

The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal

Kithure Kindiki*

Lecturer, Faculty of Law, Moi University

Summary

This article examines norms and institutions developed under the auspices of the African Union (AU), dealing with human rights challenges on the continent. The article focuses on the possibilities these norms and institutions offer to the AU to undertake collective humanitarian intervention in response to massive and grave violations of human rights involving war crimes, crimes against humanity and genocide being perpetrated in a member state. The writer expresses optimism that the norms and institutions developed under the AU in relation to intervention are more progressive than those obtained under the AU predecessor, the Organisation of African Unity (OAU). If effectively implemented, they could contribute significantly to enhancing human rights protection in Africa.

1 Introduction

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

* LLB (Hons) (Moi), LLM LLD (Pretoria), Dip in Law (Kenya School of Law); kkindiki@yahoo.co.uk

conflict resolution, the protection of human rights and the maintenance of international peace and security.¹ In Africa, the Organisation of African Unity (OAU) was over this period involved in modest efforts aimed at securing international peace, security and the protection of human rights in the region. By 2000, African states had decided to replace the OAU with the African Union (AU).

This contribution critically examines the normative and institutional framework of the AU relating to the protection of human rights and the maintenance of peace and security. The contribution seeks to show that the AU Constitutive Act presents an impressive normative and institutional structure, which, if backed by efficacious norm-enforcement approaches, is likely to lead to a better and safer Africa, in which human rights and human dignity are respected.

2 Background to the establishment of the African Union

By the middle of the 1990s, threats to peace, security and the preservation of human rights posed by armed conflicts in Africa 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.² It was soon realised that amidst armed conflicts, it would be difficult to achieve the objectives of the 1991 Treaty Establishing the African Economic Community (the Abuja Treaty), which was intended to set the stage for greater economic co-operation amongst African states.³

¹ See JP de Cueller (1990) *Report of the Secretary-General on the Work of the Organisation* 21; B Boutros-Ghali (1992) 'An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping' *Report of the Secretary-General Pursuant to Security Council Statement of 17 June 1992* UN Doc A/47/277-S/24111 paras 60–65; B Boutros-Ghali (1992) *A Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the 50th Anniversary of the United Nations* UN Doc A/50/60-S/1995/1 of 3 January 1995 paras 79–96; K Annan (1997) 'Renewing the United Nations: A programme for reform' *Report of the Secretary-General* UN Doc A/51/950 of 14 July 1997.

² For a discussion on all the legal instruments adopted by the OAU since its establishment, see T Maluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201, generally.

³ Adopted 3 June 1991, entry into force 12 May 1994. See The Treaty Establishing the African Economic Community OAU CAB/LEG/28.1; reprinted in (1991) 3 *African Journal of International and Comparative Law* 792, available also at <<http://www.oau-oua.org/generalinfo>> (accessed 28 February 2003), 52 signatures, 45 ratifications.

In order to address the challenges posed by armed conflicts, the OAU Mechanism for Conflict Prevention, Management and Resolution was established in 1993. 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 Democratic Republic of Congo (DRC).⁴

The end of the millennium presented an opportunity for re-positioning the OAU in order to set the African continent as a whole on a firm path to development, peace and the respect for human rights. 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'. 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.⁵

At this meeting the leaders adopted the 'Sirte Declaration',⁶ 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.⁷

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.⁸ The Declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.⁹ The OAU legal unit then drafted the Constitutive Act of the African Union (the AU Act). The OAU Assembly of Heads of State and Government in Lomé, Togo, on 11 July 2000, adopted the Act.¹⁰ All members of the OAU had signed the Act by

⁴ See eg A Abass & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 1 12.

⁵ As above.

⁶ OAU Doc EAHG/ DECL (IV) REV 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

⁷ 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.

⁸ Para 8(iii) Sirte Declaration.

⁹ Para 8 Sirte Declaration.

¹⁰ 36th ordinary session of the OAU Assembly of Heads of State and Government.

