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REFLECTIONS ON THE AFRICAN UNION'S RIGHT TO INTERVENE

*Ntombizozuko Dyani-Mhango**

INTRODUCTION

The African Union (“AU”) has reserved for itself a right to intervene in cases of crimes against humanity, war crimes, and genocide.¹ This Article reflects on the AU’s right to intervention in order to ascertain what this right entails and also, how the AU has dealt with it so far. The AU law requires, and international law allows, for the AU to exercise its right to intervene in a member state where international crimes are being committed. In short, the AU has a legal duty to intervene, evidenced by the codification of this duty in the AU’s Constitutive Act and by the establishment of organs that play crucial roles in allowing the AU to exercise this right.

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1. Article 4(h) of the African Union (“AU”) Constitutive Act provides that the AU has the right to intervene in a member state in “grave circumstances, namely, war crimes, genocide, and crimes against humanity.” Constitutive Act of the African Union art. 4(h), May 26, 2001, 2158 U.N.T.S. 3 [hereinafter Constitutive Act]. The Constitutive Act of the AU was adopted at the thirty-sixth ordinary session of the Assembly of Heads of States and Government of the Organization of African Unity (“OAU”) in Lome, Togo, on July 11, 2000 and entered into force on May 26, 2001. *Id.* at 33–34, 44–46. See Dan Kuwali, *Art. 4(H) + R2p: Towards a Doctrine of Persuasive Prevention to End Mass Atrocity Crimes*, 3 INTERDISC. J. HUM. RTS. L. 55, 55 (2008–2009); Jonathan D. Rechner, *From The OAU to the AU: A Normative Shift with Implications for Peacekeeping and Conflict Management, or Just a Name Change?*, 39 VAND. J. TRANSNAT’L L. 543, 544, 562 (2006); J. Emeka Wokoro, *Towards a Model for African Humanitarian Intervention*, 6 REG. J. INT’L L. 1, 12 (2008); Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L.J. 337, 369 (2011); Vincent O. Nmehielle, *The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?*, 7 SING. J. INT’L & COMP. L. 412, 414 (2003); Tiyanjana Maluwa, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 LEIDEN J. INT’L L. 157, 163–64 (2003).

However, the AU still needs to resolve some impediments that may bar it from exercising its right to intervene in a member state in whose territory crimes against humanity, war crimes, and genocide are being committed. Among the impediments that need to be resolved is the need to clarify the meaning of the right to intervene, which is not currently defined anywhere in the AU treaties, decisions, or resolutions. Further, the AU may also be barred from exercising this right as it appears that the principles of sovereignty, non-interference, and territorial integrity of the AU member states are interpreted restrictively. The AU must deal with these issues before an attempt to exercise the right to intervene is made.

Part I of this Article explains the background to the formation of the AU and how international and African communities have addressed atrocities in Africa in the past. Part II discusses the meaning of the AU's right to intervene, and examines the relationship between the AU and the United Nations Security Council with regard to the issues of peace and security in the African region. Part III then describes the interventions exercised by the AU so far.

I. BACKGROUND TO THE AU

The current African regional system began with the establishment of the Organization of African Unity ("OAU"). The OAU was established by the OAU Charter in May 1963.² Although the OAU Charter refers to the Universal Declaration of Human Rights in its preamble and in a provision outlining the purposes of the OAU, the priorities of the OAU Heads of State and Government ("OAU Assembly") were not human rights.³

2. For a critical analysis of the OAU, see generally Alfred W. Chanda, *The Organization of the African Unity: An Appraisal*, 21-24 ZAMBIA L.J. 1 (1989-92).

3. See Gino J. Naldi, *Future Trends in Human Rights in Africa: The Increased Role of the OAU?*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000 at 2 (Malcolm D. Evans & Rachel Murray eds., 2002). The purposes of the OAU are outlined in Art. 2(1) of the OAU Charter as follows:

- (a) To promote the unity and solidarity of the African States;
- (b) To co-ordinate and intensify their cooperation and effort to achieve a better life for the peoples of Africa;
- (c) To defend their sovereign, their territorial integrity and independence;
- (d) To eradicate all forms of colonialism from Africa; and

Instead, the OAU Assembly was “[d]etermined to safeguard and consolidate the hard-won independence, as well as the sovereignty and territorial integrity of our states, and fight against neo-colonialism in all its forms.”⁴ Therefore, the OAU Charter emphasized the sovereignty and territorial integrity of its member states, and enjoined those members from interfering in the internal affairs of other states.⁵ The following three over-riding principles guided the OAU for thirty-nine years:⁶

First, all states were sovereign equals. Each state would have an equal say, with no greater weight given to larger or more powerful states. Second, states agreed not to interfere in the domestic affairs of fellow members. Third, territorial borders were sacrosanct, with no room for alteration in the status quo. Adoption of these principles reflected a bitter colonial experience. No longer did states want to be dominated by outsiders or risk border changes that would unleash ethnic rivalries and invite outside intervention.⁷

(e) To promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

Charter of the Organization of African Unity [OAU Charter] art. 2(1), May 25, 1963, 479 U.N.T.S. 70.

4. *Id.* at 70. See Claude E. Welch, Jr., *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 43 (1992) (noting that the founders of the OAU did not focus on human rights policy in the original OAU Charter).

5. See OAU Charter art. 3 (including “peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;” “unreserved condemnation . . . of political assassination;” “absolute dedication to the total emancipation of the African territories which are still dependent;” and “affirmation of a policy of non-alignment with regard to all blocs,” as its principles). For a discussion of the principles of the OAU, see generally T.O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (Richard Akinjide ed., 2d rev. ed. 1988).

6. MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 204 (2d ed. 2010).

7. *Id.* See also Naldi, *supra* note 3, at 2 (noting that “[a]ccount must also be taken of the fact that the States of Africa, most newly independent, jealously guarded their freedom and deeply resented any measures which hinted at external interference with their internal affairs.”); John Okpari, *Policing and Preventing Human Rights Abuses in Africa: The OAU, the AU & the NEPAD Peer Review*, 32 INT’L J. LEGAL INFO. 461, 462 (2004) (arguing that the OAU was formed primarily to secure “accelerated decolonization of the continent and the preservation of the territorial integrity” of the newly

Based on these principles, “heads of state avoided criticizing each other” during the OAU Assembly sessions, “which led not only to disappointment but to accusations of the OAU Assembly [as merely] a ‘Heads of State Club,’” instead of being leaders concerned with the human rights violations that were being committed in some of their territories.⁸ It is in this regard that the OAU was accused of being unable to curb conflicts escalating in the continent.⁹

The OAU leaders have been criticized for the dismal record of African states regarding the protection of human rights.¹⁰ Even after the adoption of the African Charter on Human and Peoples’ Rights (“African Charter”)¹¹ and the subsequent estab-

formed independent states); *see also* Nmehielle, *supra* note 1, at 412–15, 434–35 (contending the OAU Charter neither made any express commitments to the protection of human rights generally nor the achievement of gender equality in particular as key objectives of the OAU).

8. Ben Kioko, *The Right of Intervention Under the African Union’s Constitutive Act: From Non-Interference to Non-Intervention*, 85, No. 852. INT’L REV. RED CROSS 807, 814 (2003); *see also* Jeremy Sarkin, *Humanitarian Intervention and the Responsibility to Protect in Africa*, in AFRICA’S HUMAN RIGHTS ARCHITECTURE 45, 56 (John Akokpari & Daniel Shea Zimmler eds., 2008).

9. *See* P. Mweti Munya, *The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L. J. 537, 538 (1998–1999) (noting the lack of success from the OAU’s historical record in conflict resolution, and arguing: “The ink had not even dried on the [OAU] Charter before the continent was plagued by conflicts, civil wars and a myriad of other problems. The celebrated organization that many had hoped would consolidate continental security and nurture peace and stability had failed to do so.”) However, Musifiky Mwanasali, *From Non-Interference to Non-Indifference: The Emerging Doctrine of Conflict Prevention in Africa*, in THE AFRICAN UNION AND ITS INSTITUTIONS 41, 46 (John Akokpari, Angela Ndinga-Mavumba & Tim Murithi eds., 2008), notes that “The OAU is . . . recogni[z]ed for its efforts to prevent inter-state conflicts, including the Algeria-Morocco border war of 1963, the Ethiopia-Somalia border dispute of the 1970s, and the crisis in the Comoros in the late 1990s and early 2000.”

10. *See, e.g.*, Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT’L L. REV. 1177, 1211 (2002) (noting that during the OAU era “African leaders fiddled while the edifice called ‘Africa’ was engulfed in conflagrations. Increasing political repression, denial of political choice, restrictions on freedom of association, and other human rights violations met with rare murmurs of dissent from the OAU.”); *see also* Nmehielle, *supra* note 1, at 412 (noting that many African states were “engaged in outrageous human rights violations under the not so watchful eyes of the [OAU]”).

11. African Charter on Human and Peoples’ Rights,

lishment of the African Commission on Human and Peoples' Rights ("ACHPR"),¹² OAU member states carried on with gross human rights violations that can often constitute international crimes. They also seemingly ignored the provisions of the African Charter and the ACHPR's pronouncements on human rights abuses without any apparent fear of repercussions from the OAU because they perceived that the mechanisms established under the Charter were weak.¹³ The OAU was still occupied with addressing racism and apartheid in Southern Africa, so it was not truly concerned with the human rights violations in the territories of its member states.¹⁴ Indeed, one legal scholar argues that the African Charter was adopted as a result of the pressure from the West.¹⁵ The only instances where the OAU was concerned with the internal affairs of the member states was when the issue pertained to colonialism, domination, and apartheid in South Africa and Southern Rhodesia (Zimbabwe).¹⁶ It is in these instances that the OAU Assembly

June 27, 1981, O.A.U. Doc.CAB/LEG/67/3rev. 5, 21 I.L.M. 58 (entered into force on Oct. 21, 1986). For a critical analysis of the African Charter, see generally B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982); Philip Amoah, *The African Charter on Human and Peoples' Rights—An Effective Weapon for Human Rights?*, 4 AFR. J. INT'L & COMP. L. 226 (1992).

12. The African Commission on Human and Peoples' Rights was established by Art. 30 of the African Charter on Human and Peoples' Rights "to promote human and peoples' rights and ensure their protection in Africa." African Charter on Human and Peoples' Rights, *supra* note 11, art. 30. For an analysis of the African Commission on Human and Peoples' Rights, see generally EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* (1996).

13. Nmehielle, *supra* note 1, at 413–14.

14. See FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA*, 163 (2007) (noting that the OAU "turned a blind eye" when it came to human rights violations in member states because of the principle of "non-interference"); see also notes 16 and 17 *infra* discussing the OAU resolutions and decisions when it came to racism and apartheid in Southern Africa, i.e., South Africa and Zimbabwe.

15. See U. Oji Umzurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 903–04 (1983).

16. U. Oji Umzurike, *The Domestic Jurisdiction Clause in the OAU Charter*, 78 AFR. AFF. 197, 202 (1979) (noting that the only two exceptions to non-interference are when questions of colonialism or apartheid arose).

was proactive and passed resolutions that expressly rejected colonialism, domination, and similar practices, and even called on its member states to assist in the liberation movements.¹⁷ One can argue that the rationale for the OAU's behavior in these specific cases stemmed from the OAU Charter, which clearly stated that the purposes of the OAU were to fight colonization and the dominance of the colonizers.¹⁸

The African states began to realize that there was a need to respond effectively to conflicts as there was a worldwide change in the early 1990s.¹⁹ One factor that led to this change of heart

17. See, e.g., OAU, *Resolutions Adopted by First Conference of Independent African Heads of State and Government Held in Addis Ababa, Ethiopia*, O.A.U. Doc. CIAS/PLEN.2/REV.2 (May 22–25, 1963) (agenda items including decolonization, apartheid, and racial discrimination); see also OAU, *Apartheid and Racial Discrimination*, O.A.U. Doc. AHG/Res. 6(I) (July 17–21, 1964) (“[n]oting with grave concern the consistent refusal of the Government of South Africa to give consideration to appeals by every sector of world opinion and in particular the resolutions of the [U.N.] Security Council and General Assembly.”); OAU, *Apartheid and Racial Discrimination in the Republic of South Africa*, ¶¶ 4, 10, O.A.U. Doc. AHG/Res. 34 (II) (Oct. 21–26, 1965) (“call[ing] on all states to institute a strict embargo on the supply of arms and ammunition and other material for use by military and police forces in South Africa,” and inviting “the South African liberation movements to concert their policies and actions and intensify the struggle for full equality, and appeals to all States to lend moral and material assistance to the liberation movements in their struggle.”); OAU, *Southern Rhodesia*, ¶ 1, O.A.U. Doc. AHG/Res. 8(I) (July 17–24, 1964) (requesting the “African States to take a vigorous stand against a Declaration of Independence of Southern Rhodesia by a European minority government and to pledge themselves to take appropriate measures, including the recognition and support of an African nationalist government-in-exile should such an eventuality arise.”); OAU, *Southern Rhodesia*, ¶ 6, O.A.U. Doc. AHG/Res 25 (II) (Oct. 21–25, 1965) (resolving “to use all possible means including force to oppose a unilateral declaration of independence,” and “to give immediate assistance to the people of Zimbabwe with a view to establishing a majority government in the country.”); OAU, *Territories Under Portuguese Domination*, ¶ 1, O.A.U. Doc. AHG/Res 9(I) (“condemning Portugal for its persistent refusal to recognise the right of the peoples under its domination to self-determination and independence.”).

