CHAPTER 4: THE PAST AND FUTURE ROLE OF AFRICAN INTERGOVERNMENTAL ORGANISATIONS IN HUMANITARIAN INTERVENTION: CHALLENGES AND PROSPECTS

4.1 INTRODUCTION

The international society is completing a transition from the Westphalian order to the global characteristics of the twenty-first century. This transition has

manifested itself in at least two aspects of a normative and institutional nature. The first change is that major contemporary developments are inspired by the need to ensure human dignity, freedom and welfare. The second and important change and one that is relevant in this chapter is that while the international society keeps its universal nature, regionalism has become its main driving force, to such an extent that centralised action is no longer possible unless it relies on effective regional co-operation.[1]

In terms of normative developments, the above-mentioned changes have precipitated an impressive *corpus* of international law relating to human rights, peace and security and therefore, by extension, to humanitarian intervention. The primary role in the enforcement of these norms still remains, to a large extent, with the UN, which has an obvious comparative advantage in taking the leading role in these matters. But the role of regional and sub-regional intergovernmental organisations remains pivotal.[2]

In the context of African regional and sub-regional organisations, there appears to be an increasing realisation that these organisations have an important role to play in the promotion of human rights, peace and security on the continent. Against this background, this Chapter examines the role or potential role of African intergovernmental organisations, generally in issues of human rights, and particularly in humanitarian intervention on a continent from where horrendous statistics of inhumanity and atrocity have emanated. An analysis of the role of African intergovernmental organisations in humanitarian intervention is also done against the background of internal armed conflicts in Africa.[3]

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[1] Pinto & Vicunna (1999) 16-17.

[2] See Boutros Ghali, B 'Improving Preparedness for Conflict Prevention and Peace-keeping in Africa: Report of the Secretary-General,' 1 November 1995, UN Doc A/50/711 and S/1998/318, para 4; Annan, K 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General', 13 April 1998, UN Doc A/52/871 and S/1998/318, para 41.

[3] For an overview of internal armed conflicts in Africa, see OAU (1998) 24-82 and Mekenkamp *et al* (1999), generally.

4.2 THE SUBSIDIARY ROLE OF AFRICAN INTERGOVERNMENTAL ORGANISATIONS IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY IN AFRICA: IMPLICATIONS FOR HUMANITARIAN INTERVENTION

During the 1990s, successive UN Secretaries-General Javier Perez de Cueller, Boutros Boutros-Ghali and Kofi Annan put forward proposals for a greater contribution by regional organisations with regard to issues of conflict resolution and the maintenance of international peace and security.[4] The proposals demonstrate the increasing willingness of the Security Council to authorise regional and sub-regional intergovernmental organisations to carry out operations relating to the maintenance of international peace and security, sometimes at the initiative of the concerned regional or sub-regional organisation.

What has been missing, though, is an outright endorsement by the Security Council permitting these organisations to venture into such operations without Council authorisation.[5] Yet, a few regional or sub-regional organisations have in the last decade or so taken the liberty of undertaking enforcement action involving the use of force without prior authorisation of the Security Council. Some notable examples of such undertakings are the ECOWAS intervention in Liberia and in Sierra Leone, and the NATO military attack on Kosovo in 1999. These examples have already been discussed in Chapter 2.

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[4] See de Cueller, JP (1990) *Report of the Secretary-General on the Work of the Organisation* 21; Boutros-Ghali, B (1992) 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping' *Report of the Secretary-General Pusuant to Security Council Statement of 17 June 1992* UN Doc A/47/277-S/24111 Paras 60-65; Boutros-Ghali, B (1992) *A Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations* UN Doc A/50/60-S/1995/1 of 3 January 1995 paras 79-96; Annan, K (1997) 'Renewing the United Nations: A Programme for Reform' *Report of the Secretary-General* UN Doc A/51/950 of 14 July 1997.

[5] Deen-Racsmany (2000) 297.

This section focuses on the subsidiarity debate on restructuring the operational relationship for the use of force between the UN and regional and sub-regional intergovernmental organisations in Africa. In the search for subsidiarity, two agendas appear to be competing.[6] The first of these is based on 'burden sharing', and seeks to build a new co-operative and complementary division of labour between the UN on the one hand and regional and sub-regional organisations on the other.

The second agenda is based on 'burden shifting', and it seeks to devolve responsibility for action to the concerned regional or sub- regional organisation, without due concern for whether the capacity exists for effective response. Burden shifting appeals to Western governments that are either reluctant to commit military or civilian personnel to politically volatile and physically dangerous situations, or are unwilling to underwrite the costs of assistance in regions where their rarely defined 'national interests' do not lie.[7]

However, this self-centred approach undermines the very aspiration on which the international community of nations is founded, and is therefore undesirable in this era of shrinking time, shrinking space and shrinking borders. Instead, burden sharing should guide the normative and institutional improvements within and outside the UN framework, recognising that the UN lacks the capacity, resources and expertise to tackle all problems related to the maintenance of international peace and security.

In particular, burden sharing should encourage recognition of an increased role of regional and sub-regional intergovernmental organisations in humanitarian intervention. These organisations should play a prominent role in humanitarian intervention because it is the countries of the region or sub-region that are the most likely to be affected by refugee flows or other consequences of gross

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[6] For a fuller discussion of these, see Deen-Racsmany (2000) 298 ff.

[7] Deen-Racsmany (2000) 298.

human rights violations. In addition, these countries are as a result of their proximity better placed to undertake fact finding before a decision to intervene is made. They are also capable of a more rapid response.

Chapter VIII of the UN Charter governs the role of regional and sub-regional organisations in the use of force. Under this Chapter, the Security Council has the 'primary responsibility for the maintenance of international peace and security'.[8] However, regional and sub-regional organisations - which the Charter refers to as 'regional arrangements or agencies[9] - may exist 'for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'.[10] However, such regional arrangements or agencies and their activities must, according to article 52, be consistent with the objectives of the UN.

The Security Council is obliged to utilise the regional and sub-regional organisations for actions related to the Council's mandate, that is, the maintenance of international peace and security, provided that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the ... Council'. [11] The above provision contains significant ambiguities concerning the use of force by regional organisations under the auspices of the UN Charter. These are briefly outlined below.

First, the term 'enforcement action' employed in the UN Charter is not defined. Article 53 merely obliges the Security Council to utilise regional or sub-regional organisations in carrying out 'enforcement action' where appropriate. The ICJ

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[8] Art 24.

[9] What constitutes a 'regional arrangement or agency' is not defined in the UN Charter. The meaning of the term is quite controversial. For definitions,see, for instance, Kelsen (1951) 161-145 and Akehurst (1967) 177-180.

[10] Art 52.

[11] Art 53.

gave some guidance on this issue in the *Certain Expenses Case*,[12] when it concluded that peacekeeping operations conducted with the purpose of the maintenance of international peace and security, and based on the consent of the parties concerned or clearly not directed against the sovereignty and territorial integrity of any state, should not be considered as enforcement measures.

This means that only action contrary to the sovereignty and territorial integrity of the target state amounts to an 'enforcement action' if the action is authorised by the UN or other intergovernmental organisation. According to Moore, this argument should apply not only to measures authorised by the Security Council, but also to those sanctioned by the General Assembly in the Uniting for Peace Resolution[13] and to those undertaken in the context of regional and sub-regional organisations.[14] What is not clear is the question of whether or not 'enforcement action' entails humanitarian intervention.

A second ambiguity relating to the use of force by regional or sub-regional organisations in the context of the UN Charter relates to the time when the Council authorisation must be obtained. The formulation 'without the authorisation of the Security Council' in article 53, does not provide any guidance as to whether prior or *ex post facto* authorisation is required and whether it needs to be express or tacit.

In the proposals for amendment of article 53 contained in the *travaux préparatoires,* states differed on the issue of the nature of authorisation and of when, if at all, Security Council authorisation should be obtained. Bolivia, for

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[12] *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, *ICJ Rep* (1950) 151 paras 170-175.

[13] The Uniting for Peace Resolution, UN Doc A/Res/5/377 (1950).

[14] See Moore, JN 'The Role of Regional Arrangements in the Maintenance of World Order' Black, CE & Falk, RA (eds) (1971) *The Future of the International Legal Order* Vol III, cited in Racsmany (2000) 302.

instance, advocated the necessity of express approval.[15] France objected to this view, calling for the recognition of the right of regional arrangements or agencies to undertake enforcement action without prior approval of the Security Council in urgent cases.[16] Venezuela on its part called for Security Council's 'revision' rather than the 'authorisation' of the enforcement action by the regional arrangement or agency, arguing that seeking authority from the Council may cause delay.[17]

The debate on the nature of authorisation required under article 53 of the Charter has continued to dominate the literature on the subject matter. Concerning this issue, Moore, while admitting that any regional enforcement action without prior authorisation is illegal, sees no reason why it is not possible to obtain the Council's *ex post facto* legitimisation of the action.[18]

In contrast, Wolf argues that an *ex post facto* authorisation undermines the Charter's implicit aim of exercising effective control over enforcement action by regional organisations.[19] It has further been argued, in relation to the argument that under strict Security Council control regional action becomes impossible due to the use of veto, that without the support of the five permanent members of the Security Council such action would be undesirable anyway.[20] Akehurst shared this view against *ex post facto* authorisation, stating that:[21]

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[15] See UNCIO Vol XII para 767, reproduced in (1948) *Yearbook of the International Law Commission* 211.

[16] As above, para 844.

[17] As above, para 837.

[18] Moore, cited in Deen-Racsmany (2000) 305.

[19] Wolf (1993) 293.

[20] See, for instance, Deen-Racsmany (2000) 305.

[21] Akehurst (1967) 214.

> [T]he Security Council's authori[s]ation is a decision taken to the detriment of the state against whom the enforcement action is directed, and it is a general principle of law that a legislative text (like the [UN] Charter) should, if possible, not be interpreted to permit retroactive decisions to be taken to the detriment of a party concerned.

No consensus exists on the question whether the UN Charter requires express or tacit approval of enforcement action by regional organisations. It has been argued that lack of condemnation (that is, acquiescence) or express commendation of an armed intervention by the Security implies the Council's view that the action did not require authorisation, and this conduct amounts to tacit approval of the intervention.[22] Logical as this argument may be, it falls short of outlining on a theoretical basis what specific action or reaction by the Security Council would underlie tacit approval, and the criteria that may be used to assess such approval.

The third ambiguity relates to the interpretation of the formulation that action by regional arrangements or agencies must only be permitted to act in situations that are 'appropriate for regional action'.[23] The Charter provides no clear limitation of the freedom on action specific to regional organisations, as the principle of non-intervention codified in article 2(7) deals with that norm only in the relationship between states and the UN.[24] Also, this issue has not been discussed in relation to regional organisations existing before 1945.

In spite of the ambiguities outlined above, the complementary role of regional and sub-regional intergovernmental organisations in the maintenance of peace and security in their respective areas of jurisdiction has become increasingly important, especially in Africa and in the context of *burden sharing*. With the Security Council becoming more and more keen on returning the UN's role as peacemaker in Africa, and in the presence of unending armed conflicts on the

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[22] See, for instance, Levitt (1998) 347.

[23] Art 53.

[24] Deen-Racsmany (2000) 308.

continent, it may well be concluded that in the future, the one glimmering sign of hope will come not from New York or Geneva but from Addis Ababa or Lagos or from elsewhere within Africa.[25]

While there is some evidence of greater regional co-operation in Africa, applying subsidiarity to the debate on humanitarian intervention will require the strengthening of capacities African intergovernmental organisations in the context of increasing limits of global multilateral commitment to Africa and the decline of Western engagement. This decline of Western involvement means that African intergovernmental organisations will be more involved in intervening in armed conflicts in African states where massive violations of fundamental human rights are taking place.

4.3 THE ORGANISATION OF AFRICAN UNITY (OAU), HUMAN RIGHTS AND INTERVENTION: CHALLENGES AND ACHIEVEMENTS IN HISTORICAL PERSPECTIVE

This section examines the role of the OAU in intervention and in addressing massive human rights violations in Africa. The OAU, in its 39 years of existence, did not involve itself with humanitarian intervention proper. However, it did intervene militarily or diplomatically in member states on occasions of gross violation of fundamental human rights in those states. These interventions are discussed here, not because they constitute precedents for humanitarian intervention, but because they presented opportunities for the OAU to engage in humanitarian intervention.

The OAU's failure to engage in humanitarian intervention can best be understood by looking at the historical circumstances in which the Organisation was founded. This section outlines this history, and then looks at the OAU's normative and institutional framework for addressing massive violations of fundamental human rights. The discussion here looks at the

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[25] See O'Brien (2000) 60.

strengths and weaknesses of that framework, as well as its implementation, with a view to identifying lessons that the newly established AU can learn from the OAU's experiences.

4.3.1 The Evolution and Consolidation of African Unity

Pan-Africanism, or African unity has occupied the minds of individuals of African descent and has been an emotive subject in literature since the end of the 19th century. This idea was eloquently expressed by pan-Africanists in the diaspora such as William Dubois and George Padmore.[26] At the end of the World War II, the idea of pan-Africanism entailed the demands for self-government for Africans.

