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**The Peace and Security Council  
of the African Union**

Its Relationship with the United Nations,  
the African Union and  
Sub-Regional Mechanisms



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THE PEACE AND SECURITY COUNCIL OF  
THE AFRICAN UNION



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the African Union and Sub-Regional Mechanisms

Sabelo Gumedze

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and having enjoyed listening to his presentation of the African Union, we exchanged views on how best the continental organization could change the African continent for the better. The public defense of my thesis will be a continuation of our Elmina discussion with much focus on the Peace and Security Council of the African Union.

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**Sabelo Gumedze**

20 October 2011

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## LIST OF ABBREVIATIONS AND ACRONYMS

### Abbreviations in the names of Journals

AHRLJ	African Human Rights Law Journal
Am. J. Int'l L.	American Journal of International Law
Am. Soc'y Int'l L. Proc.	American Society of International Law Proceedings
ASR	Africa Security Review
AYBIL	African Yearbook of International Law
Cal. W. Int'l L.J.	California Western International Law Journal
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
Eur. J. Int'l L.	European Journal of International Law
Fla. J. Int'l L.	Florida Journal of International Law
Fordham Int'l L. J.	Fordham International Law Journal
FIU L. Rev.	FIU Law Review
Geo. Wash. Int'l L. Rev	George Washington International Law Review
Hum.Rts.Brief	Human Rights Brief
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
ILM	International Legal Materials
Interdisc. J. Hum. Rts. L.	Interdisciplinary Journal of Human Rights
IRRC	International Review of the Red Cross
J. Conflict & Security L.	Journal of Conflict and Security Law
Liberian Stud.J.	Liberian Studies Journal
LJIL	Leiden Journal of International Law
Mich. St. J.Int'l L.	Michigan Journal of International Law
Minn. J. Int'l L.	Minnesota Journal of International Law
N.C. L. Rev.	North Carolina Law Review
NILR	Netherlands International Law Review
RADIC	Revue Africaine de Droit International et Comparé
Regent J. Int'l L	Regent Journal of International Law
SAJHR	South African Journal of Human Rights
SUM Fletcher F World Aff.	Summer Fletcher Forum of World Affairs
Tex. Int'l L.J.	Texas Law Review
U.C. Davis J. Int'l L. & Pol'y	U.C. Davis Journal of International Law and Policy

## General list of Abbreviations and Acronyms

AEC	African Economic Community
APF	African Peace Facility
AMIS	African Mission in Sudan
AMISOM	African Mission in Somalia
AMU	Arab Maghreb Union
APRM	African Peer Review Mechanism
APSA	African Peace and Security Architecture
ASF	African Standby Force
AU	African Union
CENSAD	Community of Sahel-Saharan States
CEWS	Continental Early Warning System
COMESA	Common Market for Eastern and Southern Africa
COPAX	<i>Conseil de Paix et de Sécurité de l'Afrique Centrale</i>
CSO	civil society organization
DPKO	Department of Peacekeeping Operations (of the UN)
DRC	Democratic Republic of the Congo
EAC	East African Community
EASBRIG	Eastern Africa Standby Brigade
ECCAS	Economic Community of Central African States
ECOBRI	Economic Community of West African States Brigade
ECOMOG	ECOWAS Cease-Fire Monitoring Group
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of Western African States
EU	European Union
FOMAC	<i>Force Multinationale de l'Afrique Centrale</i> (Central African Multinational Force)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICGLR	International Conference on the Great Lakes Region
ICISS	International Commission on Intervention and State Sovereignty
IDP	Internally Displaced Person
IGAD	Intergovernmental Authority on Development
ISS	Institute for Security Studies

NEPAD	New Partnership for Africa's Development
OAU	Organization of African Unity
P-5	the five permanent members of UN Security Council
PAP	Pan-African Parliament
PBC	Peacebuilding Commission
PCRD	post conflict reconstruction and development
PDI	pro-democratic intervention
POW	Panel of the Wise (a structure of the PSCAU)
PSC	Peace and Security Council (of the African Union)
PSCAU	Peace and Security Council of the African Union
REC	regional economic community
RM	regional mechanism
RPTC	Regional Peacekeeping Training Centre
SADC	Southern African Development Community
SADCBRIG	Southern African Development Community Brigade
SRMs	sub-regional mechanisms
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNOAU	United Nations Office at the African Union
UNSC	United Nations Security Council
USA or US	United States of America

## AFRICAN UNION MEMBER STATES

1. The People's Democratic Republic of Algeria
2. The Republic of Angola
3. The Republic of Benin
4. The Republic of Botswana
5. The Republic of Burkina Faso
6. The Republic of Burundi
7. The Republic of Cameroon
8. The Republic of Cape Verde
9. The Central African Republic
10. The Republic of Chad
11. The Islamic Federal Republic of the Comoros
12. The Republic of the Congo
13. The Republic of Côte d'Ivoire
14. The Democratic Republic of Congo
15. The Republic of Djibouti
16. The Arab Republic of Egypt
17. The State of Eritrea
18. The Federal Democratic Republic of Ethiopia
19. The Republic of Equatorial Guinea
20. The Gabonese Republic
21. The Republic of The Gambia
22. The Republic of Ghana
23. The Republic of Guinea
24. The Republic of Guinea Bissau
25. The Republic of Kenya
26. The Kingdom of Lesotho
27. The Republic of Liberia
28. The Great Socialist People's Libyan Arab Jamahiriya
29. The Republic of Madagascar
30. The Republic of Malawi
31. The Republic of Mali
32. The Islamic Republic of Mauritania
33. The Republic of Mauritius
34. The Republic of Mozambique
35. The Republic of Namibia
36. The Republic of Niger
37. The Federal Republic of Nigeria
38. The Republic of Rwanda
39. The Sahrawi Arab Democratic Republic
40. The Republic of Sao Tome and Principe
41. The Republic of Senegal
42. The Republic of Seychelles
43. The Republic of Sierra Leone
44. The Republic of Somalia
45. The Republic of South Africa
46. The Republic of Sudan
47. The Kingdom of Swaziland



48. The United Republic of Tanzania
49. The Togolese Republic
50. The Republic of Tunisia
51. The Republic of Uganda
52. The Republic of Zambia
53. The Republic of Zimbabwe

## MAP OF 53 AFRICAN UNION MEMBERS STATES



*As shown, the only African country not belonging to the African Union is Morocco. At the time of compiling the map Southern Sudan had not yet become an independent republic, which it did in July 2011. It was set to become the 54<sup>th</sup> African Union member state.*

## CHAPTER 1: INTRODUCTION

### 1.1 STATEMENT OF THE PROBLEM

The African continent continues to experience human suffering on a scale unparalleled in human history despite all efforts made at international, regional and sub-regional levels. This stems primarily from Africa's complex and often prolonged conflicts which occur at both the inter-state and intra-state level. Initiatives to address the continent's peace, security and stability challenges by the United Nations (UN), the African Union (AU), and a range of sub-regional organizations have failed to prove the efficacy of these organizations, which nonetheless continue the battle to find a lasting solution. Meanwhile, untold human suffering has become synonymous with the African continent.

In an attempt to reverse this unfortunate state of affairs, the AU established a subsidiary organ – the Peace and Security Council of the African Union (PSCAU) – with the responsibility to promote peace, security and stability on the continent. It was envisaged that this responsibility would be fulfilled in collaboration with other organs and institutions. This study seeks to address the question of whether or not this collaboration can bring African conflicts to an end and thereby minimise human suffering. It examines the PSCAU (also referred to simply as 'the Peace and Security Council' or 'the Council') and its relationship with the United Nations Security Council (also referred to simply as 'the UN Security Council' or 'UNSC'); as well as the Council's relationship with the relevant organs and institutions established under the auspices of the AU, and with the sub-regional mechanisms (SRMs) for conflict prevention, management and resolution. These relationships are analysed on the basis that the most important objective of the Peace and Security Council is to promote peace, security and stability in Africa,<sup>1</sup> and that therefore the cooperation that the Council is required to forge with other institutions and mechanisms is of critical importance.

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<sup>1</sup> Art. 3(a) and 6(a) of the Protocol relating to the establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003), (PSCAU Protocol) available at <<http://www.africa-union.org/root/au/Documents/Treaties>> (Accessed 1 July 2009).

The AU – the PSCAU mother body – was established through the Constitutive Act of the African Union (Constitutive Act).<sup>2</sup> This Act was adopted on 11 July 2000 and entered into force on 26 May 2001. The AU was then formally established in 2002.<sup>3</sup> The Peace and Security Council is a relatively nascent continental institution that is gradually shaping contemporary Africa’s Peace and Security Architecture (APSA). Established through the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSCAU Protocol), the Council is to some extent modelled on the UN Security Council which was established by the UN Charter.

The PSCAU Protocol entered into force on 26 December 2003 replacing the Declaration on the Establishment within the Organization of African Unity (OAU) of the Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration), which was set up in 1993. The Peace and Security Council, formally launched in 2004,<sup>4</sup> was one of the first institutions to be established after the 2002 establishment of the AU.<sup>5</sup>

This Council is one among several other AU organs (or clusters of organs) described in article 5 of the AU Constitutive Act. These are: the Assembly, the Executive Council, the Pan-African Parliament, the Court of Justice, the AU Commission, the Permanent Representative Committee, the specialized technical committees, the Economic Social

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<sup>2</sup> Reproduced in Christof Heyns (ed.) *Human Rights Law in Africa* (Martinus Nijhoff Publishers, Leiden 2004, volume 1 181-186). The Constitutive Act of the African Union is sometimes referred to in some literatures as the AU Treaty. See e.g. Tiyanjana Maluwa ‘Reimagining African Unity: Preliminary Reflections on the AU Treaty of the African Union’ (2001) 9 *African Yearbook of International Law* 3 and Tiyanjana Mmaluwa ‘The Constitutive Act of the African Union and Institutional-Building in post-colonial Africa’ 16 (2003) *Leiden Journal of International Law* 164.

<sup>3</sup> The first Summit of the AU marking its establishment was held in South Africa in July 2002.

<sup>4</sup> See Statement of Commitment to Peace and Security in Africa, issued by the Heads of State and Government of Member States of the Peace and Security Council of the African Union (25 May 2004). Available at [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/Lancement%20PSC/Statement.pdf](http://www.africa-union.org/News_Events/Calendar_of_%20Events/Lancement%20PSC/Statement.pdf) (Accessed 10 July 2009).

<sup>5</sup> See Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2007) 205.

and Cultural Council (ECOSOCC), and the financial institutions. Provision is also made for any additional organs that the AU may decide to establish,<sup>6</sup> however, a discussion on each of these organs is beyond the scope of this study. Suffice it to say that the roles of these organs should be seen as nurturing or supporting peace, security and stability within the continent. From the list above, only the relevant AU organs, that is, the Pan-African Parliament (PAP), the AU Commission and the Economic Social and Cultural Council will be analysed.

The study seeks to analyse the three-dimensional relationship of the Peace and Security Council with three important entities at the global, regional and sub-regional levels. Firstly, it analyses the PSCAU's relationship with its UN counterpart, the UN Security Council, whose primary responsibility is to maintain international peace and security<sup>7</sup>, while the AU Council confines itself to Africa. Secondly, it analyses the Peace and Security Council's relationship with three AU organs/institutions, namely the Pan-African Parliament; the African Commission on Human and Peoples' Rights (African Commission), the institution that is most intimately linked to the Council's mandate; and civil society organizations (CSOs), particularly the Economic Social and Cultural Council.<sup>8</sup> Given the different mandates of these organizations and institutions, the analysis of their respective relationships with the Peace and Security Council is confined to the promotion of peace and security in Africa. Thirdly, the research analyses the PSCAU's relationship with the sub-regional mechanisms for conflict prevention, management and resolution<sup>9</sup> in so far as the promotion of peace and security is concerned. In establishing the Peace and Security Council, the AU member states acknowledged 'the need to develop formal coordination and cooperation arrangements between these [Sub-r]egional Mechanisms and the African Union'.<sup>10</sup>

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<sup>6</sup> Art. 5 (2) of the Constitutive Act.

<sup>7</sup> Art. 24(1) of the UN Charter.

<sup>8</sup> More information on the ECOSOCC is available at <<http://www.africa-union.org/ECOSOC/home.htm>> (Accessed 7 September 2009). ECOSOCC is established in terms of article 22 of the Constitutive Act as an advisory organ composed of different social and professional groups of the AU Member States.

<sup>9</sup> The word "sub-regional mechanisms" (SRMs) shall be used to refer to the regional mechanisms.

One of the objectives of the Pan-African Parliament is to promote peace, security and stability.<sup>11</sup> The African Commission's mandate is to promote human and peoples' rights and ensure their protection in Africa.<sup>12</sup> These rights include the right to national and international peace and security.<sup>13</sup> Among other things, the Economic Social and Cultural Council is entrusted with the responsibility of supporting policies and programmes that will promote peace, security and stability in Africa.

The sources for the Peace and Security Council's three-dimensional relationships with other entities are found in the PSCAU Protocol. The source of the first dimension of the relationship is article 17 of the Protocol dealing with the relationship between the Peace and Security Council and the United Nations and other international organizations. The sources of the second dimensional duty are based on the following: article 18 dealing with the relationship with the Pan-African Parliament; article 19 dealing with the African Commission; and article 20 dealing with the Peace and Security Council's relations with civil society organizations. The source for the third dimension is article 16, dealing with the Peace and Security Council's relationship with sub-regional mechanisms for conflict prevention, management and resolution. These articles – 16 to 20 – which form the basis of this study, underscore the envisaged relationship between the Peace and Security Council and, respectively, the sub-regional mechanisms, the UN Security Council, and the relevant institutions and organs of the African Union.

Article 16 of the PSCAU Protocol provides that '[t]he [Sub-]Regional Mechanisms are part of the overall security architecture of the [AU], which has the primary responsibility for promoting peace, security and stability in Africa'. To this end, in respect of the Peace and Security Council, the Chairperson of the AU Commission is entrusted with the responsibility of firstly harmonizing and coordinating the activities of regional

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<sup>10</sup> Para. 6 of the Preamble to the PSCAU Protocol.

<sup>11</sup> Art. 3 of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (PAP Protocol) (adopted 2 March 2001, entered into force 14 December 2003).

<sup>12</sup> Art. 30 of the African Charter.

<sup>13</sup> Art. 23(1) of the African Charter.

mechanisms in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the AU; and secondly of working closely with regional mechanisms, to ensure effective partnership between them and the Peace and Security Council in the promotion and maintenance of peace, security and stability.<sup>14</sup>

Article 17(1) of the PSCAU Protocol provides that '[i]n the fulfilment 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 security'. Article 18(1) of the PSCAU Protocol provides that '[t]he Mechanism [of the PSCAU] shall maintain close working relations with the Pan-African Parliament in furtherance of peace, security and stability in Africa'. Article 19 of the PSCAU Protocol provides that '[t]he Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in matters relevant to its objectives and mandate'.

Article 20 of the PSCAU Protocol provides that the Peace and Security Council 'shall encourage non-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in efforts aimed at promoting peace, security and stability in Africa'. This article further provides that if so required, these organizations may be invited to address the Council in an endeavour to promote peace, security and stability in Africa.

The establishment of the Peace and Security Council marked 'an historic watershed in Africa's progress towards resolving its conflicts and the building of a durable peace and security order'.<sup>15</sup> It also reflected the commitment of the heads of state and member states of the Council to 'the promotion of a stable, peaceful and developed Africa, as well as a significant step towards realising the ideals enshrined in the Constitutive Act of the [African] Union and the Protocol relating to the Establishment of the Peace and Security Council'.<sup>16</sup> Most importantly, the establishment of the Peace and Security

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<sup>14</sup> Art. 16(1) of the PSCAU Protocol.

<sup>15</sup> See Statement of Commitment to Peace and Security in Africa (n 4 above).

Council reflected the desire on the part of the heads of state and member states of the PSCAU 'to assume a greater role in the maintenance of peace and security'.<sup>17</sup>

The drafters of the PSCAU Protocol considered that the Peace and Security Council could not achieve its objectives as enumerated under article 3 of the PSCAU Protocol maximally without cooperating and working closely with the UN and other international organizations, namely the Pan-African Parliament, the African Commission, and civil society organizations. The PSCAU was established in the course of a number of conflicts, some of which have caused or continue to cause untold suffering to many African people and pose major challenges to the continent's development. In an endeavour to shed some light on the causes of conflicts in Africa, the former secretary general of the United Nations noted as follows:

Africa is a vast and varied continent. African countries have different histories and geographical conditions, different stages of economic development, different sets of public policies and different patterns of internal and international interaction. The sources of conflicts in Africa reflect this diversity and complexity. Some sources are purely internal, some reflect the dynamics of a particular sub-region, and some have important international dimensions. Despite these differences the sources of conflict in Africa are linked by a number of common themes and experiences.<sup>18</sup>

Having been established to achieve a wide range of objectives, the Peace and Security Council has a daunting task, particularly in addressing peace, security and stability challenges in Africa. Against the background of the PSCAU Protocol, and given Africa's security challenges, this study seeks to address the following three research questions:

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<sup>16</sup> As above.