18. See OAU Charter art. 2(1)(d) (noting that one of the purposes of the OAU is “[t]o eradicate all forms of colonialism”); *id.* art. 3(6) (including one of the principles of the OAU: “[a]bsolute dedication to the total emancipation of the African territories which are still dependent.”).

19. SAMUEL M. MAKINDA & F. WAFULA OKUMU, *THE AFRICAN UNION: CHALLENGES OF GLOBALIZATION, SECURITY, AND GOVERNANCE* 29 (2008) (noting that “[b]y the early 1990s, globalization and the end of the Cold War had compelled African states to recognize the structural weakness that had prevented the OAU from responding effectively to conflicts.”).

was that “it was becoming evident that the West and the [U.N.] Security Council were not responding promptly to African problems, particularly security matters.”²⁰ The U.N. missions in Angola²¹ and in Somalia,²² for example, failed to restore peace in the countries.²³ As a result, it was argued that the failure of these missions led to an unwillingness on the part of the U.N. to become involved in African conflicts in general.²⁴ One significant consequence of this reluctance by the U.N. is the failure of the international community to provide adequate troops or sufficient mandate to the U.N. Mission in Rwanda (“UNAMIR”), which was on the ground as early as 1994.²⁵ Had the international community acted in time, the genocide and massive sexual violence against women in Rwanda would not have occurred.

Therefore, during the Ouagadougou OAU Summit in 1998, South Africa’s then President Nelson Mandela told his fellow leaders that

we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right

20. *Id.*

21. These missions are UNAVEM I, UNAVEM II and MONUA, which occurred between 1991 and 1999. For the background to the U.N. missions in Angola, see U.N. Mission of Observers in Angola, United Nations Peacekeeping Operations, http://www.un.org/Depts/DPKO/Missions/monua_b.htm (last visited Oct. 26, 2012).

22. These missions are UNOSOM I and UNOSOM II, which were supported by UNITAF and led by the United States (between late 1992 and May 1993). For the background to the U.N. operations in Somalia, see Mission Backgrounder, U.N. Operation in Somalia I, <http://www.un.org/Depts/DPKO/Missions/unosomi.htm> (last visited Oct. 26, 2012).

23. See Eki Yemisi Omorogbe, *Can the African Union Deliver Peace and Security?*, 16 J. CONFLICT & SECURITY L. 35, 36 (2011).

24. *Id.*

25. See generally ROMÉO A. DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004) (giving the account of the failure by the international community to act during the Rwandan genocide); Rep. of the Indep. Inquiry into the Action of the U.N. During the 1994 Genocide in Rwanda, U.N. Doc. S/1999/1257 (Dec. 15, 1999) (by Ingvar Carlsson, Han Sung-Joo & Rufus M. Kupolati); INTERNATIONAL PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, ORGANIZATION OF AFRICAN UNITY, *RWANDA: THE PREVENTABLE GENOCIDE* (2000).

and duty to intervene when behind those sovereign boundaries, people are being slaughtered to protect tyranny.²⁶

This speech is remarkable as former President Mandela specifically defended the right to intervene in member states in the name of protecting human rights. Soon after this speech, the OAU Assembly adopted the Constitutive Act, which established the AU.²⁷

The process leading to the adoption of the Constitutive Act and the subsequent establishment of the AU began at the Algiers Summit in 1999.²⁸ At this Summit, the AU Assembly was “deeply convinced the [OAU] ha[d] played an irreplaceable role in the affirmation of political identity and the realization of the unity of our continent.”²⁹ The Algiers Summit further identified new challenges for the future and urged that the continent “enter the Third Millennium with a genuine spirit of cooperation with restored human dignity and a common hope in an interdependent future for mankind.”³⁰ Then came the Sirte Declaration,³¹ which was adopted during the OAU’s extraordinary summit, convened at Libya’s request, “[to deliberate] extensively on ways and means of making the OAU effective so as to keep pace with the political and economic development taking place in the world and the preparation required of Africa within the context of globalization so as to preserve its social, economic and political potentials.”³²

26. Nelson Mandela, President of the Republic of South Africa, Address to the Summit Meeting of the OAU Heads of State and Government (June 8, 1998) (transcript available at http://www.info.gov.za/speeches/1998/98609_0w1849810090.htm).

27. See Maluwa, *supra* note 1, at 157, (noting that the Constitutive Act was adopted by the OAU on July 11, 2000, almost two years before the inauguration of the AU). It is the author’s assumption that it was “soon after” the speech of former President Mandela that the Constitutive Act was adopted. This is based on the fact that the Constitutive Act in art. 4(h) included the right to intervene.

28. See Algiers Declaration, O.A.U. Doc. AHG/Decl.1 (XXXV), ¶ 8 (July 12–14, 1999).

29. *Id.* ¶ 3.

30. *Id.* ¶ 8.

31. Sirte Declaration, O.A.U. Doc. EAHG/Draft/Decl. (IV) Rev.1 (Sept. 8–9, 1999) [hereinafter Sirte Declaration].

32. OAU, *Decisions on the Convening of an Extraordinary Session of the OAU Assembly of Heads of State and Government in Accordance with Article 33(5) of its Rules of Procedure*, O.A.U. Doc. AHG/Dec.140 (XXXV) at 22–23 (July 12–14, 1999).

The OAU Assembly declared that it was also “determined to eliminate the scourge of conflicts, which constitutes a major impediment into the implementation of our development and integration agenda.”³³ Thus, the pertinent part of the Sirte Declaration provides as follows:

8. Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of those proposals, and bearing in mind the current situation on the continent, we DECIDE TO:

(i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organization and the provisions of the Treaty Establishing the African Economic Community.

(ii) Accelerate the process of implementing the Treaty Establishing the African Economic Community, in particular:

Shorten the implementation periods of the Abuja Treaty,

Ensure the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, the Pan-African Parliament . . .

Strengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community and realizing the envisaged Union . . .³⁴

The AU “was officially launched in Durban, South Africa and effectively replaced the OAU” on July 10–12, 2002.³⁵ During the inauguration of the AU, former President Thabo Mbeki of South Africa declared the following:

Together we must work for peace, security and stability for the people of this continent. We must end the senseless conflicts and wars on our continent which have caused so much

33. Sirte Declaration, *supra* note 31, ¶ 6.

34. *Id.* ¶ 8.

35. *Nmehielle*, *supra* note 1, at 415. See also, African Union [AU], The Durban Declaration in Tribute to the Organisation of African Unity and on the Launching of the African Union, A.U. Doc. ASS/AU/Decl. 2 (I) (July 10, 2002).

pain and suffering to our people and turned many of them into refugees and displaces and forced others into exile.³⁶

This brought “hope . . . for a better future for the peoples of Africa.”³⁷ The move from OAU to AU has been argued to be the first step for Africa to demonstrate its seriousness about protecting human rights and to maintain peace, security, and stability in Africa.³⁸ However, not everyone saw this move as a promise by the African leaders to the Africans that the AU will take human rights seriously.³⁹ As such, the AU was seen as “an old wine in a new wine skin.”⁴⁰

However, the Constitutive Act of the AU has provisions that clearly refer to human rights and armed conflicts in Africa. For example, the preamble stipulates that African leaders are “conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.”⁴¹ Consequently, they are “determined to promote and protect human and peoples’ rights . . . and to ensure good governance and the rule of law.”⁴² Further, the Constitutive Act provides that its objectives include “promot[ing] and protect[ing] human and peoples’ rights in accordance with the [African Charter] and other human rights instruments.”⁴³

36. Thabo Mbeki, Chairperson of the African Union, Launch of the African Union (July 9, 2002) (transcript available at http://www.africanunion.org/official_documents/Speeches_&_Statements/HE_Thabo_Mbiki/LAUNCH%20of%20the%20African%20Union,%209%20July%202002.htm).

37. *Id.*

38. See Evarist Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa*, 1 AFR. HUM. RTS. L.J. 299, 306–07 (2001); see also Corinne A. A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT’L L. 365, 379 (2002).

39. Udombana, *supra* note 10, at 1258, 1259 (arguing that the AU “is not likely to take human rights seriously—even though that is greatly desired” and that the “adoption of the [Constitutive Act] has more to do with the hysteria of globalization than the euphoria of unity, or for that matter, human rights.”).

40. *Id.*, at 1258.

41. See Constitutive Act, at 35.

42. See *id.*

43. *Id.* art. 3(h).

Like the OAU Charter, the Constitutive Act also prioritizes the principles of state sovereignty, territorial integrity, and non-interference as the Constitutive Act defends these principles as “a core objective of the [AU]”⁴⁴ and that the AU will function in accordance with the principle “of non-interference by any Member State in the internal affairs of another.”⁴⁵ On the other hand, unlike the OAU Charter, the Constitutive Act places limitations on state sovereignty by defining sovereignty in terms of a state’s willingness and capacity to provide protection to its nationals.⁴⁶ Further, the end of the Cold War presented African leaders with a set of new challenges, which included the “rethinking of the principle of non-interference” in the internal affairs of another state.⁴⁷ The African leaders’ efforts to deal with these challenges required innovation and creativity.⁴⁸ Thus, it is not surprising that, through the Constitutive Act, the AU has reserved for itself a right to intervene in cases of crimes against humanity, war crimes, and genocide. The question remains: What does this right to intervene mean?

II. THE AU’S RIGHT TO INTERVENE, SOME POSITIVE OUTCOMES, AND SOME IMPEDIMENTS

The AU also refers to the right to intervene in the yet-to-come-into-force Kampala Convention on the protection and assistance of internally displaced persons⁴⁹ and in decisions made

44. See *id.* art. 3(b).

45. *Id.* art. 4(g); AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union [PSC Protocol] art. 4(f), July 9, 2002, available at <http://www.africanunion.org/root/au/auc/departments/psc/asf/doc/PSC%20protocol.pdf>.

46. See 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*, 49 NETH. INT’L L. REV. 1, 19 (2002). Abass and Baderin argue that: “What the AU members contracted out of by giving their consent to intervention by AU is the principle of ‘non-intervention’ . . .” Further, “[b]y 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].” *Id.*

47. Max Sesay, *Civil War and Collective Intervention in Liberia*, 23 REV. AFR. POL. ECON. 35, 50 (1996).

48. See generally *id.* (describing challenges that African nations faced during the post-Cold War era).

49. See AU, Convention on the Protection and Assistance of the Internally Displaced Persons [hereinafter Kampala Convention], at 1–2, Oct. 23, 2009,

by the AU Assembly, which is the supreme organ of the AU.⁵⁰ However, neither these treaties (the Constitutive Act and the Kampala Convention) nor the AU Assembly decisions define this right.⁵¹ As a result, some legal scholars have correctly assumed that the right to intervene confers the right to use of force and equates to the controversial humanitarian intervention (“HMI”).⁵² A few scholars even argue that it is preferable to insist that the AU has a duty to intervene rather than a “right,” as a “right” implies that the AU does not have to intervene when circumstances that pertain to crimes against humanity, war crimes, and genocide occur.⁵³ A legal duty, on the

available at <http://www.au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>. As of Feb. 10, 2012, only one state has ratified the Convention while twenty-nine states have signed it, and the Convention needs fifteen ratifications to come into force. See *List of Countries Which Have Signed Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, AFRICAN UNION (Aug. 14, 2012), http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf. Art. 8(1) of the Kampala Convention provides that “[t]he [AU] shall have the right to intervene in a Member State pursuant to a decision of the Assembly in accordance with Article 4(h) of the Constitutive Act in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity.” Kampala Convention art. 8(1).

50. See, e.g., AU, Decision on the Implementation of the Assembly’s Decisions on the International Criminal Court Doc. EX. CL/670 (XIX), ¶ 2, A.U. Doc. Assembly/AU/Dec. 366 (XVII) (June 30–July 1, 2011) (reiterating “its commitment to fight impunity in conformity with the provisions of *Article 4(h) of the Constitutive Act of the African Union*”) (emphasis added); AU, Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/640 (XVIII), ¶ 2, A.U. Doc. Assembly/AU/Dec. 335 (XVI) (Jan. 30–31, 2011) (also reiterating “its commitment to fight impunity in conformity with the provisions of *Article 4(h) of the Constitutive Act of the African Union*”) (emphasis added).

51. There is no provision in the Constitutive Act or the Kampala Convention which defines the AU’s right to intervene.

52. See, e.g., Nsongurua Udombana, *When Neutrality is a Sin: The Darfur Crisis and the Crisis of a Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149, 1149 (2005) [hereinafter *When Neutrality is a Sin*]; Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa’s Sub-regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect*, 53 J. AFR. L. 1, 25 (2009) [hereinafter *Dealing with Africa’s Human Rights Problems*].

53. See *When Neutrality is a Sin*, supra note 52, at 1157 n.42 (arguing that “the use of the word ‘right’ in referring to humanitarian intervention is a misnomer,” and observing that “[h]uman rights law is created for the benefit

other hand, may create legal consequences for the AU if it fails to execute its obligation to intervene as compared to a discretionary “right to intervene.”⁵⁴ It is important to examine the content of this right to ascertain its meaning.

According to the Constitutive Act, the criterion for the exercise of intervention by the AU is twofold: first, it may be exercised only in cases of international crimes, such as crimes against humanity, war crimes, and genocide; and second, assuming that the AU has the necessary resources (financial or otherwise) to intervene if international crimes are committed in the territory of a member state, the implication is that the AU will be willing to exercise the right to intervene.⁵⁵ The Constitutive Act does not define crimes against humanity, war crimes, and genocide as its drafters presumed that there was no need to do so, these crimes being already defined in the Rome Statute and the statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda.⁵⁶ Indeed,

of individuals and casts ‘duties’ on states to intervene to respect, promote, and fulfill those norms, including the ‘duty’ on other states to intervene to stop gross human rights violations in another.”).