The first concrete steps towards the realisation of African unity were made in the early 1960s when most African countries had gained their independence.[27] Efforts to unite the newly independent countries led to the formation of two rival groups ('Brazzaville' and 'Casablanca').[28] These groups had differing opinions as to the ends and means of achieving African unity.[29] On the one hand, the Brazzaville group (which later became the Monrovia group), made up mostly of ex-French colonies, represented a gradualist approach and advocated a loose unity, under one umbrella, while retaining national unity.

On the other hand, the Casablanca group, composed of countries such as Ghana, Morocco, Guinea and Algeria had a more radical approach involving

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[26] Chanda (1989-1992) 1. For details on the Pan-african Movement, see generally, Cervenka (1968); Wolfers (1970); Andemicael (1976); El-Ayaouty & Zartman (1984); and Amate (1986).

[27] Baimu (2001) 301.

[28] The 'Brazaville Group' met from 15 to 19 December and signed the 'Brazaville Declaration'. The Declaration was signed by representatives of Cameroon, Central African Republic, Chad, Congo Brazaville, Dahomey (now Benin), Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta (now Burkina Faso). 'The African Charter of Casablanca' was signed after a conference from 3 to 7 January 1961 by the representatives of Algeria, Ghana, Guinea, Mali, Morocco, and Libya. See Cervenka (1968) 1-3 and Wolfers (1970) 2-3.

[29] Naldi (1999) 2.

the creation of a federation of African states with joint institutions and even a joint military command. King Haile Sellasie of Ethiopia managed to get these two groups in Addis Ababa to discuss the best way to realise African unity.[30] The outcome of this meeting of 32 African heads of state was a compromise in the form of an institution named the OAU.[31]

Despite the creation of the OAU, some African leaders, particularly Kwame Nkrumah of Ghana, felt that Africa needed a stronger union than the one that had been realised in the OAU.[32] Nkrumah made his last efforts to influence his fellow leaders to establish a union government for the whole of independent Africa during the OAU Summit held in Accra, Ghana in 1965. The idea evoked suspicion and animosity from a substantial number of African heads of state.[33] African leaders were not about to give up their hard-fought independence and recently acquired presidential status for the sake of a continental union. The removal of Nkrumah from power through a military *coup d'etat* in 1966 seemed to have sealed the discussion about one government for African states for a while.[34]

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[30] Baimu (2001) 301.

[31] The OAU was established by the OAU Charter, which was adopted by a conference of Heads of State and Government in Addis Ababa on 25 may 1963. See OAU Charter, reprinted in (1963) 3 *ILM* 1116.

[32] It should be noted that on the eve of the founding of the OAU, Nkrumah made an impassioned speech in which he argued for the formation of a union government of African states with a common market, currency, monetary zone, central bank, system of defence, citizenship, foreign policy and continental communication system. The speech is reproduced in the *New African* January 2000 18-25.

[33] After a failure to establish a union government at the Accra Summit, President Nyerere of Tanzania said he had heard one head of state expressing relief that he was happy to be returning home to his country while still the head of state. See *New African* January 2002 28-31.

[34] Cervenka (1968) 3.

From 1966 onwards, the OAU directed its efforts on the eradication of colonialism and the fight against the apartheid regime in South Africa.[35] Also in this period, efforts were made to realise African unity through the means of economic integration. This was expressed theoretically through a number of OAU declarations, resolutions and plans of action that were adopted between 1968 and 1980,[36] and in concrete terms in the formation of several sub-regional economic blocs, some with overlapping mandates. These blocs include the ECOWAS in West Africa, the ECCAS in Central Africa, the COMESA in Eastern and Southern Africa, the EAC in East Africa, the SADC (previously SADCC) in Southern Africa and the AMU in North Africa.

The idea of continental economic integration was concretised in the Treaty Establishing the African Economic Community (Abuja Treaty),[37] which was adopted under the auspices of the OAU on 3 June 1991 and entered into force on 12 May 1994. The Treaty envisages the establishment of an African Economic Community as an integral part of the OAU. The anticipated period for the establishment of the African Economic Community (AEC) is 34 years.[38]

The Treaty envisions the establishment of the AEC as a goal that should be achieved through encouraging the formation of sub-regional economic bodies, which would eventually amalgamate to form the African Economic Community.[39] The institutions established under the Treaty are the Assembly

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[35] The OAU's Charter art 2 provided that that the Organisation would, *inter alia*, be involved in the fight against colonialism in all its forms.

[36] For an analysis of law-making within the OAU from 1963 to 1998, see Maluwa (2000) 201, generally. . Between 1963 and 1998, the OAU adopted 20 treaties. Of these, 14 are currently in force, see Maluwa (2000) 201 202.

[37] See the Treaty Establishing the African Economic Treaty (the 'Abuja Treaty'), OAU CAB/LEG/28.1; reprinted in (1991) 3 *African Journal of International and Comparative Law* 792. See also, <http://www.oau-oua.org/generalinfo> (accessed on 1 August 2002). 52 signatures, 45 ratifications.

[38] Art 6(1) of the AEC Treaty.

[39] As above.

of Heads of State and Government, the Council of Ministers, the Pan-African Parliament, the Economic and Social Commission, the Court of Justice, the Secretariat and the Specialised Technical Committees.[40]

The entry into force of the Abuja Treaty created a situation whereby the OAU co-existed with the African Economic Community. In a way, the OAU started operating on the basis of both the OAU Charter and Abuja Treaty.[41] This eventually created a need for an institution that would combine the OAU's political nature and the African Economic Community's economic nature. At the same time, the end of the millennium led to a sense of unity among African leadership to reposition the OAU in order to set the African continent as a whole on a firm path to development and peace in the new millennium. It was in this context that the Libyan Leader Muammar Gaddafi called a meeting to discuss the formation of a 'United States of Africa'.

On 8 and 9 September 1999, 44 Heads of State and Government of the OAU met in Sirte, Libya, in an extraordinary session of the OAU Assembly requested by Libyan leader Muammar Gaddafi, to discuss the formation of a 'United States of Africa'.[42] The theme of this summit, 'strengthening OAU capacity to enable it to meet the challenges of the new millennium', was intended to provoke the leaders to seek solutions for the myriad political, economic and social problems confronting the continent.[43]

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[40] See art 7 of the AEC Treaty.

[41] For instance, the 38th OAU Summit held in Lusaka, Zambia in 2001 was at the same time the 4th Summit of the AEC. The activities of the OAU, however, overshadowed those of the AEC.

[42] See <htpp://www.oau-oua.org/generalinfo> (accessed on 1 August 2002).

[43] As above.

At this meeting the leaders adopted the 'Sirte Declaration',[44] which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.[45]

The details regarding the designing of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Abuja Treaty.[46] The Declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.[47] The OAU legal unit then drafted the Constitutive Act of the African Union (the 'Act'). The draft Act was debated at a meeting of legal experts and parliamentarians and later at a ministerial conference held in Tripoli from 31 May to 2 June 2000.

The involvement of parliamentarians was intended to ensure that the AU becomes more closely connected with the people.[48] The OAU Assembly of Heads of State and Government in Lomé, Togo, on 11 July 2000, adopted the Act.[49] All members of the OAU had signed the Act by March 2001,[50] and

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[44] OAU Doc EAHG/ Dec 1(IV) REV 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

[45] Para 8(II), Sirte Declaration. The Sirte Declaration was adopted perhaps because African states had finally come to accept that only a strong regional organisation properly equipped to deal efficiently and expeditiously with the peculiar problems of the continent, could entitle them to the benefits of globalisation. See Daniel & Musungu (2002) 84.

[46] Para 7, Sirte Declaration.

[47] Para 8, Sirte Declaration.

[48] However, the process leading to the drafting of the Act may be criticised for not involving civil society.

[49] 36th Ordinary Session of the Assembly of Heads of State and Government.

[50] OAU ' Decision on the African Union' 5th OAU extraordinary session of the Assembly of the Heads of State and Government 1-2 March 2001, Sirte, Libya EAHG/Dec 1-4 (V).

therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001 declared the establishment of the AU.[51]

However, to fulfil the legal requirements for the Union, the Constitutive Act had to be ratified by two-thirds of the member states of the OAU[52] This was achieved on 26 April 2001 when Nigeria became the 36th member state of the OAU to deposit its instrument of ratification of the Constitutive Act of the AU with the OAU Secretary-General.[53] The AU became legal and political reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.[54] The Union was eventually launched in Durban, South Africa, on 10 July 2002.

4.3.2 The OAU, Human Rights and Intervention

The discussion below is concerned with the role of the OAU in human rights and general intervention. Although the study focuses on humanitarian intervention, the OAU, as stated earlier, did not engage in humanitarian intervention as defined in the present study. However, the Organisation's role in addressing massive violations of fundamental rights and in general intervention is relevant for the study because humanitarian intervention is linked to massive human rights violations and to general intervention: Humanitarian intervention is a particular kind of intervention, and is a response to massive violations of fundamental rights.

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[51] As above.

[52] See art 28 of the Act.

[53] OAU 'The Constitutive Act of the African Union attains the legal requirement for entering into force' Press Release No 52/2001 available at <http://www.oau-oua.org/oauinfo/pressrelease> (accesed on 1 August 2002).

[54] As at 31 July 2001, all OAU member states, with the exception of the Democratic Republic of Congo (DRC) and Madagascar, had ratified the Act. See OAU CAB/LEG 23.15/Vol.IX paras 1-3.

Violations of human rights - whether during warfare or in peacetime - have been documented from all corners of the African continent over the years.[55] However, the most egregious of these violations have occurred in the context of armed conflict, between and within states. There have been reports of application of prohibited means and methods of war,[56] indiscriminate attacks against civilians, amputation of limbs and denial of humanitarian relief to civilian populations and prisoners of war.

The culture of impunity and violence is an appropriate description for most of the entire experience of the African people.[57] Of particular importance in understanding this widespread culture is one central and overriding fact: Virtually all governments regarded how they treated those under their control and the policies they pursued as a matter exclusively within their jurisdiction.

This culture of human rights violations may be attributable to colonialism, although African leaders themselves helped create the problem. Even as the rest of the world continues to enjoy the advancements of the twenty-first century, Africa is still reeling from some of the deadliest conflicts ever witnessed anywhere in the globe. Sierra Leone, Guinea, Mali, Somalia, Sudan, Rwanda, Burundi, the DRC, Congo Brazzaville, and Angola have experienced war for the better part of their independence era.[58]

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[55] For a discussion on this point, see Solomon (1999) 34 ff.

[56] Certain methods of warfare e.g. the use of 'dum-dum bullets' are prohibited under the laws and customs of warfare, see art 35 of Protocol II Additional to the Geneva Conventions of 12 August 1949.

[57] Especially in the 1960s and 1970s, many African states experienced internal conflicts, military takeovers and systematic violations of human rights.

[58] For a fuller treatment of armed conflicts in Africa, see *Mekenkamp et al* (1999), generally.

4.3.2.1 *The 1963 OAU Charter*

When it was formed in 1963, the OAU[59] embraced among its main governing principles respect for sovereign equality of all member-states,[60] respect for the sovereign and territorial integrity of each state and its inalienable right to independent existence,[61] and the peaceful settlement of disputes.[62] Although these were established principles of general international law, their adoption as the principal purposes of the OAU coupled with the creation of the Commission on Mediation, Conciliation and Arbitration (CMCA) demonstrates the importance to the OAU of the need to have an effective dispute resolution process.[63]

Unfortunately, the CMCA did not materialise. Under the terms of the Protocol elaborating the structure and functions of the CMA, the Commission was to consist of 21 elected individuals.[64] The Commission members were elected at the 1968 OAU Summit in Algiers, but its permanent nature was revoked two years later at the Addis Ababa Summit, and it has since fallen into disuse.[65] The 1977 *ad hoc* Committee on Inter-African Disputes, which despite its name was intended as a permanent body, suffered a similar fate.[66] Instead, the OAU

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[59] Charter of the OAU, adopted on 25 May 1963 Addis Ababa 479 UNTS 39; 2 ILM 766.

[60] Art 3(1).

[61] Art 3(3).

[62] Art 3(4).

[63] For background, see Gutto (1996) 314.

[64] Art 2, Protocol of the Commission of Mediation, Conciliation and Arbitration, 24 July 1964, reprinted in 3 ILM 1116 (1964).

[65] Wolfers (1985) 176.