<sup>17</sup> As Above.

<sup>18</sup> United Nations Secretary-General and United Nations Security Council, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa / Report of the Secretary-General to the United Nations Security Council, 16 April 1998. (New York, N.Y.: United Nations, 1998).*



1. Based on article 17 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with the United Nations, and particularly with the UN Security Council, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?

2. Based on articles 18, 19 and 20 of the PSCAU Protocol, to what extent do the envisaged relationships of the Peace and Security Council with the Pan-African Parliament, the African Commission, and civil society organizations, respectively, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?

3. Based on article 16 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with sub-regional mechanisms for conflict prevention, management and resolution have an actual and potential ability to effectively contribute to peace, security and stability in Africa?

## 1.2 OVERVIEW OF RELATED LITERATURE

The relationship of the Peace and Security Council with the United Nations, the organs of the African Union, and other institutions, as envisaged in articles 16, 17, 18 and 19 of the PSCAU Protocol has not been studied in much detail. This study seeks to fill this gap, as it has been identified in the existing literature. While a considerable number of studies have been conducted on the AU and peace and security in Africa, they do not address, at least in comprehensive terms, the relationships of the Peace and Security Council with, respectively, the United Nations, the African Union and the sub-regional mechanisms. This overview of related literature focuses mainly on recent literature, including edited books and doctoral dissertations. It also lists relevant articles on peace and security in Africa.

The most recent comprehensive work on international human rights law in Africa, a 2007 book by Frans Viljoen, is confined to the relationship between the Peace and Security Council and the African Commission, which is viewed as reciprocal.<sup>19</sup> Viljoen notes that this reciprocal relationship is aimed at 'reinforcing the role of human rights as a "key tool for promoting collective security, durable peace and sustainable

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<sup>19</sup> Viljoen (n 5 above) 208.

development” on the one hand, and the need for peace and stability as a necessary condition for sustainable realization of especially socio-economic rights, on the other’.<sup>20</sup>

The most recent work on the AU and its institutions, including the Peace and Security Council, is a 2008 collection (reprinted in 2009) called *The African Union and its Institutions* (edited by John Akokpari, Angela Ndinga-Muvumba and Tim Murithi).<sup>21</sup> For purposes of this study, the relevant chapters are as follows: ‘From non-interference to non-indifference: The emerging doctrine of conflict prevention in Africa’ by Mwanasali<sup>22</sup>; ‘The peacemaking role of the OAU and the AU: A comparative analysis’ by Gomes<sup>23</sup>; ‘The peacekeeping travails of the AU and the Regional Economic Communities’ by Adebajo<sup>24</sup>; and ‘A critical appraisal of the African Union-ECOSOCC civil society interface’ by Mutasa.<sup>25</sup>

Mwanasali’s contribution highlights some of the lessons that the Peace and Security Council could learn from the OAU’s Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, and it analyses the doctrine of non-

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<sup>20</sup> As above. (Footnotes omitted).

<sup>21</sup> John Akokpari *et al* (eds.), *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009).

<sup>22</sup> Musifiky, Mwanasali, ‘From Non-Interference to Non-Indifference: The Emerging Doctrine of Conflict Prevention in Africa’ in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 41.

<sup>23</sup> Solomon, Gomes, ‘The Peacemaking Role of the OAU and the AU: A Comparative Analysis’ in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 113.

<sup>24</sup> Adekeye, Adebajo, ‘The Peacekeeping Travails of the AU and the Regional Economic Communities’ in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 131.

<sup>25</sup> Charles Mutasa, ‘A Critical Appraisal of the African Union-ECOSOCC Civil Society Interface’ in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 291.

indifference. He approaches the question of conflict prevention in Africa from a political perspective. Gomes, in his chapter, assesses how the African Union has taken new bold steps in creating the Peace and Security Council in order to undertake peacemaking initiatives across Africa, among other things. Gomes' contribution traces the peacemaking framework at the UN level, while also tracing the OAU's and subsequently the African Union's peacemaking efforts. Adebajo examines Africa's peacekeeping travails since the establishment of the AU, presenting some highlights on its mission in Darfur (this mission was still underway at the time of writing), and assessing the efforts of the principal regional mechanisms, namely, the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS), the Intergovernmental Authority on Development (IGAD), and the Arab Maghreb Union (AMU). Mutasa's contribution gives a critical appraisal of the Economic, Social and Cultural Council and the events, mechanisms, dynamics and reasons leading to the involvement of the citizens of the AU countries in the affairs of the African Union.<sup>26</sup>

The most recent book on the Peace and Security Council, edited by Ulf Engel and João Gomes Porto, is titled *Africa's New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions*.<sup>27</sup> For purposes of this study, the most relevant chapters in this 2010 book are as follows: Chapter 2 by Söderbaum and Hettne, 'Regional security in a global perspective';<sup>28</sup> Chapter 4 by Sturman and Hayatou, 'The Peace and Security

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<sup>26</sup> As above 292.

<sup>27</sup> Ulf Engel & João Gomes Porto, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010).

<sup>28</sup> Fredrick Söderbaum & Bjorn Hettne, 'Regional Security in a Global Perspective' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 13.

Council of the African Union: From design to reality’;<sup>29</sup> and Chapter 7 by Cilliers and Pottgieter (sic), ‘The African Standby Force’.<sup>30</sup>

Söderbaum and Hettne introduce the theory, practice, rationale and experience of security cooperation at a regional level. Among other things, they discuss the establishment of the AU and offer an analysis of how three regional economic communities (RECs) – the Economic Community of West African States, the Intergovernmental Authority on Development, and the Southern African Development Community – have performed over the years. Sturman and Hayatou review the development of the Peace and Security Council since its launch on 24 May 2004. They trace the history behind its establishment and give an analysis of how the Council has performed over the years, pointing out both challenges and successes. The chapter by Cilliers and Pottgieter, whose earlier version is published by the Institute for Security Studies,<sup>31</sup> provides a critical commentary and update on the African Standby Force (ASF), which they view as ‘an ambitious scheme to enable Africa to play a greater role in, and assume responsibility for, continental conflict management’.<sup>32</sup> Their analysis concentrates on the technical rather than the legal aspects of the ASF.

The most recent book on the protection of human security in Africa, edited by Ademola Abass, is titled *Protecting Human Security in Africa*.<sup>33</sup> For purposes of this study, the most

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<sup>29</sup> Kathryn Sturman & Aissatou Hayatou, ‘The Peace and Security Council of the African Union: From Design to Reality’ in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa’s new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 57.

<sup>30</sup> Jakkie Cilliers, & Johann Pottgieter (sic), ‘The African Standby Force’ in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa’s new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 111.

<sup>31</sup> Jakkie J. Cilliers, *The African Standby force. An update on Progress*, Paper 160 (Pretoria, Institute for Security Studies, 2008).

<sup>32</sup> Cilliers and Pottgieter (n 30 above) 112.

<sup>33</sup> Ademola Abass, (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010).

relevant contribution is chapter 11 by Abass, titled 'African Peace and Security Architecture and the Protection of Human Security'.<sup>34</sup> Abass analyses the relevance of the APSA in realising human security within the continent. He underscores the importance of the relationship between the AU and RECs/SRMs and notes that the ability of these organization to maintain peace and security rests upon their aptitude to operationalise the African Peace and Security Architecture.<sup>35</sup> In his analysis, Abass highlights some of the major challenges faced by the regional economic communities and/or sub-regional mechanisms and provides concrete suggestions on how best a collaborative effort between these and the African Union could be made effective in the protection of human security in Africa. In his conclusion, Abass cautions the African Union on its fast-paced adoption of treaties 'as though there was a medal for quantity' and suggests that the AU has, at this critical moment, a 'historical role to play in protecting human security in Africa'.<sup>36</sup>

Relevant doctoral dissertations include Kithure Kindiki's 2002 LLD dissertation (unpublished) titled *Humanitarian Intervention in Africa: The Role of Intergovernmental Organizations*.<sup>37</sup> Largely focussing on the role of intergovernmental organizations in so far as humanitarian intervention in Africa is concerned, Kindiki argues that the PSCAU Protocol 'presents a bold normative and institutional framework and may be a relevant source of authority for humanitarian intervention in Africa once it enters into force'.<sup>38</sup> Kindiki's work was unable to test this assertion as it was completed in 2002 (before the PSCAU Protocol came into force), thus limiting its application to this study.

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<sup>34</sup> Ademola Abass, 'African Peace and Security Architecture and the Protection of Human Security' in Abass, Ademola, (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 252.

<sup>35</sup> As above 257.

<sup>36</sup> As above 283.

<sup>37</sup> Kithure Kindiki, *Humanitarian Intervention in Africa: The Role of intergovernmental Organizations* (unpublished LLD thesis, Faculty of Law, University of Pretoria, 2002). See particularly 259-262.

<sup>38</sup> As above 255.

Also worthy of note in terms of the issue of intervention is a 2008 PhD thesis by Girmachew Aneme titled *A Study of the African Union's Right of Intervention Against Genocide, Crimes Against Humanity and War Crimes*.<sup>39</sup> In his thesis, Aneme critically analyses the African Union's right of intervention against genocide, crimes against humanity and war crimes inside African states. The analysis is confined to the content of article 4(h) of the Constitutive Act. While its focus is not the relationship between the Peace and Security Council and the relevant institutions and mechanisms, Aneme's thesis is pertinent in that it makes recommendations on how this relationship may be used in implementing article 4(h) of the Constitutive Act, which also happens to be article 4(j) of the PSCAU Protocol.

Another study is Dan Kuwali's 2009 LLD thesis, titled *Persuasive Prevention: Implementation of the Right of Intervention*.<sup>40</sup> Among other things, Kuwali's dissertation analyses the normative status of the right to intervene under article 4(h) of the Constitutive Act (of the African Union) in international law, particularly in relation to the UN Charter and also in relation to how the AU can legally intervene in a member state in prescribed circumstances. Kuwali launches a scathing attack on the PSCAU Protocol for not addressing what he terms 'the obvious intervention dilemmas that have dragged decisions to intervene in the past'.<sup>41</sup>

Other relevant studies on the AU and the promotion of peace and security in Africa are as follows: 'The unfinished business: Conflicts, the African Union and the New Partnership for Africa's Development' (2003) by Nsongurua Udombana<sup>42</sup>; 'The Peace

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<sup>39</sup> Girmachew Alemu Aneme, *A Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD thesis, Faculty of Law, University of Oslo, 2008).

<sup>40</sup> Daniel Kuwali, *Persuasive Prevention: Implementation of the AU Right of Intervention* (Published PhD thesis, Faculty of Law, Lund University, 2009) 5. Parts of Kuwali's PhD thesis are published in Dan Kuwali, 'Art. 4(H) + R2P: Towards a Doctrine of Persuasive Prevention to End Mass Atrocity Crimes' (2008-2009) 3 *Interdisc. J. Hum. Rts. L.* 55. See also Dan Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (Martinus Nijhoff Publishers, 2011).

<sup>41</sup> As above 165.

and Security Council of the African Union: The known unknowns' (2003) by Jeremy Levitt<sup>43</sup>; 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) by Kithure Kindiki<sup>44</sup>; 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) by Ben Kioko<sup>45</sup>; 'The OAU/African Union and international law: Mapping new boundaries or revising old terrain?' (2004) by Tiyanjana Maluwa<sup>46</sup>; 'It takes a village ... or at least a region: Rethinking peace operations in the twenty-first century, the hope and promise of African regional institutions' (2007) by Michael Hollywood<sup>47</sup>; and 'The evolving role of the African Union peace operations: The AU Mission in Burundi, Darfur, and Somalia' (2008) by Tim Murithi<sup>48</sup>.

### 1.3 OVERVIEW OF CHAPTERS

This study is divided into seven chapters, each containing a separate set of footnotes.

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<sup>42</sup> Nsongurua Udombana, 'The Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development' (2003) 35 *George Washington International Law Review* 87.

<sup>43</sup> Jeremy I. Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Transnat'l L. & Contemp. Probs.* 125.

<sup>44</sup> Kithure Kindiki, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal' (2003) 3 *AHRLJ* 115.

<sup>45</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 807.

<sup>46</sup> Tiyanjana Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?' (2004) 98 *Am. Soc'y Int'l L. Proc.* 237.

<sup>47</sup> Michael, Dana Hollywood, 'It Takes a Village ...Or At Least a Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions' (2007) 19 *Fla. J. Int'l L.* 148.

<sup>48</sup> Tim Murithi, 'The Evolving Role of the African Union Peace Operations: The AU Mission in Burundi, Darfur, and Somalia' *African Security Review*, Vol. 17, No. 1, (March 2008) 78.

**Chapter 1** introduces the research topic and incorporates the following components: statement of the problem; overview of related literature; overview of chapters; research methodology; the Peace and Security Council and International Law; relevance and limitations of the study. The discussion on the Peace and Security Council and international law is relevant because the Council operates under the auspices of the African Union, which is an international (intergovernmental) organization that operates under an international treaty, namely the AU Constitutive Act. The PSCAU Protocol is itself an international treaty with a regional/continental application.

**Chapter 2** discusses the establishment of the Peace and Security Council and its role in the prevention, management and resolution of conflict in Africa. It introduces the notion of peace and security as a human right guaranteed under the African Charter on Human and People's Rights (African Charter).<sup>49</sup> It also considers peace and security as one of the main objectives and principles of the AU and discusses the implications thereof. The focus then turns to the role of the Peace and Security Council as one of the main organs of the AU entrusted with ensuring peace and security in Africa. The supporting structures falling under the Council; namely, the Panel of the Wise and the African Standby Force are also discussed. The chapter also discusses how the peace and security framework proposes to address some of the most serious threats to peace and security in Africa, among which are unconstitutional changes of governments and terrorism.

**Chapter 3** considers the linkage between the African Union (including the Peace and Security Council) and the responsibility to protect. It traces the origins of the concept of the responsibility to protect and demonstrates how it has evolved within the AU. The chapter also makes linkages between this concept and the notions of human rights, human security and international security. Given the fact that the responsibility to protect has African roots, the chapter examines the norm from an African perspective. Particular attention is devoted to article 4(h) of the Constitutive Act, discussing how the article gives effect to the responsibility to protect. This elaborates on the notion of collective intervention, among other things. Further, the chapter considers the processes to be undertaken by the AU as a means of giving effect to the responsibility to protect,

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<sup>49</sup> African Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force 21 October 1996) (1982) 21 *ILM* 58 (African Charter on Human and Peoples Rights).



following requests for intervention by its member states and occurrences of undesirable unconstitutional changes of government.

**Chapter 4** analyses the relationship between the AU Peace and Security Council and the UN Security Council. It addresses the first research question, namely: *Based on article 17 of the PSCAU Protocol, to what extent does the envisaged relationship of the PSCAU with the UN, particularly, the UN Security Council, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?* The relationship between the Peace and Security Council and the UN Security Council is considered in light of the PSCAU's mandate of promoting peace, security and stability in Africa. Among other things, the chapter considers the seeming conflict between international law under the UN Charter (and customary international law) and the emerging international law under the Constitutive Act. It also discusses how this conflict between the laws of the AU (African Union law) and those of the UN play out, especially in light of the PSCAU Protocol provision on the relationship between the PSCAU and the UN Security Council. The work of the Peace and Security Council is considered in as far as it has cooperated with the UN Security Council in the past when addressing peace and security challenges in Africa.

**Chapter 5** addresses the second research question, namely: *Based on articles 18, 19 and 20 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with the Pan-African Parliament, the African Commission, and CSOs, respectively, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?* The relationship between the Peace and Security Council and the African Union organs, that is, the PAP and ECOSOCC and the institution established under the auspices of the OAU/AU, that is, the African Commission is considered. Other relationships discussed are those between the Peace and Security Council and civil society organisations as well as the AU Commission. These respective relationships are considered in light of the Peace and Security Council's overarching mandate of promoting peace, security and stability in Africa. Importantly, the chapter also considers the issue of whether the mandates of the Council and the AU organs and institutions, as given above, could complement each other in addressing peace and security in Africa and, if so, the practicality thereof.

**Chapter 6** addresses the third and final research question, namely: *Based on article 16 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security*

*Council with sub-regional mechanisms for conflict prevention, management and resolution have an actual and potential ability to effectively contribute to peace, security and stability in Africa?* The chapter analyses the relationship between the Council and the sub-regional mechanism for conflict prevention, management and resolution. It focuses on the sub-regional economic blocs that are officially recognized by the AU, namely: the Economic Community of Western African States, the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States, the Southern African Development Community, the Intergovernmental Authority on Development, the Arab Maghreb Union / *Union du Magreb Arabe*, and the Community of Sahel-Saharan States (CENSAD).<sup>50</sup> The chapter also discusses the extent to which the Peace and Security Council and the sub-regional mechanisms that operate under the auspices of the above-mentioned regional economic communities, have implemented article 16 of the PSCAU Protocol. This article deals with their relationship, particularly, in conflict prevention, management and resolution.