54. *See id.*

55. *See* Constitutive Act art. 4; *see also* Wokoro, *supra* note 1, at 21. Wokoro argues that:

Unfortunately, notwithstanding its consensual orientation, absence of a debilitating veto arrangement, and dedication to human rights, there is scant reason to believe that the African Security Council is any more potent, effective, or responsible than the U.N. Security Council, and there is little evidence to support the repudiation of the sacrosanct sovereignty that characterized the OAU. Indeed, while the U.S. Congress accused Sudan of genocide in Darfur and strode to the world stage to rally global support against Sudan, the [AU] stymied those efforts, stating that the dire humanitarian situation in Darfur “cannot be defined as a genocide.

Id.

56. *See* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) was established to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”). For the definitions of the crimes contained in the Statute of ICTY, *see* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at 37–38, U.N. Doc. S/25704 (May 3, 1993). The International Criminal Tribunal for Rwanda (“ICTR”) was established for the “prosecuti[on] of persons responsible for genocide and other serious violations of international humanitarian law committed in the ter-

Professor Maluwa, the AU's counsel at the time the Constitutive Act was drafted, explains that

[t]he original proposal to incorporate the right of intervention in article 4(h) of the Constitutive Act was heavily debated during the ministerial meetings that examined the draft texts in 2000. The limitation of the grounds for intervention to war crimes, genocide and crimes against humanity was predicated on the understanding that these acts are now generally recognized as violations of international law, as evidenced in the statutes of the international tribunals for Rwanda and the Former Yugoslavia, and most recently the Rome Statute of the International Criminal Court. As it presently stands, therefore, Article 4(h) is in line with current international law.⁵⁷

The Rome Statute outlines a specific procedure that is to be followed before an indictment for international crimes may be issued against a perpetrator.⁵⁸ This includes the collection and an examination of evidence and the questioning of individuals, including any victims, by the prosecution team.⁵⁹ This process also requires the International Criminal Court ("ICC") Pre-Trial Chamber to decide if the issuance of an arrest warrant is necessary for a particular situation.⁶⁰

However, for the intervention envisaged in terms of Article 4(h), the Constitutive Act does not provide a procedure to follow.⁶¹ It is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is neces-

ritory of Rwanda and Rwandan citizens responsible for genocide and other violations in the territory of neighbouring States, between 1 January 1994 and 31 December 1994" S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). For the definitions of the crimes contained in the Statute of the ICTR, see *id.* ¶¶ 3–5.

57. Tiyanjana Maluwa, *The OAU/African Union and International Law: Mapping New Boundaries or Revisiting Old Terrain?*, 98 AM. SOC'Y INT'L L. PROC. 232, 236 (2004) [hereinafter *OAU/African Union and International Law*].

58. See Rome Statute of the International Criminal Court arts. 53–58, Jul. 17, 1998, 2187 U.N.T.S. 3.

59. See *id.* arts. 51, 54.

60. See *id.* arts. 53–58.

61. ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 78 (2009) (arguing that "the AU remains unclear about both the procedural and substantive conditions" under which the intervention would be exercised).

sary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state.⁶² Article 4(h) requires that there must be a commission of an international crime to necessitate an intervention.⁶³ Also, the AU has created organs specifically for the purpose of going on fact-finding missions, enabling the AU Assembly to decide on whether to take action.⁶⁴ Therefore, it makes sense to establish the commission of the international crime prior to intervention.

There is no institution operational yet to interpret Article 4(h) of the Constitutive Act or the AU Assembly's decision to intervene or not to intervene. The African Court of Justice, which is one of the AU institutions, is not yet operational⁶⁵ even though the Protocol that establishes it has been in force since 2009.⁶⁶ Instead, the AU has decided to adopt a Protocol on

62. Dan Kuwali, *The Conundrum of Conditions for Intervention Under Article 4(h) of the African Union Act*, 17 AFR. SECURITY REV. 90, 93 (2008) (arguing that the Constitutive Act is "silent on how to intervene" and is "incomplete on how to decide when to intervene"). Kuwali also argues that "[a]lthough the [AU Assembly] can decide on intervention on its own initiative or at the request of a member state pursuant to article 4(j), the provision does not spell out a clear cut threshold that would warrant intervention." *Id.*

63. Constitutive Act art. 4(h).

64. In particular, the AU created the Panel of the Wise, which has already conducted fact-finding missions in places such as Libya and the Darfur, and the Democratic Republic of Congo. *See Dealing with Africa's Human Rights Problems*, *supra* note 53, at 15–16 (discussing the institutional organs of the AU relevant to the exercise of the right to intervene); *see also infra* Part III.B (discussing the institutional organs of the AU relevant to the exercise of the right to intervene).

65. Constitutive Act art. 5(1)(d). The AU Assembly has not appointed judges to the African Court of Justice even though the Protocol establishing the Court has reached the necessary ratifications needed in order to come into force. *See* note 68 *infra*. Instead, the AU Assembly has recently requested the AU Commission and the AfCHPR "to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the [AfCHPR] and submit the study along with the Draft Protocol on the Amendments to the Protocol to the Statute of the African Court of Justice and Human Rights for consideration at the next summit slated for January 2013." *See* AU, *Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, ¶ 2, A.U. Doc. Assembly/AU/Dec.427 (XIX) (July 15–16, 2012).

66. The Protocol of the Court of Justice of the AU came into force on Feb. 11, 2009 after acquiring fifteen ratifications. *See List of Countries Which Have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the*

the Statute of the African Court of Justice and Human Rights to merge the African Court on Human and Peoples' Rights ("AfCHPR") and the African Court of Justice into one.⁶⁷ This Protocol will replace the prior protocols that established the AfCHPR and the African Court of Justice.⁶⁸ The existing Protocol of the African Court of Justice provides that the African Court of Justice is the AU's "principal judicial organ,"⁶⁹ which will "function in accordance with the provisions of the [Constitutive] Act and this Protocol."⁷⁰ Article 18 of the Protocol of the African Court of Justice establishes personal jurisdiction of the African Court of Justice, which includes state parties to the Protocol, the AU Assembly, and other organs of the AU as authorized by the AU Assembly.⁷¹

The African Court of Justice has subject matter jurisdiction over the interpretation and application of the Constitutive Act;⁷² any question of international law;⁷³ all acts, decisions, regulations, and directives of AU organs;⁷⁴ and circumstances that would constitute a breach of an obligation owed to a state party or the AU.⁷⁵ Thus, the African Court of Justice will be helpful in interpreting Article 4(h) to ascertain the meaning of intervention. However, the Constitutive Act provides that if the

African Union, AFRICAN UNION (Nov. 12, 2012), http://www.au.int/en/sites/default/files/Court%20of%20Justice_0.pdf.

67. See Protocol on the Statute of the African Court of Justice and Human Rights [Protocol of the Statute of African Court] art. 2, July 1, 2008, 48 I.L.M. 317. So far there are only five ratifications for this Protocol. See *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFRICAN UNION (Nov. 12, 2012), <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>. The African Court of Human and Peoples' Rights ("AfCHPR") is established by the Organization of African Unity. See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights [Protocol to AfCHPR], June 10, 1998, *reprinted in* 12 AFR. J. INT'L & COMP. L. 187 (2000).

68. Protocol of the Statute of African Court arts. 1, 2.

69. See Protocol of the Court of Justice of the African Union art. 2(2), July 11, 2003, *reprinted in* 13 AFR. J. INT'L. COMP. L. 115 (2005).

70. *Id.* art. 2(1).

71. *Id.* art. 18(1)(a)–(b).

72. *Id.* art. 19(1)(a).

73. *Id.* art. 19(1)(c).

74. *Id.* art. 19(1)(d).

75. *Id.* art. 19(1)(f).

organ responsible for its interpretation is not operational, the AU Assembly can assume such function as long as the decision reaches a two-thirds majority.⁷⁶ This may be problematic, especially when it comes to deciding on the meaning of the right to intervene, as the AU Assembly may be embroiled in disagreements. It is therefore necessary to have an impartial body to interpret this right. However, the correct assumption has been that the AU's right to intervene can be equated to the use of force.⁷⁷ This assumption is based on the fact that, in order to exercise this right, the AU has made provisions for the establishment of an armed force whose responsibility includes intervention as contemplated in the Constitutive Act.⁷⁸ Less intrusive means of intervention are listed outside this right.⁷⁹

There has not been an instance where the meaning of the AU's right to intervention has been questioned in practical terms. One hopes that when that time comes the African Court of Justice will be fully operational.

A. The Relationship Between the AU and the Security Council on the AU's Right to Intervene

As mentioned above, the AU has reserved for itself a right to intervene in a member state where international crimes are being committed.⁸⁰ Intervention by use of force triggers the application of the United Nations Charter.⁸¹ The U.N. Charter provides that “[a]ll Members [of the U.N.] 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 United Nations.”⁸² The International Court of Justice (“ICJ”) made clear in *Nicaragua v. United States* that prohibiting the

76. Constitutive Act art. 26.

77. Legal scholars have assumed that the AU's right to intervene can mean the use of force. See *When Neutrality is a Sin*, *supra* note 52, at 1156–57; *Dealing with Africa's Human Rights Problems*, *supra* note 52, at 25.

78. See, e.g., PSC Protocol art. 13(1) (establishing the African Standby Force in order to “enable the Peace and Security Council perform its responsibilities with respect to . . . intervention pursuant to [A]rticle 4(h) . . . of the Constitutive Act”).

79. See Constitutive Act art. 23(2) (providing sanctions against member states that fail to comply with the AU decisions).

80. See *id.* art. 4(h), (j).

81. U.N. Charter art. 2, para. 4.

82. *Id.*

use of force is a part of customary international law.⁸³ On the other hand, the principle of non-intervention does not apply against the U.N. Security Council when it takes enforcement measures under Chapter VII of the U.N. Charter.⁸⁴ The Security Council may, in appropriate circumstances, recommend intervention by U.N. forces or by individual states.⁸⁵ The aim of the drafters of the U.N. Charter was not only to prohibit the use of force by states under Article 2(4), but also to centralize control of the use of force in the Security Council under Chapter VII of the U.N. Charter.⁸⁶ The Security Council therefore has the primary responsibility to decide on the use of force, though that power may be delegated to regional organizations.⁸⁷

The Constitutive Act strongly implies that the AU, not the Security Council, may assume primary responsibility in cases of crimes against humanity, war crimes, and genocide in Africa. In fact, there is nothing in the AU Constitutive Act or in the

83. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 202 (June 27); see also *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 16, ¶ 148 (Dec. 19) (reaffirming that this principle is “the cornerstone of the [U.N.] Charter”).

84. Article 39 of the U.N. Charter provides that “[t]he Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

85. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 4 (1999), (“According to [the U.N. Charter] provisions, the Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the Member States. In actual UN practice, it is now common for such enforcement action to be carried out on the basis of a mandate to, or more frequently of an authorisation of, states which are willing to participate either individually or in *ad hoc* coalitions or acting through regional or other international organizations”); see also Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AM. J. INT'L L. 42, 46 (2005) (arguing that the U.N. Charter does not preclude intervention “provided it is mandated by the Security Council”).

86. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 254–55 (3d ed. 2008).

87. See U.N. Charter arts. 52–53.

Peace and Security Council (“PSC”) Protocol⁸⁸ that expressly requires the AU to seek prior authorization from the U.N. Security Council before authorizing or exercising intervention. Instead, the PSC Protocol entrusts to itself the “primary responsibility for promoting peace, security and stability in Africa.”⁸⁹ This is in contrast with the U.N. Charter, which provides,

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.⁹⁰

On the other hand, the PSC Protocol provides as follows:

In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.

Where necessary, recourse will be made to the [U.N.] to provide the necessary financial, logistical and military support for the [AU]’s activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the [U.N. Charter] on the role of Regional Organizations in the maintenance of international peace and security.⁹¹

These texts suggest that the AU is willing to assume the primary role when it comes to the conflicts in Africa. Only

88. Protocol to Relating to the Establishment of the PSC of the AU (“PSC Protocol”) came into force on Dec. 26, 2003 after twenty-seven states of the AU ratified it, and as of May 21, 2012, forty-seven out of fifty-four African states have ratified the PSC Protocol. *See List of Countries Which Have Signed, Ratified/Acceded to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, AFRICAN UNION (July 13, 2012),

http://www.au.int/en/sites/default/files/Peace%20and%20Security_0.pdf.