[66] Berman & Sams (2000) 4.

has relied on *ad hoc* committees of member states and eminent personalities to mediate disputes.[67]

4.3.2.2 *Examples of OAU's Role in Post-Independence Conflicts*

The OAU's role in the 1964 conflict between Ethiopia and Somalia as well as the continuing civil unrest in the Congo was at best disastrous.[68] The conflict was occasioned by the Western Somalia Liberation Front's (WSLF) decision to step up the guerrilla campaign in the Ogaden, and evidence of Somali support for WSLF.[69] A few years later, the Organisation failed to intervene meaningfully in the Nigerian civil war (1967-1970), after which African countries largely eschewed the Organisation's involvement in attempting in attempting to resolve their differences and increasingly turned to countries outside the continent for their security needs.[70]

Another armed conflict which the OAU was unable to resolve was that involving the Western Sahara. The OAU was seized of the conflict in 1976, although no concrete action was taken for the next three years.[71] During the OAU Monrovia Summit of 1979, an *ad hoc* committee was established, which recommended withdrawal of Moroccan troops and the autonomy of Western Sahara.[72] Subsequently, the OAU in 1984 passed a resolution recognising Western Sahara, leading to Morocco's pullout from the OAU. Morocco has never rejoined the Organisation. Mainly, the UN has handled resolution of the Western Sahara conflict especially since the end of the Cold War.

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[67] Kouassi (1984) 45 49; Berman & Sams (2000) 67.

[68] As above.

[69] For a detailed discussion of this conflict see Legum & Lee (1977) 33ff; Gorman (1981) 62ff and and Olonisakin (2000) 54ff.

[70] Berman & Sams (2000) 97.

[71] Olonisakin (2000) 54.

[72] As above.

The OAU took its first step towards intervention by military means in the Chad civil unrest (1981-1982). Although the crisis dates back to the 1960s,[73] it was not until the 31st Session of the OAU Council of Ministers, held in Khartoum in 1978, that the possibility of intervention under the auspices of the OAU was first entertained.[74] The Assembly of Heads of State and Government then passed a resolution authorising a multinational peacekeeping force for Chad.[75]

After the experience in Chad, the OAU has been involved in the resolution of many other conflicts in Africa. Examples of countries where the OAU has been involved in conflicts in Africa are Algeria, Angola, Congo Brazaville, Burundi, Congo Kinshasa (now DRC), Djibouti, Eritrea, Ethiopia, the Gambia, Ghana, Mozambique, Niger, Nigeria, Rwanda, Uganda and Zimbabwe.[76]

However, the OAU has no experience in actual military intervention to pre-empt or halt massive violations of fundamental human rights, perhaps with the exception of the intervention in Chad. But even in Chad, the intervention was of a peacekeeping nature, and not an instance of humanitarian intervention.

4.3.2.3 Human Rights Norm-setting under the OAU

None of the five specialist commissions established under article 20 of the OAU Charter was devoted to human rights.[77] Nevertheless, the OAU

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[73] Abass & Baderin (2002) 10.

[74] As above.

[75] See AHG/ RES 102 (XVIII) Rev 1. The force went into Chad with the consent of Chadian President Guokouni. However, the consent was later withdrawn after the OAU forces maintained neutrality, in the midst of increasing rebel advancements against the Government of Chad. Apparently President Guokouni had thought that the OAU forces would support his Government. For an analysis of the OAU's involvement Chad (1981–1982), see Naldi (1999) 595.

[76] For a complete list, see OAU (1998).

[77] The Commissions established in 1963 under the Charter were: The Economic and Special, the Educational and Cultural, and the Sanitation and Nutrition Commissions. In 1964, the Commission on Transport and Communication. In 1964, the Commission on transport and Communications and another on Jurists were added.

accomplished four notable successes between 1963 and 1981, relating to:[78] Eradication of colonialism; self-determination of African peoples; the collective efforts to rid Africa of apartheid in South Africa and Namibia; and the adoption of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

In spite of the above, human rights abuses in independent African states, especially violations involving their own citizens, were largely overlooked by the OAU.[79] The principle of non-intervention is entrenched in article 3(2) of the OAU Charter. For a long time, strict adherence to the state sovereignty and non-interference rule made it difficult for the OAU to acquire much credit for the protection of human rights in the continent.[80] According to Chanda:[81]

> [D]espite the well publicised atrocities of Idi Amin ... in Uganda, ... Bokassa in the Central African Republic, Marcias Nguema in Equatorial Guinea, Mobutu Sese Seko in Zaire, Jaafar el-Nimeiry and Omar Bashir in Sudan, Said Barre in Somalia, Mengistu Haile Mariam in Ethiopia, Samuel Doe in Liberia, Kamuzu Banda in Malawi, Arap Moi in Kenya and General Sani Abacha in Nigeria, the OAU has never criticised these leaders.

However, in the 1980s, there was a significant shift by the OAU in favour of human rights protection. In June 1981, the OAU Heads of State and Government meeting in Nairobi unanimously adopted the African Charter on Human and Peoples' Rights.[82] The Charter came into force on 21 October

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[78] Viljoen (1997) 47.

[79] Chanda (1989-1992) 1.

[80] As above.

[81] Chanda (1989-1992) 18.

[82] (1982) 21 ILM 58. Adopted on 27 June 1981 in Nairobi, and entered into force on 21 October 1986. Most meetings for the Drafting of the African Charter took place in Banjul, the Gambia. Thus the African Charter is often referred to as 'the Banjul Charter'.

1986 and has been ratified by all OAU member states.[83] The body tasked with implementing the Charter is the African Commission on Human Rights and Peoples' Rights ('the Commission').[84] The Protocol on the establishment of the African Court on Human and People's Rights is yet to enter into force.[85]

In the formative years of its operation, the Charter was hardly complied with by member states. The Commission had little to show in terms of accomplishment in the first ten years.[86] In many instances, ratification of the Charter was used by repressive governments to whitewash human rights abuses, or to serve as a smoke screen to hide the reality of repression.[87]

The Commission may entertain individual and inter-state communications.[88] In emergency cases or where there are gross violations of human rights in a state party, the Commission may, under article 58, draw the attention of the Chairman of the OAU Assembly of Heads of State and Government to the matter.[89] The Chairman may then request the Commission to undertake an in-

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[83] All 53 member states of the OAU have ratified the Charter. Morroco, was a member of the OAU until 1984, when it pulled out following its differences with the AOU in relation to the latter's recognition of Western Sahara as a sovereign state. Morrocco is also not a party to the African Charter.

[84] For a detailed discussion on the composition. and mandate of the Commission, see Viljoen (1997a).

[85] OAU/LEG/AFCHPR/PROT(III)(1998). The OAU Assembly of Heads of State and Government at its thirty-fourth Ordinary Session in Ouagadougou, Burkina Faso in 1998 adopted the Protocol. Article 34 (3) of the Protocol requires that 15 ratifications are needed for the Protocol to come into force. As at 30 September 2002, six countries had ratified the Protocol. These are Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda.

[86] For a fairly thorough discussion on the performance of the Commission in the first ten years of its existence (1986-1987), see Viljoen (1997), generally.

[87] Viljoen (1997) 47 49. See also, Ondinkalu (1998), and Murray (2000).

[88] See arts 47-56.

[89] Art 58 reads as follows:
(1). 'When it appears after deliberations of the Commission that one r more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases'.

depth study of the situation and make a report, accompanied with the necessary recommendations to the Assembly.[90]

In order to define its mandate under article 58, the Commission held a consultation on mechanisms for urgent response in case of mass violations of human rights and emergency situations.[91] This consultation recommended, *inter alia*, that there is a need for permanent as opposed to *ad hoc* mechanisms for dealing with emergency situations and cases of gross violation of human rights. There was also agreement that appropriate means be put in place to get data about human rights situations in all state parties, and that focal points be established within each party for the purposes of alerting the Commission of emergencies of gross violations.[92]

The recommendations of the consultation were discussed and adopted during the Commission's 27th Ordinary Session held in Algiers, Algeria, from 27 April to 11 May 2000.[93] The inter-state communication procedure, and the proposed mechanism for the Commission's response to emergency situations and cases of gross violation of human rights, indicates that the doctrine of state sovereignty may not be as rigid as it was when the OAU was founded in 1963. However, calls have been made for a dynamic interpretation of article 58 of the African Charter such that the Commission could implement and apply article 58 'with imagination and vigour', with a view to preventing serious and massive

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(2). The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations...'.

[90] Art 58 (2).

[91] See, African Commission on Human and Peoples' Rights (1996) 155.

[92] African Commission on Human and Peoples' Rights (1996) 10.

[93] As above.

violations of human rights.[94] The Commission has seldom invoked article 58 or acted under its provisions.[95]

Besides the African Charter, the other notable human rights treaties are the African Charter on the Rights and Welfare of the Child,[96] the Convention on the Ban of the Import into Africa of Trans-boundary Hazardous Waste,[97] and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.[98] The OAU has also been deliberating on a draft protocol to the African Charter relating to the rights of women.[99]

The end of the Cold War provided the impetus for the OAU and many of its member states to attempt to redress the failings of the organisation in protecting human rights, especially in grave situations. This dispensation also marked the start of a new epoch, where Africa lost the strategic value it had to the world superpowers and thus became increasingly marginalized both politically and economically.[100] The post-Cold War era also ushered in globalisation, a process involving a complex set of factors often operating in a contradictory manner.[101] While the 'supporters' of globalisation promised

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[94] See, for instance, Odinkalu & Mdoe (1996), generally.

[95] As above.

[96] OAU Doc CAB/LEG/153/REV. 2; reprinted in Heyns (1997) 38.

[97] Popularly known as the 'Bamako Convention'. Adopted in 1991 and entered into force in 1998. See text in (1991) 30 ILM 773; (1993) 1 *African Yearbook of International Law* 269; and Heyns (1997) 108.

[98] UNTS Vol 1001 45, adopted on 10 September 1969 and entered into force on 20 June 1974. For text, see Heyns (1997) 34.

[99] See Draft Protocol, OAU Doc CAB/LEG/66.6, reprinted in (2001) 1 *African Human Rights Law Journal* 53.

[100] Baimu (2001) 299.

[101] Oloka-Onyango (1999) 'Globalisation in the Context of Increased Racism, Racial Discrimination and Xenophobia' *Working Paper of the UN Sub-Commission on the Protection and Promotion of Human Rights* (E/CN 4/ Sub 2/1999/8), para 2.

progress and prosperity for all, it became evident that globalisation was also a major factor behind Africa's marginalisation and the undermining of the continent's development prospects.

The disengagement of Western support during this era also led to a resurgence of deadly armed conflicts in Africa. As a result, Africa has been plagued in recent years by highly destructive armed conflicts between and within states. This fact, which weighs heavily upon the peoples of Africa in many ways including, notably, the arrest of Africa's development, moved the OAU member states to relax somewhat the OAU's standards on intervention in the internal affairs of states. This in turn strengthened the Organisation's role in regional peace and security.

4.3.2.4 The 1990 OAU Declaration on the Political and Socio-economic Situation in Africa

In July 1990, the OAU Assembly of Heads of State and Government met in Addis Ababa and adopted the Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World.[102] Broadly speaking, the wording of the Declaration reflects a radical approach, by the OAU, to conflict resolution, management and resolution. According to the Declaration, the OAU commits itself towards the peaceful and speedy resolution of all conflicts in Africa, including internal ones.[103] The Declaration was informed by the proliferation of conflicts in Africa and the growing concern within the OAU, over the suffering the conflicts had brought to the peoples of Africa, as well as their adverse security and socio-economic repercussions.[104]

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[102] Declaration AHG/Decl.1/(XXVI) of 11 July 1990, adopted unanimously.

[103] Naldi (1999) 32.

[104] As above.

However, the African leaders noted in the same Declaration 'that the possibilities of achieving the objectives' set in the Declaration 'will be constrained so long as an atmosphere of lasting peace and stability does not prevail in Africa'.[105] They therefore pledged their 'determination to work together towards the peaceful and speedy resolution of all the conflicts' on the continent.[106]

While they did not openly challenge the OAU's cherished principles of state sovereignty and non-intervention in domestic affairs of states, the leaders indicated a willingness to become somewhat transparent.[107] According to one commentator, the 1990 Declaration is tantamount to the Heads of State and Government saying that that non-intervention should not mean indifference.[108] Following the Declaration, the OAU sent, in the same year, a military observer group in Rwanda to help promote reconciliation and put an end to hostilities in the Rwandan crisis.[109]

The 1990 initiative bore fruit two years later at the 28th Meeting of Heads of State and Government held in Dakar between June and July 1992 when it was decided to endorse the report of the Secretary-General in which he proposed the establishment of a mechanism to deal with the prevention, management and resolution of conflicts in Africa.[110] The leaders also decided to charge the Secretary-General with the preparation of a study on the institutional and

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[105] Para 10.

[106] As above.

[107] Berman & Sams (2000) 57.

[108] Ibok (1997) 70.

[109] Burundi, Uganda and Zaire agreed to take part in this undertaking, known as the Military Observer Team (MOT).

[110] The Secretary General's Report is reprinted in (1992) 4 *African Journal of International and Comparative Law* 1072.

operational aspects of his proposal. The Secretary-General's report had explored a number of radical options, including:[111]

- An African Security Council within the OAU should be created.
- The Bureau of the Assembly should assume responsibility for dealing with intra-state and inter-state disputes at the diplomatic and political level.
- The Court of Justice of the African Economic Community (AEC) could be generally available for judicial settlement of disputes.
- The OAU member states could earmark units within their armed forces for an African Peace-keeping Force.