**Chapter 7** makes specific recommendations on how the relationship between the Peace and Security Council and, respectively, the UN Security Council, the Pan-African Parliament, the African Commission, CSOs and the sub-regional mechanisms could effectively contribute to peace, security and stability in Africa. Before making specific recommendations, the chapter looks at how best the provisions of the PSCAU Protocol, particularly articles 16, 17, 18, 19, and 20, are to be implemented, underscoring the role of the AU Commission. The recommendations are informed particularly by the elaborate discussions in Chapters 4, 5 and 6. The chapter also discusses what aspects could be considered for amendment and revision both at the regional and sub-regional levels. A recommended practical time frame within which such amendments and revisions could be considered is given.

#### **1.4 PEACE AND SECURITY COUNCIL AND INTERNATIONAL LAW**

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<sup>50</sup> See Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs). AU Doc Assembly/AU/Dec.112 (VII) (July 2006). According to this decision, the AU urged the recognized RECs to coordinate and harmonize their policies among themselves and with the AU Commission with a view to accelerating Africa's integration process.

This study is mainly based upon the premise that as an organ of the African Union, the establishment of the Peace and Security Council reflects a significant development under international law. Rosenne argues that international law is a law of *co-ordination* as opposed to one of *subordination* as characterises most national law.<sup>51</sup> Rosenne looks at the *law of co-ordination* as international law 'that own actors have created and apply [it] between themselves, and are responsible for enforcing [it]'.<sup>52</sup> In this context, therefore, the AU is a creation of its member states through a legal instrument which co-ordinates them through its application and enforcement by the same member states. By extension, the PSCAU Protocol is a creation of the AU member states which also co-ordinate the Protocol through its application and enforcement by the same member states.

An important point raised by Rosenne is the fact that the actors, namely the member states, remain, as before, independent sovereign states and act directly or indirectly through the intergovernmental organization for their common purpose.<sup>53</sup> Thus, member states of the AU remain independent sovereign states while subscribing to the objectives of the international organization. The AU operates under a constitutive framework, the Constitutive Act, which is multilateral in nature. A multilateral treaty, such as the Constitutive Act, offers an avenue for the creation of international law in the international realm.<sup>54</sup> The Constitutive Act is thus governed by the Law of Treaties.<sup>55</sup>

Interpretation of the Constitutive Act in particular is covered by the 1969 Vienna Convention on the Law of Treaties,<sup>56</sup> which partly reflects customary international law

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<sup>51</sup> Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2004) 15.

<sup>52</sup> As above.

<sup>53</sup> As above.

<sup>54</sup> See Tiyanjana Maluwa, 'International Law-Making in the Organization of African Unity: An Overview' (2000) 12 *Revue Africaine de Droits International et Comparé* 203.

<sup>55</sup> On the law of treaties, see Malcolm N Shaw, *International Law* (3<sup>rd</sup> edition) Cambridge University Press (1999) 560.

<sup>56</sup> Signed in Vienna on 23 May 1969 and entered into force on 27 January 1980.

and constitutes the basic framework for any discussion of the nature and characteristics of treaties.<sup>57</sup> Adopting the definition of a treaty under the Vienna Convention on the Law of Treaties,<sup>58</sup> the Constitutive Act and the PSCAU Protocol are, therefore, international agreements concluded between the African states in written form and governed by international law embodied in the Constitutive Act and the PSCAU Protocol, respectively. Amerasinghe identifies two elements, which are sometimes mentioned in connection with public international organizations, these are, 'the international personality' and 'treaty making capacity'.<sup>59</sup> The latter is evidenced in the adoption of the PSCAU Protocol by the AU member states as governed by the parent international instrument, the Constitutive Act. These elements are 'to be regarded as consequences of being a public international organization'<sup>60</sup> and they are also present with the AU.

That the Constitutive Act and the PSCAU Protocol are binding instruments is not in doubt. Rosenne argues that international law is a formal binding conduct-regulating system for those actors,<sup>61</sup> which are in this context the AU member states. According to Shaw 'the fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon parties to them and must be performed in good faith'.<sup>62</sup> This is in accordance with article 31 (1) of the Vienna Convention on the Law of Treaties which provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The good faith principle is expressed as *pacta sunt servanda* in legal terms. Applying this principle to the PSCAU Protocol, it is therefore a legal requirement

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<sup>57</sup> See Shaw (n 55 above) 561.

<sup>58</sup> Article 2(1)(a) of the Vienna Convention on the Law of Treaties.

<sup>59</sup> Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2<sup>nd</sup> edition) Cambridge University Press (2005) 10.

<sup>60</sup> As above 11.

<sup>61</sup> Rosenne (n 51 above) 17.

<sup>62</sup> Shaw (n 55 above) 561.

under the law of treaties that obligates state parties to it to conclude the same in good faith. In addition to concluding the PSCAU Protocol, the member states are obliged as a matter of principle to perform their obligations as prescribed therein in good faith.

The concept of good faith is the fundamental principle of the law of treaties. In the *Nuclear Tests (Australia v France) Case* the International Court of Justice stated:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.<sup>63</sup>

Defining the principle of good faith in international law, O'Connor argues that it is a

[F]undamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of this rule is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.<sup>64</sup>

In the treaty-making process trust and confidence, inherent features in states' co-operation, must guide the state parties, if such cooperation is to be effective. They must also adhere to the principles of honesty, fairness and reasonableness in laying the foundation for their common vision of a united and strong Africa. This can best be achieved through adherence to international norms and standards set by them through the AU and other relevant international legal instruments.

According to Mutharika, Africa has 'generally been a recipient of, rather than a contributor to, the development of international law'.<sup>65</sup> However, this is far from the case

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<sup>63</sup> *I.C.J. Rep.* 1974, 253 at p 268.

<sup>64</sup> John F. O'Connor, *Good Faith in International Law* (Dartmouth Publishing Company Limited, 1991) 124.

when it comes to what the African Union has done over its years of existence, for the development of international law and by extension, for the establishment of the Peace and Security Council. The AU's contribution to the development of international law is, among other things, informed by the fact that it is mandated to 'encourage international cooperation'<sup>66</sup>; 'establish the necessary conditions which enable the continent to play its rightful role in the global economy and international negotiations'<sup>67</sup>; and most importantly (for our purposes) to '[p]romote peace, security, and stability on the continent'.<sup>68</sup>

The involvement in international relations of the AU, and particularly the Peace and Security Council, requires not only the application of international law but also its development in order to address contemporary situations and challenges that are peculiar to the continent. While international law has an influence on the AU and the Council, such law is also developed through the dynamism of the international relationships between states within the AU and the PSCAU. As an international organization, the AU is in its own right capable of shaping international relations among its member states and also shaping and developing international law governing its member states.

As an organ of the AU, the Peace and Security Council is expected to make a significant contribution to international law in as far as the promotion of peace and security on the continent is concerned. Over and above this, the Council's powers are far-reaching since, according to the PSCAU Protocol, '[t]he member states agree to accept and implement the decisions of the [PSCAU], in accordance with the Constitutive Act'.<sup>69</sup> This will become clearer in succeeding chapters.

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<sup>65</sup> Arthur P. Mutharika, 'The Role of International Law in the Twenty-First Century: An African Perspective' (1995) *Fordham International Law Journal* 1706.

<sup>66</sup> Art. 3(e) of the Constitutive Act.

<sup>67</sup> Art. 3(i) of the Constitutive Act.

<sup>68</sup> Art. 3(f) of the Constitutive Act.

<sup>69</sup> Art. 7(2) of the Constitutive Act.

Amerasinghe observes that 'the lives of people all over the world have come to be touched by the work of international organizations, as is evidenced by the interest taken by them in the protection of human rights or development'.<sup>70</sup> This applies equally to the African people *vis-à-vis* the AU and the Peace and Security Council. Another important observation, which Amerasinghe makes, is the fact that even less-developed states 'have become accustomed to look to these organizations for assistance in the solution of problems'.<sup>71</sup> Within this context, African states, a majority of which are less developed, look to the AU for assistance in addressing their many challenges. In so far as peace and security is concerned, the PSCAU is the lead organ within the AU system. The Peace and Security Council must therefore be accepted as the AU organ that is primarily responsible for addressing African problems relating to peace and security.

## 1.5 DESK REVIEW AND RESEARCH METHODOLOGY

The study uses the following sources and methodology:

Largely based on desk research, the study makes use of both primary and secondary sources. The primary sources relied upon include treaties, declarations and resolutions – of the AU in particular and of other international organizations such as UN bodies and specialised agencies in general. These primary sources have a legally binding effect in relation to member states of both the African Union and the United Nations and they form part of international law.

Secondary sources include books, articles, reports and other relevant papers and documentation. The reports include those compiled by the various organs of the AU, which have a bearing on peace and security in Africa and which are not necessarily legally binding. Of significant importance are the Peace and Security Council's Communiqués, which capture the work of the Council, including how it has over the years related to the regional mechanisms, the UN Security Council, and the institutions/organs of the AU. The issuance of communiqués is done in terms of the

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<sup>70</sup> Amerasinghe (n 59 above) 7.

<sup>71</sup> As above.

Rules of Procedure of the PSCAU, which states that at the end of each meeting, it may issue a communiqué.<sup>72</sup> These Rules of Procedure have a very strong interpretative value in the sense that they capture the practices of the state parties and were adopted by consensus of all the state parties to the PSCAU Protocol.

The Communiqués of the Peace and Security Council also provide a practice, which may be used as a means of interpreting the PSCAU Protocol. This is in accordance with the Vienna Convention of the Law of Treaties which provides that '[t]here shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.<sup>73</sup> The PSCAU has also passed decisions that are not necessarily labelled as 'Communiqués'.<sup>74</sup> These decisions are also used in this study. Over and above these communiqués and decisions, the Council makes declaratory statements, which are also used in this study.

As part of the secondary sources, this study makes reference to the Audit of the African Union, High Level Panel of the Audit of African Union of December 18, 2007 (AU Audit Review), which is very important for the present discourse on the AU and its organs. The AU Audit Review, which is a product of an intense investigation into the state of the AU, seeks to provide an in-depth analysis and assessment of the current state of integration of the Union and to audit its organs and institutions and its relationship with regional economic communities and its partners, the African Development Bank and the UN Economic Commission for Africa. The reliance on the AU Audit Review is informed by the fact that the Audit was instructed 'to make recommendations to strengthen the efficiency and effectiveness of current institutions as well as accelerate economic integration'.<sup>75</sup>

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<sup>72</sup> African Union (Executive Council) "Decision on the Peace and Security Council" (Addis Ababa 2004) EX/CL/Dec. 79(IV) (Peace and Security Council Rules of Procedure) Rule 32.

<sup>73</sup> Art. 31(3)(b) of the Vienna Convention on the Law of Treaties.

<sup>74</sup> See Girmachew Alemu Aneme, *A Study of the African Union's Right of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD thesis, Faculty of Law, University of Oslo, 2008) 27.



Most of the primary and secondary sources used in this study are easily accessible on the Internet. Needless to say, as a result of the Peace and Security Council being a fairly new organ, which is dynamic in terms of structural development, institutional processes and its impact in Africa and globally, the electronic media serve as a powerful tool through which both researchers and practitioners can post their analyses of this organ, which continues to shape the African Peace and Security Architecture. Despite the fact that the AU's website is under-prioritised, under-resourced and under-valued,<sup>76</sup> the AU, nevertheless, posts most of its important documentation and latest developments on its website.<sup>77</sup>

The study is descriptive, prescriptive and analytical. An understanding of the Peace and Security Council requires an appreciation of the overall organizational structure of the African Union. This inevitably requires a description of the relevant sub structures and an analysis of what role they have in the maintenance of peace and security, directly or indirectly. As the AU is a law making body, it is important to analyse its relevant legal provisions that have a bearing on peace and security. An enquiry on the AU and peace and security also requires a critical analysis of the AU as an international organization along with its various structures and processes.

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<sup>75</sup> The AU Audit Review was undertaken by thirteen members of the High Level Panel on the Audit of the African Union. The Panel held its inaugural meeting on 10 September 2007 and its final meeting between 10-18 December 2007. According to the AU Audit Review, the panel held eighteen hearings, considered over 300 documents and interviewed sixty officials and staff of the AU Commission, African Embassies and external partners.

<sup>76</sup> See p. 52 of the Audit of the African Union, High Level Panel of the Audit of African Union, December 18, 2007, Addis Ababa, Ethiopia. (AU Audit Review), Available at [www.pambazuka.org/actionalerts/images/.../AUDIT\\_REPORT.doc](http://www.pambazuka.org/actionalerts/images/.../AUDIT_REPORT.doc) (Accessed 6 July 2009).

<sup>77</sup> The AU's new website is <http://www.au.int/>, and it was previously <http://www.africa-union.org>. The African Commission posts relevant documentation and communications relating to human rights in Africa at <http://www.achpr.org>. In order to circumvent the challenge of not being able to access some of the documents of the PSCAU from the AU's website, a much reliable website of the Institute for Security Studies (ISS) is utilised. The ISS website is <http://www.issafrica.org>.

As already mentioned, this study inevitably applies international law. It is also accepted that a study on the Peace and Security Council should, over and above international law, also adopt a multi-disciplinary approach, which best informs a robust debate about the effectiveness or otherwise of the organ in ensuring peace and security in Africa. For instance, the treaties, decisions and resolutions of the AU are preceded by political and diplomatic engagements among the member states. The implementation of these instruments requires political commitment on the part of its state parties. While taking cognisance of other disciplines, the primary focus of this study remains international law.

## 1.6 RELEVANCE OF THE STUDY

According to Juma, the Peace and Security Council functions as the fulcrum for all peace and security activities of the African Union in the sense that its mandate is to undertake peacemaking and peace-building activities, promote post-conflict peace building and prevent resurgence of violence, and combat international terrorism.<sup>78</sup> The relevance of the study therefore lies in an exploration of what strategic direction the PSCAU should take in cooperating and working closely with the UN Security Council, the Pan-African Parliament and the African Commission, the CSOs and the SRMs. This process will inevitably address the ways, means and ends, that is: first, what ways could be devised in forging these relationships; second, what means could be implemented in ensuring that these relationships are effective; and third, what ends are envisaged in devising the ways and applying the means in the promotion of peace and security on the continent.

As the Peace and Security Council is an organ entrusted with ensuring peace and security in Africa, it must be nurtured and strengthened by means of a thorough critical analysis. The relationship established by the PSCAU Protocol between the Council and the UN Security Council, the PAP, the African Commission, CSOs and SRMs, respectively, exists for one reason and one reason only, that is, to strengthen its mandate of promoting peace, security and stability in Africa. As the available literature indicates, there exists a gap when it comes to exploring the envisaged relationship between the Peace and Security Council and these institutions and mechanisms. Inherent in this

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<sup>78</sup> Laurence Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13 *Mich. St. J.Int'l L.* 487.

relationship (or these relationships) is a window of opportunity when it comes to overcoming the continent's peace and security challenges, which arguably remain a stumbling block to Africa's development.

The aim and relevance of this study is therefore to explore and propose ways to fill this relationship gap. Having analysed the relationship between the Peace and Security Council and, respectively, the UN Security Council, the Pan-African Parliament, the African Commission, CSOs and SRMs, concrete recommendations, both general and specific, will be made in an endeavour to make the Council more effective in the fulfilment of its mandate through partnering with the above-mentioned institutions.

### **1.7 LIMITATIONS OF THE STUDY**

The first key limitation affecting the study is that the Peace and Security Council is still a fairly new organ, having been formally established in 2004. The African Union is itself a fairly new institution, having been formally established in 2002. The realization of the envisaged institutional relationship between the Peace and Security Council and the UN Security Council, the Pan-African Parliament and the African Commission, the CSOs, and the SRMs, respectively, will take considerable time. At best, the relationships remains *ad hoc* due to the fast pace with which the Peace and Security Council has had to react to conflict situations.

The second limitation is that while the relationship between the Peace and Security Council and the relevant institutions and mechanisms is formally established in terms of the PSCAU Protocol, the provisions are very limited in the sense that they do not give a clear description of how, specifically, such relationships are to be effected. In fact, save for a few, these institutions and mechanisms have not yet elaborated on any formal legal instrument with regard to adherence to the relevant provisions of the PSCAU Protocol.

The third limitation is the fact that the AU, as a regional institution with a plethora of organs aimed at addressing a variety of continental issues and challenges, is still suffering from a lack of interaction and coordination. This, no doubt, affects the relationship of the Peace and Security Council with the UN, and the relevant institutions and mechanisms.

To illustrate the point, in 2002, the AU Assembly made a request to the African Commission (in concert with the AU Commission) to enhance interaction and coordination with the different organs of the AU in order to strengthen the African mechanism for the promotion of human and peoples' rights and to report at its next session.<sup>79</sup> As a follow up to this request, in 2006 the African Commission held a brainstorming meeting in Banjul, The Gambia, wherein one of the recommendations made was the overriding and urgent need for the African Commission to initiate consultations with the organs of the AU with a view to establishing modalities to formalize their relationship and develop common programmes.<sup>80</sup> This formal relationship has not as yet been established and common programmes have not been developed. Once this happens, it is likely to change the AU's approach to the promotion and protection of human rights. The fact that the AU has not yet initiated a process outlining the parameters of the relationship between the Peace and Security Council and the UN as well as the AU organs and institutions, presents a major challenge when it comes to understanding the intention of the PSCAU Protocol, especially as regards international law.