March 2001,¹¹ and 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.¹²

The Constitutive Act had to be ratified by two-thirds of the member states of the OAU¹³ After this had been achieved, the AU became legal and political reality a month thereafter (on 26 May 2001), when the Constitutive Act entered into force.¹⁴ The Union was eventually launched in Durban, South Africa, on 10 July 2002.

3 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.¹⁵ The importance of human rights was sparingly recognised under the OAU Charter, which only made reference to the United Nations (UN) Charter and to the Universal Declaration of Human Rights (Universal Declaration), but further established through the adoption of the African Charter on Human and Peoples' Rights (African Charter or Charter) in 1981.¹⁶ 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 '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'.¹⁷ The above provisions of the Sirte Declaration was a reaffirmation of the OAU

¹¹ OAU 'Decision on the African Union' 5th OAU extraordinary session of the Assembly of Heads of State and Government 1–2 March 2001, Sirte, Libya OAU Doc EAHG/Dec 1–4 (V).

¹² As above.

¹³ See art 28 of the Act.

¹⁴ See OAU CAB/LEG 23.15/Vol.IX paras 1–3.

¹⁵ For an examination of the process leading to the transformation of the OAU into the AU, see, generally, E Baimu 'The African Union: Hope for a better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299; S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 175; and KD Magliveras & G Naldi 'The African Union: A new dawn for Africa?' (2002) 52 *International and Comparative Law Quarterly* 415.

¹⁶ 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 Universal Declaration.

¹⁷ See para 6 OAU Sirte Declaration, 2 September 1999.

Ministers' Grand Bay Declaration of 16 April 1999, which acknowledged that:¹⁸

[O]bservance 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 a 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'.¹⁹ 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'.²⁰ The principles of the AU include the 'promotion of gender equality, respect for democratic principles, human rights, the rule of law and good governance'²¹ as well as 'respect for the sanctity of human life'.²²

The human rights provisions of the AU Act are more far-reaching than those contained under the OAU Charter. The provisions reinforce the earlier mentioned declarations made by African leaders to respect human rights, and suggests *bona fide* commitment to pursue human rights in Africa under the Act.²³ 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 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 9 permanent organs established under the Act has defined tasks specifically relating to human rights.²⁴ This raises the question of how and through which organ the AU can fulfil its specific objective to protect and promote human rights.²⁵

¹⁸ 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.

¹⁹ Art 3(e).

²⁰ Art 3(h).

²¹ Art 4(m).

²² Art 4(o).

²³ See Abass & Baderin (n 4 above) 1 29.

²⁴ 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 specialised committees established under art 14(1) relates to human rights. However, it is noteworthy that a human rights mandate may be inferred from powers and functions entrusted to ECOSOCC, the Commission and the Pan-African Parliament.

²⁵ See Abass & Baderin (n 4 above) 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.²⁶ 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'.²⁷ 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, despite the difference contexts in which the two institutions operate, relates to the role of non-governmental organisations (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.²⁸ Equally, NGOs participate in the activities of the African Commission on Human and Peoples' Rights (African Commission or Commission).

However, neither the OAU Charter nor the AU Act contains any provision on the role of NGOs. It is proposed that in defining the mandate of the AU ECOSOCC, a provision is needed to afford NGOs observer or consultative status to participate in the activities of ECOSOCC. In this way, the AU will benefit from the experiences of the NGOs resulting in 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 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]', thus reaching a decision to incorporate it 'as one of the [o]rgans of the [AU] . . .'.²⁹ Despite this positive move, the Assembly surprisingly failed to incorporate two OAU institutions directly concerned with promotion and protection of human rights, namely the

²⁶ See art 22 AU Act.

²⁷ See art 62(2) UN Charter.

²⁸ Such NGOs can avail information to the thematic and special rapporteurs of the Sub-Commission on the Promotion and Protection of 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.

²⁹ See 'Decisions on the implementation of the Sirte summit decision on the African Union' OAU Doc AHG/Decl 1 (XXXVII) para 8.