The proposals were too radical and many states did not accept them. At the Dakar Summit, a clear consensus emerged against the involvement of the OAU in peacekeeping and related issues.[112] Further, a proposal that the OAU's Defence Commission be tasked with advisory functions to strengthen member-states' peacekeeping policies received little support.[113] The proposal received scant reference in both the debate and the written responses, and even in the consultations.[114]

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[111] Naldi (1999) 32.

[112] Djinnit, S Speech delivered at the 'Meeting on Enhancing Africa's Peacekeeping Capacity', 5 December 1997, cited in Berman & Sams (2000) 57.

[113] Berman & Sams (2000) 60.

[114] As above.

4.3.2.5 *The 1993 Mechanism for Conflict Prevention, Management and Resolution*

Despite the rejection of some of the proposals made by the OAU Secretary-General in 1992, his fundamental proposition of a special Mechanism for Conflict Prevention, Management and Resolution ('the Mechanism') was accepted in principle. Subsequently, the 29th Ordinary Session of OAU Heads of State and Government, held in Cairo in 1993, formally endorsed the Mechanism.[115]

The decision-making body of the Mechanism, the Central Organ, was modelled on the Bureau of the Assembly of Heads of State and Government. Despite the establishment of the Mechanism, serious armed conflicts have occurred in Africa, notably in Rwanda that broke out in April 1994.[116] Consistent civil wars have been going on in Burundi,[117] Zaire,[118] Sudan and elsewhere. The adequacy of the Mechanism has, therefore, been rightly queried.[119]

The mandate of the Mechanism presents a stark contradiction between the declared objectives and the institutional and operational structure. This is more so when one recognises, as the Heads of State and Government did in

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[115] See Assembly of Heads of State and Government, Twenty-ninth Ordinary Session: *Declaration ... on the Establishment Within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution* Declaration AHG/Decl. 3 (XXIX) (Rev 1) of 29 June 1993, reprinted (1994) 6 *African Journal of International and Comparative Law* 158.

[116] See Final Report of the Committee Established Pursuant to UN Security Council Resolution 935 (1994), S/1994/1405 of 9 December 1994; and the Reports of the UN Special Rapporteur on the Situation of Human Rights in Rwanda, documents E/CN.4/1995/7 and E/CN.4/1996/68.

[117] See, for example, Reports of the UN Special Rapporteur on the Situation of Human Rights in Burundi, documents E/CN.4/1995/66 and E/CN.4 1996/16.

[118] See, for example, reports of the UN Special Rapporteur on the Situation of Human Rights in Zaire, documents E/CN.4/1995/67 and E/CN.4/1996/66.

[119] For a good, critical summary of the content of the mandate of the Mechanism, see generally, Packer (1997).

Paragraphs 6-8 of the 1993 Declaration, that there are root causes and structural deficiencies in their states which add stress to the normal situation. Important among these root causes is said to be 'certain internal human factors and policies which have negatively contributed to the present state of affairs on the [c]ontinent'.[120] The leaders also correctly summarised the problem in paragraph 9 that continent's socio-economic problems had been caused by conflicts between and within states.

In paragraph 12 of the 1993 Declaration, the African leaders declare that they saw in the Mechanism 'the opportunity to bring to the processes of dealing with conflicts on our continent a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur'. However, in the first operational paragraph,[121] the Heads of State and Government placed formidable obstacles in the way of dynamic, speedy or ultimately successful action.

In this paragraph, the declaration emphasised that any action under the auspices of the Mechanism must respect the principles of sovereign equality, and non-interference in 'internal affairs'. It must also respect the principles of territorial integrity, 'the inalienable right to independent existence', 'peaceful settlement of disputes' and 'the inviolability of borders inherited from colonialism'. Paragraph 14 also made it a requirement that the consent of the parties to the conflict be obtained before the Mechanism could take any action.

The leaders were realistic to declare that the Mechanism will simultaneously be an instrument of peacemaking to stop conflicts 'where they inevitably occur'.[122] However, in the same paragraph, emphasis was clearly placed on prevention of conflict, which the leaders believed would 'obviate the need to resort to the complex and resource-demanding peacekeeping operations'.

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[120] Para 8.

[121] Para 14.

[122] Para 15.

With regard to the technical organisation of the Mechanism, it is constituted principally by the Central Organ, composed of the state members of the Bureau of the Assembly of Heads of State and Government.[123] This evidently political body is required to function at the levels of Heads of State as well as that of Ministers and Ambassadors.[124] The Rules of Procedure of the Central Organ are, according to paragraph 20 of the 1993 Declaration, those of the Assembly of Heads of State and Government. The Mechanism is required to meet once a month and to make decisions 'guided by the principle of consensus',[125] a provision that essentially accords some sort of 'veto power' to each and every member state of the Mechanism.

Other provisions in the Declaration, which are an impediment to dynamic, speedy and successful action include the requirement that the agenda for the Central Organ should 'be prepared by the Secretary-General in consultation with the Chairman',[126] thereby politicising even the agenda.[127] Also, the requirement that the Mechanism should 'closely coordinate its activities with the African regional and sub-regional organisations,[128] had the effect of slowing the process further.

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[123] Para 18.

[124] Para 18.

[125] Para 20.

[126] Para 21.

[127] This provision imposes restrictions on the Secretary- General by requiring that he should consult with the Chairman before setting the agenda. The provision implies that the Chairman must endorse every item on the agenda. Being a political leader, the Chairman is likely to be guided by political preferences in deciding the agenda to be discussed. Preferably, he should. have been free to set the agenda for and the Mechanism's work would be to deliberate on the agenda

[128] Para 23.

Even the relatively limited flexibility of the Secretary-General to bring in eminent African personalities was undermined by the requirement that he must first consult with the authorities of the person's state.[129] Finally, the ultimate action of the Central Action is only to 'report on its activities to the Assembly of heads of State and Government'.[130] To add to the numerous 'internal' obstacles to effective action by the Mechanism, there have been from the start inadequate financial resources and an uncertain legal status for the entity.

Although the regime of the Mechanism proved unable to forestall and mitigate the effects of the 1994 Rwandan genocide, Gutto has described the Mechanism as a bold normative, institutional and procedural attempt by the OAU to rethink the manner in which its member states should individually and collectively respond to conflicts within and across their national territories.[131] Furthermore, he argues that in light of the institutionalisation of the Mechanism, there is a real prospect that the principle of non-interference in the internal affairs of states within Africa, and as between the African states and communities themselves, will be re-examined and modified so as to promote legitimate humanitarian intervention to prevent and resolve conflicts.[132]

According to former OAU Secretary-General Salim Ahmed Salim, the 'progress' made by the Mechanism is attributable to the member states' broadening consensus on widening the definition of the non-intervention principle, amounting to an acceptance by the member states that the OAU should concern itself not only with inter-state conflicts but also with internal

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[129] Para 22.

[130] Para 20.

[131] See Gutto (1996) 314.

[132] As above.

conflicts.[133] Salim further explained the likely impact of the activities of the Mechanism on sovereignty and non-intervention rules as follows:[134]

> Within the context of general international law as well as humanitarian law, Africa should take the lead in *developing* the notion that *sovereignty can legally be transcended* by the 'intervention' of 'outside forces' and by their will to facilitate prevention and/ or resolution, particularly on humanitarian grounds. In other words, given that every African is his brother's keeper and that our borders are at best artificial, we in Africa need to use our own cultural and social relationship to interpret the principle of non-interference in such a way that we are enabled to apply it to our own advantage in conflict prevention and resolution.

4.3.2.6 The 1999 OAU Declaration on Security, Stability, Development and Co-operation

One of the most notable declarations of the OAU in the post-Cold War that encapsulate the idea of a continued erosion of the doctrine of non-intervention in favour of human rights is the 1999 Heads of State and Government's Declaration on the Ministerial Conference on Security, Stability, Development and Co-operation in Africa (the 'CSSDCA Declaration').[135] It traces several decisions of the OAU from the 1980s to 1999.

In particular, it 'recalls' the 1990 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes in the World, which aimed at 'promoting stability in Africa'.[136] It also recalled the OAU Assembly's 1997 Harare Summit, where a 'stand was taken against unconstitutional changes of government'.[137] Also recalled was the 1999 Algiers

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[133] See *West Africa*, 12-18 July 1993 1197. Emphasis added.

[134] *West Africa* 7-13 July 1992 1524.

[135] AHG/Dec 4 (XXXVI).

[136] Para 1.

[137] Para 4.

Declaration on the Unconstitutionality of Governments, the Reinforcement of the Respect for Democracy, the Rule of Law, Good Governance and Stability.[138]

The CSSDCA reaffirms the commitment on the part of the OAU to uphold these past declarations, and to move towards their implementation. The Declaration then goes on to declare that the OAU, while recognising the primacy of the UN Security Council in the maintenance of international peace and security, will strive, in co-operation with the UN and sub-regional intergovernmental organisations in Africa, strive to act as the premier organisation in these matters.[139] This Declaration set the stage for the transformation of the OAU into the AU, which forms the subject of analysis in the following section.

4.3.2.7 General OAU Norms on Conflict Prevention, Management and Resolution

Traditionally, fundamental norms underpin OAU responses to conflict situations: non-interference in the internal affairs of member states, territorial integrity and the inviolability of the borders inherited at independence, and 'African solutions to African problems'.[140] The first of these is a standard feature of virtually all intergovernmental organisations, although the norm has been enforced by the OAU with greater intensity, resulting in great inefficiency of the OAU mechanisms for dealing with conflicts.

The principle of territorial integrity and the preservation of borders as inherited at independence no matter how arbitrary they may have been drawn may

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[138] As above.

[139] As above.

[140] See Foltz (1991) 347 353.

reflect a point of criticism for the OAU.[141] The borders of African states were drawn during the colonial times by European powers, without due regard to ethnic or anthropological interrelationships. In traditional Africa, it was commonplace to find that a particular community related well with certain other communities, but not others. Had the drawing of boundaries between African states taken these anthropological 'affiliations' into consideration, perhaps most armed conflicts that are of an ethnic nature in Africa would have been pre-empted.

The OAU norm of 'African solutions to African problems' is a well-established norm in matters of inter-state conflict and proceeds from the 'try OAU first' (before going to the UN Security Council) attitude that the OAU adopted during its 39 years of existence.[142] In furtherance of this norm, the OAU adopted unique African methods of dispute prevention and resolution. For example, it frequently used the intervention of other African heads of states or some other imminent personalities to carry out mediation in inter-state as well as intra-state conflicts. This practice is based on Africa's respect for elders.

This norm has legal foundation in the UN Charter, which obliges states that are also members or regional organisations to make every effort to settle local disputes peacefully through that organisation before referring them to the UN Security Council.[143] Because of this Charter endorsement, and in line with the burden sharing principle advocated for earlier in this Chapter, I am of the view that the norm of 'African solutions to African problems' may be a good legacy that the OAU left for the AU to further.

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[141] As above.

[142] See Andemichael (1976).

[143] See art 52(2) of the UN Charter.

4.3.2.8 Conclusion

The OAU has played a role subsidiary to that of the UN in the maintenance of international peace and security in Africa. During the 39 years of its existence, the OAU concentrated on achieving complete decolonisation in the continent, and in the dismantling of the racist regime in South Africa. The organisation was also concerned with economic integration on the continent.

For a long time, the OAU strictly adhered to the principle of non-intervention in the internal affairs of its member states. As a result, the OAU did not condemn massive violations of fundamental human rights in its member states. In the 1980s, the OAU started adopting continental human rights instruments. This process gained momentum after the end of the Cold War, during which period Africa also lost its strategic position with regard to Western governments. The desire for solidarity in Africa in tackling the continent's problems culminated in the adoption of the AU Act in 2001. The AU replaced the OAU in 2002.

One of the major achievements of the OAU in terms of establishing a normative and institutional framework for addressing massive violations of fundamental human rights was the adoption of the 1993 Mechanism for Conflict Prevention, Management and Resolution. However, the Mechanism did not succeed in its work due to its restricted mandate. The lessons learned from the work of the Mechanism will no doubt inform the AU, in order for the AU to engage in humanitarian intervention and in addressing massive violations of fundamental human rights.

4.4 THE AFRICAN UNION (AU)

4.4.1 Background

By the middle of the 1990s, the dangerous drift of several African states into armed conflicts became a source of concern for African leaders and the broader international community. This concern was reflected by the myriad

conferences and summits held by the OAU to discuss the issue of conflicts and the array of treaties, protocols, declarations, and communiqués that emanated from these meetings.[144] It was soon realised that amidst armed conflicts, it would be difficult to achieve the objectives of the 1991 Abuja Treaty, which was intended to set the stage for greater co-operation amongst African states.[145]

The Abuja Treaty was swiftly followed, in 1993, by the Mechanism for Conflict Prevention, Management and Resolution. Despite any normative and institutional developments that the regime of the Mechanism may have brought, it has been criticised for the apparent failure to halt the genocide in Rwanda, stop the civil war in Liberia, mitigate the crisis in Burundi or put an end to the conflict in the DRC.[146] It was against this background that the Libyan leader, Muammar Gadhafi, convened the Summit of African Heads of State and Government in Sirte in 1999, setting in motion a process that led to the establishment of the AU in July 2002.