The fourth limitation is that a possibility exists that in this study, any conclusions drawn may be tentative, given the fact that the Peace and Security Council is arguably still in its formative and/or developmental years. Be that as it may, despite any seemingly premature judgement made in this study, an analysis of the envisaged institutional relationship is critical in shaping the future thinking of the Council and its activities on the African continent as enhanced by the institutional cooperation that the PSCAU Protocol establishes. Acknowledging and critically reflecting upon the recent developments of the PSCAU in respect of peace and security in Africa will bring out any of the Council's shortcomings that need to be addressed and any strengths that need to be further consolidated, particularly through institutional cooperation.

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<sup>79</sup> See Decision on the 16<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights. Doc.Assembly/AU/7 (II).

<sup>80</sup> See Annex Two: Report of the Brainstorming Meeting on the African Commission in the 20<sup>th</sup> Activity Report of the African Commission on Human and Peoples' Rights. <[http://www.chr.up.ac.za/hr\\_docs/documents/20th%20Activity%20Report.doc](http://www.chr.up.ac.za/hr_docs/documents/20th%20Activity%20Report.doc)> (Accessed 4 July 2009).

## CHAPTER 2: ESTABLISHMENT AND ROLE OF PSCAU

### 2.1 INTRODUCTION

The overarching research question of this study is the extent to which the envisaged relationship between the Peace and Security Council and, respectively, the sub-regional mechanisms, the UN Security Council, and the AU institutions/organs, have an actual and potential ability to effectively contribute to peace, security and stability in Africa. Before this question is addressed, the chapter discusses the establishment of the PSCAU and considers its role in conflict prevention, management and resolution. Virtually all the organizations and institutions with which the Peace and Security Council is to seek collaboration existed before the Council was established. Forging relations with already existing institutions is not an easy task, as shall become clear in the succeeding chapters.

That the Peace and Security Council is the key player in the promotion of peace and security in Africa is not in dispute. Sarkin argues that in comparison to the OAU's approach in addressing peace and security in Africa, the PSCAU represents a more robust system for the early detection of crises or conflicts and is empowered to take steps to prevent these problems.<sup>1</sup> The Council's role in the promotion of peace and security is complemented by the roles of the AU Commission, the Panel of the Wise, the Continental Early Warning System (CEWS), an African Standby Force, and a Special Fund.<sup>2</sup> Levitt argues that the Peace and Security Council forms a vital part of the African regional human rights system.<sup>3</sup> It is for this reason that it is obliged to seek close cooperation with the African Commission, among other institutions.<sup>4</sup> While the maintenance of peace and security, *per se*, is not a new phenomenon within Africa, the establishment of the Peace and Security Council ushered in a new era in the way in

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<sup>1</sup> Jeremy Sarkin, 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 381.

<sup>2</sup> Art. 2(2) of the PSCAU Protocol.

<sup>3</sup> Jeremy Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Transnat'l L. & Contemp. Probs.* 110.

<sup>4</sup> Art. 19 of the PSCAU Protocol. This point is discussed in much detail under chapter 5.

which peace, security and stability challenges were to be addressed in Africa. Of note is the manner in which the PSCAU Protocol provided for the joining of forces between the Council and other organizations/institutions, both within and outside the continent.

This chapter starts by discussing the establishment and composition of the Peace and Security Council. Secondly, it discusses the functions of the Council and its specific mandate in the promotion of peace, security and stability in Africa. Under this part the link between this mandate and the right to peace and security is discussed. Thirdly, the chapter considers the role of the Peace and Security Council in conflict prevention, management and resolution. Here there is a discussion of the various roles to be played by the AU Commission, the Panel of the Wise, the Continental Early Warning System, the African Standby Force, and the Special Fund. The Panel of the Wise, the CEWS and the ASF have been referred to as the 'three noteworthy operational organs' established by the PSCAU Protocol.<sup>5</sup> The various roles of these organs are critical in conflict prevention, management and resolution. Fourthly, it discusses the role of the Council in so far as the principle of intervention or the use of force is concerned. Fifthly, the chapter discusses the role of the Council in addressing terrorism in Africa. Lastly, a conclusion is drawn.

## **2.2 ESTABLISHMENT OF PEACE AND SECURITY COUNCIL**

Initially it was not intended that the Peace and Security Council would be established as organ of the African Union.<sup>6</sup> Prior to the Council's establishment, the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution (Central Organ) was already in place. As the name suggests, the Central Organ operated under the auspices of the AU's predecessor, the OAU. Despite the existence of the Central Organ, it has been argued that the OAU, for its part, never possessed the political mandate, resolve, or resources to manage conflict.<sup>7</sup>

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<sup>5</sup> Levitt (n 3 above) 120.

<sup>6</sup> See Art. 5 of the Constitutive Act.

<sup>7</sup> Levitt (n 3 above) 113.

During its 37<sup>th</sup> Ordinary Session from 9 to 11 July 2001, the Assembly of Heads of States and Government of the OAU decided to incorporate the Central Organ as one of the organs of the African Union.<sup>8</sup> This was in accordance with article 5(2) of the Constitutive Act.<sup>9</sup> A specific request was made to the OAU secretary general to undertake a review of the structures, procedures and working methods of the Central Organ, including the possibility of changing its name. It was in pursuance of article 5(2) of the Constitutive Act that the Peace and Security Council was established as a 'decision-making organ [of the AU] for the prevention, management and resolution of conflicts'.<sup>10</sup> As of 27 January 2011, out of a total of 53 AU member states, 44 had already ratified the PSCAU Protocol.<sup>11</sup>

There is no doubt that the Peace and Security Council was established as an afterthought following the coming into force of the Constitutive Act. Article 5(f) of the Constitutive Act, introduced, for the first time, the Peace and Security Council as one of the organs of the African Union.<sup>12</sup> Worthy of note is that this article was included through the Constitutive Act Amendment Protocol<sup>13</sup> after the adoption of the Protocol Relating to the

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<sup>8</sup> Decision AHG/Dec.160 (XXXVII).

<sup>9</sup> In terms of art. 5 (2) of the Constitutive Act, the Assembly may decide to establish other organs. On the development of the PSCAU since its launch on 24 May 2004, see generally, Sturman, Kathryn & Hayatou Aissatou, 'The Peace and Security Council of the African Union: From Design to Reality' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 57.

<sup>10</sup> Art. 1 of the PSCAU Protocol.

<sup>11</sup> States that have not as yet acceded to the PSCAU Protocol include Central African Republic, Cape Verde, Democratic Republic of Congo, Eritrea, Guinea-Bissau, Guinea, Liberia, Seychelles, and Somalia.

<sup>12</sup> This clause was a result of an amendment to the Constitutive Act. See article 5 of the Protocol on Amendment to the Constitutive Act of the African Union.

Establishment of the Peace and Security Council of the African Union.<sup>14</sup> The PSCAU Protocol entered into force on 26 December 2003 and replaced the Declaration on the Establishment within the OAU, of the Mechanisms for Conflict Prevention, Management and Resolution (Cairo Declaration), while superseding the resolutions and decisions of the OAU relating to the Mechanisms for Conflict Prevention, Management and Resolution in Africa, which are in conflict with the PSCAU Protocol.<sup>15</sup>

According to the preamble of the PSCAU Protocol, the establishment of the Peace and Security Council resulted from the fact that the heads of state and government of the member states of the AU were

determined to enhance [their] capacity to address the scourge of conflicts on the Continent and to ensure that Africa, through the African Union, plays a central role in bringing about peace, security and stability on the Continent.<sup>16</sup>

The above preambular provision is very important in understanding why the Central Organ had to be done away with and replaced by the Peace and Security Council. Firstly, the Council was to enhance the capacity of the AU in addressing the scourge of conflict in Africa, and secondly it was to play a central role in bringing about peace, security and stability. As shall be seen, in order for the Council to enhance the capacity of the AU in addressing conflicts and play a central role in bringing about peace, security and stability, there was a need to forge relationships with other institutions, which were relevant to its mandate.

### **2.3 COMPOSITION OF THE COUNCIL**

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<sup>13</sup> Adopted by the 1<sup>st</sup> Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003.

<sup>14</sup> Adopted by the 1<sup>st</sup> Ordinary Session of the African Union held in Durban on 9 July 2002.

<sup>15</sup> Art. 22 of the PSCAU Protocol.

<sup>16</sup> Para. 19 of the Preamble to the PSCAU Protocol.



The Peace and Security Council is composed of fifteen members elected on the basis of equal rights. In order to ensure continuity, ten members are elected for a term of two years and the rest for a term of three years.<sup>17</sup> The PSCAU operates at the level of ambassadors, ministers and heads of state and government.<sup>18</sup> The members states of the Council are elected by the AU Assembly based on the principles of equitable regional representation and rotation. Three members are from Central Africa, three from East Africa, two from North Africa, three from southern Africa and four from West Africa.<sup>19</sup> Of importance, there is no provision for permanent members of the Peace and Security Council as is the case with the UN Security Council.

The current members of the Peace and Security Council by region are as follows: from Central Africa are Burundi, Chad and Equatorial Guinea; from East Africa are Djibouti, Rwanda and Kenya; from North Africa are Mauritania and Libya; from southern Africa are Namibia, South Africa and Zimbabwe; and from West Africa are Benin, Côte D'Ivoire, Mali and Nigeria.<sup>20</sup> The chairmanship of the Council is on a monthly rotational basis and in alphabetical order (of the members of the PSCAU).<sup>21</sup>

Among other things, the criteria used in electing members of the Council include their contribution to the promotion and maintenance of peace and security in Africa and their respect for human rights.<sup>22</sup> No doubt, the promotion of peace and security as a human

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<sup>17</sup> Art. 5(1) of the PSCAU Protocol.

<sup>18</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 817.

<sup>19</sup> Art. 4 of the African Union (Executive Council) "Modalities of the Election of Members of the Peace and Security Council" (March 2004).

<sup>20</sup> All these members took their seats from 1 April 2010 there mandate vary with one group serving for the their two years term from 1 April to 31 March 2012 and the other serving for a three years term from 1 April 2010 to 31 March 2013.

<sup>21</sup> The elections for 2-year PSCAU membership will be in January 2012 and this will see a fresh streaming of the rotating Chairmanship. Elections for 3-year PSCAU membership will be in January 2013.

right, calls for Council members to embrace the notion of human rights and to have made a contribution to realizing this right. In terms of the modalities for the election of the members of the Peace and Security Council, any AU member state that meets the criteria may apply for membership to the PSCAU.<sup>23</sup>

The other criteria with regard to each prospective member state are as follows:<sup>24</sup> commitment to uphold the principles of the AU; capacity and commitment to shoulder the responsibilities entailed in membership; participation in conflict resolution, peace-making and peace building at regional and continental levels; willingness and ability to take up responsibility for regional and continental conflict resolution initiatives; contribution to the Peace Fund and/or Special Fund created for specific purpose; respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights; having sufficiently staffed and equipped Permanent Missions at the Headquarters of the Union and the United Nations, to be able to shoulder the responsibilities which go with the membership; and commitment to honour financial obligations to the Union.

Regarding the criterion of 'respect for the rule of law', a question has been raised on how this may be quantified in legal terms and 'if international standards are the means of measurement, how many African states genuinely would be entitled to AU membership'<sup>25</sup> and consequently to membership of the Peace and Security Council. The problem with this question is that the principle of the rule of law is an ideal, which many states, particularly in Africa, fail to achieve. The former secretary general of the United Nations, Kofi Annan, defined the rule of law for the UN as

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly

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<sup>22</sup> See arts. 5(2)(b) and (g) of the PSCAU Protocol.

<sup>23</sup> Art. 7 of the African Union (Executive Council) "Modalities of the Election of Members of the Peace and Security Council" (March 2004).

<sup>24</sup> See art. 5(2) of the PSCAU Protocol.

<sup>25</sup> Levitt (n 3 above) 117.

promulgated, equally enforced and independently adjudicated, and which are consistent with international norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>26</sup>

Despite the fact that respect for the rule of law is an ideal, it is possible to achieve at least the minimum criteria for its respect. In this regard, the AU is best placed to decide whether or not a prospective member state qualifies, based on the minimum criteria for membership to the PSCAU.

According to Levitt, the composition of the PSCAU is not wholly unique in that in some ways it emulates the structure of the UN Security Council, particularly on issues concerning membership, core functions, and voting.<sup>27</sup> One of the reasons for this is that the AU arguably relied on the UN Security Council staffers as advisers during the drafting of the PSCAU Protocol.<sup>28</sup> Notwithstanding the similarities between the PSCAU and the UN Security Council, the former is hailed as being more democratic due to the fact that it does not provide for permanent membership or for veto power.<sup>29</sup>

There is no likelihood that any member state of the Peace and Security Council can lead the decision-making process to a deadlock. This is because firstly, all decisions of the Council must, as a general rule, be made by consensus in terms of article 8(13) of the PSCAU Protocol. Secondly, while the principle of consensus may in itself lead to a deadlock, the article further provides that in the event that consensus cannot be reached, the Peace and Security Council shall then adopt its decisions on procedural matters by a

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<sup>26</sup> See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (2004). Available at <http://www.unrol.org/files/2004%20report.pdf>. (Accessed 20 December 2010).

<sup>27</sup> Levitt (n 3 above) 116.

<sup>28</sup> As above.

<sup>29</sup> As above.

simple majority, while decisions on all other matters shall be made by a two-thirds majority of its members voting. In so far as the voting process is concerned, each member of the Council is, in terms of article 8(12) of the PSCAU Protocol, entitled to one vote.

#### **2.4 FUNCTIONS OF PSCAU AND RIGHT TO PEACE AND SECURITY**

As alluded to above, on one hand, the Peace and Security Council has been established as a standing decision-making organ for the prevention, management and resolution of conflicts, and on the other, as a collective and early-warning arrangement to facilitate a timely and efficient response to conflict and crisis situations in Africa.<sup>30</sup> The functions of the Council, therefore, are aimed at fulfilling the above objectives. These functions are seen not only as complementary to the other security mechanisms in Africa but also as contradicting them as shall be seen in the succeeding chapters.<sup>31</sup>

In terms of article 6 of the PSCAU Protocol, the areas in which the Peace and Security Council shall function are: the promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace-making, including the use of good offices; mediation, conciliation and enquiry; peace support operations and intervention pursuant to article 4(h) and (j) of the Constitutive Act; peace-building and post-conflict reconstruction; humanitarian action and disaster management; and any other function as may be decided by the Assembly. The functions of the Council as enumerated above embrace the notions of peace prevention, management and resolution, which are essential for conflict maintenance on the continent. According to Levitt, while the functions of the Council are important, neither the Constitutive Act nor the PSCAU Protocol defines what the terms provided for in article 6 of the PSCAU Protocol mean from an operational or policy standpoint.<sup>32</sup> It would seem that these instruments provide only for the structures without giving an indication of how these are to operate in practice.

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<sup>30</sup> Art. 1 of the PSCAU Protocol.

<sup>31</sup> Levitt (n 3 above) 117. See generally chapters 4-6 of this study.

<sup>32</sup> Levitt (n 3 above) 118.

The adoption of the PSCAU Protocol was a collective attempt to put into practice article 1 of the African Charter, which obliges member states of the African Charter to undertake legislative and other measures in order to realize the rights contained in the Charter, in this case the right to peace and security. The PSCAU Protocol is therefore the central instrument of the AU's peace and security architecture. According to Sands and Klein, the creation of the Peace and Security Council and the extent of its powers 'are clear evidence of the [AU] members' will to play a much more active role in the prevention of conflicts and in the maintenance of peace and security on the continent'.<sup>33</sup>

Among other things, article 4 of the PSCAU Protocol provides that the Peace and Security Council shall be guided by the principles enshrined in the Universal Declaration of Human Rights (UDHR).<sup>34</sup> This acknowledges the importance of human rights in respect of the Council fulfilling its mandate. Inexplicably, the most important human rights instrument in Africa, the African Charter, is not expressly mentioned in this provision. The UDHR, which is expressly mentioned in the provision, does not contain the right to peace and security.<sup>35</sup> The African Charter, which is conspicuous by its absence in the PSCAU Protocol, is binding to all AU member states and expressly provides for the right to peace and security.

It may be argued that since the Peace and Security Council shall, over and above the arguably non-binding UDHR, be guided by the Constitutive Act, which in turn makes

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<sup>33</sup> Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, (6th edition, London, Sweet & Maxwell, 2009). 254. See also S/RES/1744, para. 4, where the UN Security Council authorised this.

<sup>34</sup> Universal Declaration of Human Rights (UDHR). Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, UN Doc A/810 at 71 (1948). The UDHR is the first comprehensive human rights instrument to be proclaimed by the United Nations. The UDHR was founded three years after the United Nations' founding nations resolved in 1945 that the horrors of the Second World War should never be allowed to recur. Suffice it to say that the UDHR has been described as embodying customary international human rights law.