89. PSC Protocol art. 16.

90. U.N. Charter art. 24, para. 1.

91. PSC Protocol art. 17.

when it is necessary, especially when the AU is in dire need of financial support, the AU will consider the role of the Security Council.⁹² African legal scholars justify this AU power by pointing to the Rwandan genocide, which “remains . . . ‘a deplorable example of [the] international community’s disinterest in the African continent,’”⁹³ where “an estimated 800,000 Tutsis were killed in Rwanda in 1994.”⁹⁴ Professor Udombana pointed out that “[t]ragically, the international community failed to forestall the genocide, despite the wide publicity given to it in the world’s media, prior to and during the pogrom.”⁹⁵ He maintained that, as a result, “Africa’s desire to take urgent actions to stop massacres or serious fighting in the immediate future may trump any commitment to cooperate with the [Security Council].”⁹⁶ Ben Kioko, the AU’s Legal Advisor, explained that “when questions were raised as to whether the [AU] could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand.”⁹⁷ He argued that this decision reflects a sense of frustration with the slow pace of reform of the international community and the

92. See Kwesi Aning & Samuel Atuobi, *Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security Architecture*, 1 GLOBAL RESP. PROTECT 90, 103–04 (2009) (“It is clear from the proactive interventionist language in both the Constitutive Act and the PSC Protocol that while the [AU recognizes the Security Council’s] primacy in maintaining international peace and security, . . . the AU has also reserved for itself an interventionist role that reverts to the Security Council only when the AU deems necessary.”); see also Jeremy L. Levitt, *The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur*, in THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY, REALITY—A NEED FOR CHANGE? 213, 229–30 (Niels Blokker & Nico Schrijver eds., 2005). Levitt contends that read together, the relevant provisions of the AU Constitutive Act Articles 4(h) and (j) and the PSC Protocol Articles 4(j) and (k), 6(d), 7(c)–(g), 16(1), and 17(1) and (2) “reveal that while the AU acknowledges the ‘primary’ role of the Security Council in maintaining international peace and security, particularly in Africa, it reserves the right to authorize intervention in Africa, seeking UN involvement ‘where necessary.’” *Id.* (quoting PSC Protocol, *supra* note 45, arts. 17(1)–(2)).

93. See *When Neutrality is a Sin*, *supra* note 53, at 1175 (quoting Daniela Krosiak, Book Review, 75 INT’L AFF. 877 (1999) (reviewing ARTHUR JAY KLINGOFFER, THE INTERNATIONAL DIMENSION OF GENOCIDE IN RWANDA (1998))).

94. *Id.*

95. *Id.*

96. *Id.* at 1176.

97. See Kioko, *supra* note 8, at 821.

tendency to focus attention on other parts of the world at the expense of more pressing problems in Africa.⁹⁸ In addition, Ambassador Sam Ibok, the Director of the Peace and Security Department of the AU, stated the following:

We [the AU] are not an arm of the United Nations. We accept the UN's global authority, but we will not wait for the UN to authorize an action that we intend to take [W]e are in tacit agreement with the [U.N.] on this and there is an understanding to that effect.⁹⁹

These statements show the African community's frustration over the Security Council and the international community's past failures to act against the atrocities committed during armed conflict in Africa. On the other hand, some scholars have argued that the provisions of the Constitutive Act and the PSC Protocol regarding the AU's right to intervene violate Article 103 of the U.N. Charter.¹⁰⁰

The High Level Panel on Threats, Challenges, and Change ("the *Ezulwini* Consensus"),¹⁰¹ which was adopted by the AU in

98. *Id.*

99. Interview by Ademola Abass with Ambassador Sam Ibok, (Feb. 2, 2004), in ADEMOLA ABASS, REGIONAL ORGANISATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: BEYOND CHAPTER VIII OF THE UN CHARTER 166 (2004).

100. See David Wippman, *Treaty-based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 620 (1995) (arguing that "[c]ritics of treaty-based intervention contend that any treaty purporting to authorize states to use force against another state without its contemporaneous consent necessarily violates Article 2(4) and therefore also Article 103"); see also Rudolf Bernhardt, *Article 103*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1117, 1122 (Bruno Simma et al. eds., 1994). Bernhardt contends: "if the members of a regional arrangement . . . agree that in case of internal disturbances or other events within one of the states concerned, the other state(s) can intervene with military forces without the consent of the *de jure* or *de facto* government, the compatibility of such a special agreement with the Charter becomes doubtful and must, in principle be denied. Here, the territorial integrity of all states and the prohibition of the use of force is at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103." *Id.* Art. 103 of the U.N. Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. Charter art. 103.

101. See Rep. of the High Level Panel on Threats Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec.

2005, presents another perspective through “The Common African Position on the Proposed Reform of the [U.N.]”¹⁰² It states in clear terms the position of the AU on its relationship with the Security Council on one hand, and Article 4(h) of the AU Act vis-à-vis the U.N. Charter law on intervention on the other:

Since the General Assembly and the Security Council are often far from the scenes of the conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts are empowered to take actions in this regard. The [AU] agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted “after the fact” in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations

With regard to the use of force, it is important to comply scrupulously with the provisions of Article 51 of the UN Charter, which authorize the use of force only in cases of legitimate self-defense. In addition, the Constitutive Act of the African Union, in its Article 4 (h), authorizes intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4(h) of the AU Constitutive Act should be prohibited.¹⁰³

The AU’s position implies two things. First, it shows an insistence by the AU that “even if regional organizations *may* decide to intervene . . . regional deliberations must take precedence

2004) (by Anand Panyarachun et al.). The Panel affirmed that “[t]here is a growing recognition that the issue . . . [does not surround] ‘the right to intervene’ of any State, but the ‘responsibility to protect’”; every state bears this right “when it comes to people suffering from avoidable catastrophe[s]—mass murder and rape, ethnic cleansing by forcible expulsion and terror, deliberate starvation, and exposure to disease.” *Id.* ¶ 201. The Panel also recognized that “while sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so, that responsibility should be taken by the wider international community” *Id.*

102. See AU, *The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus,”* A.U. Doc. Ext/EX.CL/2 (VII) (Mar. 7–8, 2005) [hereinafter *The Ezulwini Consensus*].

103. *The Ezulwini Consensus*, *supra* note 102, at 6.

over global deliberations, even when relevant regional bodies decide not to act or are incapable of acting effectively.”¹⁰⁴ Second, this position implies that “until the Security Council has taken the measures necessary to maintain international peace and security,”¹⁰⁵ the AU is willing to take the primary responsibility without prior authorization from the Security Council. For example, in the Darfur case, the AU played a primary role in resolving the internal armed conflict.¹⁰⁶ It is reported that when discussing how best to respond to the crisis in Darfur, especially in the event the Sudanese government continues fail, the Security Council members from the United States, United Kingdom, Germany, Chile, and Spain referred to the AU as “bearing the primary responsibility.”¹⁰⁷ Francis Deng “argued that since the Sudanese government had declared its hostility to U.N. intervention, the best way forward was to encourage the AU to establish a presence in Darfur with the Sudanese government’s consent.”¹⁰⁸ Although the AU’s regional mechanism was used to block collective action through the Security Council, Deng’s viewpoint was “supported by . . . African states primarily concerned with averting [unsolicited] international intervention.”¹⁰⁹ This episode reveals that the international community has acknowledged and recognized that the AU has taken the primary responsibility to deal with issues of peace and security in the region.

104. BELLAMY, *supra* note 61, at 80.

105. See U.N. Charter, art. 51.

106. See Suyash Paliwal, *The Primacy of Regional Organizations in International Peacekeeping: The African Example*, 51 VA. J. INT’L L. 185, 198–201 (2010–2011).

107. See BELLAMY, *supra* note 61, at 79; see also S.C. Res. 1556, ¶ 2, U.N. Doc. S/RES/1556 (July 30, 2004) (The Security Council “[e]ndorses the deployment of international monitors, including the protection force *envisioned by the African Union*, to the Darfur region of Sudan under *the leadership of the African Union* and urges the international community to support these efforts . . .”) (emphasis added).

108. BELLAMY, *supra* note 61, at 79 (citing Rep. of the Secretary-General on Internally Displaced Pers., *Specific Groups and Individuals: Mass Exoduses and Displaced Persons*, Comm’n on Human Rights, ¶¶ 22, 26, 36, U.N. Doc. E/CN.4/2005/8 (Sept. 27, 2004) (by Francis M. Deng)).

109. See BELLAMY, *supra* note 61, at 79–80; see also AU, *Decision on Darfur*, ¶ 4, A.U. Doc. Assembly/AU/Dec.54(III) Rev.1 (July 6–8, 2004) (The Assembly “[s]tress[ing] that the [AU] should continue to lead these efforts to address the crisis in Darfur and that the International Community should continue to support this efforts [sic].”).

The relationship between the AU and the Security Council remains speculative with regard to the AU's right to intervene. Nevertheless, as the recent history has shown, the AU has reserved for itself the primary responsibility to deal with war crimes, crimes against humanity, and genocide, which threaten peace and security in the African region.¹¹⁰ This is evident in the codification of the right to intervene in the Constitutive Act of the AU—the very instrument that created the AU.¹¹¹ Additionally, the AU is in close proximity with the internal armed conflicts in Africa. Thus, the AU has a greater claim than the Security Council on the issues of international crimes that are committed in the territory of the AU member states and that threaten the regional peace and security.

B. The Institutional Organs of the AU Put in Place for the Exercise of the AU's Right to Intervene

This section describes the institutional organs of the AU that are structured toward realizing the AU's duty to intervene. Several new organs were established¹¹² to enable the AU to meet these new objectives and to strengthen what others have termed a “very ambitious experiment based on the [European Union] model.”¹¹³ The description of the organs of the AU will show that the AU as a whole has been structured toward intervention.

Consistent with the sovereign equality principle, the annual Assembly of Heads of State and Government (“AU Assembly”) is the supreme organ that debates and decides issues, and adopts resolutions, just as it had under the OAU.¹¹⁴ It is this

110. Constitutive Act art. 4(h), (j).

111. Art. 2 of the Constitutive Act states that “[t]he [AU] is hereby established in accordance with the provisions of this Act.” Constitutive Act art. 2; see also Bryan D. Kreykes, *Toward a Model of Humanitarian Intervention: The Legality of Armed Intervention to Address Zimbabwe's Operation Murambatsvina*, 32 LOY. L.A. INT'L & COMP. L. REV. 335, 346 (2010).

112. See Constitutive Act art. 5 (listing the organs of the AU).

113. KARNs & MINGST, *supra* note 6, at 205.

114. See Constitutive Act art. 6; see also OAU Charter art. 8. Article 8 of the OAU Charter states that “[t]he [OAU Assembly] shall be the supreme organ of the Organization. It shall, subject to the provision of this Charter, discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization. It may in addition review the structure, functions and acts of all the organs and any specialized agencies which may be created in accordance with the present Charter.” *Id.*

body that must approve calls for AU intervention and give directions to the relevant organs established to deal with peace and security in Africa. To implement its decisions, the Constitutive Act allows the AU Assembly to delegate its powers to any of its organs¹¹⁵ and to establish any other organs not listed in the Constitutive Act.¹¹⁶ It is on this basis that the PSC¹¹⁷ was established. The PSC is required to work with many organs within the AU, which are in turn designed to support the PSC in playing its role of preventing conflicts and international crimes. These are organs are discussed below in this section.

The PSC is the primary decision-making organ established to prevent, manage, and resolve conflicts in Africa.¹¹⁸ Its “collective security and early-warning arrangements facilitate [a] timely and efficient response to conflict” situations.¹¹⁹ The AU Assembly established the PSC because of the concerns “that conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internal displaced persons, deprived of their means and livelihood, human dignity and hope.”¹²⁰ Therefore, the PSC Protocol gives broad powers to the PSC in comparison to the Central Organ of the OAU,¹²¹ which was the predecessor of the PSC.¹²² These powers include making recommendations to the AU Assembly “pursuant to article 4(h) of the Constitutive Act, and intervention on behalf of the [AU], in a Member State in respect of grave cir-

115. See Constitutive Act art. 9(2).

116. *Id.* art. 5(2).

117. The PSC Protocol is rooted in Art. 5(2) of the AU Constitutive Act and determines that the PSC shall be “a collective security and early warning arrangement to facilitate timely and efficient response to conflict situation in Africa.” PSC Protocol art. 2(1). The PSC is therefore the primary organ of the AU tasked with conflict resolution and prevention on the continent. *See id;* see also Hennie Strydom, *Peace and Security under the African Union*, 28 S. AFR. Y.B. INT'L L. 59, 62 (2003).

118. PSC Protocol art. 2(1).

119. *Id.* See Strydom, *supra* note 117, at 62.

120. PSC Protocol pmbl.

121. See PSC Protocol art. 3 (listing the objectives of the PSC). The Central Organ was established by the OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (“Cairo Declaration”). See OAU, Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, ¶ 17, O.A.U. Doc. AHG/DECL.3 (XXIX) (June 28-30, 1993).

122. PSC Protocol pmbl.

cumstances, namely war crimes, genocide and crimes against humanity as defined in international conventions and instruments.”¹²³ The AU Assembly recognizes that the “observance of human rights” and “the rule of law” are essential for the prevention of conflicts.¹²⁴ In achieving its objectives, the PSC seeks guidance from the Constitutive Act, the U.N. Charter, and the Universal Declaration of Human Rights.¹²⁵ The PSC Protocol also gives the PSC a wide variety of functions in a wide range of areas, including the promotion of peace and stability in Africa and intervention pursuant to the Constitutive Act.¹²⁶

The PSC acts on behalf of the AU member states that are parties to the PSC Protocol.¹²⁷ The PSC is composed of fifteen members, ten of which are elected for a term of two years, while the remaining five members are elected for a term of three years.¹²⁸ The members are elected by the Assembly according to specifically defined criteria.¹²⁹ The criteria consider moral obligations, which include the history of a particular state in curtailing the effects of conflict on the continent, the states’ own histories that relate to peace and security, and the commitment to the principles of the AU, as contained in the Constitutive Act.¹³⁰

Another organ instrumental in the exercise of the AU’s right to intervene is the Panel of the Wise, which was established to support and to advise the PSC and the Chairperson of the AU Commission in their efforts in the areas of conflict prevention and in “the promotion and maintenance of peace, security, and stability in Africa.”¹³¹ The Panel of the Wise is 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 conti-

123. *See id.* art. 7(e).