4.4.2 The AU Act, Human Rights and Humanitarian Intervention

4.4.2.1 Human Rights Mechanisms and Structures under the AU Act

The AU Act clearly departs from the regime of the OAU Charter in the area of human rights.[147] The importance of human rights was sparingly recognised under the OAU Charter by reference to the UN Charter and to the UDHR, but further established through the adoption of the African Charter on Human and

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[144] For a discussion on all the legal instruments adopted by the OAU since its establishment, see Maluwa (2000), generally.

[145] See Naldi (1999) 240-262; Abass & Baderin (2002) 1 5.

[146] See, for instance, Abass & Baderin (2002) 1 5.

[147] For an examination of the process leading to the transformation of the OAU into the AU, see generally, Baimu (2001); Gutto (2001) and Magliveras & Naldi (2002).

Peoples' Rights in 1981.[148] The OAU 4th Extraordinary Summit held in Sirte did not specifically address the issue of human rights.

However, the protection of human rights was captured in the Summit's general determination to, *inter alia*, 'eliminate the scourge of conflicts' in Africa and to 'effectively address the new social, political and economic realities in Africa and the world'. The summit also pledged 'to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances'.[149] The above provisions of the Sirte Declaration was a reaffirmation of the OAU Ministers' Grand Bay Declaration of 16 April 1999, which acknowledged that:[150]

> Observance of human rights is a key tool for promoting collective security, durable peace and sustainable development as enunciated in the Cairo Agenda for Action on relaunching Africa's socio-economic transformation.

The AU Act confirms growing attachment to the importance of human rights in Africa by providing that it shall be the objective of the AU to 'encourage international co-operation, taking due account of the [UN Charter] and the Universal Declaration of Human Rights'.[151] The Act provides that the AU shall strive to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".[152] The principles of the AU include, *inter alia*, 'promotion of

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[148] However, in order to give due credit to the African Charter, it is worth noting that the Charter was the first human rights instrument ever to make reference to the UDHR, see Robertson & Merrills (1996) 242.

[149] See para 9, OAU Sirte Declaration, 2 September 1999.

[150] The Grand Bay Declaration and Plan of Action on Human Rights in Africa was adopted after the first OAU Ministerial Conference on Human Rights, 12 – 16 April 1999, Grand Bay, Mauritius.

[151] Art 3(e).

[152] Art 3(h).

gender equality, respect for democratic principles, human rights the rule of law and good governance'[153] as well as 'respect for the sanctity of human life'.[154]

The human rights provisions of the AU Act are more far-reaching than what obtained under the OAU Charter in respect of the guarantee of human rights. The provisions reinforce the earlier mentioned declarations made by African leaders to respect human rights, and suggests *bona fide* commitment to pursue an effective guarantee to pursue human rights in Africa under the Act.[155] The consequence of the obligations of the AU regarding human rights is that apart from the individual obligations of member states to ensure the guarantee of human rights within their jurisdictions, the AU itself has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa generally.

In order to achieve its aim of ensuring the protection and promotion of human rights, the AU requires an institutional framework with specific organs empowered to further the human rights mandate of the AU Act. Unfortunately, none of the nine organs established under the Act has defined tasks specifically relating to human rights.[156] This raises the question of how and through which organ the AU can fulfil its specific objective to protect and promote human rights.[157]

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[153] Art 4(m).

[154] Art 4(o).

[155] See, Abass & Baderin (2002) 1 29.

[156] The Act currently establishes the following organs: 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 Economic, Social and Cultural Council, and the Financial Institutions. None of the 8 specialised committees established under article 14(1) relate to human rights.

[157] See Abass & Baderin (2002) 1 32.

One way to address this question would be to utilise the Economic, Social and Cultural Council (ECOSOCC) of the AU, established under article 22 of the AU Act. The functions and powers of the AU ECOSOCC are not yet determined.[158] In determining these powers and functions, lessons may be drawn from the UN Economic and Social Council (ECOSOC), whose functions include the making of 'recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms'.[159] Adopting such a function would easily make the AU ECOSOCC a human rights organ.

Another important area from which the AU ECOSOCC can benefit from the UN ECOSOC relates to the role of NGOs. NGOs accorded observer or consultative status with the UN ECOSOC play an important role in monitoring how the UN ECOSOC discharges its obligations of furthering the protection and promotion of human rights.[160] Equally, NGOs participate in the activities of the African Commission on Human and Peoples' Rights.

However, neither the OAU Charter nor the AU Act contains any provision on the role of NGOs. It is proposed that the in defining the mandate of the AU ECOSOCC, a provision should be made to allow NGOs to get observer or consultative status in order to participate in the activities of ECOSOCC. In this way, the AU will benefit from the experiences of the NGOs and this in turn would lead to a more participatory process of protecting and promoting human rights on the continent.

In order to achieve its human rights related objectives, the AU has incorporated the OAU human rights organs into the AU framework. The AU

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[158] See art 22 of the AU Act.

[159] See art 62(2), UN Charter.

[160] Such NGOs can avail information to the thematic and special rappoteurs of the Sub-Commission on Human Rights, which is a subordinate organ of ECOSOC. The NGO with observer status also can attend and participate in ECOSOC sessions, in which recommendations of both the sub-Commission and the Commission on Human Rights are discussed and adopted.

Assembly in its Lusaka Summit in July 2001 adopted a declaration incorporating the 1993 Mechanism on Conflict Prevention, Management and Resolution as an organ of the AU. The Assembly particularly noted that the Mechanism was an organ within the OAU that constituted 'an integral part of the declared objectives and principles of the [AU]', and thus reached a decision to incorporate it 'as one of the [o]rgans of the [AU] ...'[161] Despite this positive move, the Assembly surprisingly failed to incorporate two OAU institutions that are directly concerned with promotion and protection of human rights, namely, the African Commission on Human and Peoples' Rights,[162] and the African Committee of Experts on the Rights of the Child.[163]

After a year of uncertainty[164] regarding the fate of the above two institutions, the Assembly of Heads and State and Government incorporated the institutions into the AU framework in the Durban Summit held in July 2002.[165] According to the 2001 and 2002 AU declarations incorporating the above three OAU human rights institutions into the AU structure, the incorporation was done under article 5(2) of the AU Act, which gives the Assembly the power to establish new organs besides those already established under the Act.

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[161] See 'Decisions on the Implementation of the Sirte Summit Decision on the African Union' OAU Doc AHG/Decl 1 (XXXVII), para 8.

[162] Established under art 30 of the African Charter on Human and Peoples' Rights, (1982) 21 ILM 58; For a discussion on the establishment, mandate, functions and an evaluation of the Commission see Viljoen (1998) for the period up to 1 October1997; and Murray (2001), for the period up to February 2001. Other general works that are relevant Claude (1992), Ondinkalu (1998) and Murray (2000).

[163] Established under art 32 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/153/REV 2 (1999), reprinted in Heyns (1997) 38, adopted in 1991, entered into force on 29 November 1999.

[164] The uncertainty was expressed in various fora, including through scholarly publications. Abass & Baderin, or instance, writing in March 2002, expressed the concern that the failure to adopt the OAU institutions was undesirable, because it caused anxiety regarding the fate of those institutions. See Abass & Baderin (2002) 1 33.

[165] See AU 'Decision on Interim Period' *1st Ordinary Session of the AU Assembly of Heads of State and Government* 9-11 July 2001, AU DOC ASS/AU/Dec 1(I) para 9.

It is contended that on a literal interpretation of article 5(2), the Assembly could not have acted under this provision because the institutions in question already existed. Instead, the OAU human rights institutions should have been regarded as having been intergrated into the AU through article 3(h) of the AU Act, which provides that the AU will "promote and protect human and peoples' rights *in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*".[166]

The latter assertion is based on the interpretation that these institutions were created either in accordance with the Charter, or under the provision for 'other relevant human rights instruments'. The human rights mandate of the AU may be realised by invoking articles 5(2) and 9(2) of the AU Act, which gives the AU Assembly the power to create new organs for the purposes of ensuring that the AU realises its objectives.

Ostensibly, this means that the Assembly can, in addition to the incorporation of the already existing organs, also decide to establish new organs for the protection and promotion of human rights. Besides being tedious, the latter approach is likely to undo the progress that the above-mentioned OAU human rights institutions have achieved so far.[167] The OAU institutions already exist, and it would be beneficial to build on their past experiences. It is also not prudent to set up too many new organs under the AU because of the financial implications.[168]

In a recent study, Baimu has warned of a likelihood of proliferation of human rights institutions under the AU, especially considering that the 'developmental arm' of the AU - the New Partnership for Africa's Development (NEPAD) -

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[166] Emphasis added.

[167] Abass & Baderin (2002) 1 34.

[168] Recent studies have shown that the African Commission on Human and Peoples' Rights, for instance, has been heavily underfunded by the OAU. Sometimes, the Commission has had to rely on external donors to discharge its obligations. See, for example, Viljoen (1997) and Murray (2000).

envisages the creation of other human rights institutions.[169] The ideas in the NEPAD were conceived and are being implemented under the auspices of the AU.[170] NEPAD seeks to address Africa's underdevelopment through promoting democracy, human rights, accountability, transparency and participatory governance.[171] The structure of NEPAD consists of the Heads of State and Government Implementation Committee,[172] the Steering committee, which comprises the representatives of the Heads of State and Government of the five countries that have been at the forefront of promoting NEPAD,[173] and a secretariat based at Midrand, South Africa.

Two proposed institutions of NEPAD of relevance to human rights are the African Peer Review Mechanism (APRM), whose mandate is to evaluate compliance by states of NEPAD principles including human rights, and the position of the Commissioner for Democracy, Human Rights and Good Governance.[174] Baimu has argued for a cautious approach in the establishment of parallel human rights organs under the auspices of the AU.[175] Instead, he prefers integration of these institutions into the mainstream AU

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[169] See generally, Baimu (2002). The NEPAD document is available at <htpp//www.nepad.org> (accessed on 30 September 2002).

[170] See Baimu (2002) 7, where he discusses the linkage between NEPAD and the OAU/AU.

[171] Para 49 of the NEPAD Document.

[172] Para 60. This Committee will consist of 20 Heads of State and Government.

[173] Para 202. The five countries are Algeria, Egypt, Nigeria, Senegal and South Africa.

[174] The proposal for the establishment of the APRM was made by the Heads of State and Government Implementation Committee in October 2001, and was endorsed by the AU in its Durban Summit in July 2002. See AU 'Declaration on the Implementation of ... NEPAD' 1st Ordinary Session of the Assembly of Heads of State and Government of the AU, 9 – 10 July 2002, Durban, South Africa. Concerning the proposal or the creation of the position of the Commissioner for Democracy, Human Rights and Good Governance, see Communiqué issued at the end of the Second Meeting of the Heads of State and Government Implementation Committee, Abuja, Nigeria, 26 March 2002, para 12.

[175] Baimu (2002) 12 – 15.

framework.[176] This cautious approach is advisable, considering that the number of the organs under the AU Act is numerous. In the long run, this could result in the cumbersome operation of the AU and also present a financial burden.[177]

4.4.2.2 Prospects for Humanitarian Intervention under the AU Act

During the OAU Council of Ministers Session held in Lusaka, Zambia, in July 2001, the OAU Secretary-General stated that the AU was designed to be a new institution, completely different from the OAU. He said:[178]

> It is important to point out that when African leaders decided to establish the [AU] when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organisation which was going to be a continuation of the OAU by another name.

Although only time will tell whether or not the AU will be more effective than its predecessor, the OAU, it is noteworthy that the provisions of the AU Act, especially those concerning intervention, radically depart from those of the OAU Charter. The Act contains a number of general provisions of the AU Act on collective security, and these provisions envisage an interventionist organisation.

The provisions state that the AU shall 'promote peace, security and stability on the continent'.[179] Also, it is provided that the AU shall function in accordance with the principles of the 'establishment of a common defence policy for the

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[176] As above.

[177] Magliveras & Naldi (2002) 419.

[178] See *Report of the Secretary-General*, CM/2210 (LXXIV), Council of Ministers, 74th Ordinary Session/9th Ordinary Session of the AEC, 2-7 July 2001, 10.

[179] Art 3(f).

African Continent',[180] the right of member states 'to live in peace and security',[181] and the right of any member state of the AU 'to request intervention from the [AU] in order to restore peace and security'.[182]

A cursory evaluation of the above provisions prompts an impression that they contradict the time-honoured customary international law principle of non-intervention that also forms part of the AU Act.[183] Article 4(g) enshrines the non-intervention principle, stating that the AU shall function according to the principle of 'non-interference by any member state in the internal affairs of another'. One may argue that this provision completely negates those discussed in the previous paragraph.

However, a closer examination of the wording of article 4(f) reveals otherwise. The AU provision differs fundamentally from its UN Charter 'equivalent' contained in article 2(7) of the UN Charter, which provides, *inter alia*, that:[184]

> Nothing contained in the present Charter shall authori[s]e *the [UN]* to intervene in matters which are essentially within the domestic jurisdiction of any state.