<sup>35</sup> The closest that the UDHR guarantees is the right to liberty and security of the person under articles 3 and 9, the latter provided within the context of arrest and detention.

reference to the African Charter,<sup>36</sup> then, the latter shall automatically guide its operations as well. Since article 4(c) of the PSCAU Protocol makes reference to respect for fundamental human rights and freedoms, then impliedly, the Council must make recourse to the African Charter which provides for such fundamental human rights and freedoms, among other international human rights instruments. The fact that the African Charter is not expressly mentioned is disturbing as it undermines its importance in so far as ensuring peace and security in Africa is concerned.

As a check and balance mechanism, the Peace and Security Council is required to submit, through its chairperson, regular reports to the AU Assembly on its activities and the state of peace and security in Africa.<sup>37</sup> The PSCAU Protocol is however not clear on whether or not such reports may be made public. Making such reports public, especially after being considered by the Assembly, will promote transparency in the workings of both the Peace and Security Council and the AU. Such reports could be used as a benchmark in assessing how effective the Council is in the area of peace and security in Africa. Furthermore, public scrutiny of such reports would open them up to be critiqued, with a view to improving the peace and security framework of the AU.

Not only should the Peace and Security Council be answerable to the AU Assembly, the African people also deserve to know what the Council is doing to promote their right to peace and security. Making PSC reports public would allow Africans to exercise their right to receive information, a right which is guaranteed in the African Charter,<sup>38</sup> through the Pan-African Parliament. In this case such reports would be available to be considered and debated by the Pan-African Parliament.<sup>39</sup>

#### **2.4.1 MEMBER STATES IN RELATION TO PSCAU FUNCTIONS**

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<sup>36</sup> Art. 3(h) of the Constitutive Act.

<sup>37</sup> Art. 7(q) of the PSCAU Protocol.

<sup>38</sup> See art. 9 of the African Charter.

<sup>39</sup> The relationship between the PSCAU and the PAP is discussed in chapter 5.

The functions of the Peace and Security Council can only be carried through effectively through the cooperation of the member states. The PSCAU Protocol creates three important rules, of which the member states to the Council must take cognisance. Firstly, article 7(2) of the PSCAU Protocol provides that member states agree that in carrying out its duties under the Protocol, the Peace and Security Council 'acts on their behalf'. This means that in all matters relating to peace, security and stability in Africa as a region, the member states cede their power to the Peace and Security Council. Any decisions of the Council, therefore, are binding on all the member states bound by the PSCAU Protocol.

Secondly, article 7(3) of the PSCAU Protocol provides that member states agree to accept and implement the decisions of the Peace and Security Council in accordance with the Constitutive Act. This means that member states cannot question a decision of the Council and are obliged to 'accept' and 'implement' such decisions in line with the Constitutive Act. The PSCAU Protocol, however, is not clear as to what happens when a state does not adhere to article 7(3) of the PSCAU Protocol. Article 10(3)(a) of the PSCAU Protocol only states that the chairperson of the AU Commission shall, among other things, 'ensure the implementation and follow-up of the decisions of the Peace and Security Council, including mounting and deploying peace support missions authorized by the Peace and Security Council'. The only situation which allows the PSCAU to institute sanctions against a member state is 'whenever an unconstitutional change of Government takes place',<sup>40</sup> and not when a member state does not accept and implement its decision.

Thirdly, over and above ceding their power to the Peace and Security Council, and also accepting and implementing its decisions, article 7(4) of the PSCAU Protocol provides that member states shall extend full cooperation to, and facilitate action by the Council for the prevention, management and resolution of crises and conflicts, pursuant to the duties entrusted to it under the PSCAU Protocol. Of all the AU organs, the Peace and Security Council is the only one that recommends intervention in a member state against the commission of genocide, crimes against humanity and war crimes, under

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<sup>40</sup> Art. 7(1)(g) of the PSCAU Protocol.

article 4(h) of the Constitutive Act.<sup>41</sup> Without the full cooperation of member states in carrying out a recommended intervention, the Council's mandate would be futile.

In order for the Peace and Security Council to carry out its functions effectively, the PSCAU Protocol establishes a special fund, known as the Peace Fund, which is governed by the relevant financial rules and regulations of the AU.<sup>42</sup> The Peace Fund is necessary for peace support missions and other operational activities related to peace and security. The member states' contributions are critical in building up and maintaining this fund.<sup>43</sup> According to Aneme, despite the declaration by the AU member states to support the Peace Fund and increase the statutory contribution from the AU regular budget to the Fund, the budget of the AU and the Peace Fund are in a constant state of shortage when it comes to financing the activities of the Peace and Security Council, among other things.<sup>44</sup> He argues that as a result of the failure of many AU member states to fulfil their obligations to financially support the AU, the Peace Fund is not in a position to cover the expenses of smaller observation missions, let alone highly expensive and elaborate ASF intervention missions, otherwise known as Scenario 6 AU intervention missions.<sup>45</sup>

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<sup>41</sup> Art. 7(1)(e) of the PSCAU Protocol. See also Girmachew Alemu Aneme, *A Study of the African Union's Rights of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD Thesis, Faculty of Law, University of Oslo, 2008) 27.

<sup>42</sup> Art. 21(1) of the PSCAU Protocol.

<sup>43</sup> Art. 2(2) of the PSCAU Protocol. The Peace Fund is made up on financial appropriations from the regular AU budget, including arrears of contributions, voluntary contributions from Member states and from other sources within Africa, including the private sector, civil society and individuals, as well as through appropriate fund raising activities.

<sup>44</sup> Aneme (n 41 above) 279. See also African Union (Peace and security Council), "Statement of Commitment to Peace and Security in Africa issued by the Heads of State and Government of the Member States of the Peace and Security Council of the African Union" (Addis Ababa, 2004) PSC/AHG/ST.(X) para. 8.

<sup>45</sup> Aneme (n 41 above) 280. See also the Policy Framework for the establishment of the ASF (ASF Policy). The ASF Policy resulted from a decision adopted in July 2004 by the AU Assembly known as the "Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee" (Addis Ababa 2003) Exp/ASF-MS/2(I) Part I (ASF Policy). See also African Union (Assembly of Heads of State and Government) "Decision on the African Standby



According to Ungel and Porto, both the peace and security architecture and the ongoing AU peace support operations were being funded almost entirely through donor assistance, in particular through the European Union's African Peace Facility (APF). The APF was funded by the European Union (EU) to the tune of EUR 250 million for the period covering 2003 and 2007.<sup>46</sup> These authors further note that in June 2008, the European Union decided to grant EUR 300 million for the period covering 2008-2011.<sup>47</sup> According to the 2010 Annual Report of the APF, steps were being taken for a replenishment of the Facility to cover the period 2011-2013.<sup>48</sup>

Of equal importance is that within the Peace Fund, a trust fund has been set up for which an appropriate revolving amount is determined by the relevant policy organs of the AU.<sup>49</sup> Over and above making contributions to the Peace Fund, member states' contributing contingents may be requested to bear the costs of their participation during the first three months.<sup>50</sup> The Peace Fund is essential to the Peace and Security Council's strategy of preventing, managing and resolving conflicts within the continent and can be sustained to a large extent by member states.

## 2.5 CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION

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Force (ASF) and the Military Staff Committee (MSC), (Addis Ababa 2004) Assembly / AU / Dec 35 (III).

<sup>46</sup> Ulf Engel & João Gomes Porto, 'Africa's New Peace and Security Architecture: An Introduction' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 4.

<sup>47</sup> As Above.

<sup>48</sup> See the European Commission, 2010 Annual Report on the Activities of the EU-Funded African Peace Facility (APF)\_5. Available at <[http://ec.europa.eu/europeaid/where/acp/regional-cooperation/peace/documents/apf-annual-report-2010\\_en.pdf](http://ec.europa.eu/europeaid/where/acp/regional-cooperation/peace/documents/apf-annual-report-2010_en.pdf)> (Accessed 25 August 2011).

<sup>49</sup> Art. 2(4) of the PSCAU Protocol.

<sup>50</sup> Art. 2(6) of the PSCAU Protocol.

As mentioned, the peace and security regime under the AU embraces the concepts of conflict prevention, management and resolution. The following discussion focuses on the AU's framework, which is regional in nature and aimed at complementing the efforts undertaken at both sub-regional and international levels. At the sub-regional level, there are actors such as the Economic Community of West African States, the Southern African Development Community and the Intergovernmental Authority on Development, which have been active in the promotion of peace and security in Africa.

The relationship between the Peace and Security Council and the regional mechanisms is discussed in more detail in Chapter 6. At the international level, there is the UN and other actors such as the International Committee of the Red Cross. The relationship between the AU's Peace and Security Council and the UN Security Council is discussed in more detail in Chapter 4. Suffice it to say that the AU Council takes the centre-stage in spearheading the peace and security regime in Africa both at the regional and sub regional levels.

In developing an analysis of the peace and security regime in Africa, Levitt's view of the concepts of *conflict prevention*, *conflict management* and *conflict resolution* as 'separate but independent components of a comprehensive conflict maintenance system', is used.<sup>51</sup> It is noteworthy that Levitt defines these terms from both a political and an operational perspective. Both perspectives are applied in this discussion. The idea of a peace and security regime for Africa is founded upon article 3(f) of the African Union Constitutive Act which provides that the AU shall promote peace, security and stability on the continent. A peace and security regime under the AU should therefore aim at fulfilling this objective.

### **2.5.1 PREVENTION**

Conflict prevention is the most important aspect in ensuring peace and security. Levitt argues that from a political viewpoint, preventing conflict should mean averting it altogether, or at least diffusing it in the initial stages, with trust-building, coalition

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<sup>51</sup> Jeremy Levitt, 'Conflict Prevention, Management, and Resolution: Africa—Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC, and IGAD' (2001) 11 *Duke J. Comp. & Int'l L.* 45-47.

building, and negotiated settlements being key objectives.<sup>52</sup> From an operative perspective, this may be achieved through a variety of means, both traditional and non traditional, most notably through preventive diplomacy or preventive deployment.<sup>53</sup> The AU has in the past been involved in mediation and diplomacy in Burundi, Liberia, Mauritania and Sudan.<sup>54</sup> Levitt further argues that no conflict prevention mechanism can be sustained without a viable early warning and risk assessment system.<sup>55</sup> In this regard, article 12 of the PSCAU Protocol establishes the Continental Early Warning System (CEWS). The establishment of this continental system came after some sub-regional mechanisms had already put in place their own early warning systems, such as those developed by the Intergovernmental Authority on Development and the Economic Community of West African States.

The Continental Early Warning System is comprised of an observation and monitoring *centre*, with continent-wide coverage, and the observation and monitoring *units* of the regional mechanisms. The centre is located at the Conflict Management Directorate of the AU, known as 'The Situation Room' and is responsible for collecting data and analysing it on the basis of an appropriate early warning indicators module.<sup>56</sup> This module is a CEWS' development based on clearly defined and accepted political,

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<sup>52</sup> As above 46. See also Jeremy Levitt, *Pre-Intervention Trust Building, African States and Enforcing the Peace: The Case of ECOWAS in Liberia and Sierra Leone*, (1999) 24 *Liberian Stud.J.* 1.

<sup>53</sup> As above.

<sup>54</sup> See p. 48, para. 84 of the AU Audit Review.

<sup>55</sup> As above. See also Jakkie Cilliers, 'The Continental Early Warning System of the African Union' in Alfred Nhema, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post-Conflict Reconstruction* (Oxford: James Currey – Published in Association with OSSREA, Addis Ababa, 2008) 38.

<sup>56</sup> Art. 12(2)(a) of the PSCAU Protocol.

economic, social, military and humanitarian indicators which are used to analyse continental developments and recommend the best course of action.<sup>57</sup>

The observation and monitoring units of the regional mechanisms are set to be linked directly, through appropriate means of communication, to the Situation Room. The responsibility of these units is to collect and process data at the regional level and transmit it to the Situation Room.<sup>58</sup> The process of collecting data and analysing it is crucial for Africa's peace and security process. As Levitt notes,

information attainment and analysis are perhaps the most important functions of any conflict maintenance system and are crucial for crisis prevention, as they provide decision-makers with crucial information to enable them to take decisive actions before conflict escalates resulting in coerced populations movements.<sup>59</sup>

Thus, article 12(5) of the PSCAU Protocol provides that the chairperson of the AU Commission shall use the information gathered through the CEWS timeously to advise the Peace and Security Council on potential conflicts and threats to peace and security and to recommend the best course of action. Under this article, the chairperson is required to use this information for the execution of the responsibilities and functions falling under his/her domain in terms of the PSCAU Protocol.<sup>60</sup>

What is even more important is the fact that the AU Commission is entrusted with the responsibility of collaborating with UN, its agencies, other relevant international organizations, research centres, academic institutions and non-governmental

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<sup>57</sup> Art. 12(4) of the PSCAU Protocol. On the development, operationalization and institutionalization of the CEWS, see generally El-Ghassim Wane, *et al* 'The Continental Early Warning System: Methodology and Approach' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 91.

<sup>58</sup> Art. 12(2)(b) of the PSCAU Protocol.

<sup>59</sup> Levitt (n 51 above) 46.

<sup>60</sup> Art. 12(5) of the PSCAU Protocol.

organizations, for purposes of facilitating the effective functioning of the CEWS.<sup>61</sup> Among others, human rights organizations and various institutions (academic, research and/or otherwise) would be important in this regard.

## 2.5.2 MANAGEMENT

Equally important in the maintenance of peace and security is the notion of conflict management. Clinically speaking, the very existence of a process designed to manage conflict could be interpreted as an indictment on the Peace and Security Council and the AU for failing to prevent conflict. However that would be in an ideal world.

Conflict management is aimed at restoring life to normality in the event of conflict. An effective conflict management process requires a proper 'diagnosis' of the conflict in question. In this regard, the Council plays a crucial role including, if necessary, the use of coercive methods to forestall conflict. Needless to say, such coercive methods should be within acceptable international norms and standards. Menkhaus observes that the misreading of Africa's conflicts is responsible for the many failed diplomatic initiatives and peace operations littering the continent since 1992.<sup>62</sup> In other words, the inaccurate early warning systems coupled with the AU member states' failure of being proactive in ending conflicts in Africa is arguably to blame for the continent's protracted conflicts. The Peace and Security Council would not want to run the risk of misjudging conflicts as the process of conflict management is essentially aimed at diffusing the aggression of warring factions and ensuring peace and security, nothing more, nothing less. In this way the humanitarian crisis would be minimized.

In terms of article 13 of the PSCAU Protocol an African Standby Force is established. It is composed of standby multidisciplinary contingents with civilian and military components in their country of origin, and is ready for rapid deployment at appropriate notice. Upon request by the AU Commission following an authorization by the Peace and Security Council or the Assembly the troop contributing states are required to

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<sup>61</sup> Art. 12(3) of the PSCAU Protocol.

<sup>62</sup> Ken Menkhaus, 'A 'Sudden Outbreak of Tranquillity:' Assessing the New Peace in Africa' (2004) 28-SUM *Fletcher F World Aff.* 75.

release the standby contingents with the necessary equipment for operations.<sup>63</sup> Among other things, the Standby Force is mandated to observe and monitor missions, support peace missions and intervene in a member state in accordance with article 4(h) and (j) of the Constitutive Act.

It must be applauded that the PSCAU Protocol provides for the training of the Standby Force in both International Humanitarian Law and International Human Rights Law with particular emphasis on the rights of women and children, the most vulnerable groups in conflict situations.<sup>64</sup> Actually, the PSCAU Protocol has been hailed for its inclusion of women in a few places,<sup>65</sup> which is in itself an acknowledgement of the importance of women's rights. The training of the ASF in humanitarian and human rights law complements the force's own specific training programme, both at the operational and tactical level. The training of the ASF in international human rights law in particular is very important because more often than not there are disturbing reports of peace mission personnel committing egregious human rights violations in conflict situations, especially against civilian populations. An understanding of the relationship between *international humanitarian law* and *international human rights law* is equally important for members of the ASF: both sets of law are aimed at protecting the human being. The ASF must also appreciate the fact that violations of human rights and humanitarian law are both consequences of and contributing factors to instability and further conflict in Africa.

Levitt views conflict management as a process that is 'most integral to the physical and legal protection of displaced people [and] works to prevent the escalation of refugee flows and IDPs'.<sup>66</sup> He further argues that the political objective of conflict management is to promote trust and confidence, and with respect to Internally Displaced Persons

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<sup>63</sup> Art. 17(a) of the PSCAU Protocol.

<sup>64</sup> Art. 13(13) of the PSCAU Protocol.

<sup>65</sup> See Adrien Katherine Wing & Tyler Murray Smith, 'The New African Union and Women's Rights' (2003) 13 *Transnat'l L. & Contemp. Probs.* 77.

<sup>66</sup> Levitt (n 51 above) 46.