African Commission³⁰ and the African Committee of Experts on the Rights of the Child.³¹

After a year of uncertainty³² 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 2002.³³ 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.

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 integrated 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*'.³⁴

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, decide to establish new organs for the protection and promotion of human rights. The latter approach is likely to undo the progress that the above-mentioned OAU human rights institutions have achieved so far.³⁵ The OAU institutions already exist, and it would be beneficial to build on their past

³⁰ Established under art 30 of the African Charter on Human and Peoples' Rights (1982) 21 *International Legal Materials* 58.

³¹ Established under art 32 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/153/REV 2 (1999), adopted in 1991, entered into force on 29 November 1999; reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

³² 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 (n 4 above) 1 33.

³³ See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(I) para 9.

³⁴ My emphasis.

³⁵ Abass & Baderin (n 4 above) 1 34.

experiences. Moreover, it would be imprudent to set up additional organs under the AU because of financial implications.³⁶

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) — envisages the creation of other human rights institutions.³⁷ The ideas in the NEPAD were conceived and are being implemented under the auspices of the AU.³⁸ Although NEPAD has yet no legal status in international law and considering that it only exists in the agreement of states, the institutional structures to be created under it are, nevertheless, bound to interplay with existing structures under the AU.

NEPAD seeks to address Africa's underdevelopment through promoting democracy, human rights, accountability, transparency and participatory governance.³⁹ The structure of NEPAD consists of the Heads of State and Government Implementation Committee,⁴⁰ 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,⁴¹ 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.⁴² Baimu has argued for a cautious

³⁶ Recent studies have shown that the African Commission, for instance, has been heavily underfunded by the OAU. Sometimes the Commission has had to rely on external donors to discharge its obligations. See eg F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in Heyns (n 31 above) 47 111 and R Murray 'The African Charter on Human and Peoples' Rights 1987–2000' (2001) 1 *African Human Rights Law Journal* 1.

³⁷ The NEPAD document is available at <<http://www.nepad.org>> (accessed 28 February 2003).

³⁸ See E Baimu 'Human rights mechanisms and structures under NEPAD and the African Union: Emerging trends towards proliferation and duplication' Occasional Paper 15, Centre for Human Rights (2002) 7, where he discusses the linkage between NEPAD and the OAU/AU.

³⁹ Para 49 of the NEPAD Document.

⁴⁰ Para 60. This Committee will consist of 20 Heads of State and Government.

⁴¹ Para 202. The five countries are Algeria, Egypt, Nigeria, Senegal and South Africa.

⁴² 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.

approach in the establishment of parallel human rights organs under the auspices of the AU.⁴³ Instead, he prefers institutional integration within the mainstream AU framework.⁴⁴ 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.⁴⁵

4 The AU Act, human rights and the norms of international law on non-intervention and non-use of armed force

The AU Act contains provisions that are of relevance to humanitarian intervention, consisting of, the use of force by states or states to pre-empt or halt gross human rights violations leading to massive loss of lives, without the consent of the target state.⁴⁶ Since humanitarian intervention is a response to human rights atrocities that may amount to breaches to peace and security, this section discusses some of the AU Act provisions which could be invoked to support a right of humanitarian intervention under the auspices of the AU.

The Act states that the AU shall 'promote peace, security and stability on the continent'.⁴⁷ Furthermore, it is provided that the AU shall function in accordance with the principles of the 'establishment of a common defence policy for the African Continent',⁴⁸ the right of member states 'to live in peace and security',⁴⁹ and the right of any member state of the AU 'to request intervention from the [AU] in order to restore peace and security'.⁵⁰

A cursory evaluation of the above provisions prompts an impression that they contradict the time-honoured customary international law principle of non-intervention forming part of the AU Act.⁵¹ Article 4(g) enshrines the non-intervention principle, stating that the AU shall

⁴³ Baimu (n 38 above) 12–15.

⁴⁴ As above.