124. *See id.* at 3.

125. *See id.* art. 4.

126. *Id.* art. 6.

127. *See id.* art. 7(2).

128. *Id.* art. 5(1).

129. *Id.* art. 5(2).

130. *See id.* art. 5(2)(a)–(e).

131. *See id.* art. 11(3); *see also* Ademola Jegede, *The African Union Peace and Security Architecture: Can the Panel of the Wise Make a Difference?*, 9 AFT. HUM. RTS. L.J. 409, 409 (2009) (examining the necessity to have the Panel of the Wise in the AU peace and security architecture).

nent.”¹³² “The Panel meets as often as the circumstances may require, or at least three times a year.”¹³³ It “may also sit at any time at the request of the [PSC] or [of] the Chairperson of the [AU] Commission.”¹³⁴ One scholar has correctly argued that “such impromptu sittings” are appropriate, “considering the spontaneous nature of conflicts” that arise in Africa.¹³⁵

The PSC Protocol also mandates the Chairperson of the AU Commission to bring to the attention of the PSC any matter that “may threaten peace, security, and stability in the continent.”¹³⁶ The AU Commission is the secretariat of the AU whose structures, functions, and regulations are determined by the AU Assembly.¹³⁷ It is composed of the Chairperson, the deputy to the Chairperson, and various commissioners.¹³⁸ The AU Assembly has decided that the AU Commission must be transformed into the AU Authority “to strengthen the institutional framework of the AU and to accelerate the economic and political integration of the continent.”¹³⁹ This transformation is yet to come because the AU Assembly must still decide on the progress made by the AU Commission in dealing with this matter so far.¹⁴⁰ To this end, the Chairperson of the Commission may use his or her office to “prevent potential conflicts.”¹⁴¹

The Chairperson of the Commission also works closely with the Panel of the Wise and the regional mechanisms to prevent conflicts.¹⁴² The role of the Chairperson of the AU Commission with regard to peace and security matters is defined in the PSC Protocol.¹⁴³ In this regard, the Chairperson of the AU Commission is required to “take all initiatives deemed appropriate to

132. PSC Protocol art. 11(2).

133. See Jegede, *supra* note 131, at 419; see also PSC Protocol art. 11(6).

134. See Jegede, *supra* note 131, at 419; see also PSC Protocol art. 11(4).

135. See Jegede, *supra* note 131, at 419.

136. PSC Protocol art. 10(2)(a).

137. Constitutive Act art. 20.

138. *Id.* art. 20(2).

139. AU, *Decision on the Transformation of the AU Commission into the AU Authority*, ¶ 2, A.U. Doc. Assembly/AU/Dec.341 (XVI) (Jan. 30–31, 2011).

140. AU, *Decision on the Transformation of the AU Commission into the AU Authority*, ¶ 2, A.U. Doc. Assembly/AU/Dec.372 (XVII) (Jun. 30–July 1, 2011) (the AU Assembly deciding to defer the consideration of the said item to the next ordinary session in early 2012).

141. PSC Protocol art. 10(2)(c).

142. *Id.*

143. See *id.* arts. 7, 10.

prevent, manage, and resolve conflicts” under the authority of the PSC and in consultation with all the parties involved.¹⁴⁴ Additionally, the Chairperson may bring to the Panel of the Wise any matter he or she deems that deserve the attention of the Panel.¹⁴⁵ The Chairperson’s function regarding matters of peace and security also includes implementing and following up on the decisions of the PSC and those decisions taken by the AU Assembly in terms of Articles 4(h) and (j) of the Constitutive Act.¹⁴⁶

The PSC Protocol also established the Continental Early Warning System (“Early Warning System”) to “facilitate the anticipation and prevention of conflicts.”¹⁴⁷ The Early Warning System includes “the Situation Room,” which is “responsible for data collection and analysis on the basis of an appropriate early warning indicator module” and for the “observation and monitoring units of the Regional Mechanisms to be linked directly through appropriate means of communications to the Situation Room”¹⁴⁸ The Chairperson of the Commission is expected to use “the information gathered through the Early Warning System timeously to advise the [PSC] on potential conflicts and threats to peace and security in Africa and [to] recommend the best course of action.”¹⁴⁹

C. The Impediments That May Bar the AU from Exercising the Right to Intervene

The AU functions on the basis of sovereignty, territorial integrity, and non-interference, and intervention may not occur as easily as it sounds on paper. In this regard, a collective decision on the part of a two-thirds majority of the Assembly of the AU is required for an intervention.¹⁵⁰ To ascertain the challenges faced by the AU in the exercise of its right to intervene, one must examine the relevant decisions and resolution adopted by the AU Assembly since the AU’s inception. At the same time, these resolutions and decisions also show the positions that the AU has taken to date when it comes to internal con-

144. *Id.* art. 10(1).

145. *Id.* art. 10(2)(b).

146. *Id.* art. 10(3).

147. *Id.* art. 12(1).

148. *Id.* art. 12(2).

149. *Id.* art. 12(5).

150. *See* Constitutive Act art. 7(1).

licts in Africa. It must be recalled that the AU was established with a view to eradicate all forms of human rights violations as the African leaders recognized that there can be no peace without ensuring that human rights are protected.¹⁵¹

From this examination of the AU resolutions and decisions, the following observations can be made: First, the AU Assembly does not tolerate internal conflicts arising from unconstitutional changes of governments. This is reflected in the AU Assembly decision concerning Chad, where the AU Assembly “recall[ed] its rejection of any unconstitutional change in accordance with the principles enshrined in the Constitutive Act of the [AU] . . . and stress[ed] that no authority that comes to power by force will be recognized by the AU.”¹⁵² As a result, the AU Assembly “[s]trongly condemn[ed] the attacks perpetrated by armed groups against the Chadian government and *demand[ed]* an immediate end to [the] attacks . . . resulting [in] bloodshed.”¹⁵³ The language used here by the AU Assembly is clear and leaves no doubt in the minds of the parties involved as to its position.¹⁵⁴ The AU may even issue sanctions against a state that does not abide by the decisions and principles of the AU. For example, sanctions were passed on the Ivory Coast during the dispute over the results of the November 2010 presidential elections.¹⁵⁵ Consequently, the Ivory Coast was suspended from participation in the activities of the AU “until such a time the democratically elected President effectively assumes State Power.”¹⁵⁶ Further, although the language was not

151. *See id.* at 35 (stating that the OAU Heads of State and Government were “[c]onscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the . . . need to promote peace, security and stability . . .”).

152. *See* AU, *Decision on the Situation in Chad*, ¶ 2, A.U. Doc. Assembly/AU/Dec.188 (X) (Jan. 31–Feb. 2, 2008).

153. *Id.* ¶ 1 (emphasis added).

154. *See* AU, *Decision on the Report of the Peace and Sec. Council on its Activities and on the State of Peace and Security in Africa*, ¶ 9, A.U. Doc. Assembly/AU/Dec.252 (XIII) (July 3, 2009) (supporting the decisions of the PSC on the unconstitutional changes that occurred in Mauritania, Guinea, and Madagascar).

155. Peace and Sec. Council of the AU (PSC), *Communiqué of the 252d Meeting of the Peace and Security Council*, ¶ 4, A.U. Doc. PSC/PR/Comm.1 (CCLII) (Dec. 9, 2010).

156. *Id.* This PSC decision was endorsed by the AU Assembly. *See* AU, *Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Sec. in Africa*, ¶ 22, A.U. Doc. Assembly/AU/Dec.338 (XVI)

as strong as in the situations in Chad and Ivory Coast, the AU Assembly did stress “the need for those involved in [human rights] violations to be held accountable” following the violence caused by the dispute of the presidential elections results in Kenya.¹⁵⁷

Second, the decisions adopted by the AU Assembly also demonstrate that the heads of state still have not relinquished their fear of criticizing each other, and that their reaction depends on a state involved in particular conflicts and also on the nature of the conflict.¹⁵⁸ This is evident in the crisis in Sudan and the way the AU handled the situation.¹⁵⁹ The language used in the decisions of the AU Assembly pertaining to the crisis in Darfur is lax compared to that of the decisions stated for the situations in Chad and Ivory Coast.¹⁶⁰ Here, the AU Assembly “[r]eiterated its serious concern over the prevailing situation in the Darfur Region”¹⁶¹ and “welcome[d] the measures taken by the [Government of Sudan] to protect the civilian populations, facilitate the work of the humanitarian agencies and NGOs and provide them with unrestricted access

(Jan. 31, 2011). The AU Assembly made the following decision with regard to the situation in Ivory Coast: The AU Assembly “[expresses] its deep concern at the prevailing crisis in Cote d’Ivoire following the 2nd round of the presidential elections held on 28 November 2010, [endorses] the PSC Communiqués and [commends] ECOWAS, the AU Commission and all the African and international leaders involved in the search for a peaceful solution to the crisis. The Assembly [encourages] the AU Commission and ECOWAS to continue with their efforts to find, as soon as possible, a solution that respects democracy and the will of the people as expressed on 28 November 2010 and preserves peace in the country.” *Id.*

157. AU, *Decision on the Situation in Kenya Following the Presidential Election of Dec. 27, 2007*, ¶¶ 3, 5, Assembly/AU/Dec.187 (X) (Jan. 31–Feb. 2, 2008) (where the AU Assembly “strongly *urg[ed]* the parties to commit themselves to a peaceful dialogue in conformity with the rule of law”) (emphasis added).

158. See AU, *Decision on Darfur*, ¶ 2, A.U. Doc. Assembly/AU/Dec.54 (III) (July 6–8, 2004) (noting that “even though the humanitarian situation in Darfur is serious, it cannot be defined as genocide”) [hereinafter *Decision on Darfur*].

159. *Id.*

160. See notes 156 and 157 *supra*, where the language used by the AU Assembly against Chad is strong as compared to the language used against Sudan. The inference therefore is that because the Chad situation involved an armed group against the government as compared to the situation in Sudan where it is the government of Sudan at the forefront of the conflict. *Id.*

161. *Decision on Darfur*, *supra* note 158, ¶ 1.

to the affected populations.”¹⁶² This is in contrast with reports that the Sudanese government did not want to cooperate and that it was one of the parties that targeted civilians in this conflict.¹⁶³ While the AU sent the AU Mission in Darfur¹⁶⁴ to participate in peacekeeping, it avoided criticizing President Al Bashir or the way he dealt with the conflict as the leader.¹⁶⁵

Third, when the international community has intervened on African issues to protect the nationals, the AU has shown dissatisfaction. For example, when the ICC issued arrest warrants against President Al Bashir, the AU Assembly adopted several decisions requesting that AU member states should not cooperate with the ICC.¹⁶⁶ The AU even went as far as examining the

162. *Id.* ¶ 3.

163. On the history of Darfur, see JULIE FLINT & ALEXANDER DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 112 (2005) (noting that when U.N. agencies attempted to intervene, the Khartoum government obstructed outside investigation and blocked relief efforts); see also Rep. of the Int'l Comm'n of Inquiry on Darfur to the UN Secretary-General, *Pursuant to Security Council Resolution 1564 of 18 September 2004*, at 3, U.N. Doc. S/2005/60 (Jan. 25, 2005) (by Antonio Cassese et al.).

164. “In 2006, the AU deployed a peacekeeping mission to Sudan, which was replaced in 2008 by the unprecedented joint African Union/United Nations Hybrid operation in Darfur (“UNAMID”), currently the largest peacekeeping mission in the world.” *UNAMID Background*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/unamid/background.shtml> (last visited Oct. 27, 2012). UNAMID's mandate has been extended since then, most recently until July 31, 2012, and currently stands at 92 percent of its authorized troop strength of almost 20,000. See *UNAMID Facts and Figures*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/unamid/facts.shtml> (last visited Oct. 27, 2012).

165. There is no resolution or decision of the AU criticizing Sudan's handling of the situation.

166. See AU, *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan*, ¶¶ 1, 5, A.U. Doc. Assembly/AU/Dec. 221 (XII) (Feb. 1–3, 2009) (requesting “the Commission to convene a meeting of the African States that are parties to the Rome Statute . . . to exchange views on the work of the ICC in relation to Africa, in particular, in light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements”); AU, *Decision on the Meeting of African States Parties to the Rome Statute of the ICC*, ¶ 10, A.U. Doc. Assembly/AU/Dec.245 (XIII) (July 1–3, 2009) (deciding not to cooperate with the ICC in the execution of the arrest warrant issued against Al Bashir of Sudan); AU, *Decision on the Implementation of the Decisions on the International Criminal Court*, ¶¶ 4, 5, A.U. Doc. Assembly/AU/Dec.334 (XVI) (Jan. 30–31, 2011), (regretting

possibility of the AfCHPR having the jurisdiction to deal with international crimes.¹⁶⁷ This is significant because the AU Assembly has never taken any adverse decisions against the member states that referred the situations to the ICC to prosecute the opposition parties.¹⁶⁸ It is therefore questionable that the AU would claim that the ICC is targeting Africans.¹⁶⁹ This is also reflected by the AU Assembly's decision to target the Lord's Resistance Army, which is alleged to have committed atrocities in the Great Lakes Region, particularly in the Democratic Republic of Congo ("DRC"), the Central African Republic, and Southern Sudan.¹⁷⁰ This decision should be commended for

"the Decisions . . . of the Pre-Trial Chamber I of the ICC . . . informing the U.N. Security Council and the Assembly of the States Parties of the Rome Statute (ASP) about the visit of President [Al Bashir] to [Chad and Kenya] . . ." and deciding that "by receiving President Bashir, [Chad and Kenya] were implementing various AU Assembly Decisions on the warrant of arrest issued by the ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions"); AU, *Decision on the Implementations of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670 (XIX)*, ¶ 6, A.U. Doc. Assembly/AU/Dec. 366 (XVII) (June 30–July 1, 2011). (noting "that the warrant of arrest . . . seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya" and deciding that member states "shall not cooperate in the execution of the arrest warrant"); AU, *Decision on the Implementation of the Decisions on the International Criminal Court*, ¶ 7, A.U. Doc. Assembly/AU/Dec.419 (XIX) (July 15–16, 2012) (encouraging the African State Parties to the Rome Statute and African non-state parties "to consider concluding bilateral agreements on the immunities of their Senior State officials").