(IDPs), to ensure peace, security and stability for purposes of allowing for voluntary repatriation and internal replacement.<sup>67</sup>

From an operational viewpoint, Levitt asserts that conflict management should be aimed at establishing order through what he calls 'intense preventive diplomacy, coercive sanctions, peacekeeping and peace enforcement or humanitarian intervention'.<sup>68</sup> Humanitarian intervention entails a response to human rights violations that are a threat to peace and security and such a response may consist of the use of force in order to bring the violations to a stop.<sup>69</sup> Along with article 6 of the PSCAU, article 15 of the same provides for humanitarian action. The ASF is responsible for such humanitarian action while the Peace and Security Council is responsible for its coordination.<sup>70</sup> The ASF is mandated under article 13(f) of the PSCAU Protocol to render humanitarian assistance in order to alleviate the suffering of civilian populations in conflict areas, among other things.<sup>71</sup> The ASF is adequately equipped to undertake humanitarian activities under the control of the chairperson of the AU Commission and is also responsible for facilitating the activities of the humanitarian agencies in the mission areas.<sup>72</sup> Being adequately equipped to undertake humanitarian action is very important in Africa, and in this respect Marshall observes

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<sup>67</sup> As above.

<sup>68</sup> As above.

<sup>69</sup> On humanitarian intervention in Africa, see Kindiki Kithure, *Humanitarian Intervention in Africa: The Role of intergovernmental Organizations* (unpublished LLD thesis, Faculty of Law, University of Pretoria, 2002). See also Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 808-810.

<sup>70</sup> Art. 7(1)(b) of the PSCAU Protocol provides that the PSCAU shall 'support and facilitate humanitarian action in situations of armed conflict or major natural disasters.'

<sup>71</sup> The ASF is also involved in supporting efforts aimed at addressing major natural disasters.

<sup>72</sup> Arts. 15(3) & (4) of the PSCAU Protocol, respectively.

when armed conflict breaks out in poor countries [like in most African countries] the potential for the emergence of a humanitarian crisis is immediate and severe...[it] disrupts patterns of everyday life and its principal victims are non-combatant populations.<sup>73</sup>

### 2.5.3 RESOLUTION

The final conflict maintenance process is conflict resolution. This stage is dependent upon the success of the process of conflict management. Levitt argues that from a political viewpoint, the process of conflict resolution should be one of maintaining and sustaining peace by building and re-building civil society and state institutions to allow transparency and accountability.<sup>74</sup> It is therefore no wonder that the cooperation of the Peace and Security Council and civil society is emphasized. The participation of civil society in efforts aimed at promoting peace and security in Africa is sanctioned by article 20 of the PSCAU Protocol. In terms of this, the Council may invite non-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to address it on issues touching on peace and security in Africa.

Levitt argues that the operational objectives of conflict management should be to impartially monitor cease-fire agreements and other accords and also to preserve peace and security so as to allow for repatriation, demobilization, and the deployment of civil society and government structures, including political and judicial processes to bring about justice and reconciliation.<sup>75</sup> In this regard the PSCAU Protocol mandates the ASF to be involved in peace-building, including post-conflict disarmament and demobilization and, of course, in any other functions as may be mandated by the Peace and Security Council and the Assembly.<sup>76</sup>

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<sup>73</sup> Monty G. Marshall, 'Focus on Political Instability in Africa' in Monty G. Marshall & Ted Robert Gurr, (eds.) *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (Centre for International Development and Conflict Management (CIDCM) University of Maryland College Park, MD, USA, May 2005) 39-40. Also available at <http://www.systemicpeace.org/PC2005.pdf> (Accessed 10 December 2009).

<sup>74</sup> Levitt (n 51 above) 47.

<sup>75</sup> As above.



On the issue of peace-building, article 14 of the PSCAU Protocol addresses the modalities involved under the auspices of the Peace and Security Council. These modalities include institutional capacity for peace-building, and peace-building during and at the end of hostilities. Firstly, in so far as institutional capacity for peace-building is concerned, the Council is entrusted with the responsibility of assisting in the restoration of the rule of law, the establishment and development of democratic institutions, and the preparation, organization and supervision of elections in the member state concerned.<sup>77</sup> Concerning the development of democratic institutions, the Peace and Security Council is bound to face the daunting challenge of arms proliferation, a legacy stemming from the Cold War. Thus, Marshall argues that despite the disappearance of large wars from the continent,

large populations remain “armed and dangerous” and the legacies of war carry the plague of personal violence and organized crime...[which] is the cultural foundation of the modern, African state: a culture of violence and marginalization [and] this is the climate in which democracy is expected to blossom and endure.<sup>78</sup>

Secondly, in so far as peace-building during hostilities is concerned, the PSCAU Protocol provides that in areas of relative peace, priority shall be given to the implementation of policy designed to reduce degradation of social and economic conditions arising from the conflicts.<sup>79</sup> The existence of relative peace is a signpost along the way to a total ceasefire, and the process of peace-building should be kick started right away. In this regard, the need for the realization of socio-economic rights becomes even more important because the implementation of such policy is aimed at restoring the living conditions that the population had prior to the conflict. As Scheinin argues, socio-economic and cultural rights are designed to ensure the protection of people, based on a perspective in which people can enjoy rights, freedoms and social justice

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<sup>76</sup> Arts. 13(3)(a) & (g) of the PSCAU Protocol, respectively.

<sup>77</sup> Art. 14(1) of the PSCAU Protocol.

<sup>78</sup> Marshall (n 73 above) 45.

<sup>79</sup> Art. 14(2) of the PSCAU Protocol.

simultaneously.<sup>80</sup> The absence of such enjoyment renders the peace-building process futile.

Thirdly, in so far as peace-building at the end of hostilities is concerned, the Peace and Security Council is required to undertake numerous activities. Among other things, it has to consolidate negotiated peace agreements; establish political, social and economic reconstruction of the society and government institutions; and implement disarmament, demobilization and reintegration programmes, including those for child soldiers.<sup>81</sup> Peace-building is a process which is likely to take years to complete. While undertaking the peace-building process, the risk of a relapse must be guarded against.

The Peace and Security Council and the United Nations have played a critical role in the area of peacebuilding in Africa. At its 208<sup>th</sup> meeting, held on 9 November 2009, the PSCAU and the Delegation of the United Nations Peace Building Commission exchanged views 'on ways to enhance peacebuilding efforts in Africa and to strengthen the relationship between the PSC[AU] and the UN Peace-Building Commission'.<sup>82</sup> The Peace Building Commission has in the past played an important role in providing support to African countries emerging from conflicts, such as Burundi, the Central African Republic, Sierra Leone and Guinea Bissau. As there are still a considerable number of African states emerging (and due to emerge) from conflicts, the AU-UN partnership in promoting peace, security and development remains extremely important.

#### **2.5.4 ROLE OF PANEL OF THE WISE**

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<sup>80</sup> Martin Scheinin, 'Economic and Social Rights as a Legal Right' in Asbjørn Eide *et al Economic, Social and Cultural Rights* (1995) 41.

<sup>81</sup> Art. 14(3) of the PSCAU Protocol. Other responsibilities include the facilitation of resettlement and reintegration of refugees and IDPs as well as rendering assistance to vulnerable persons, including children, the elderly, women and other traumatized groups in society.

<sup>82</sup> African Union, 'Meeting of the PSC and the UN Peace-Building Commission to enhance peace-building efforts in Africa' *Quarterly Bulletin: Peace and Security* Vo.1, No. 5 (September – November 2009) 9.

As a support system to the Peace and Security Council's conflict prevention strategy, article 11 of the PSCAU Protocol establishes the Panel of the Wise.<sup>83</sup> This 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 in Africa and are selected by the chairperson of the AU Commission after consultation with the member states concerned.<sup>84</sup> The Panel reports to the Peace and Security Council and, through the latter, to the AU Assembly.<sup>85</sup> The PSCAU Protocol provides that any modalities for the functioning of the Panel shall be worked out by the chairperson of the AU Commission and approved by the Peace and Security Council.<sup>86</sup> A set of modalities for the functioning of the Panel was adopted by the PSC, at its 100<sup>th</sup> meeting on 12 November 2007. These modalities enabled the full operationalisation of the Panel of the Wise, albeit with a slight delay, due to the time taken to recruit support staff,<sup>87</sup> organise an office and mobilise financial resources.<sup>88</sup>

Article 11(4) of the PSCAU Protocol provides that the Panel, at the request of the Peace and Security Council or of the AU chairperson, or on its own initiative

shall undertake such action deemed appropriate to support the efforts ... for the prevention of conflicts, and to pronounce itself on issues relating to the promotion and maintenance of peace, security and stability in Africa.

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<sup>83</sup> On the Panel of the Wise, see Jamila El Abdellaoui, *The Panel of the Wise*, ISS Paper 193, Pretoria: Institute for Security Studies, 2009. See also Murithi, Tim, & Mwaura, Charles, 'The Panel of the Wise' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 77.

<sup>84</sup> Art. 11(2) of the PSCAU Protocol.

<sup>85</sup> Art. 11(5) of the PSCAU Protocol.

<sup>86</sup> Art. 11(7) of the PSCAU Protocol.

<sup>87</sup> See p. 13 of the PSC Report No. 3, October 2009.

<sup>88</sup> See para. 279 of the AU Audit Review.

While article 11(1) of the PSCAU Protocol particularises the area of support by the Panel of the Wise, this does not mean that it is barred from supporting the Peace and Security Council in conflict management and resolution. The AU Audit Review states that the Panel can be a flexible mechanism that can serve many purposes.<sup>89</sup> The Panel produced a report on Strengthening the Role of the African Union in the Prevention, Management and Resolution of Election-Related Disputes and Violent Conflicts in Africa.<sup>90</sup> This report does not confine itself to the role of the Panel in conflict prevention, it also looks at its role in the management and resolution of election-related disputes and violent conflicts in Africa.

The responsibility of the Panel is to advise the Peace and Security Council and the chairperson of the AU Commission on all issues pertaining to the promotion and maintenance of peace, security and stability on the continent.<sup>91</sup> The Panel reports to the Peace and Security Council and through the Council to the Assembly.<sup>92</sup> Levitt argues that if the Panel of the Wise is to be a viable mechanism in helping the Peace and Security Council to avert conflict, its membership must be viewed as impartial and must be respected and trusted by all segments of African society.<sup>93</sup>

In line with article 11 of the PSCAU Protocol, the AU Assembly decided in January 2007 to appoint, for a period of three years, the following African personalities: Salim Ahmed Salim, former secretary-general of the OAU (East Africa); Brigalia Bam, chairperson of the Independent Electoral Commission of South Africa (Southern Africa); Ahmed Ben Bella, former president of Algeria (North Africa); Elisabeth K. Pognon, president of the Constitutional Court of Benin (West Africa); and Miguel Trovoada, former president of Sao Tomé and Príncipe (Central Africa).<sup>94</sup> The three-year period in which these esteemed

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<sup>89</sup> Para. 279 of the AU Audit Review.

<sup>90</sup> Assembly/AU/6(XIII).

<sup>91</sup> Art. 11(4) of the PSCAU Protocol.

<sup>92</sup> Art. 11(5) of the PSCAU Protocol.

<sup>93</sup> Levitt (n 3 above) 120.

African personalities served concluded in January 2010. By March 2010, the Peace and Security Council and the AU Commission had not issued a communiqué indicating whether the terms of the Panel members had been renewed, or whether the new Panel members had been appointed.<sup>95</sup> It was only with effect from December 2010, that the AU Assembly reappointed former president of Algeria, Ahmed Ben Bella (North Africa) for a further and final mandate of three years and appointed former Zambian president, Dr Kenneth Kaunda (Southern Africa), along with Marie Madeleine Kalala-Ngoy (Central Africa) and Mary Chinery Hesse (West Africa).<sup>96</sup> The delay of almost a year in appointing and/or reappointing the members of the Panel is regrettable considering the important role that it played within the African Peace and Security Architecture.

The importance of the Panel in promoting peace, security and stability in Africa cannot be overemphasised. The sub-regional mechanisms are encouraged to emulate the Peace and Security Council's Panel of the Wise structure. According to the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa, '[t]he parties shall, where appropriate and within the framework of their conflict prevention strategies, establish structures similar to the Panel of the Wise, as provided for by Article 11 of the PSC Protocol'.<sup>97</sup>

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<sup>94</sup> See Art. 2 of the Decision on the Appointment of the Members of the Panel of the Wise – Doc. Assembly/AU/13 (VIII). Assembly/AU/Dec.152 (VIII). 8<sup>th</sup> Ordinary Session of the Assembly 29 -30 January 2007.

<sup>95</sup> See p. 2 of the Peace and Security Council Report No. 8, March 2010.

<sup>96</sup> See Decision on the Appointment of the Members of the Panel of the Wise Doc. Assembly/AU/14(XV). Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda. See also p. 15 of the PSC Report, No. 14, September 2010.

<sup>97</sup> Art (VI)4 of the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa. June 2008.

## 2.6 INTERVENTION AS A CONFLICT MANAGEMENT TOOL

One of the most important principles introduced by the PSCAU Protocol as a conflict management tool is that of intervention.<sup>98</sup> As a means of ensuring peace and security in Africa, the Constitutive Act introduces, under article 4(h) (as amended), this very important principle, described as

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.

This initial article 4(h) of the Constitutive Act was article 4(g) of the draft Constitutive Act and read as follows:

The Union shall function in accordance with the following principles:

(g) Non-interference by any Member State in the internal affairs of another, except in grave circumstances such as genocide and where the Assembly of the Union so decides.<sup>99</sup>

According to Aneme, in the final version of the Constitutive Act, article 4(g) of the draft Constitutive Act was changed to article 4(h) with the following words:

The Union shall function in accordance with the following principles:

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.

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<sup>98</sup> The principle of intervention is discussed in more detail as part of the responsibility to protect in chapter 3.

<sup>99</sup> Art. 4(g) of the draft Constitutive Act as prepared by the OAU Ministerial Conference. See also Aneme (n 41 above) 77.

Article 4(g) of the Constitutive Act became the non-interference principle clause, which is also provided for in article 4(f) of the PSCAU Protocol. It must be noted that article 4(g) of the Constitutive Act and 4(f) of the PSCAU Protocol are both directed to AU member states and not to the AU or its Peace and Security Council. The AU itself is therefore not precluded by the principle of non-interference from exercising its right to intervene, since the principle is directed at member states as opposed to the Union as a body.

On one hand, article 4(g) of the Constitutive Act provides for the principle of non-interference by member states in the internal affairs of another member state as a principle according to which the AU functions. On the other hand, article 4(f) of the PSCAU Protocol provides for the principle of non-interference by member states in the internal affairs of another member state as a guiding principle for the Peace and Security Council.

In light of both articles 4(h) of the Constitutive Act and 4(j) of the PSCAU Protocol, the right that is bestowed on both the AU and the Peace and Security Council is that of intervention in a member state in the case of grave circumstances and pursuant to a decision of the AU Assembly. Kioko argues that in providing for a right of intervention, 'the African Union ... moved away from non-interference or non-intervention – which is a cardinal principle in both the United Nations Charter and the Constitutive Act of the African Union – to what could be referred to as the doctrine of "non-indifference"'.<sup>100</sup> He further argues that this doctrine of non-indifference conforms to the idiom in most African cultures that 'you do not fold your hands and just look on when your neighbour's house is on fire'.<sup>101</sup>

The intervention may only be undertaken by the AU in a member state. This means that the intervention is implemented in so far as it is confined to the 53 member states of the AU, which at the time of writing was set to increase to 54 once the Republic of Southern

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<sup>100</sup> Kioko (n 18 above) 819.

<sup>101</sup> As above. 820.

Sudan gained admittance.<sup>102</sup> Such a right, therefore, may not be exercised outside the jurisdiction of these member states. This means that the AU has no right to interfere in Morocco, which is the only African state that is not a member of the AU.

Linked to this issue is the fact that the mandate of the Peace and Security Council is to promote peace and security within the entire continent,<sup>103</sup> which invariably includes Morocco. The question of the AU intervening in a non-member state has not arisen as yet. However, for the sake of ensuring peace and security, it would seem that the AU would be morally justified in intervening in Morocco. Legally speaking, the AU would be violating its own rules if it did so and such an intervention could be classified as an illegal invasion of Morocco. As a precautionary measure, the AU and the Peace and Security Council in particular must be aware of what position it would take should such a case arise.

## 2.7 PEACE AND SECURITY COUNCIL AND TERRORISM

As part of its mandate, and in terms of its conflict prevention, management, and resolution strategy, the Peace and Security Council needs to address the threat of terrorism in Africa. Terrorism remains one of the most serious threats to global peace and security. The 11 September 2001 attacks in the United States of America fuelled this threat to unprecedented proportions and Africa has in no way been insulated.<sup>104</sup> In the African context, terrorism infringes upon 'all people's right to national and international peace and security'<sup>105</sup> as well as the right of the member states of the AU 'to live in peace and security'.<sup>106</sup>

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<sup>102</sup> The Republic of Southern Sudan received its independence (from Sudan) on 9 July 2011. See Press Statement of the 285<sup>th</sup> Meeting of the Peace and Security Council. PSC/PR/PS/1.(CCLXXXV).

<sup>103</sup> Art. 3(f) of the Constitutive Act.

<sup>104</sup> See generally Jakkie Cilliers, 'Terrorism and Africa' (2003) 12(4) *African Security Review* 91.