⁴⁵ Magliveras & Naldi (n 15 above) 419.

⁴⁶ For definitions of the term 'humanitarian intervention', see eg JPL Fonteyne 'The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter' (1973–4) 4 *California Western International Law Journal* 203–204; D Kritsiotis 'Reappraising policy objections to humanitarian intervention' (1998) 19 *Michigan Journal of International Law* 1005; and A Roberts 'The so-called 'right' of humanitarian intervention' (2000) 3 *Yearbook of International Humanitarian Law* 1–3.

⁴⁷ Art 3(f).

⁴⁸ Art 4(d).

⁴⁹ Art 4(i).

⁵⁰ Art 4(j).

⁵¹ See arts 4(g) & 4(f).

function according to the principle of 'non-interference by any member state in the internal affairs of another'. Arguably, 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:⁵²

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. 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'.

A provision of the AU Act of prime relevance to this contribution is article 4(h). Importantly, it 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 has 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:

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*.⁵³ Such a view would be strengthened by the fact that the UN Charter provides that obligations

⁵² My emphasis.

⁵³ See, *inter alia*, JI Charney 'Anticipatory humanitarian intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231 and Abass & Baderin (n 4 above) 16.

of member states under the UN Charter supersede their obligations under any other treaty.⁵⁴ Furthermore, the Vienna Convention on the Law of Treaties provides that '[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law'.⁵⁵

A response to such a concern would be that the means 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 infringe upon 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 may 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 follows:⁵⁶

What the AU members contracted out of by giving their consent to intervention by 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 Union [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 African Union [AU].

Second, article 4(h) does not clarify who determines when to intervene and by what means. Indeed, 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', of which are specified as 'war crimes, genocide and crimes 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 decides 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.

⁵⁴ Art 103.

⁵⁵ Art 53.

⁵⁶ See Abass & Baderin (n 4 above) 1 19.

Fortunately, these terms have already been defined in the 1998 Rome Statute of the International Criminal Court.⁵⁷ This means that it may be difficult to develop 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.⁵⁸ 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.⁵⁹ Indeed, the UN Security Council in exercising its primary responsibility has the mandate to supervise the AU, which is a regional arrangement or agency within the meaning of article 52 of the UN Charter.⁶⁰ Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:⁶¹

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.

⁵⁷ (1998) 37 *International Legal Materials* 999. The Rome Statute of the International Criminal Court entered into force on 1 July 2002, 60 days after the 60th ratification, pursuant to art 126 of the Statute. The definitions are in art 6 (genocide), art 7 (crimes against humanity) and art 8 (war crimes).

⁵⁸ Art 7(1) AU Act.

⁵⁹ Art 24 UN Charter.

⁶⁰ Nothing in the AU Act states that the AU is a regional arrangement or agency. According to Abass & Baderin (n 4 above) 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.

⁶¹ My emphasis.

The omission by the AU Act of the requirement that the Security Council should supervise article 4(h) interventions is arguably intentional. This is because the same year the AU Act was adopted, the OAU Solemn Declaration on Security Stability Development and Co-operation in Africa expressly recognised 'the *primary* responsibility for the maintenance of international peace and security [lies] with the [UN] Security Council [with] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organisations] remaining the *premier* organi[s]ation for promoting security, stability, development and co-operation in *Africa*'.⁶² 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. The Economic Community of West African States (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.⁶³ 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 acquire power 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.⁶⁴ Thus, it may be argued, that where the UN Security Council refuses to intervene in a crisis of a UN member state, this enables concerned regional arrangements or agencies to undertake whatever actions deemed necessary.⁶⁵

⁶² See AHG/Decl 4 (XXXVI), para 9(9) (my emphasis).

⁶³ See West Africa 4–10 February 1991 140; West Africa 2–8 March 1992 210; Kufuor (1993) 529.

⁶⁴ M Weller *Regional peacekeeping and international enforcement: The Liberian crisis* (1994) Foreword IX.