167. See AU, *Decision on the Implementations of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670 (XIX)*, ¶ 8, A.U. Doc. Assembly/AU/Dec. 366 (XVII) (June 30–July 1, 2011).

168. There are no decisions or resolutions adopted by the AU that condemn the DRC and Uganda for referring the situations in their respective territories to the ICC for investigations and prosecutions.

169. For further discussion on whether the ICC is targeting Africans, see Ntombizozuko Dyani, *Is the International Criminal Court Targeting Africa? Reflections on the Enforcement of International Criminal Law in Africa*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 185 (Vincent Nmehielle ed., 2012).

170. See Annex II to Letter Dated Sept. 15, 2009 from the Permanent Observer of the African Union to the United Nations Addressed to the President of the Security Council, *Plan of Action*, ¶ 8(ix), U.N. Doc. S/2009/461 (Sept. 15, 2009) (by Lila Hanitra Ratsifandrihamanana) (renewing "efforts . . . to neutralize the [LRA] and [to] bring to an end its atrocities and destabilizing atrocities in the [Democratic Republic of Congo], Southern Sudan, and Central African Republic"); see also AU, *Decision on the Report of the Peace and*

dealing with human rights atrocities that include the use of child soldiers and sexual slavery, even if the motivation remains questionable due to its exclusive focus on crimes committed by the opposition group. Therefore, although the AU still adheres to the principles of non-interference, sovereignty, and territorial integrity with regard to its leaders—"brother leaders,"¹⁷¹ depending on the situation—it still passes resolutions to condemn human rights violations. Moreover, the AU has, in some instances, intervened in the territory of some member states even though the intervention was not based on the right to intervene as contemplated in the Constitutive Act.¹⁷²

III. THE AU INTERVENTIONS

The AU has not conducted extensive interventions on the continent despite the significant need for intervention. Nevertheless, it has intervened in Burundi to build peace, intervened in Darfur to enable the establishment of a more robust U.N. peace operation and to monitor the humanitarian crisis effectively, and intervened in Somalia to coordinate efforts to advance the cause of peace.¹⁷³ Although these interventions are evidence of the AU's ambition to handle issues that threaten peace and security, and to halt gross human rights violations in the continent, the AU is faced with challenges that include lack of funds and an unwillingness of states to deploy troops in areas that are deemed too dangerous.¹⁷⁴ Further, the interventions are exercised with the state's consent as opposed to the right to intervene without state consent.¹⁷⁵

Security Council on Its Activities and the State of Peace and Security in Africa, ¶ 21, A.U. Doc. Assembly/AU/Dec. 369 (XVII) (June 30–July 1, 2011) (welcoming the initiatives taken by the AU Commission on the issue of the LRA, and requesting the AU Council to give early authorization for the envisaged operation against the LRA).

171. This term is used by the AU Assembly to refer to the late Colonel Gaddafi, and the same term was also used during the OAU era to refer to the African heads of state.

172. See *infra* Part IV.

173. See *infra* Part IV.A–C.

174. See *infra* Part IV.A–C.

175. See Lieblich, *supra* note 1, at 370–71 (arguing that the AU exercises its right to intervene in terms of Art. 4(h) of the Constitutive Act against the will of its member states).

A. AU Mission in Burundi

Like its neighboring state Rwanda, Burundi has a population made up of Hutus (85%) and Tutsis (14%), and the power struggle between these groups of people has been the same since the country's independence.¹⁷⁶ The current conflict in Burundi began in the latter half of 1993, when President Melchior Ndadaye, a Hutu, was assassinated by "soldiers from the Tutsi-dominated government army."¹⁷⁷ Mediation initiatives by former presidents Julius Nyerere (Tanzania) and Nelson Mandela (South Africa) resulted in the Arusha Peace and Reconciliation Agreement for Burundi,¹⁷⁸ which was signed by the parties involved, including the Burundi government and representatives of the principal Hutu and Tutsi political parties.¹⁷⁹ The agreement provided for power sharing and for a transitional period of thirty-six months, during which national assembly and presidential elections were to take place.¹⁸⁰ Ceasefire agreements were signed between the transition government of Burundi and two Hutu rebel groups.¹⁸¹ However, despite the progress that had been made, one rebel group refused to engage in the peace process and continued its attacks against government forces.¹⁸²

During this time, the PSC was not yet operational.¹⁸³ As a result, the OAU Central Organ approved the deployment of the

176. See Linda Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT'L L. 49, 51, 65 (1995).

177. Omorogbe, *supra* note 23, at 44–45; see Tim Murithi, *The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and The African Union Mission in Somalia*, 17 AFR. SECURITY REV. 70 (2008).

178. See Arusha Peace and Reconciliation Agreement for Burundi, at 2, Aug. 28, 2000, available at <http://www.issafira.org/AF/profiles/Burundi/arusha.pdf> [hereinafter Arusha Agreement].

179. *Id.* at 1.

180. Arusha Agreement, *supra* note 178, Protocol II, art. 13.

181. Stef Vandeginste, *Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error*, 3 AFRICA SPECTRUM 63, 72 (2009).

182. Cent. Organ of the Mechanism for Conflict Prevention, Mgmt. and Resolution at Heads of State and Gov't Level, AU, *Communiqué*, ¶ 1, A.U. Doc. Central Organ/MEC/AHG/Comm. (VII) (Feb. 3, 2003) [hereinafter AU Conflict Prevention VII].

183. The PSC was inaugurated in 2004. See U.N. Secretary-General's, Secretary-General's Message to the Inauguration of the Peace and Security Council of the African Union (May 25, 2004), <http://www.un.org/sg/statements/index.asp?nid=943> (congratulating "the

African Mission in Burundi (“AMIB”) to support its peace process on February 3, 2003.¹⁸⁴ AMIB “was the first operation wholly initiated, planned, and executed by the AU.”¹⁸⁵ One of AMIB’s tasks was to protect returning politicians who would take part in the transitional government.¹⁸⁶ AMIB was also involved in creating conditions that would allow internally displaced persons and refugees living in the eight Burundian provinces and three refugee camps in Tanzania to return to their homes.¹⁸⁷ The objectives of the mission also included overseeing the implementation of the Ceasefire Agreements and implementing conditions that would be favorable for the establishment of a U.N. peacekeeping mission.¹⁸⁸ South Africa, Mozambique, and Ethiopia pledged to send their troops for AMIB,¹⁸⁹ with South Africa as the Lead Nation.¹⁹⁰

It is argued that despite challenges faced by AMIB during its operation, it eventually “succeeded in de-escalating a potentially volatile situation, which would likely have escalated to a violent conflict in its absence.”¹⁹¹ It is in this regard that “AMIB showed that the AU could play a significant role in stabilizing situations on the ground prior to U.N. deployment.”¹⁹² But, despite its relative success, AMIB faced financial constraints in its mission.¹⁹³ As a result, the AU “decided that troop-contributing [states] would be responsible for the first two months of deployment, pending AU reimbursement, with the AU assuming the financial responsibility at the end of this period.”¹⁹⁴ Thus, during the launch of the mission, only South Af-

members of the African Union on this historic day,” which marked the inauguration of the PSC).

184. AU Conflict Prevention VII, *supra* note 182, ¶ 2.

185. Murithi, *supra* note 177, 75.

186. See Cent. Organ of the Mechanism for Conflict Prevention, Mgmt. and Resolution at Heads of State and Gov’t Level, AU, *Communiqué*, ¶ 5(iii), A.U. Doc. Central Organ/MEC/AMB/Comm. (XCI) (Apr. 2, 2003).

187. *Id.*

188. *Id.* ¶ 5(ii).

189. *Id.* ¶ 3.

190. *Id.* ¶ 2.

191. Murithi *supra* note 177, 75.

192. *Id.*

193. See U.N. Secretary-General, *Report of the Secretary-General on Burundi*, ¶ 62, U.N. Doc. S/2004/210 (Mar. 16, 2004); see also Omorogbe, *supra* note 23, at 46.

194. *Id.*

rica was deployed in Burundi even though Ethiopia and Mozambique had also given their commitment to send their troops.¹⁹⁵ It was only after the United States and the United Kingdom contributed funds to Ethiopia and Mozambique that they were able to deploy their forces.¹⁹⁶

AMIB fulfilled “its primary objective” in March 2004.¹⁹⁷ The Security Council authorized the deployment of the U.N. Operation in Burundi (“ONUB”) in May 2004.¹⁹⁸ The former AMIB troops were also incorporated into ONUB,¹⁹⁹ and “[d]uring the mission, the Burundi government’s transitional process was successfully concluded in September 2005, after democratic elections for the National Assembly and the Presidency, and [also] after the installation of a government in line with the power-sharing agreements outlined in the Arusha Agreement.”²⁰⁰ By December 2006, ONUB had completed its mission.²⁰¹

B. AU Mission in Darfur

It is argued that the armed conflict in Darfur became the “AU’s most significant test to date.”²⁰² Following the escalation of the armed conflict, the Chadian government mediated between the Sudanese government and the two rebel groups: Sudan Liberation Movement (“SLM”) and Justice and Equality Movement (“JEM”). The mediation process led to the signing of a Humanitarian Ceasefire Agreement (“N’djamena Agreement”) in April 2004 between the Sudanese government, the SLM, and the JEM.²⁰³ The N’djamena Agreement provided for,

195. *Id.*

196. *Id.*

197. *See Id.* at 47 (“In March 2004, the PSC stated that AMIB had fulfilled its primary objective—the creation of a ‘conducive environment’ for the deployment of a UN peacekeeping mission—and requested the UN to take over.”); *see also* Murithi *supra* note 177, 75 (“AMIB’s crucial role in this case was to create conditions through which peace, albeit fragile, could be built in the country. By the end of its mission AMIB had succeeded in establishing relative peace to most provinces in Burundi . . .”).

198. S.C. Res. 1545, ¶¶ 2, 5, U.N. Doc. S/RES/1545 (May 21, 2004).

199. *See* Murithi, *supra* note 177, 76.

200. Omorogbe, *supra* note 23, at 47.

201. *Id.*

202. Murithi, *supra* note 177, 76.

203. *See* AU, *Report of the Chairperson of the Commission on the Situation in Sudan (Crisis in Darfur)*, ¶ 18, A.U. Doc. PSC/PR/2(V) (Apr. 13, 2004); *see*

among other provisions, the establishment of a Ceasefire Commission composed of two high-ranking officers from the parties, the Chadian mediation, and the involvement of the international community in the mediation process.²⁰⁴

On May 28, 2004, under the backing of the AU, the parties concluded an "Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur."²⁰⁵ In short, this agreement held that in order to implement the provisions in the N'Djamena Agreement, an AU Monitoring Mission composed of observers from the parties, the Chadian mediation, AU member states, and other representatives of the International Community would be the operational arm of the Ceasefire Commission.²⁰⁶ This resulted in AU's decision to establish an AU Observer Mission ("AMIS I"), the purpose of which was to protect civilian population and to monitor compliance with the ceasefire agreement.²⁰⁷ The U.N. Security Council gave its support to the AU's active and lead role in Darfur and to the deployment of AU monitors, including a protection force.²⁰⁸ The government of Sudan, "the SLM and the JEM also signed the Abuja Protocol on Humanitarian and Security Issues" ("Abuja Protocols") on November 9, 2004.²⁰⁹ In

also Robert P. Barnidge Jr., *The United Nations and the African Union: Assessing a Partnership for Peace in Darfur*, 14 J. CONFLICT & SECURITY L. 93 (2009); Omorogbe, *supra* note 22; Marten Zwanenburg, *Regional Organizations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations*, 11 J. CONFLICT & SECURITY L. 483, 494 (2006).

204. Agreement on Humanitarian Ceasefire on the Conflict in Darfur art. 3, Apr. 8, 2004, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=14149>.

205. See AU, Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur, May 28, 2004, available at <http://www.iss.co.za/af/profiles/sudan/darfur/cfc/agreement.pdf>.

206. *Id.* § II(4).

207. PSC, AU, *Communiqué of the Solemn Launching of the Peace and Sec. Council*, § A(6), A.U. Doc. PSC/AHG/Comm. (X) (May 25, 2004) [hereinafter *PSC Communiqué X*].