The UN Charter provision above is addressed to the UN acting as such, and not to the member states. In contrast, article 4(f) of the AU Act is directed at member states, by requiring that no member state should interfere in the 'internal affairs of another'. Thus it is argued that article 4(f) does not have the same effect as article 2(7), because the former provision does not restrain the AU from intervening in the internal affairs of individual states.

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[180] Art 4(d).

[181] Art 4(i).

[182] Art 4(j).

[183] See art 4(g) and 4(f).

[184] Emphasis added.

An additional argument to support the view that the AU provisions permitting intervention do not contradict article 4(f) is that human rights issues are not matters falling within the description of 'internal affairs'. This is the position adopted in this study in the discussion concerning the legal basis for humanitarian intervention under the UN Charter.[185]

A provision of the AU Act that is of prime relevance to this study is article 4(h), which gives the AU 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'. Article 4(h) is couched in terms of a 'right', meaning that the AU Assembly will have the discretion to decide whether or not to intervene. The consent of the target state will not be required. It would have been better if the provision required the AU to intervene as a matter of 'duty' because a sense of obligation to intervene is more likely to move the AU into action. Nevertheless, the provision raises at least two general legal issues, which are discussed below.

First, a question might arise whether or not article 4(h) is in conflict with article 2(4) of the UN Charter, which states that:[186]

> All members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.

It may be argued that the above provision precludes any consent that African states have given the AU to intervene in their internal affairs. In such a situation, then article 4(h) would be void for incompatibility with article 2(4), which is regarded as *jus cogens*.[187] Such a view would be strengthened by the

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[185] See Chapter 2.

[186] Scholarly opinion is sharply divided on the meaning of article 2(4) of the UN Charter. Frank (1970), for instance, 'declared' article 2(4) 'dead', concluding that this provision is so permissive that 'only the words remain'. On the other hand, Henkin (1971) replied that 'the reports of the death of article 2(4) were greatly exaggerated'.

[187] See, *inter alia*, Schatcher (1985), Charney (1999) and Abass & Baderin (2002).

fact that the UN Charter provides that obligations of member states under the UN Charter supersede their obligations under any other treaty.[188] Furthermore, the Vienna Convention on the Law of Treaties provides that:[189]

> A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.

A response to such a concern would be that the kind of force prohibited by article 2(4) is that which is 'against the territorial integrity or political independence of states'. Intervention under article 4(h) would not be against the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states would not have agreed to allow the provision in the Act. The provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories. One recent study adopts this reasoning, and argues as folows:[190]

> What the AU members contracted out by giving their consent to intervention by the AU is the principle of 'non-intervention'. ... By ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the [AU] to that effect under article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the [AU].

Second, article 4(h) does not clarify who determines when to intervene and by what means the AU may intervene. Of course, the article is quite clear that it is the AU Assembly of Heads of State and Government that will make a decision for intervention. The means of intervention are not stated, but considering that the intervention under this provision will be responding to 'grave circumstances', which are specified as 'war crimes, genocide and crimes

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[188] Art 103.

[189] Art 53.

[190] See Abass & Baderin (2002) 1 18.

against humanity', one may plausibly presume that the intervention will be by use of armed force. War crimes, genocide and crimes against humanity are most likely to be committed in the context of armed conflicts. Therefore, only proportional use of armed force is likely to address these 'grave circumstances'.

It must be accepted that it is the AU Assembly of Heads of State and Government that is to decide when to intervene, and that the intervention is likely to involve the use of armed force. Two subsidiary issues arise from this proposition. The first is that the Assembly's power to determine the existence of war crimes, genocide and crimes against humanity may be 'hijacked' by more powerful states within the AU. These states may want to politicise the interpretation of these terms.

Fortunately, these terms have already been defined in the 1998 Rome Statute of the International Criminal Court.[191] This means that it will not be easy to come up with other definitions. Furthermore, a decision to intervene will only require an endorsement of two-thirds of the member states, and no single member of the AU has the power to veto.[192] This will ensure that no single state can control the decision making process in respect of the operation of article 4(h) and the AU Act in general.

The second subsidiary issue arising from the above concern is that the AU Act does not envisage the AU's supervision by the Security Council, yet the UN Charter provides that the UN Security Council has 'primary responsibility' concerning the maintenance of international peace and security.[193] Indeed, the UN Security Council in exercising its primary responsibility has the mandate to

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[191] (1998) 37 *ILM* 999.The Rome Statute of the International Criminal Court entered into force on 1 July 2002, 60 days after the 60th ratification, pursuant to article 126 of the Statute. The definitions are in art 6 (genocide), art 7 (crimes against humanity) and art 8 (war crimes).

[192] Art 11 of the AU Act.

[193] Art 24, UN Charter.

supervise the AU, which is a regional arrangement or agency within the meaning of article 52 of the UN Charter.[194] Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:[195]

> The Security Council shall, where appropriate, utili[s]e such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies *without the authori[s]ation of the Security Council* ...

The above provision restrains all activities of regional organisations with regard to the use of force, unless the Security Council has authorised such action. Yet, the AU Act in article 4(h) purports to authorise the AU to intervene without the authority of the Security Council. The AU Act does not anticipate the supervision of the UN Security Council, at least with regard to intervening in AU member states where war crimes, genocide or crimes against humanity are being committed. This may imply that the AU considers that it will not be expedient to wait for UN Security Council authorisation before responding to situations of war crimes, genocide and crimes against humanity.

The omission by the AU Act of the requirement that the Security Council should supervise article 4(h) interventions can only be interpreted as being deliberate. This is because only one year before the AU Act was adopted, the CSSDCA Declaration of the OAU had expressly recognised that 'the *primary* responsibility for the maintenance of international peace and security [was] with the [UN] Security Council [but] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organisations], remains the *premier* organi[s]ation for promoting security, stability, development and co-operation in

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[194] Nothing in the AU Act states that the AU is a regional arrangement or agency. According to Abass & Baderin (2002) 1 20, the status of the AU as a regional arrangement or agency can only be assumed from its composition (African states only), the bond between the members (common historical, cultural and political values) and the territorial scope of its operation (the African continent). In any case, they argue, the OAU, whose member states have now formed the AU have been treated in the past by the UN and the general international community as constituting a regional arrangement or agency.

[195] Emphasis added.

Africa'.[196] In this Declaration, the 'primacy' of the UN Security Council in matters of international peace and security was recognised, although even then, the framers carefully added that the OAU remained the 'premier' organisation for the same purpose when it comes to the OAU's region of competence – Africa.

An approach similar to that of the AU had been taken in the past. ECOWAS intervened in Liberia and in Sierra Leone in 1990 and 1997 respectively, without the authority of the Security Council. In both cases, ECOWAS authorities invoked the doctrine of humanitarian intervention, as well as the provisions of the Protocol on Mutual Assistance and Defence.[197] ECOWAS is likely to continue with this trend under the provisions of the 1999 Mechanism for Conflict Prevention, Management and Resolution. Similarly, NATO's use of force in Kosovo was not authorised by the Security Council.

The reason behind the increasing tendency by regional organisations to seize for themselves the powers to intervene in member states, to use the words of the AU Act, in 'grave circumstances', arises from the fact that the UN Security Council's bureaucratic procedures cannot guarantee a quick response in cases of gross human rights violations. Furthermore, the Council has either ignored some conflicts or has shown discrepant standards in those conflicts to which it has responded. Weller, for instance, notes that in Liberia, the Council first declined to intervene, then intervened, only after ECOWAS did, with considerably less vigour than it did in the Former Yugoslavia.[198] Thus, an argument may be made that where the UN Security Council refuses to intervene in a crisis of a UN member state, this frees the concerned regional arrangement or agency to undertake whatever actions it deems necessary.[199]

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[196] See AHG/Decl 4 (XXXVI), principle 4(g). Emphasis added.

[197] See, *West Africa* 4–10 February 1991, 140; *West Africa* 2– 8 March 1992 210; Kufuor (1993) 529.

[198] Weller (1994) 'Foreword' IX.

[199] See Abass & Baderin (2002) 1 24.

The right conferred upon the AU under article 4(h) can serve to complement the powers of the African Commission under article 58 of the African Charter. Under this article, the Commission may draw to the attention of the Assembly of Heads of State and Government any 'existence of a series of serious or massive violations of human and peoples' rights' that may be revealed by communications before the Commission.[200] The Assembly may then request the Commission to 'make an in-depth study' of these cases and thereby make a report of the findings and recommending specific action.[201]

However, the mandate of the Commission under article 58 is limited, in so far as it can only be exercised with the consent of the state where the violations are reportedly occurring.[202] Under the AU dispensation, article 4(h) will enable the Assembly to intervene, without the consent of the target state, in situations of gross violations of human rights, so long as the violations constitute the 'grave circumstances' specified in the article.

Having discussed the provisions of the AU Act relating to human rights, collective security and intervention, we conclude that the Act presents an opportunity for the AU to engage in treaty-based humanitarian intervention without the authority of the UN Security Council. The AU Act, unlike the OAU Charter, has clear provisions relating to the protection and promotion of human rights. The AU has taken the right decision in incorporating into the AU framework, the main OAU human rights organs. This not only ensures continuity, but also avoids duplicity and the dissipation of resources.

Article 4(h), which permits intervention to pre-empt or stop war crimes, genocide and crimes against humanity, envisages humanitarian intervention under the auspices of the AU. The restriction of the circumstances in which the

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[200] Art 58(1).

[201] See art 58(2).

[202] Art 58(2).

AU can intervene to the three crimes considered to be of 'the greatest concern to the international community',[203] supports this position. As stated earlier, humanitarian intervention responds to rare and atrocious circumstances such as those described in article 4(h).

Finally, it is fundamental to note that it is likely that the norm of humanitarian intervention may be espoused by further enactments by the AU in the future. This is so because of the fundamental difference between the contents of article 3 and that of article 4 of the AU Act. The provisions of the former article are expressed, as 'objectives' while those of the latter are 'principles'. Maluwa has stated that 'principles' form the main process by which the OAU embarked on lawmaking.[204] This trend is likely to continue under the new dispensation of the AU.

4.4.2.3 The Protocol Relating to the Establishment of the Peace and Security Council of the AU, 2002

The Protocol Relating to the Establishment of the Peace and Security Council of the AU presents a bold normative and institutional framework and may be a relevant source of authority for humanitarian intervention in Africa once it enters into force.[205] The Protocol seeks to establish an African Peace and Security Council to take over the work of the OAU Mechanism for Conflict Prevention, Management and Resolution,[206] which, as stated earlier, is now part of the institutional structure of the AU.

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[203] See art 2, Rome Statute of the ICC.

[204] See Maluwa (2000) 201.

[205] Pursuant to art 22(5), the Protocol shall enter into force after ratification by a simple majority of the members of the AU.

[206] Art 22(1) of the Protocol provides that the Protocol 'replaces' the 1993 Cairo Declaration, which establishes the Mechanism for Conflict Prevention, Management and Resolution. Under art 22(2), the provisions of the Protocol shall supersede the resolutions and decisions of the OAU relating to the Mechanism.

The Peace and Security Council of the AU shall be composed of fifteen member states of the AU elected for a term of two years in due regard to equitable geographical representation, and provided that five of the members shall be elected for a term of three years to ensure continuity.[207] To qualify for election, the prospective member state shall manifest, *inter alia*, commitment to uphold the principles of the Union, which include humanitarian intervention.[208]

Such member state should also show a commitment to the respect for the rule of law and human rights.[209] If this criteria is followed, it is likely that the humanitarian intervention envisaged in article 4(h) of the AU Act will be realised the states that may constitute the Peace and Security Council are bound to be the more democratic states in Africa. Such states may not shield states involved in massive violations of fundamental human rights, as was the case during the existence of the OAU.

Moreover, the provision in the Protocol for decisions to be made by a simple majority if they concern procedural matters and by two-thirds majority if they relate to any other matter,[210] will empower the Council to make decisions which may be contested by some members. One of the obstacles on the functioning of the 1993 OAU Mechanism, as stated earlier, is the requirement that decisions are to be made by consensus.

The AU Protocol also provides that decisions of the Peace and Security Council shall be guided by the principle of consensus, but in cases where consensus cannot be reached, decisions will be made in the manner described

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[207] Art 5(1)(a) and (b) of the Protocol.

[208] Art 5(a) of the Protocol.

[209] Art 5(2)(g).

[210] See art 5(13) of the Protocol.

above.[211] Each member of the Peace and Security Council shall have one vote.[212] The Peace and Security Council shall meet at the Addis Ababa Headquarters of the AU at the level of Permanent Representatives, Ministers or Heads of State and Government.[213]

The Council is required to be so organised as to be able to function continuously.[214] For this purpose, the Council shall, at all times, be represented at the Headquarters of the AU.[215] This provision envisages that most of the decisions of the Council will be made at the level of Permanent Representatives for referral to the Council of Ministers and Heads of State and Government who, according to the Protocol will meet less frequently.[216] With regard to humanitarian intervention, the continuity of the work of the Peace and Security Council is particularly important. The Council may be required to take decisions to intervene to pre-empt mass loss of lives or massive violations of human rights on short notice.