<sup>105</sup> In terms of art. 23 of the African Charter.

<sup>106</sup> In terms of art. 4(1) of the Constitutive Act.



While terrorism has not yet been authoritatively defined, states are in agreement on some of its core elements as reflected in the Declaration on Measures to Eliminate International Terrorism (Terrorism Declaration) in the Annex to Resolution 49/60.<sup>107</sup> According to this declaration, terrorism includes 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.<sup>108</sup> The declaration further holds that such acts 'are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them'.<sup>109</sup>

A more relevant definition for our purposes is given in the OAU/AU Convention on the Prevention and Combating of Terrorism (Terrorism Convention), which defines a terrorist act under article 1(3) to mean:

- a) any act which is a violation of the criminal laws of a State Party and which may endanger life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
  - (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or adopt or abandon a particular standpoint, or act according to certain principles; or
  - (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
  - (iii) create general insurrection in a State.
- b) Any promotion, sponsoring, contributing to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

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<sup>107</sup> Adopted by the UN General Assembly on 9 December 1994.

<sup>108</sup> Art. 1(3) of the Terrorism Declaration.

<sup>109</sup> As above.

From the above definition, it is clear that the Terrorism Convention not only confines a terrorist act to an 'act of terrorizing' but also to the means of facilitating the same under article 1(3)(b). An exception is made under article 3(1) of the Terrorism Convention in the following words:

Notwithstanding the provisions of article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

Just like the Terrorism Declaration,<sup>110</sup> the Terrorism Convention provides under article 3(2) that political, philosophical, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act. In terms of article 2(a) of the Terrorism Convention, state parties undertake to 'review their national laws and establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences'.

That there is a relationship between terrorism and human rights is fairly obvious. Terrorist acts violate the human rights of the victims, such as the rights to life, liberty, security and the dignity of the individual. While the causes of terrorism remain varied and complex, von Schorlemer makes the important observation that violations of human rights may in fact be a causal factor of terrorism, a dimension that in practice tends to be neglected.<sup>111</sup> As a result, von Scholemer argues that 'promoting human rights, democracy and the rule of law is in the long term the surest foundation for stability and peace'.<sup>112</sup> These remarks are as relevant in Africa as they are in every part of the world. It is therefore important for AU member states to strive for democracy, good governance, respect for human rights and the rule of law, failing which an escalation in terrorist acts is inevitable.

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<sup>110</sup> Art. 1(3) of the Terrorism Declaration.

<sup>111</sup> Sabine von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism' (2003) 14 *Eur. J. Int'l L.* 266.

<sup>112</sup> As above 268.

Among other things, article 4(o) of the Constitutive Act provides that the condemnation and rejection of acts of terrorism and subversive activities shall be one of the principles under which the AU shall function. Article 7(i) of the PSCAU Protocol mandates the Peace and Security Council to

[e]nsure the implementation of the OAU Convention on the Prevention and Combating of Terrorism and other relevant international, continental and regional conventions and instruments and harmonize and coordinate efforts at regional and continental levels to combat international terrorism.

In an endeavour to enhance the coordination and harmonizing of continental efforts to prevent and combat terrorism in all its aspects as well as to implement other relevant instruments, the AU adopted the Protocol to the OAU/AU Convention on the Prevention and Combating Terrorism (Terrorism Protocol).<sup>113</sup> The Terrorism Protocol was not yet in force at the time of writing. Upon its coming into force, state parties to the Terrorism Protocol will undertake to take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism<sup>114</sup> and to strengthen national and regional measures in conformity with relevant continental conventions and treaties, to prevent the perpetrators of terrorist acts from acquiring weapons of mass destruction.<sup>115</sup>

In terms of the Terrorism Protocol, state parties will also undertake to submit reports to the Peace and Security Council on an annual basis, or such regular intervals as shall be determined by the Council, on measures taken to prevent and combat terrorism as provided for in the Terrorism Convention, the AU Plan of Action, as well as in the

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<sup>113</sup> Adopted by the 3<sup>rd</sup> Ordinary Session of the Assembly of the African Union, Addis Ababa, 8 July 2004.

<sup>114</sup> Art. 3(1)(a) of the Terrorism Protocol. As at 13 July 2011, 12 member states of the AU had ratified the Terrorism Protocol. The Protocol requires 15 instruments of ratification to come into force, which means that only 3 ratifications were needed at the time of writing.

<sup>115</sup> Art. 3(1)(f) of the Terrorism Protocol.

Terrorism Protocol<sup>116</sup> and also to report to the Peace and Security Council all terrorist activities in their countries as soon as they occur.<sup>117</sup> Emphasizing the importance of respecting human rights in fighting against terrorism, the Terrorism Protocol provides that states will also undertake 'to outlaw torture and other degrading and inhumane treatment, including discrimination and racist treatment of terrorist suspects, which are inconsistent with international law'.<sup>118</sup>

In terms of the Terrorism Protocol, the Peace and Security Council is entrusted with the responsibility of harmonizing and coordinating continental efforts in the prevention and combating of terrorism. In this regard, the article 4 of the Terrorism Protocol states that the Council will be responsible for the following:<sup>119</sup>

- establishing operating procedures for information gathering, processing and dissemination;
- establishing mechanisms to facilitate the exchange of information among State Parties on patterns and trends in terrorist acts and activities of terrorist groups and on successful practices on combating terrorism;
- presenting an annual report to the Assembly of the AU on the situation of terrorism on the continent;
- monitoring and making recommendations on the implementation of the Plan of Action and programmes adopted by the AU;
- examining all reports submitted by States Parties on the implementation of the provisions of the Terrorism Protocol; and
- establishing an information network with national, regional and international focal points on terrorism.

During its launch, the Peace and Security Council noted,

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<sup>116</sup> Art. 3(1)(h) of the Terrorism Protocol.

<sup>117</sup> Art. 3(1)(i) of the Terrorism Protocol.

<sup>118</sup> Art. 3(1)(k) of the Terrorism Protocol.

<sup>119</sup> Art. 4 of the Terrorism Protocol.

[w]e shall work tirelessly to prevent and combat the phenomenon of terrorism through the effective implementation of the relevant AU instruments, including in particular the Algiers Convention of 1999 and the Plan of Action of 2002. We equally undertake to work with the international community [in] combating terrorism.<sup>120</sup>

In fighting against terrorism, it is important for the AU to maintain the integrity of international humanitarian and human rights norms while at the same time building a continent where peace and security prevail. This is the whole point of training the African Standby Force on these most important aspects of international law. The Inter-American Commission on Human Rights emphasizes the relevance of international humanitarian law in the analysis of counter-terrorism measures taken by states in certain circumstances, in the following terms:

[I]n situations of armed conflict, the protection under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictated that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.<sup>121</sup>

Member states of the UN were reminded by the former UN Secretary-General Kofi Annan 'that there is no trade-off between effective action against terrorism and the

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<sup>120</sup> See para. 12 of the Statement of Commitment to Peace and security in Africa, Issued by the Heads of State and Government of the Member States of the Peace and Security Council of the African Union. Solemn Launching of the Peace and Security Council 25 May 2004, Addis Ababa, Ethiopia. PSC/AHG/ST.(X).

<sup>121</sup> Inter-American Commission on Human Rights 'Precautionary Measures in Guantanamo Bay, Cuba', March 13, 2002. <<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>> (Accessed 4 January 2010).

protection of human rights'.<sup>122</sup> This reminder is equally important for the AU member states whose general record for respecting human rights is not encouraging. Importing Annan's remarks to the peace and security discourse in Africa, one would argue that no trade-off is possible between the effective promotion of peace and security and the protection of human rights.

As a counter-terrorism measure, many states declare a state of emergency, which sometimes results in a number of human rights being restricted or derogated from. Fitzpatrick rightly argues that 'derogation norms apply in all emergencies threatening the life of the nation, regardless of the source of the threat, both in war and in peace'.<sup>123</sup> Acts of terrorism are no doubt life-threatening to the nations of the world. The African Charter does not contain a derogation clause that justifies the limitation of the enjoyment of the rights contained therein. In practice however, in a state of emergency, some human rights are bound to be restricted, owing to the exigencies of the acts of terrorism. The International Covenant on Civil and Political Rights (ICCPR) catalogues rights which may not be derogated from in a state of emergency, namely: the right to life; freedom of thought; conscience and religion; freedom from torture and cruel, inhuman or degrading treatment or punishment; the principles of precision and of non-retroactivity of criminal law (except where the later law imposes a lighter sentence).<sup>124</sup>

During a state of emergency resulting from a terrorist act, countries still have an obligation under international law. Through General Comment No. 29,<sup>125</sup> on States of Emergency (article 4), the Human Rights Committee developed a list of elements which, in addition to the rights specified in article 4 of the ICCPR, cannot be subject to lawful derogation. These are as follows: hostage-taking, abduction, and unacknowledged detention are prohibited; persons belonging to minorities are to be protected; unlawful

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<sup>122</sup> UN doc. S/PV. 4453, page 3, verbatim record of the 4453<sup>RD</sup> meeting of the Security Council, 18 January 2002.

<sup>123</sup> Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 *Eur. J. Int'l L.* 252.

<sup>124</sup> See art. 4(2) of the ICCPR.

<sup>125</sup> U.N.Doc.CCPR/C/21/Rev.1/Add.11 (2001).

deportations or transfers of population are prohibited; and 'no declaration of a state of emergency ... may be invoked as justification for a state party to engage itself...in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence'.<sup>126</sup>

In preventing and combating terrorism, the AU member states should therefore take cognisance of General Comment No. 29, which provides a guideline on the striking of a balance between the setting into motion of counter-terrorism measures and respect for international human rights during a declared state of emergency.

## 2.8 CONCLUSION

Mankhaus argues that from a humanitarian perspective, the magnitude of human suffering caused by Africa's wars defies comprehension.<sup>127</sup> The fact that these wars are largely of Africa's own making means that concerted measures from within Africa are needed, with the AU and the PSCAU in particular leading the way. It is time for Africa to stop putting the blame for its woes on 'foreign elements', as implied in notions such as colonialism, neo-colonialism, marginalization and globalisation, and to focus on priority issues such as the quest for peace and security. Udombana argues that peace and security are keys to the restoration of Africa's glory and advises the African leadership to put the problem of conflicts on the 'front burner of their continental developmental agenda'.<sup>128</sup> That peace, security and human rights are intertwined is beyond question. In actual fact peace and security are keys to ensuring respect for human rights in Africa. The question remains: how can the African Union ensure peace and security when, as Menkhaus observes 'conditions are simply not favourable for widespread consolidation of peace across a continent that exhibits all of the high risk symptoms of new or renewed conflict'.<sup>129</sup>

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<sup>126</sup> Para. 13.

<sup>127</sup> Menkhaus (n 62 above) 73.

<sup>128</sup> Nsongurua Udombana, 'The Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development' (2003) 35 *George Washington International Law Review* 58.

<sup>129</sup> Menkhaus (n 62 above) 87.

It cannot be denied that there are already positive trends in Africa in so far as ending armed conflict is concerned. The peace and security regime under the auspices of the AU is commendable in that it makes the prospects of the AU, in terms of the promotion and protection of human rights, a reality, at least on paper. However, these trends do not warrant unqualified optimism. In order for the AU to succeed in ensuring peace and security, its member states must act on the commitments as expounded in the Constitutive Act and other relevant instruments. An effective peace and security framework requires member states to commit themselves to make available to the AU 'all forms of assistance and support required for the promotion and maintenance of peace, security and stability on the continent'.<sup>130</sup>

In ensuring peace and security, the AU should not allow the protection of human rights to take a back seat as has arguably been the case with the so-called 'fight against terrorism' in the wake of the events of 11 September 2001 and the 'war' or 'invasion' (as some would argue) in Iraq. Whether or not the AU will successfully overcome Africa's peace and security challenge depends on whether it fully embraces and in practice applies human rights principles.

Since the African Union seeks to forge relationships with other institutions, such as the UN, in ensuring peace and security and consequently giving the continent a complete overhaul, its member states should assume a meaningful role in doing good for Africa. This can be done along the lines of Levitt's call for Africans to 'move beyond sexy clichés and genuinely take it upon themselves to proffer African solutions for African problems because ... the rest of the world is not proactively concerned'.<sup>131</sup> For now it is apt to say that only the application of human rights can deliver Africa from conflict, and that ensuring the right to peace and security is one way to address this mammoth challenge. Udombana argues that peace and security are keys to the restoration of the African continent's glory and advises African leaders to put the problem of conflicts on the 'front burner of their continental developmental agenda'.<sup>132</sup>

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<sup>130</sup> Art. 17(b) of the PSCAU Protocol.

<sup>131</sup> Levitt (n 51 above) 79.

<sup>132</sup> Udombana (n 128 above) 58.



## CHAPTER 3: THE RESPONSIBILITY TO PROTECT UNDER THE AUSPICES OF THE AU

### 3.1 INTRODUCTION

The research question on the extent to which the relationship between the PSCAU and the UN Security Council, the sub-regional mechanisms, the AU and other institutions/organs has an actual and potential ability to effectively contribute to peace, security and stability in Africa, demands that this study goes beyond simply analysing the relevant institutions and mechanisms. Having considered the establishment of the PSCAU and its role in conflict prevention, management and resolution, it is now appropriate to consider the role played by the AU in general, and the PSCAU in particular, in relation to the responsibility to protect, a norm with African roots, both in terms of its conceptualisation and implementation.<sup>1</sup>

It is noteworthy that in implementing the responsibility to protect, the relationship between the PSCAU and, respectively, the UN Security Council, the Pan-African Parliament, the African Commission, CSOs, and sub-regional mechanisms, becomes even more critical.<sup>2</sup> These institutions and organs play a pivotal role in complementing the AU in terms of its responsibility to protect the African citizenry. In the final analysis, this complementary role contributes to respect for human rights. This chapter will demonstrate the link between human rights, the responsibility to protect and the right to intervene in certain circumstances.

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<sup>1</sup> Jeremy Sarkin & Mark Paterson, 'Special Issue for GR2P: Africa's Responsibility to Protect – Introduction' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 339. The UN Special Advisor on the responsibility to protect, Edward Luck, noted in 2009 that the responsibility to protect has been implemented more fully in Africa than almost anywhere else. See e.g. Edward Luck, 'Sovereignty, Choice, and the Responsibility to Protect' (2009)1(1) *Global Responsibility to Protect* 15.

<sup>2</sup> The relationship between the PSCAU and the UNSC is discussed in chapter 4. The relationship between the PSCAU and the AU organs and other institutions is discussed in chapter 5. The discussion on the relationship between the PSCAU and the SRMs is discussed in chapter 6.

Upholding human rights is one of the most effective ways of contributing to international security. Respect for human rights arguably prevents conflicts, both intra-state and interstate. Where conflicts take place, the application of human rights principles best addresses violations of fundamental freedoms. Achieving international security requires states to fulfil their responsibility to protect their citizens against human rights violations. Sarkin and Paterson acknowledge that the responsibility to protect, as a concept, derived much intellectual weight and practical authority from ideas that informed the birth of nation-states in 17<sup>th</sup> century Europe and thereafter shaped the behaviour of many Western countries.<sup>3</sup> They argue, however, that since the end of the Cold War in 1990, Africa gave the concept its most coherent and practical expression, through its actors and experiences.<sup>4</sup> As a norm, the responsibility to protect could not have been given more impetus than has been the case in Africa, where it is most needed.

Within the African context, the responsibility to protect is articulated in article 4(h) of the Constitutive Act,<sup>5</sup> which provides for 'the right of the [African] Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.<sup>6</sup> Article 4(h) of the Constitutive Act is referenced in article 4(j) of the PSCAU Protocol which provides that the PSCAU shall be guided, among other things, by 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act.'

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<sup>3</sup> Sarkin & Paterson (n 1 above) 341.

<sup>4</sup> As above.

<sup>5</sup> This articulation is in implied terms. On this point, see also Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *Am. J. Int'l L.* 114.

<sup>6</sup> See generally, Alemu Girmarchew Aneme, *Study of the African Union's Rights of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD publication, Faculty of Law, University of Oslo, 2008).

The responsibility to protect ensures that human rights are respected, protected, promoted and fulfilled.<sup>7</sup> It goes beyond the so-called 'grave circumstances', as human rights must be respected, protected, promoted and fulfilled at all times. In post-conflict situations, for instance, human rights become the centre-stage in addressing post-conflict challenges such as social and economic development or lack thereof. Thus, in post-conflict reconstruction and development,<sup>8</sup> the consideration of human rights is one of the most important indicative elements for addressing past experiences and thereby informing a peaceful future and stable environment. Essentially, human rights as an indicative element, encompass the promotion, protection and respect of human rights and human dignity. International security, therefore, cannot be achieved without respect for human rights. Hence, one cannot talk about international security without addressing human rights, the so-called 'idea of our time'.<sup>9</sup>

That Africa faces multifaceted challenges is not in dispute. Violations of human rights and general insecurity have now become the norm in Africa. One of the most profound challenges is the responsibility of African states to protect their citizens and to ensure their right to peace, security and stability. Amongst other things, this challenge results

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<sup>7</sup> On the levels of state obligation to respect, protect, promote and fulfil human rights, see Communication No 155/96, Decision of the African Commission on Human and Peoples' Rights, 30th Ordinary Session, Banjul, The Gambia, 13-27 October, 2001, OAU Doc ACHPR/COMM/A044/1, Oct. 2001 (*SERAC's case*) <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (Accessed 2 March 2010). In particular, see Para 44-47 of the *SERAC case*. 36-37.