208. See S.C. Res. 1556, *supra* note 107, ¶ 2.

209. Omorogbe, *supra* note 23, at 49; see Protocol Between the Government of the Sudan (Gos), the Sudan Liberation Movement/Army (SLM/A) and the Justice Equality Movement (JEM) on the Enhancement of the Humanitarian Situation in Darfur in Accordance with the N'Djamena Agreement, Nov. 9, 2004, available at

the Protocols, “the parties requested the ‘AU to urgently take the necessary steps to strengthen AMIS I on the ground, with the requisite mandate to ensure more effective monitoring of the commitments”²¹⁰

On May 25, 2004, the PSC approved AMIS I,²¹¹ and “[i]nitially, AMIS I had sixty military observers (“MILOBs”) and 300 MILOB protectors.”²¹² Commentators have observed that the small size of AMIS I was insufficient because it failed to provide the “full coverage of the Darfur region,” resulting in “ceasefire violations on all sides” and the deterioration of the security situation.²¹³ In response, the PSC decided to create an enhanced mission, which became known as AMIS II. At this time, AMIS II’s mandate and resources were strengthened from those of its predecessor, and the PSC expanded the size of AMIS II.²¹⁴ The Security Council also supported the increased mandate of AMIS II.²¹⁵ In addition to monitoring compliance with ceasefire agreements, AMIS II was mandated “to contribute to a secure environment for the delivery of humanitarian relief and . . . the return of [internally displaced persons] and refugees to their homes”²¹⁶ Further, AMIS II could “[p]rotect civilians whom it encounters under imminent threat and in the immediate vicinity”²¹⁷

Despite the commendable changes made to the AMIS II, commentators have noted that the AU’s lack of resources prevented the AMIS II from effectively carrying out its reinforced mandate.²¹⁸ Because of the challenges arising from the lack of

<http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=14152> [hereinafter Protocol of Sudan].

210. Omorogbe, *supra* note 23, at 49 (quoting Protocol of Sudan, *supra* note 214).

211. Omorogbe, *supra* note 23, at 49; see PSC *Communiqué* X, *supra* note 208, § A(6).

212. Omorogbe, *supra* note 23, at 49; see AU, *Briefing Note on the Renewal of the Mandate of the AU Mission in The Sudan (AMIS)*, ¶ 4, A.U. Doc. PSC/PR/2 (XLII) (Oct. 20, 2005).

213. Omorogbe, *supra* note 23, at 49; Zwanenburg, *supra* note 203, at 495.

214. See PSC, AU, *Communiqué*, ¶ 7, A.U. Doc. PSC/PR/Comm. (XVII) (Oct. 20, 2004) [hereinafter PSC *Communiqué* XVII]; see also PSC, AU, *Communiqué*, ¶ 9, A.U. Doc. PSC/PR/Comm. (XXVIII) (Apr. 28, 2005).

215. S.C. Res. 1574, ¶ 13, U.N. Doc. S/RES/1574 (Nov. 19 2004).

216. PSC *Communiqué* XVII, *supra* note 214, ¶ 4.

217. *Id.* ¶ 6.

218. See Omorogbe, *supra* note 23, at 49, 53; Zwanenburg, *supra* note 203, at 495.

resources in early 2006, the PSC agreed to a transition from an AU to a U.N. force.²¹⁹ This led to a number of resolutions that established the AU/U.N. hybrid operation in Darfur (“UNAMID”) as a joint peace support mission with a mandate to protect civilians derived from Chapter VII of the U.N. Charter.²²⁰ UNAMID assumed the mandate from AMIS II on December 31, 2007.²²¹ This meant that the U.N. also assumed financial responsibility for the cost of AMIS forces, operating now under the single command of the U.N.²²² There are differing opinions about the effectiveness of AU and U.N. efforts through UNAMID.²²³ One commentator has noted that the situation in Darfur will ultimately depend on the ability of the parties to reach a political settlement.²²⁴ UNAMID was extended for one year until July 31, 2012, while welcoming the intention of the Secretary-General and the AU to review the number uniformed personnel required for effectiveness.²²⁵ The Security

219. See Omorogbe, *supra* note 23, at 50 (noting that the PSC supported the transition to a U.N. force as a result of “uncertainties regarding the financial stability” in the AU); see also, PSC, AU, *Communiqué*, ¶¶ 2–5, A.U. Doc. PSC/PR/Comm. (XLV) (Jan. 12, 2006); PSC, AU, *Communiqué*, ¶¶ 5–6, A.U. Doc. PSC/MIN/Comm. (XLVI) (Mar. 10, 2006).

220. See Omorogbe, *supra* note 23, at 51; see also, PSC, AU, *Communiqué on the Situation in Darfur*, ¶ 8, A.U. Doc. PSC/PR/Comm. (LXXIX) (June 22, 2007); see also S.C. Res. 1769, ¶ 15, U.N. Doc. S/RES/1769 (July 31, 2007).

221. G.A. Res. 62/232A, ¶¶ 43–44, U.N. Doc. A/RES/62/232A (Dec. 22, 2007).

222. *Id.*; S.C. Res. 1769, *supra* note 220, ¶¶ 6–8. For a discussion of the cost of the UNAMID resources, see Omorogbe, *supra* note 23, at 51–52.

223. See Murithi, *supra* note 177, 79 (questioning this “new relationship” between the UN and the AU in this regard (UNAMID), arguing that “[i]t is too early to pass a definitive judgment on this emerging hybrid partnership,” and noting that “[t]he AU has to remain vigilant to ensure that it does not descend into a relationship of hybrid paternalism”); Tom Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union’s Interventions*, 4 GOETTINGEN J. INT’L L. 49, 67 (2012) (arguing that UNAMID “was more than a larger peacekeeping force, and not a robust enforcement force despite previous unsuccessful peacekeeping, continued civil war and mass atrocities”). Kabau attributes this to the fact that both the AU and the U.N. focused “on Sudan to consent to the deployment of troops and military equipment . . .” *Id.* at 68. This was done despite the resolutions of the Security Council passed under Chapter VII of the U.N. Charter that permitted enforcement action (which did not sought consent from Sudan). *Id.*

224. Omorogbe, *supra* note 23, at 53.

225. S.C. Res. 2003, ¶¶ 1–2, U.N. Doc. S/RES/2003 (July 29, 2011).

Council has now decided to extend the UNAMID mandate “for a further 12 months” to July 31, 2013.²²⁶

C. AU Mission in Somalia

Since the collapse of the Somali state in 1991, various attempts have been made by both regional and international actors to find ways to resolve the armed conflict in Somalia.²²⁷ Mark Malan, writing in the late 1990s, noted that prior international interventions in Somalia failed to produce desired results and have instead created reluctance on the part of the U.N. and the international community to become involved in African conflicts generally.²²⁸ This is due to the fact that international efforts have proven to be counterproductive because of the continuous instability in Somalia.²²⁹ In 2002, the Somali National Reconciliation Process took place “under the patronage of . . . Inter-Governmental Authority on Development” (“IGAD”) with the support of the U.N., AU, European Union (“EU”), and United States.²³⁰ This process is argued to have been successful since over twenty major Somali stakeholders signed “a statement on the Cessation of Hostilities and the Structures and Principles of the Somalia National Reconcilia-

226. S.C. Res. 2063, ¶ 1, U.N. Doc. S/RES/2063 (July 31, 2012).

227. See Peter Pham, *Somalia: Where a State Isn't a State*, 35 FLETCHER F. WORLD AFF. 133, 137 (2011) (“Since the fall of President Siyad Barre and the coterminous collapse of the Somali state in 1991, regional and international actors have tried repeatedly to find ways to resolve the armed conflict in Somalia by sponsoring extensive international peace processes, with the intention of instituting a functioning government in Mogadishu, Somalia.”). Pham also discusses the role played by the sub-regional organization Inter-Governmental Authority on Development (“IGAD”) supported by the European Union and the United States in an attempt to solve the Somali conflict. *Id.*; see also, Mark Malan, *The Crisis in External Response, in* PEACE, PROFIT OR PLUNDER: THE PRIVATIZATION OF SECURITY IN WAR-TORN AFRICAN SOCIETIES 37, 42–43 (Jakkie Cilliers & Peggy Mason eds., 1999) (discussing various international responses to the Somali situation since 1991).

228. See Malan, *supra* note 227, at 43 (describing the events that occurred in Somalia, including the “humiliating scenes” of the bodies of the US soldiers being subjected to public acts of outrage, and arguing that “Somalia was thus a turning point at which international community lost all desire to experiment further with ‘middle ground’ operations in Africa”).

229. See Pham, *supra* note 227, at 133–41 (discussing the reasons for Somalia’s failure to find peace).

230. See *Id.* at 137; see also Omorogbe *supra* note 23, at 54 (describing the “Somalia National Reconciliation Process” that took place under IGAD).

tion Process on October 27, 2002.”²³¹ This led to the adoption of a Transitional Federal Charter by the Transitional Federal Government (“TFG”) in February 2004.²³²

While the TFG had found international acclaim, it found it difficult to operate within Mogadishu.²³³ The TFG was therefore “provisionally located in Baidoa, 250 kilometers northwest of Mogadishu.”²³⁴ The TFG lost its control of Somalia to the Union of Islamic Courts (“UIC”),²³⁵ and “[i]n June 2006, the UIC seized control of Mogadishu, and began to extend its authority over a large part of Southern Somalia.”²³⁶ Also during that month, the UIC established the “Supreme Council of Islamic [C]ourts, with an executive and legislative authority.”²³⁷ TFG and UIC agreed to engage in dialogue, but armed conflict resumed the following month, resulting in the UIC’s capture of parts of TFG’s areas of control.²³⁸ By September 2006, the UIC had also taken control of Kismayo, the largest city in the southern region of Somalia.²³⁹

The TFG received support from Ethiopia,²⁴⁰ while UIC also enjoyed foreign support.²⁴¹ The intensification of the armed conflict in 2006 and the participation of foreign actors increased the risk of a broader regional armed conflict.²⁴² This led

231. See Omorogbe, *supra* note 23, at 54; see also Declaration on Cessation of Hostilities, and the Structures and Principles of the Somalia National Reconciliation Process, Oct. 27, 2002, available at http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/igad/somaliadeclaration.pdf.

232. Omorogbe, *supra* note 23, at 54.

233. Benjamin R. Farley, *Calling a State: Somaliland and International Recognition*, 24 EMORY INT’L L. REV. 777, 784–85 (2010) (noting that the TFG had never entered Mogadishu, instead it operated in Kenya for several months).

234. See Omorogbe, *supra* note 23, at 55.

235. Pham, *supra* note 227, at 138.

236. Omorogbe, *supra* note 23, at 55; see Pham, *supra* note 227, at 138.

237. Omorogbe, *supra* note 23, at 55.

238. See *id.*

239. *November 2006 Monthly Forecast of Somalia*, SECURITY COUNCIL REPORT (Oct. 30, 2006), http://www.securitycouncilreport.org/monthly-forecast/2006-11/lookup_c_glKWLeMTIsG_b_2193657.php.

240. Colin Warbrick & Zeray W. Yihdego, *Ethiopia’s Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications*, 56 INT’L & COMP. L. Q. 666, 667 (2007).

241. U.N. Secretary-General, *Rep. of the Secretary General on the Situation in Som.*, ¶ 4, U.N. Doc. S/2007/115 (Feb. 28, 2007).

242. *Id.* ¶¶ 4, 5.

to the Security Council establishing the IGAD Mission in Somalia ("IGASOM").²⁴³ According to Eki Yemisi Omorogbe, the IGASOM project was overtaken by events of December 20, 2006 when a conflict broke out again between the TFG, assisted by Ethiopian troops, and the UIC.²⁴⁴ Omorogbe also stated that "[a]lthough the TFG and Ethiopian troops forced the UIC to retreat, the TFG was not able to institute an effective authority" in Somalia.²⁴⁵ The TFG's reliance on the presence of Ethiopian forces raised issues regarding its legitimacy in the eyes of the civilian population and their endorsement of the UIC.²⁴⁶ In addition, the UIC still posed a serious threat to TFG through Shabaab, its well-armed and well-trained elite force.²⁴⁷

The African Union Mission in Somalia ("AMISOM") was eventually authorized by the PSC with the aim to support the TFG.²⁴⁸ The AMISOM's mandate included support to the TFG institutions and the facilitation of the provisions of humanitarian assistance to create conditions conducive for the long-term stabilization and reconstruction of Somalia.²⁴⁹ The AMISOM received support from the Security Council.²⁵⁰ The Security Council provided AMISOM with a mandate under Chapter VII of the U.N. Charter "to take all necessary measures as appro-

243. S.C. Res. 1725, at 2, U.N. Doc. S/RES/1725 (Dec. 6, 2006). (The Security Council "[d]etermin[ed] that the situation in Somalia constituted a threat to international peace and security in the region," and "authorize[d] IGAD and [AU] [m]ember [s]tates to establish a protection and training mission in Somalia."). *Id.* ¶ 3.

244. Omorogbe, *supra* note 23, at 55–56.

245. *Id.* at 55.

246. *Id.* at 55–56.

247. See Monitoring Group on Somalia, *Rep. of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1724 (2006)*, ¶¶ 23–27, 35–38, U.N. Doc. S/2007/436 (July 18, 2007) (by Bruno Schiemksy et al.); see also Warbrick & Yihdego, *supra* note 240, at 667, 670.

248. See *Background and Political Developments, African Union Mission in Somalia*, AFRICAN UNION COMMISSION, http://www.africanunion.org/root/au/auc/departments/psc/amisom/AMISOM_Background.htm (last visited Oct. 26, 2012); see also PSC, AU, *Communiqué of the 69th Meeting of the Peace and Sec. Council*, ¶ 8, A.U. Doc. PSC/PR/Comm (LXIX) (Jan. 19, 2007).

249. *Id.* ¶¶ 5, 8.