The objectives of the Peace and Security Council will include the anticipating and pre-empting of armed conflicts,[217] and the attendant massive violations of fundamental human rights. It will also aim at the promotion of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law.[218]

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[211] As above.

[212] Art 5(12) of the Protocol.

[213] Art 8(2) and (3) of the Protocol.

[214] Art 8(1) of the Protocol.

[215] As above.

[216] See art 8(2) of the Protocol. The Council of Ministers and the Heads of State and Government shall meet at least once a year, respectively, or as often as required.

[217] Art 3(b) of the Protocol.

[218] Art 3(f) of the Protocol.

Among the principles to govern the Peace and Security Council is the principle in article 4(h) of the AU Act, by which the AU may intervene pursuant to a decision of the Assembly of Heads of State and Government, in member state in respect of genocide, war crimes and crimes against humanity.[219] Also, the functions of the Council shall include, *inter alia*, 'intervention, pursuant to article 4(h) of the [AU Act]'.[220]

In order to enable the Peace and Security Council to perform this and other responsibilities, the Protocol provides for the establishment of the African Standby Force, composed of standby contingents 'for rapid deployment at appropriate notice.[221] Such standby contingents shall be established by member states of the AU, in terms of 'standard operating procedures' of the AU.[222] It appears from these provisions that the African Standby Force shall be *an ad* hoc force, constituted as need arises. The functions of the African Standby Force shall include 'intervention in member state in respect of grave circumstances ... in order to restore peace and security, in accordance with article 4(h) [of the AU Act]'.[223]

The Protocol defines the role of the AU Chairperson with regard to conflict prevention and resolution as well as the maintenance of peace, security and stability on the continent. His role includes bringing to the attention of the AU Peace and Security Council or the Panel of the Wise, any matter that is relevant for the promotion of peace, security and stability in Africa.[224] He may also use his good offices to prevent potential conflicts, resolve actual conflicts

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[219] See art 4(j) of the Protocol.

[220] Art 6(d) of the Protocol.

[221] Art 13(1) of the Protocol.

[222] As above.

[223] Art 13(3)(c) of the Protocol.

[224] Art 10 of the Protocol.

and promote peace-building and post-conflict reconstruction.[225] The Protocol requires the Chairperson to use the information gathered the Protocol's 'early warning system' to advise the AU Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action.[226]

The Protocol, once in force, will clarify at least three issues that the AU Act has left open for interpretation. First, as stated earlier, the Act is silent on who determines when the 'grave circumstances' justifying intervention in a state, and by what means is the intervention to be carried out. We argued that the specified 'grave circumstances of genocide, crimes against humanity and war crimes have already been defined in the Rome Statute of the ICC, and that these definitions may offer guidance. The Protocol supports this view, by providing that the AU Peace and Security Council will have the power to recommend to the AU Assembly of Heads of State and Government, intervention pursuant to article 4(h) of the AU Act in respect of 'war crimes, genocide and crimes against humanity as defined in relevant international conventions and instruments'.[227]

Concerning the means of intervention under article 4(h) of the AU Act, we argued earlier that the use of force is envisaged. This position is supported by the provision of the Protocol requiring the establishment of an African Standby Force with both 'military and civilian contingents' for purposes of 'rapid deployment at appropriate notice'.[228]

Second, we observed in the discussion of article 4(h) of the AU Act that neither the provision nor the rest of the Act clarifies the relationship between the AU

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[225] As above.

[226] Art 12(5) of the Protocol.

[227] Art 7(e) of the Protocol.

[228] Art 13(1) of the Protocol.

and the UN when it comes to issues touching on international peace and security. We concluded that the drafters of the Act deliberately left out any definition of this relationship, in order to ensure that the AU can act in emergency cases of the 'grave circumstances' and the attendant massive violations of fundamental rights. The Protocol appears to discount this assumption by detailing out how the Peace and Security Council of the AU will work together with the UN Security Council.

In its preamble, the Protocol recognises the 'provisions of the Charter of the [UN], conferring on the Security Council primary responsibility for the maintenance of international peace and security'.[229] It also takes cognisance of the 'provisions of the [UN] Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the [UN], other international organisations and the [AU], in the promotion and maintenance of international peace ... [and] ... security in Africa'.[230]

Also, the Peace and Security Council of the AU shall be guided by the principles of the AU Act, those of the *UN Charter*, and the Universal Declaration of Human Rights.[231] The AU Council also has power to 'promote and develop a strong partnership for peace and security between the [AU] and the [UN] and it agencies ...'[232] Furthermore, the AU Peace and Security Council is enjoined by the Protocol to 'co-operate and work closely with the [UN] Security Council, which has the primary responsibility for the maintenance of international peace and security'.[233]

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[229] Preamble to the Protocol, para 4.

[230] As above.

[231] Art 4 of the Protocol. Emphasis added.

[232] Art 7(k) of the Protocol.

[233] Art 17 of the Protocol.

The above provisions manifest a sustained effort by the drafters of the Protocol to provide for an African regional mechanism for the maintenance of international peace and security that is subservient to the UN Security Council. Therefore, it may be argued that the Protocol clarifies that the AU will only intervene militarily in member states with the approval and under the supervision of the UN Security Council. However, it is possible that the drafters of the Protocol were either oblivious of the relevant provisions of the AU Act, or they intended to define the relationship between the AU and the UN Security Council, which the AU Act had omitted.

It is interesting to note that there exists an internal contradiction regarding the provisions of the Protocol on the relationship between the AU Peace and Security Council and the UN Security Council. The Protocol states that the AU 'has the *primary* responsibility for promoting peace, security and stability *in Africa*.[234]

Despite the elaborate provisions by the Protocol recognising the primacy of the UN Security Council in the promotion of international peace and security, that primacy only relates to peace and security in other parts of the world. Within Africa, the Protocol adopts the position taken the AU Act – that of according the AU the primary role in matters of international peace and security, including the use of force in the maintenance thereof. This argument is supported by the fact that the Protocol does not provide anywhere that the AU Peace and Security Council or the AU Assembly of Heads of State and Government will require the authorisation of the UN Security Council before engaging in humanitarian intervention under article 4(h) of the AU Act.

The third and final issue in respect of the AU Act which the Protocol clarifies relates to the relationship between the Peace and Security Council of the AU and the African Commission on Human and Peoples' Act. The Protocol

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[234] Art 16(1) of the Protocol. Emphasis added.

provides that the Council 'shall seek close co-operation' with the Commission in all matters relevant to the mandate of the Council.[235]

The Commission is obliged under the Protocol to bring to the attention of the Council 'any information relevant to the objectives of the [Council]'.[236] These provisions are likely to 'give teeth' to the Commissions mandate under article 58 of the African Charter on Human and Peoples' Rights, by which it may bring the attention of the Council situations of gross and systematic violations of human rights. Information provided by the Commission under the Protocol may be a basis of a recommendation by the Council to the AU Assembly for humanitarian intervention under article 4(h) of the AU Act.

Finally, it is noteworthy that the role of eminent personalities that was prominent in the functioning of the AU has also been recognised in the Protocol. A 'Panel of the Wise' is established with the mandate to 'advise the [Peace and Security Council of the AU] and the Chairperson of the [AU] Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa'.[237] The Panel of the Wise is to be composed of 'five highly respected African personalities form various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent'.[238]

The advise of the Panel of the wise is likely to be headed by the AU machinery, and the personal intervention of the Panel in situations of armed conflicts where massive violations of fundamental human rights are taking place may succeed in reconciling the warring parties, given Africa's respect for elders. The provision for the 'Panel of the Wise' is an important development,

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[235] Art 19 of the Protocol.

[236] As above.

[237] Art 11(1) of the Protocol.

[238] Art 11(2) of the Protocol.

as it will ensure that the use of force will only be resorted to if the Panel's mediation, conciliation and other peaceful methods of intervention have failed.

4.4.2.4 Conclusion

The analysis of the provisions of the AU Act lead us to the conclusion that the AU Act represents a major normative and institutional departure form that obtaining in the OAU regime. The AU Act, unlike the OAU Charter, has an express provision mandating it to deal with human rights issues in member states. This suggests that human rights issues will not be treated as matters within the domestic jurisdiction of AU member states.

Article 4(h) provides for treaty-based humanitarian intervention as defined in this study. The intervention will be exercised through the recommendations of the Peace and Security Council of the AU to the Assembly of Heads of State and Government. The Protocol Relating to the Establishment of the Peace and Security Council, unlike the AU Act, provides for the relationship between the AU and the UN Security Council relating the use of force by the AU. However, the provisions of the Act, as well as those of the AU Act, fall short of expressly requiring that the AU shall have to prior or *ex post facto* obtain authorisation of the UN Security before engaging in the use of force under article 4(h) of the AU Act.

4.5 THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) AND HUMANITARIAN INTERVENTION: PROSPECTS

The transformation of ECOWAS from an economic to a political organisational scheme started with the adoption in 1978 and 1981, respectively, of the Protocol on Non-Aggression and the Protocol on Mutual Assistance and Defence. The revision of the ECOWAS Treaty in 1993 was an important event in the history of the Organisation. The Treaty not only allows ECOWAS to forge a strong and economic and monetary union to meet the challenges of

globalisation, but reinforces within its provisions the need to protect fundamental human rights and threats to international peace and security.[239]

Despite the opportunities created by these protocols and the 1993 revised ECOWAS Treaty, the ECOWAS responses to massive violations of fundamental human rights have not been based on the hypothetical institutions provided for.[240] The protocols provided for the establishment of diverse institutional mechanisms and administrative processes to be made operative during situations of mass violations of fundamental human rights.[241] The Protocol on Mutual Assistance and Defence, for instance, envisaged the creation of an Allied Armed Force of the Community (AAFC), Defence Council as well as a Defence Commission.[242]

However, by the time ECOWAS intervened in Liberia, none of these institutional and administrative mechanisms had been established. As a result, ECOWAS intervention in Liberia, and the subsequent one in Sierra Leone were justified, not on the Protocol of Mutual Assistance and Defence but on the Protocol on Non-Aggression.[243] Also, as a result of lack of the proper functioning of some of the institutions provided for under the protocols and 1993 Treaty, ECOWAS had to resort to *ad hoc* mechanisms, such as ECOMOG, as well as mediation initiates of imminent personalities.[244]

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[239] See art 4 of the 1993 Revised Treaty.

[240] See, for instance, Aning (2000) 5 (stating that rather, the responses have been based on the actual experiences of ECOWAS in addressing the conflicts in the region, notably those in Liberia and Sierra Leone).

[241] Aning (2000) 5.

[242] Art 12(i) of the Protocol.

[243] Aning (2000) 6; Didigu (2001) 1.

[244] Didigu (2001) 1.

Despite institutional shortcomings, ECOWAS successfully intervened on humanitarian grounds in Liberia and Sierra Leone. In Sierra Leone, for instance, ECOMOG addressed the conflict effectively, leading to the return of civilian power to a civilian head of state in 1998. ECOWAS troops continued to monitor events in Sierra Leone when ECOMOG withdrew as a result of financial constrains – troop contributing member states could no longer afford to maintain the forces in Sierra Leone.[245]

The failure of the UN to submit the interventions by ECOWAS in Liberia and Sierra Leone to serious scrutiny in terms of the legality of the operations, reinforces the view that post Cold-War Africa holds little interest for the major players in the international community.[246] Thus the interventions appear to have been convenient for the UN, and the US in particular, given its reluctance to intervene militarily in Sierra Liberia, and the UN's reluctance to take decisive action in Sierra Leone.[247] On the basis of this experience, the role of ECOWAS in humanitarian intervention in West Africa is bound to be more prominent in the 21st century.

4.6 THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC) AND HUMANITARIAN INTERVENTION: PROSPECTS

While SADC is essentially an intergovernmental organisation devoted to economic and development integration in Southern Africa, it has become clear that its role cannot be achieved without peace, security and respect for fundamental human rights. This realisation caused the drafters of the SADC

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[245] See <http://www.reliefweb.int> (accessed on 20 September 2002).

[246] Olonisakin (2000) 144.

[247] As above.

Treaty to commit the Organisation to, *inter alia*, the principles of human rights, democracy and the rule of law.[248]

The human rights provisions in the SADC Treaty were strengthened by the adoption on 7 August 2000 of the Protocol on the SADC Tribunal ('SADC Tribunal Protocol') and the Rules of Procedure Thereof.[249] The Protocol will enter into force 30 days upon ratification by two-thirds of the member states of SADC.[250] The Protocol establishes a SADC Tribunal, pursuant to article 16 of the SADC Treaty.[251] The Tribunal will be composed of not less than 10 judges[252] to be elected from among nationals of SADC member states for a five-year term.[253] The Tribunal 'shall have its seat at a place designated by the [SADC] Council, provided it may in any particular case sit and exercise its functions anywhere within [SADC] if it considers it desirable'.[254]

The Tribunal shall have jurisdiction over all disputes and applications relating to the interpretation and application of the SADC Treaty or Protocols or other instruments adopted under the auspices of SADC, as well as other instruments binding upon SADC member states.[255] Since the SADC Treaty provides for the observance of human rights and the rule of law as one of the principles

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[248] See art 4 of the SADC Treaty.