⁶⁵ See Abass & Baderin (n 4 above) 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.⁶⁶ The Assembly may then request the Commission to 'make an in-depth study' of these cases and to make findings and recommend specific action.⁶⁷

However, the mandate of the Commission under article 58 is limited to the extent that it can only be exercised with the consent of the state where the violations are reportedly occurring.⁶⁸ 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.

In light of the foregoing discussion, we conclude that the AU Act presents an opportunity for the AU to engage in treaty-based humanitarian intervention without the authority of the UN Security Council or of the target state. 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. Moreover, the restriction of the circumstances in which the AU can intervene in such matters, is considered to be of 'the greatest concern to the international community'.⁶⁹

Finally, 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 expressed as 'principles'. Maluwa has stated that 'principles' form the main process by which the OAU embarked on lawmaking.⁷⁰ Arguably, this trend is likely to continue under the new dispensation of the AU.

⁶⁶ Art 58(1).

⁶⁷ Art 58(2).

⁶⁸ As above.

⁶⁹ See art 2 Rome Statute of the ICC.

⁷⁰ See Maluwa (n 2 above) 201.

5 The Protocol Relating to the Establishment of the Peace and Security Council of the AU

The Protocol Relating to the Establishment of the Peace and Security Council of the AU (the Protocol) was adopted at the 1st ordinary session of the AU Heads of State and Government in Durban, South Africa.⁷¹ Ratification by a simple majority of member states is required for its entry into force.⁷²

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,⁷³ which, as stated earlier, is now part of the institutional structure of the AU.

The Peace and Security Council of the AU shall be composed of 15 member states of the AU elected for a term of two years with 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.⁷⁴ To qualify for election, the prospective member state shall manifest among others commitment to uphold the principles of the Union, including humanitarian intervention.⁷⁵

Such member states should also demonstrate respect for constitutional governance, the rule of law and human rights.⁷⁶ If these criteria are followed, it is likely that the humanitarian intervention envisaged in article 4(h) of the AU Act will be realised. Indeed, states constituting the Peace and Security Council are bound to be relatively democratic. These states should not shield those 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,⁷⁷ 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.

⁷¹ (AU) AAU, 1st ordinary session, 9 July 2002.

⁷² Art 22(5) Protocol

⁷³ 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 which are in conflict with the Protocol.

⁷⁴ Arts 5(1)(a) & (b) Protocol.

⁷⁵ Art 5(2)(a) Protocol.

⁷⁶ Art 5(2)(g).

⁷⁷ Art 8(13) Protocol.

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 must conform to the manner described above.⁷⁸ Each member of the Peace and Security Council shall have one vote.⁷⁹ 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.⁸⁰

The Council is required to be so organised to enable it to function continuously.⁸¹ For this purpose, the Council shall, at all times, be represented at the Headquarters of the AU.⁸² 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.⁸³ 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 life 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,⁸⁴ and preventing massive violations of fundamental human rights. It will also aim at the promotion and encouragement of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law.⁸⁵

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 states with in respect of genocide, war crimes and crimes against humanity.⁸⁶ Also, the functions of the Council shall include 'intervention, pursuant to article 4(h) of the [AU Act]'.⁸⁷

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'.⁸⁸ Such standby contingents shall be

⁷⁸ As above.

⁷⁹ Art 8(12) Protocol.

⁸⁰ Arts 8(2) & (3) Protocol.

⁸¹ Art 8(1) Protocol.

⁸² As above.

⁸³ Art 8(2) 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.

⁸⁴ Art 3(b) Protocol.

⁸⁵ Art 3(f) Protocol.

⁸⁶ Art 4(j) Protocol.

⁸⁷ Art 6(d) Protocol.

