, principles and organs, seems promising. It covers all the relevant challenges, with regards to peace and security, currently facing the African continent and further sets down the tools it wishes to use in facing these challenges.

3.2 RECOMMENDATIONS

3.2.1 General

The General recommendations made towards the greater protection of the right to peace and security in the AU are as follows:

Recommendation 1: The PSC or the ECOSOCC must cultivate a relationship with UNESCO, particularly with its Culture of Peace Programme. Ngwane describes the programme thus:

(it).. aims at peace-building from the grassroots level, mainly through programmes in which players from all sides participate in the design and implementation of projects at

*community and national levels.*¹⁶⁷

The conviction behind the programme is that lasting peace comes within a nation, from its people and culture, not imposed upon it. Therefore the education and indoctrination of the youth and masses is imperative, as it sows the seed of peace, from the onset, into the heart of society.

Recommendation 2: The utmost efforts should be taken to encourage States to ratify all the relevant Protocols establishing the AU organs. A decision was passed to this effect by the Executive Council '*appealing to all Member States to sign and ratify the Treaties/Conventions adopted under the aegis of the AU, or accede to them.*'¹⁶⁸ However more drastic steps should be taken to elaborate on the urgency of the matter. For example, setting deadlines for ratification by States, failing which they face shaming tactics from the AU.

3.2.2 Specific

The Recommendations made towards the establishment of a common defence and security policy are as follows:

Recommendation 1: The need for greater cooperation and coordination between the AU, more especially the PSC and the Sub regional organisations (also known as Regional Economic Communities), has been repeatedly highlighted by the African leaders. A Protocol on the relations between the AU and RECs is actually in the making.¹⁶⁹ It seems therefore that the African leaders have finally decided to go beyond the constant rhetoric towards specifying the modalities of a working relationship between the two forms of establishments. The only recommendation in this regard therefore, is that the utmost care ought to be taken in the preparation of the Protocol. It should not be rushed, only to face amendments in subsequent years (as is the case of The Constitutive Act).

Recommendation 2: The AU must continue to ponder upon innovative means of raising funds.¹⁷⁰ At the second AU summit in Maputo, the European Union (EU) was asked to 'examine the possibility of setting up a Peace Support Operation Facility (PSOF), to fund peace support and peacekeeping operations conducted under the authority of the AU'.

¹⁶⁷ Ngwane, G 'African security Council as an Organ of the African Union' Conflict Trends 1/2002 34.

¹⁶⁸ See Decision on the Status of Signatures and Ratification of AU Treaties, Doc.EX/CL/36(III), EX/CL/Dec.33(III).

¹⁶⁹ See Decision on the Report of the interim chairperson on the Protocol on relations between the AU and RECs, Doc.EX/CL/22(III).

¹⁷⁰ Decision on the Report of the Interim Chairperson on Alternative Sources of Funding the African Union, Doc.EX/CL/24(III), confirms that studies and recommendation in this regard will be submitted for

However, in line with Africa's new philosophy of 'African solutions to African problems', this researcher supports the proposition by the OAU Club of Cameroon. It put forth the idea that all visitors to Africa should pay a solidarity entry visa fee of 10 dollars. This according to the President of the Club, would generate 200 million dollars annually. The Peace Fund, as it stands, constitutes only 6% of the AU budget which is highly insufficient. Experience shows that certain State parties are willing to contribute peacekeeping troops but are hindered by lack of funds. For example, the African force deployed in Burundi by the AU numbers only 1,250 instead of the total 2,870 envisaged. The South African quota is already on the ground, but the Mozambican and Ethiopian troops have not yet been deployed due to a lack of resources.

Recommendation 3: Lessons may be drawn, where necessary, from the European Common Defence Policy (ECDP). For example, the ECDP provides for a Civilian Crisis Management Force which shall be composed of 5,000 police, to deal with non-military issues on the ground. The resolution establishing it is aimed at '*strengthening the capabilities of the European Union in the field of civil protection*'. Furthermore, they have established a network for the protection of public figures.¹⁷¹ This idea may prove useful to the African continent whose leaders are always, it seems, in danger of being overthrown by their own military. The very entity that is supposed to ensure their protection. By creating this network in Africa, the protection of the leaders shall not be restricted to the State's security forces, it would be internationally collective, thus ensuring security of the leaders' reign. Currently, measures to protect classified information are being taken and expanded in Europe. This is highly relevant in this day and age, where terrorism is an ever-present threat, that requires espionage-like tactics for its elimination. Africa should not hesitate to develop similar devices in the CADSP.

3.3 CONCLUSION

The right to national and international peace and security is a third generation right recognised in the African Charter. Through this study, we have gone through the process of firstly defining the internationally accepted meaning of the terms *peace* and *security*. We then deliberated on what is meant by a human right and whether peace is considered a human (peoples') right. We touched on the issue of universalism and cultural relativism to illustrate the existing disagreement as to what should be included as a human right, with specific regard to the right to peace and security. To illustrate this point, we compared on the one hand, the UN human rights system which accepted it as a peoples' sacred right and, on the

¹⁷¹ consideration at the 4th Session of the Executive Council.
European Network for the Protection of Public Figures (Council Decision 2002/956/JHA of 28 November 2002) Official Journal L 333, December 10, 2002.

other hand, the European and American human rights systems which outrightly rejected its recognition. And we finally focused on the African human rights system which explicitly recognises and gives binding force to the right. The reason for this methodology was to show whether the right exists, what the right encompasses, before examining how it is protected.

The aim of this study was to clarify two issues. Firstly, whether the Peoples' right to peace and security is well defined in the African Charter. This we discovered not to be so. The African Charter had deliberately left out the definition of peoples, the result of which meant that each provision for peoples' right had to be considered in the context of the particular right.

With specific reference to the right to peace and security we found that it was very illusive and vague.

*All peoples shall have the right to national and international peace and security*¹⁷²

There is no elaboration on who constituted the 'peoples', nor is there a conceptualisation of peace and security. And further the ACHPR, currently the main body responsible for the interpretation and application of the African Charter, has either lacked the opportunity or daring to elucidate on the contents and subjects of the right. The result is that, one is left at the mercy of the various authors writing on the subject, who place their own interpretations on what the right should encompass. The African Charter, in a further erosion of the right, restricts its implementation to two situations which also constitute the duty placed on the States. This state of affairs towards the right needs to be corrected. Special studies must be undertaken and seminars held towards providing a working definition of the right as has been the case concerning the Right to Development. The right to peace and security is an important one and should not be rendered unenforceable by the mere fact of its imprecision.

The second aim of our study was to determine whether the AU is capable of adequately protecting the right to peace and security. In this case we chose to focus on the CADSP which is the guiding framework that will complement the work of the PSC and the African Standby Force. Our study looked at the provisions and found them to be comprehensive and in cognisance of the challenges facing Africa. However, it is the application of policies and ideas that is of real importance and in this regard we found that though the AU was full of potential it was in danger of being hindered by organisational setbacks, division in political visions, and funding.

¹⁷² Art 23(1) African Charter.

In answer, therefore, to our hypothesis put in the beginning of the study, it is submitted that the right to peace and security is not well defined. Furthermore, the AU as it stands, without the required modifications and political will, may not adequately protect the right to peace and security.

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