[249] See SADC, *Protocol on Tribunal and the Rules of Procedure Thereof*, adopted at Windhoek, Namibia on 7 August 2000 (copy with the author).

[250] Art 38 of the SADC Tribunal Protocol.

[251] See art 2 of the SADC Tribunal Protocol.

[252] Art 3 of the SADC Tribunal Protocol.

[253] Art 6(1) of the SADC Tribunal Protocol.

[254] Art 13 of the SADC Tribunal Protocol.

[255] Art 14 of the SADC Tribunal Protocol.

that guides SADC,[256] it is arguable that human rights matters are likely to be litigated before the SADC Tribunal once it is established.

This argument is supported by the fact that the SADC Tribunal Protocol provides that individuals may access the Tribunal for redress.[257]Both inter-state and individual petitions may be brought against states that are SADC members because the SADC Tribunal Protocol will have jurisdiction over 'disputes between states and between natural or legal persons and states'.[258]

The 1998 SADC military interventions in the DRC and in Lesotho were justified on an array of grounds. Of these grounds, intervention with the consent of the target state seems to be documented reason for both interventions.[259] However, the two interventions have set precedents for military intervention under the auspices of SADC, in response to situations of armed conflicts in member states. The experiences gained through the interventions will undoubtedly inform future military interventions in the region specifically on the basis of humanitarian intervention.

4.7 THE POTENTIAL ROLE OF OTHER AFRICAN SUB-REGIONAL ORGANISATIONS IN HUMANITARIAN INTERVENTION

Although the OAU (now the AU), ECOWAS and SADC have presented the most significant articulation regarding peace, security and human rights issues, the other sub-regional organisations in Africa are often mentioned as potentially playing a similar role. The other sub-regional organisations are:

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[256] Art 4 of the SADC Treaty.

[257] Art 15 of the SADC Tribunal Protocol.

[258] Art 15 of the SADC Protocol.

[259] The different justifications for the interventions are discussed in Chapter 2 of this study.

Common Market of Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the inter Governmental Authority on Development (IGAD), the East African Community (EAC) and the Arab Maghreb Union (AMU). The potential role in humanitarian intervention of these intergovernmental organisations is now discussed briefly.

4.7.1 The Common Market For Eastern and Southern Africa (COMESA)

COMESA was established in 1993,[260] replacing the Preferential Trade Area of East and Southern African States (PTA) of 1981.[261] One of the institutions of COMESA is the Court of Justice, which has a contentious and advisory jurisdiction on matters relating to the application of the COMESA Treaty.[262] Member states and legal and natural persons have standing before the Court.[263]

The COMESA Court definitely does not have a specific human rights mandate. However, a number of provisions in the Treaty establishing COMESA concern human rights, and have an implied relevance to peace and security. The preamble refers to 'the principles of liberty, fundamental freedoms and the rule of law'.[264] By Article 6, the fundamental principles of COMESA include the promotion and sustenance of a democratic system of governance in each

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[260] See COMESA Treaty (1994) 33 ILM 1067.

[261] The PTA was the immediate predecessor of COMESA. It consisted of 23 member states.

[262] Art 19 COMESA Treaty.

[263] Art 26 COMESA Treaty.

[264] See Preamble COMESA Treaty.

member state,[265] the recognition and observance of the rule of law,[266] and the recognition, promotion and protection of human and peoples' rights.[267]

4.7.2 The Economic Community for Central African States (ECCAS)

ECCAS has been largely moribund since its creation in 1981.[268] The members of ECCAS are Burundi, Rwanda, the DRC, Cameroon, Central African Republic, Chad, Congo, Gabon, Guinea, São Tomé and Principé, and Angola. In May 1992, the Standing Advisory Committee on Security Questions in Central Africa was established[269] in response to a UN General Assembly Resolution.[270] Through this UN Standing Committee, ECCAS member states have taken a number of initiatives to promote regional peace and security. For instance, a non- aggression pact was concluded in 1996.[271]

In 1999, ECCAS Heads of State and Government created a mechanism for the promotion and maintenance of sub regional peace and security- the Council of Peace and Security in Central Africa.[272] The aim of this Council is to prevent, manage and settle conflicts in Central Africa, and the undertaking of activities

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[265] Art 6 (h) COMESA Treaty.

[266] Art 6 (g) COMESA Treaty.

[267] Art 6 (e) COMESA Treaty.

[268] Berman & Sams (2000) 201.

[269] As above.

[270] UN DOC A/ RES/ 46/ 37 B, 6 December 1991.

[271] UN DOC A/ 51/ 274- S/ 1996/ 631 Annex Final Declaration of Heads of State and Government of Countries Members of the United Nations Standing Advisory Committee on Security Questions in Central Africa 8 July 1996, August 1996, Para 4.

[272] UN DOC A/ 53/ 868- S/ 1999/ 303, 17 March 1999.

aimed at promoting, maintaining and consolidating of peace and security in the sub region.[273]

4.7.3 The Intergovernmental Authority on Development (IGAD)

The origins of IGAD differ from those of most other African sub-regional organisations. The organisation began in 1986 as the Inter-Governmental Authority on Drought and Development (IGADD), mainly to address humanitarian disasters in the sub-region.[274] Its name changed to IGAD in 1996. IGAD's member states, at present, are the seven states of East Africa and the Horn of Africa - Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. IGAD's attention has subsequently turned to peace and security issues. The organisation has mediated a number of conflicts in the sub region, usually in collaboration with the OAU and the UN. The division of political and humanitarian affairs includes a conflict prevention, management and resolution section.[275] The organisation has also developed a five element 'programme on conflict prevention, management and resolution'.[276]

4.7.4 The East African Community (EAC)

The EAC was re-launched in 1996, after the initial Community collapsed in 1977.

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[273] See Art 1 Decision on the Creation and of a Mechanism for Promotion, Maintenance and Consolidation of Peace and Security in Central Africa; Annex II Yaounde Declaration on Peace, Security and Stability in Central Africa, adopted on 25 February 1991.

[274] Berman & Sams (2000) 207.

[275] Berman & Sams 209; see also <http://www.igad.org/generalinf> (accessed on 1 August 2002).

[276] The programme entail: (1) developing capacity building for conflict prevention; (2) documenting demobilization and post- conflict peace- building experience; (3) elaborating a culture of peace and tolerance; (4) developing a conflict early warning mechanism, and; (5) creating an emergency relief fund.

In November 1997 and January 1998, the three EAC countries held high-level meetings to discuss possible cooperation for undertaking in peace support operations. These discussions led to the signing of a memorandum of understanding between the armed forces of the three countries on defence matters.[277] In addition, the EAC countries have severally participated in joint military exercises, whose aim is to create confidence and to prepare the forces for peacekeeping activities or deployment in the case of a humanitarian disaster in the region.[278]

The Treaty establishing the EAC, concluded between Kenya, Uganda and Tanzania[279] in 1999 expands the objectives of the Community from economic cooperation envisaged in the defunct EAC, to issues of human rights, peace and security.[280] Under the new Treaty, the member states pledge themselves to ensure, *inter alia*, gender equity, and the promotion of peace, security and stability within the Community.[281] The 'fundamental principles' of the Community include:[282]

> Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights

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[277] Berman & Sams (2000) 200.

[278] *The East African* 29 June-5 July 1998, 11; See also 'East African Countries Sign Pact on Joint Military Training' *Pan African News Agency*, 19 June 1998, available at <http://www.africanews.org/archives> (accessed on 1 August 2002).

[279] Applications for membership from Rwanda and Burundi are still pending for consideration by the EAC Heads of State and Government.

[280] See art 3, *Treaty of the East African Community*, 30 November 1999, reproduced in (1999) 7 *African Yearbook of International Law* 418.

[281] Art 3 (e) and 3 (f).

[282] See art 6(d).

The Treaty also provides for 'operational principles of the Community',[283] and these include good governance, democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.[284] The East African Court of Justice established under article 23 of the Treaty initially has jurisdiction over the interpretation and application of the EAC Treaty.[285] However, the Treaty provides that the Court shall have such other original, appellate, human rights or other jurisdiction as may be determined by the EAC Council of Ministers at a suitable subsequent date.[286] To this end, EAC member states are required to conclude a protocol to operationalise this extended jurisdiction.[287]

Considering that the Treaty is not clear on the use of force or methods of compelling member states to comply with the principles and objectives of the Community, these issues may be clarified by the Court upon a request for an advisory opinion. Under the Treaty, the Summit of Heads of State and Government, the Council of Ministers or any member state of the Community may request the Court to give an advisory opinion regarding a question of law arising from the Treaty.[288]

The EAC Treaty acknowledges that peace and security in the region are pre-requisites to social and economic development.[289] In this regard, member states undertake to establish common mechanisms for the management of

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[283] Art 7.

[284] Art 7(2).

[285] Art 27(1).

[286] Art 27(2).

[287] As above.

[288] Art 36.

[289] Art 124.

refugees,[290] and to periodically review the region's security.[291] This ostensibly means that there exists a legal basis for humanitarian intervention under the EAC treaty, as a response to human rights violations that disturb regional peace and security.

4.7.5 The Arab Maghreb Union (AMU)

The very creation of the AMU in February 1989 represented a notable accomplishment, given the level of distrust among some of its member states.[292] Previously, the Organisation's member states had concentrated their energies on concluding bilateral and trilateral political agreements with one another.[293] The AMU was established through the Treaty of Marrakech, concluded in 1989 between Mauritania, Morocco, Algeria, Tunisia and Libya.

The main aims of the Union are to promote regional security, to create viable sub-regional economic integration and to develop trade and other links with the European Union.[294] A Maghreb Court of Justice with its seat at Nouakchott, Mauritania, is to be established. The Court will adjudicate issues arising from the Treaty of Marrakech, but will not have any human rights mandate.[295] This means that the potential for humanitarian intervention under the auspices of the AMU is very limited considering that the organisation's mandate at the moment does not include human rights matters.

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[290] Art 124(5)(h).

[291] Art 124(6).

[292] Berman & Sams (2000) 193.

[293] Mohamedou (1997) 2-6.

[294] See in general on the Maghreb Arab Union E I Kahiri *Union du Maghreb Arab* (1994).

[295] Viljoen (1999) 208.

4.7.6 Conclusion

Two sub-regional African intergovernmental organisations – ECOWAS and SADC – have been involved in actual use of military force in respective member states as a response to massive violations of fundamental human rights. In the case of ECOWAS's interventions in Liberia and Sierra Leone, we conclude after analysis that they constitute humanitarian intervention. The interventions by SADC in the DRC and Lesotho were based on the consent of the government of the respective state.

However, the SADC interventions are relevant for humanitarian intervention because they were undertaken in countries where massive violations of fundamental human rights were taking place. For this reason, we conclude that the experiences of SADC in the DRC and Lesotho interventions will provide lessons for future humanitarian intervention under the auspices of SADC.

The other African sub-regional intergovernmental organisations - the AMU, the COMESA, the EAC, the ECCAS and the IGAD - have not been involved in actual humanitarian intervention. However, their mandates as described in their respective treaties increasingly include the protection of fundamental human rights, the rule of law and democratic principles. Human rights norm-setting in the context of these African sub-regional organisations, coupled with the experiences of ECOWAS and SADC in military interventions, provides a basis for concluding that these organisations are likely to engage in actual humanitarian intervention in the future.

4.8 CONCLUSION

The debilitating effects of abuse of power by political leadership and authority have been particularly felt in Africa, where the principle of accountability was for many years simply non-existent. One of the consequences of the abuse of power in Africa has been the problem of armed conflicts that has plagued the

continent since independence and the resultant massive violations of human rights.

However, there is increasing political will, both at the continental and sub-regional level, to end a culture of human rights violations and impunity. This political will is manifest in the adoption of the AU Act, an instrument which recognises the 'right' of humanitarian intervention to halt acts of genocide, war crimes and crimes against humanity. The provisions of the AU Act permitting humanitarian intervention will be given 'teeth' once the Protocol on the establishment of the Peace and Security Council enters into force.

At the African sub-regional level, ECOWAS militarily intervened in Liberia and Sierra Leone for humanitarian purposes in respect of purely internal conflicts in the respective countries. These interventions, which constitute treaty-based humanitarian interventions, will serve as an important benchmark in relation to the role of African sub-regional organisations in humanitarian intervention.

Indeed, greater potential for humanitarian intervention lies with sub-regional intergovernmental organisations, because such groups of states not only share common interests and borders, but also common security problems.[296] The analysis in this chapter has shown that there are treaty bases for humanitarian intervention by African intergovernmental organisation. This finding leads us to conclude that in the future, African intergovernmental organisations need not invoke customary international law to justify humanitarian intervention.

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[296] Olonisakin (2000) 52.