⁸⁸ Art 13(1) Protocol.

established by member states of the AU, in terms of 'standard operating procedures' of the AU.⁸⁹ 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]'.⁹⁰

The Protocol defines the role of the AU Chairperson with regard to conflict prevention and resolution including 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.⁹¹ He may also use his good offices to prevent potential conflicts, resolve actual conflicts and promote peace-building and post-conflict reconstruction.⁹² The Protocol requires the Chairperson to use the information gathered under 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.⁹³

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'.⁹⁴

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'.⁹⁵

⁸⁹ As above.

⁹⁰ Art 13(3)(c) Protocol.

⁹¹ Art 10(2) Protocol.

⁹² As above.

⁹³ Art 12(5) Protocol.

⁹⁴ Art 7(1)(e) Protocol.

⁹⁵ Art 13(1) Protocol.

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 and the UN in relation 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 to attend 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'.⁹⁶ 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, security and stability in Africa'.⁹⁷

Also, the Peace and Security Council of the AU shall be guided by the principles of the AU Act and those of the *UN Charter* and the Universal Declaration.⁹⁸ The AU Council also has power to 'promote and develop a strong partnership for peace and security between the [AU] and the [UN] and its agencies . . .'.⁹⁹ 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'.¹⁰⁰

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

⁹⁶ Preamble to the Protocol para 4.

⁹⁷ As above.

⁹⁸ Art 4 Protocol (my emphasis).

⁹⁹ Art 7(1)(k) Protocol.

¹⁰⁰ Art 17(1) Protocol.

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'.¹⁰¹

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 under 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 that the Protocol has clarified relates to the relationship between the Peace and Security Council of the AU and the African Commission on Human and Peoples' Act. The Protocol provides that the Council 'shall seek close co-operation' with the Commission in all matters relevant to the mandate and objectives of the Council.¹⁰²

The Commission is obliged under the Protocol to bring to the attention of the Council 'any information relevant to the objectives and mandate of the [Council]'.¹⁰³ These provisions are likely to 'give teeth' to the Commission's mandate under article 58 of the African Charter, by attracting the attention of the OAU (AU) Assembly 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, the prominent 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'.¹⁰⁴ The Panel of the Wise is to be composed of 'five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent'.¹⁰⁵

¹⁰¹ Art 16(1) Protocol (my emphasis).

¹⁰² Art 19 Protocol.

¹⁰³ As above.

¹⁰⁴ Art 11(1) Protocol.

¹⁰⁵ Art 11(2) Protocol.

The advice of the Panel of the Wise is likely to be headed by the AU machinery. 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, 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.

6 Conclusion

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:¹⁰⁶

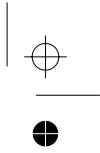
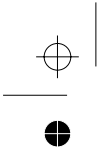
It is important to point out that when African leaders decided to establish the [AU] when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organisation which was going to be a continuation of the OAU by another name.

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 human rights, peace and security, radically depart from those of the OAU Charter. The analysis of the provisions of the AU Act leads us to the conclusion that the AU Act represents a major normative and institutional departure from that contained in the OAU regime. The AU Act, unlike the OAU Charter, has express provisions mandating it to deal with issues of human rights, peace and security in member states.¹⁰⁷

Article 4(h) provides a basis for humanitarian intervention. 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

¹⁰⁶ 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.

¹⁰⁷ The relevant provisions are in review, with the aim of 'strengthening' them. The Executive Council of the AU, for example, met in Tripoli on 13 December 2002 and proposed, *inter alia*, that the AU Act be amended to highlight the role of women in continental development and their role in securing peace and security on the Continent. The Council also decided to replace the appellation 'founding fathers' with 'founders' in the understanding that those who created the AU predecessor did so well aware of women's contribution in this regard. See 'First extraordinary session of the Executive Council on the proposed amendments to the African Union', Tripoli, Libya, 11-13 December 2002, press release and information available at <<http://www.africa-union.org>> (accessed 28 February 2003).



PROTECTION OF HUMAN RIGHTS / MAINTENANCE OF PEACE AND SECURITY¹¹⁷

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 obtain prior or *ex post facto* authorisation of the UN Security before engaging in the use of force under article 4(h) of the AU Act.