250. S.C. Res. 1744, ¶ 4, U.N. Doc. S/RES/1744 (Feb. 21, 2007) (The Security Council decided to "authorize member States of the [AU] to establish for a period of six months a mission in Somalia," and authorized them "to take all necessary measures as appropriate to carry out the following mandate.").

appropriate” to support dialogue and reconciliation, to offer protection to the TFG, and to contribute to the creation of security for humanitarian assistance.²⁵¹ However, as in Darfur, commentators have noted that the AU and U.N. efforts in Somalia have been ineffective.²⁵² Much of the difficulties have to do with the lack of financial resources by the AU and of commitment from the international community.²⁵³ Some of the difficulties faced by the AU are also caused by member states’ reluctance to contribute their troops to a place such as Somalia, which is considered to be very dangerous.²⁵⁴

However, the AU still continues to intervene in Somalia. Analysts are reported to have acknowledged that “the [AU] has done a better job of pacifying Mogadishu . . . than any other outside force, including 25,000 American troops in 1990s.²⁵⁵ Further, the AU has recently received some assistance from member states such as Kenya,²⁵⁶ Ethiopia,²⁵⁷ and Sierra Leone.²⁵⁸ If the AMISOM succeeds, this may be a huge boost to the AU, as the internal armed conflict in Somalia has been ongoing for over twenty years.

D. Assessment

Interventions by the AU in the cases described above are conducted at the invitation or through the consent of the member states pursuant to Article 4(j) of the Constitutive Act. This

251. *See id.*

252. *See* Paul Williams, *Into the Mogadishu Maelstrom: The African Union Mission in Somalia*, 16 INT’L PEACEKEEPING 514, 515–527 (2009); Pham, *supra* note 227, at 147; Omorogbe, *supra* note 23, at 60–61.

253. Omorogbe, *supra* note 23, at 61 (concluding that “the recent intervention in Somalia shows that the AU is unable to undertake complex peacekeeping functions without calling for UN and international assistance”).

254. *Id.* (citing Williams, *supra* note 252, at 515, 527).

255. Jeffrey Gettleman, *African Force Makes Strides Inside Somalia*, N.Y. TIMES, Nov. 24, 2011, <http://www.nytimes.com/2011/11/25/world/africa/africa-forces-surprise-many-with-success-in-subduing-somalia.html?pagewanted=all>.

256. *Id.*

257. *See* Jeffrey Gettleman, *Ethiopian Troops Said to Enter Somalia, Opening New Front against Militants*, N.Y. TIMES, Nov. 20, 2011, http://www.nytimes.com/2011/11/21/world/africa/ethiopian-troops-enter-somalia-witnesses-say.html?_r=2.

258. *See* Josh Kron, *Sierra Leone to Send Troops*, N.Y. TIMES, Nov. 3, 2011, available at <http://www.nytimes.com/2011/11/04/world/africa/somalia-sierra-leone-to-send-troops.html>.

means that the AU has not yet exercised its right to intervene as envisaged in Article 4(h) of the Constitutive Act, which does not require the consent of member states.²⁵⁹ This can be attributed to the fact that under the Constitutive Act, a collective decision on the part of a two-thirds majority of the AU Assembly is required for intervention purposes,²⁶⁰ and the AU only meets twice a year.²⁶¹ Thus, intervention is not expected to take place if the two-thirds majority of the AU Assembly has not been reached, irrespective of whether international crimes mentioned in the Constitutive Act are being committed. Furthermore, “given the continent’s traditional reluctance to endorse interventionism . . . the likelihood of securing a two-thirds majority in the face of a hostile host must be considered slim at best.”²⁶² Therefore, invoking Article 4(h) authority in order to intervene in member states could only be “time-consuming and fraught with political obstacles.”²⁶³

It appears, then, that intervention may not happen at all or may happen too late, as was the case with Rwanda,²⁶⁴ Darfur,²⁶⁵ and in Libya recently.²⁶⁶ On February 15, 2011, the

259. Lieblich, *supra* note 1, at 370–71.

260. Constitutive Act art. 7(1).

261. *Id.* art. 6(3) states that the Assembly meets once a year. The same provision also states that the Assembly can meet on extraordinary session requested by a member state and on approval by a two-thirds majority of the Assembly. *Id.* However, due to its “increasing responsibilities . . . in addressing the challenges facing the Continent,” the Assembly has decided to meet twice a year. See AU, *Decision on the Periodicity of the Ordinary Sessions of the Assembly*, ¶¶ 3, 4, A.U. Doc. Assembly/AU/Dec.53 (III) Rev.1 (July 6–8, 2004).

262. BELLAMY, *supra* note 61, 78–79.

263. *Id.* at 78.

264. See Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 49, 51 (Eric Stover & Harvey M. Weinstein eds., 2004) (observing that while genocide was being committed in Rwanda, the international community, including the OAU, continued to receive representatives of the Rwandan government committing genocide to sit in at the U.N. Security Council and OAU summit meetings).

265. The PSC formed AU High-Level Panel on Darfur to submit recommendations on “accountability and combating impunity, on the one hand, and reconciliation and healing on the other” a week after the ICC prosecutor applied for an arrest warrant against President Al Bashir and five years after the Darfur conflict broke. See PSC, AU, *Communiqué of the 142d Meeting of the Peace and Security Council*, ¶ 11, A.U. Doc. PSC/MIN/Comm(CXLII) Rev.1 (July 21, 2008); see also *Situation in Darfur, Sudan: Prosecutor v.*

masses of Libya decided to hold a peaceful demonstration seeking a regime change.²⁶⁷ The Gadhafi government responded through the use of force, leading to deaths and internal displacement of Libyan civilians.²⁶⁸ The AU formed a panel to look into the situation in Libya only a week before the Security Council passed a resolution that authorized a no-fly zone over Libya.²⁶⁹ An inference can be drawn that as a result of this delay,²⁷⁰ NATO took over the situation.²⁷¹ This raises concerns as

Omar Hassan Ahmad Al Bashir, INTERNATIONAL CRIMINAL COURT (June 15, 2012), <http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf>. The Report of the Panel, dubbed the Mbeki Panel Report on Darfur after its chair and former President Thabo Mbeki, was endorsed by the AU on October 29, 2009. See Paul Okolo & Maram Mazen, *African Union Leaders Accept Mbeki Report on Darfur Conflict*, BLOOMBERG (Oct. 29, 2009, 7:38 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aIg0Q1H8F6UA>; Press Release, Security Council, Security Council Press Statement on Sudan, U.N. Press Release SC/9831, AFR/1925 (Dec. 21, 2009), available at <http://www.un.org/News/Press/docs//2009/sc9831.doc.htm>; see also PSC, AU, *Report of the African Union High-Level Panel on Darfur (AUPD)*, at vii, xiii, xvi, A.U. Doc. PSC/AHG/2 (CCVII) (Oct. 29, 2009).

266. The AU's plans for Libya were overtaken by swift response from the United States, France, and Britain to the Security Council's resolution on the situation there. See *AU Panel Says Opposed to Foreign Military Intervention in Libya: Media Report*, XINHUA NEWS (Mar. 20, 2011, 04:45 AM), http://news.xinhuanet.com/english2010/world/2011-03/20/c_13788058.htm (additionally noting that the call for the western countries' intervention was also at the invitation of some Arab countries after a meeting with their western counterparts in Paris) [hereinafter *AU Opposed to Foreign Intervention*].

267. See *Battle for Libya: Key Moment: Timeline of Decisive Battles and Political Developments in Libya's Uprising Against Muammar Gaddafi*, AL JAZEERA (Aug. 23, 2011), <http://www.aljazeera.com/indepth/spotlight/libya/2011/08/20118219127303432.html>.

268. *Id.*

269. See *AU Opposed to Foreign Intervention*, *supra* note 266.

270. Thabo Mbeki, *How the West Won Control over Africa*, THE HERALD (Apr. 5, 2011), <http://allafrica.com/stories/201104080011.html> (Referring to the events that occurred in Tunisia, Egypt and Libya, Mbeki noted that Africans were "unable to quickly decide how we should respond [and] instinctively resolved that we had no choice but to stand back and wait."). Mbeki also argued that by adopting Resolution 1973, which prescribed the foreign military intervention that "Africa had rejected," the West "dismissed the notion and practice of finding African solutions to African problems." *Id.*

271. *Id.* Although Mbeki refers to the UN and the "West" taking charge in Libya, it is well known that it is actually NATO that heeded the Security Council's call in terms of Resolution 1973. See NATO, *NATO and Libya*, http://www.nato.int/cps/en/natolive/topics_71652.htm (last visited Nov. 14,

to whether the AU Assembly has, in fact, changed its stance of non-intervention in internal armed conflicts.

Lack of financial resources and unwillingness by member states to contribute finances and troops hamper the work of the AU. Without proper funding, the AU will fail in its missions. Indeed, the "lack of funding for AU operations" and many member states defaulting on their annual contributions are huge obstacles to the AU's efficient operation.²⁷² It is crucial that the member states make their annual contributions to the AU's budget, and the AU Assembly takes it seriously when the member states default on their contributions. In this regard, the Constitutive Act gives the AU Assembly the power to issue sanctions against the defaulting states.²⁷³ The sanctions include the "denial of the right to speak at meetings, to vote, to present candidates for any position or post within the [AU] or to benefit from any activity or commitments" within the AU.²⁷⁴ Furthermore, the missions were authorized and mandated by the Security Council.²⁷⁵ Therefore, it seems that, at least for the time being, the AU will have to rely on the U.N. assistance to carry out its mandates effectively.

CONCLUSION

The following observations can be made regarding the AU's right to intervention: First, this discussion is evidence that Africa is making progress in dealing with international crimes that are committed during armed conflict by reserving for itself the right to intervene in a member states where such crimes are being committed. This is further evidenced by the creation of organs that aim to enable the AU to deal with international

2012) ("Following the Qadhafi regime's targeting of civilians in February 2011, NATO answered the United Nations' (UN) call to the international community to protect the Libyan people. In March 2011, a coalition of NATO Allies and partners began enforcing an arms embargo, maintaining a no-fly zone and protecting civilians and civilian populated areas from attack or the threat of attack in Libya under Operation Unified Protector (OUP). OUP successfully concluded on 31 October 2011.").

272. Ghana Center for Democratic Development, *A 'United States of Africa' by 2015?*, 8 BRIEFING PAPER 1, 3 (2007), available at http://www.cddghana.org/documents/Briefing%20_AU.pdf.

273. Constitutive Act art. 23(1).

274. *Id.*

275. See *Dealing with Africa's Human Rights Problems*, *supra* note 53, at 24 (discussing the AU missions authorized by the Security Council).

crimes within the region. However, this does not mean that the African community can solve these problems in isolation from the international community as a whole, as there is nothing in the U.N. Charter that states a regional organization has priority over the Security Council and that the Security Council must step aside when the regional organization decides to act locally to stop atrocities.

Second, the fact that the AU has not exercised its right to intervene pursuant to Article 4(h) of the Constitutive Act—which does not require the consent of states—shows that the AU has not completely rid itself of the impediments brought about by the principles of sovereignty which have largely crippled the OAU in the past. Thabo Mbeki, the former AU Chairperson and former President of South Africa, has said:

[W]e have to agree that we cannot be ruled by a doctrine of absolute sovereignty. We should not allow the fact of the independence of each one our countries to turn us into spectators when crimes against the people are being committed As independent states we have developed in the context of a largely unbridled respect for the notion of the national sovereignty. We must therefore foresee somewhat of a struggle to ensure that the approach adopted by the [AU] . . . wins the day.²⁷⁶

Thirdly, the financial situation within the AU also hinders the AU from exercising its duties, including exercising the right to intervene. Fourth and most importantly, the AU still needs to clarify what the right to intervene means. In order to do so, there is an urgent need for the AU to ensure that the African Court of Justice or the African Court of Justice and Human Rights becomes operational in order to interpret the provisions of the Constitutive Act on intervention. Once these courts are fully established, one should hope that nothing will hinder the AU from exercising its right to intervene because Africa needs the AU leaders' guarantees that they will promptly deal with any international crimes committed in the territory of member states during armed conflict.

276. Thabo Mbeki, President of South Africa, Lectured Delivered as Part of Activities Marking the Twentieth Anniversary of the Guardian at the Nigerian Institute of International Affairs, *Africa Will Emerge as the Hope of All Humanity* (Dec. 6, 2003) (transcript available at <http://www.waado.org/NigerDelta/Essays/Guardian-Mbeki.html>).

However, concerns about the AU's ability to intervene come to the surface when recognizing the fact that the only time the AU is willing to act is (1) when there is an unconstitutional change in government and (2) when the international community threatens to take over the situation. Therefore, while the AU has reserved for itself a legal duty to intervene, its attitude toward such a duty raises concerns because of its apparent adherence to the principles of non-interference and territorial integrity. Simultaneously, one may also argue that unless the AU has a clear view of the meaning of the right to intervene in terms of Article 4(h), it will be hard to exercise this right.

Despite the challenges outlined above, the AU has demonstrated that it is willing to intervene in cases where internal armed conflicts threaten peace and security in Africa, as evidenced by its missions in Burundi, Sudan, and Somalia. Although the missions have either been passed to the U.N. or are still ongoing, the initial decision by the AU to undertake them demonstrate the willingness to take the primary responsibility for crimes against humanity, war crimes, and genocide committed in the African region. There is hope that in time, and through trials and tribulations, the AU may have a strong chance of dealing with those international crimes that may adversely impact the peace and security of Africa.