<sup>8</sup> Post-Conflict Reconstruction and Development (PCRD) is one of the tools of the African Union designed to curb the severity and repeated nature of conflicts in Africa as well as bring about sustained development. See e.g. Decision on Post Conflict Reconstruction and Development (PCRD)(EX.CL/Dec.302 (IX) 25 June - 2 July, 2006, Banjul, the Gambia) and Report on Post Conflict Reconstruction and Development (PCRD): (DOC.EX.CL/274 (IX) 25 June - 2 July, 2006, Banjul, the Gambia) available at <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/Main%20Folder/documents.html> (Accessed 23 January 2010).

<sup>9</sup> See Christof Heyns & Frans Viljoen, 'The Regional Protection of Human Rights in Africa. An Overview and Evaluation' in P.T. Zelela, and P.J. McConnaughay, *Human Rights, the Rule of Law, and Development in Africa* (2004) 129.

from the fact that Africa generally is wracked by armed conflict and full of what Furley and May refer to as 'hopeless cases where peace, if it does break out, can be tenuous, full of unresolved rivalries and tension, liable to be temporary and viewed as unsatisfactory by many of the participants.'<sup>10</sup> The International Commission on Intervention and State Sovereignty (ICISS) could not have put it better when stating that '[m]illions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse'.<sup>11</sup>

Using the human factory metaphor, Soyinka makes the following remarks about the African continent:

[T]here are moments when I feel that we are trapped in a mammoth factory known as the African continent, where all the machinery appears to have gone out of control all at once. No sooner do you fix the levers than the pistons turn hyperactive in another part of the factory, then the conveyor belt snaps and knocks out the foreman, the boiler erupts and next the whirling blades of the cooling fans lose one of their members which flies off and decapitates the leader of the team of would-be investors – the last hope of resuscitating the works. That, alas, is the story of our human factory on this continent.<sup>12</sup>

The African continent presents interesting case studies due to a wide array of challenges: undemocratic governments; *coups d'états*; mercenarism; blood/conflict diamonds; bad governance and poor leadership; un-free and unfair elections; corruption and money laundering; underdevelopment; abuse of human rights; genocide; poverty; drought and famine; human trafficking and HIV/AIDS.<sup>13</sup> These problem areas have a bearing on the

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<sup>10</sup> Oliver Furley & Roy May, (eds.) *Ending Africa's Wars: Progressing to Peace* (Aldershot, England; Burlington, VT: Ashgate, 2006) 1.

<sup>11</sup> Report of the International Commission on Intervention and State Sovereignty *The Responsibility To Protect* (2001) 11.

<sup>12</sup> Wole Soyinka, *Constitution and Continuity*, *Tempo*, Mar, 16, 2000, available at <http://www.nigerianlaws.com/> as quoted in Nsungorua J. Udombana, 'The Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development' (2003) 35 *Geo. Wash. Int'l L. Rev.* 55.

responsibility to protect and speak to the need for African states to ensure human security on the continent.

As a result of the many problem areas enumerated above, the responsibility of ensuring that African states protect their citizens becomes even more profound. The notion of the responsibility to protect is simply the duty entrusted upon states to ensure that the fundamental human rights of their citizens are zealously guarded and protected against violation of any kind. Within the African context, the responsibility to protect is unfortunately challenged by various factors, one of which is the poor human rights record of a majority of African states. This is despite the fact that individual states are parties to a plethora of human rights treaties, both at the international and regional levels. Notwithstanding these challenges, as shall become clear, there are positive prospects for ensuring that African states fulfil their responsibility to protect their citizens against human rights abuses, especially in view of article 4(h) of the Constitutive Act.

This chapter discusses the African Union and the responsibility to protect, which is entrenched in article 4(h) of the Constitutive Act. Firstly, the chapter discusses the responsibility to protect and how it has evolved within the African context. Secondly, it considers the responsibility to protect under the AU with specific focus on collective intervention by the AU, the request for intervention by AU member states, and unconstitutional changes of government. Thirdly, a conclusion is drawn.

### **3.2 GENERAL RESPONSIBILITY TO PROTECT**

The responsibility to protect is a very wide concept, which covers a variety of issues. As stated, the chapter seeks to confine the concept to the obligation of states to ensure respect for human rights within the African context. It cannot be denied that the concept finds greater emphasis in cases where there is serious violation of human rights. In his report to the 1999 General Assembly, Kofi Anan, who was secretary-general at the time, challenged the international community to agree on the basic principles and processes involved in respect of when intervention should occur, under whose authority and how

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<sup>13</sup> See Sabelo Gumedze, "Meaning of Human Security Revisited" ISS Today 29 June 2007. [http://www.iss.co.za/static/templates/tmpl\\_html.php?node\\_id=2436&slink\\_id=4660&slink\\_ty\\_pe=12&link\\_id=21](http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2436&slink_id=4660&slink_ty_pe=12&link_id=21) (Accessed 29 October 2008).

this was to be achieved.<sup>14</sup>

As a result of this challenge, the Government of Canada responded by establishing the independent International Commission on Intervention and State Sovereignty in September 2000.<sup>15</sup> The ICISS published a report titled, 'The Responsibility to Protect' in December 2001.<sup>16</sup> Parallel to the work of the ICISS, the AU took the lead in entrenching the responsibility to protect in its founding legal document, the Constitutive Act. As mentioned, the responsibility to protect is found in article 4(h) of the Constitutive Act. This became one of the core principles in accordance with which the AU was to function.<sup>17</sup>

It could be argued that the Rwanda genocide, which could have been avoided had the UN intervened, was one of the most important considerations when it came to entrenching the responsibility to protect in the Constitutive Act, as it affected African states directly. As Mwanasali observes, the risk of genocide was never far from the thinking of the founders of the AU and hence the inclusion of article 4(h) in the Constitutive Act.<sup>18</sup> After all, the AU remains Africa's premier institution and principal organization for the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.<sup>19</sup>

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<sup>14</sup> See the Annual Report of the Secretary General to the 54th session of the UN General Assembly in September 1999. Available at [http://www.un.org/News/press/docs/1999/statements\\_search\\_full.asp?statID=28](http://www.un.org/News/press/docs/1999/statements_search_full.asp?statID=28) (Accessed 11 April 2010).

<sup>15</sup> See the website of the International Commission on Intervention and State Sovereignty (ICISS) is <http://www.iciss.ca> (Accessed 10 January 2010).

<sup>16</sup> The Report of the International Commission on Intervention and State Sovereignty is available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (Accessed 10 January 2010).

<sup>17</sup> On the other core principles, see generally art. 4 of the Constitutive Act.

<sup>18</sup> Musifiki Mwanasali, 'The African Union, the United Nations, and the Responsibility to Protect: Towards an African Intervention Doctrine' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 390.

As a concept, the responsibility to protect is a fluid one. This presupposes that the concept is one that can be employed at various levels to ensure the protection of citizens. The responsibility to protect is a notion which seeks to challenge the traditional understanding of state sovereignty by allowing regional organizations to intervene in cases where serious human rights violations are taking place. Thus, the concept is viewed as a legal and ethical commitment by the international community, acting through organizations such as the UN and Africa's regional organizations, to protect citizens from genocide, war crimes, crimes against humanity, and/or ethnic cleansing.<sup>20</sup>

In a recent report on the Wilton Park Conference 922<sup>21</sup> it was stated that the concept of the responsibility to protect rests on three pillars, namely: the obligation of states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from incitement; a commitment to assist states to meet these obligations; and a responsibility to protect populations from these crimes and violations.

The international community has proscribed the crime of genocide, crimes against humanity, and war crimes, which are deemed to be the most serious crimes of international concern and which have been elaborated upon in the Rome Statute of the International Criminal Court (Rome Statute).<sup>22</sup> The Rome Statute has proved to be an

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<sup>19</sup> Art. 3(h) of the Constitutive Act.

<sup>20</sup> Centre for Conflict Resolution, *Africa's Responsibility to Protect* Policy Advisory Group Seminar Report (2007) 6.

<sup>21</sup> See Report on Wilton Park Conference 922: Implementing The Responsibility to Protect: The Role of Regional and Sub-Regional Partners (Friday 11 – Sunday 13 2008). Available at <http://www.wiltonpark.org.uk/documents/conferences/WP922/pdfs/WP922.pdf> (Accessed 12 February 2010).

<sup>22</sup> The text of the Rome Statute was circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. On the international crimes see Art. 5-8 of the Rome Statute. According to the amendments to the Rome Statute adopted on 11 June 2010 by the Review Conference of Rome Statute (held in Kampala, Uganda between 31 May and 11 June 2010), article 8 *bis* of the Rome Statute defines the

invaluable tool in the struggle against impunity, especially in conflict-ridden locations. Noteworthy is the fact that those individuals who are alleged to have committed serious crimes are predominantly from the African continent,<sup>23</sup> namely, Darfur in Sudan,<sup>24</sup> the Democratic Republic of the Congo,<sup>25</sup> the Central African Republic,<sup>26</sup> and Uganda.<sup>27</sup>

The above-mentioned serious crimes of international concern involve grave violations of human rights. Over and above the entrenchment of the responsibility to protect in article 4(h) of the Constitutive Act, African leaders have acknowledged the concept as an essential tool in preventing and halting war crimes, ethnic crimes, crimes against humanity and genocide. Africa's classic example of an expression of the responsibility to protect is found in an address by the president of Rwanda, Paul Kagame, during a 2005 World Summit convened in New York. Kagame noted: '[n]ever again should the international community's response be left wanting. Let us resolve to take collective action in a timely and decisive manner. Let us also commit to put in place early warning

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individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression. It further defines an act of aggression as the use of armed force by one State against another State without the justification of self-defence or authorization by the Security Council. The conditions for entry into force of this article decided upon in Kampala provide that the Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to be made by States Parties to activate the jurisdiction. See the Coalition for the International Criminal Court website at <http://www.iccnw.org/?mod=aggression> (Accessed 10 December 2010).

<sup>23</sup> See situations and cases at <http://www.icc-cpi.int/cases.html> (Accessed 22 February 2010).

<sup>24</sup> The case before the ICC is *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/07.

<sup>25</sup> The cases before the ICC include: - *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07.

<sup>26</sup> The case before the ICC is *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>27</sup> The case before the ICC is *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.



mechanisms and ensure that preventive intervention are the rule rather than the exception'.<sup>28</sup>

It was at this 2005 World Summit that the idea of the responsibility to protect gained widespread international legitimacy.<sup>29</sup> It is of note that the summit's outcome document stated that the UN must 'affirm that every sovereign government has a "responsibility to protect" its citizens and those within its jurisdiction from genocide, mass killing, and massive and sustained human rights violations'.<sup>30</sup> Both the 1994 genocide and Kofi Annan's admission of inaction speech in 1999 (to stop the genocide) led to the 2005 World Summit at which this internationally agreed responsibility to protect was formulated.<sup>31</sup>

After the 1994 Rwanda genocide, African states grappled with the question of whether the UN was still a lead instrument of choice for them to bring peace and security in Africa. In the most general sense, as Evans puts it, the international community has conspicuously failed to maintain the peace since the end of the Cold War.<sup>32</sup> Evans and Sahnoun state unequivocally, '[i]n this new century, there must be no more Rwandas'.<sup>33</sup>

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<sup>28</sup> See *The Responsibility to Protect: Towards a Collective African Response to Genocide, War Crimes and Crimes against Humanity*. Available at <http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=421> (Accessed 10 January 2010).

<sup>29</sup> Sarkin & Paterson (n 1 above) 340.

<sup>30</sup> United Nations, General Assembly, 'World Summit Outcome', A/RES/60/1, 16 September 2005.

<sup>31</sup> Sarkin & Paterson (n 1 above) 342.

<sup>32</sup> See generally, Evans, Gareth, *Cooperative Security and Intrastate Conflict Foreign Policy*, vol. 96, Autumn 1994, pp. 3-20 (retrieved 5 May 2010, JSTOR).

<sup>33</sup> Evans, Gareth, and Sahnoun, Mohamed, *The Responsibility to Protect Foreign Affairs, Foreign Affairs*, vol. 81, no. 6, 2002, pp. 1-8 (retrieved 3 April 2010, JSTOR.) 6.

This statement underlies and informs the AU's approach in addressing human rights and international security on the African continent.

In March 2005, during the 7th extraordinary session of its executive council, the AU affirmed its acceptance of the responsibility to protect in a document titled, *The Common African Position on the Proposed Reform of the United Nations*, otherwise known as the *Ezulwini Consensus*. According to the *Ezulwini Consensus*, it was stated that the General Assembly and the UN Security Council are far removed from the reality of African conflict, and therefore may not be in a position to effectively appreciate the nature of African conflict situations. In addressing this glaring challenge, it was critical for regional organizations in areas of proximity to conflicts to be empowered to intervene with the approval of the UN Security Council. Also coming out of the *Ezulwini Consensus* was a realisation that in circumstances where urgent action is needed, the approval of the UN Security Council can be granted *ex-post facto*.<sup>34</sup> Sarkin and Paterson point out, that African regional organizations have since crafted collective security measures to protect civilian populations from gross violation of human rights, such as genocide and 'ethnic cleansing'.<sup>35</sup>

At the UN level in January 2009, African leaders (heads of state or government) unanimously affirmed the responsibility to protect at the 2005 World Summit that, 'each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>36</sup> The heads of state and government at the 2005 Summit outlined a three-pillar strategy for implementing the responsibility to protect. Pillar one: *the protection of the state*, gives the state enduring responsibility to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. Pillar two: *international assistance and capacity-building*, commits the international community to

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<sup>34</sup> *The Common African Position on the Proposed Reform of the United Nations: "Ezulwini Consensus"* is available at [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc](http://www.africa-union.org/News_Events/Calendar_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc) (Assessed 29 March 2010).

<sup>35</sup> Sarkin & Paterson (n 1 above) 343.

<sup>36</sup> See the Report of the UN Secretary-General on implementing the responsibility to protect. 12 January 2009. A/63/677.

assisting states in meeting those obligations. Pillar three: *timely and decisive response*, gives member states the responsibility to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.<sup>37</sup>

This three-pillar strategy complements the ICISS's proposed three-dimensional definition of the responsibility, as follows:

First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. This preferred terminology refocuses the international searchlight back where it should always be, that is, on the duty to protect communities from mass killing, women from systematic rape and children from starvation.

Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfil this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thus the 'responsibility to protect' is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the 'right or duty to intervene' is intrinsically more confrontational.

Thirdly, the responsibility to protect means not just the 'responsibility to react,' but the 'responsibility to prevent' and the 'responsibility to rebuild' as well. It directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction.<sup>38</sup>

The ICISS's first proposed dimension is very important in the sense that it makes those seeking or needing support, that is, the human beings, the focal point for human

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<sup>37</sup> As above.

<sup>38</sup> Report of the International Commission on Intervention and State Sovereignty *The Responsibility To Protect* (2001) 17.

security. The responsibility to protect should be concentrated primarily on the human needs of those seeking protection and support.<sup>39</sup> After all, the Universal Declaration of Human Rights provides that '[a]ll human beings are born free and equal in dignity and rights'.<sup>40</sup> By virtue of this, anything that threatens such freedom, equality in dignity and fundamental rights should be guarded against. Hence the need for states to be made responsible for protecting human beings, regardless of distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>41</sup> This proposed dimension brings to attention the more serious forms of threat to human security, namely mass killings, the systematic rape of women and the starvation of children. The responsibility for states to intervene in these situations cannot be gainsaid. It is for this reason that specific international treaties have been adopted both at the international and regional levels with the main objective of addressing such challenges.

The second ICISS dimension gives an indication that the primary responsibility to protect rests with none other than the state concerned. The international community, therefore, assumes the secondary responsibility in the event that the particular state fails or is unwilling to protect its citizens. The principle of sovereignty in this situation cannot inhibit the operationalization of the responsibility to protect at the international level. In his 2000 *Millennium Report* to the UN General Assembly, Kofi Annan, argued,

[i]f humanitarian intervention [in implementing the responsibility to protect] is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity.<sup>42</sup>

According to the ICISS, the UN is an organization dedicated to the maintenance of international peace and security on the basis of protecting the territorial integrity,

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<sup>39</sup> As above 15.

<sup>40</sup> Art. 1 of the Universal Declaration of Human Rights, 1948 (UDHR).

<sup>41</sup> Art. 2 of the UDHR.

<sup>42</sup> Kofi Annan quoted in the ICSS Report, page 2.

political independence and national sovereignty of its member states.<sup>43</sup> The ICISS states further that the fact that the overwhelming majority of today's armed conflicts are internal has, among other things, presented the UN with the major difficulty of reconciling the principle of national sovereignty with its own mandate to maintain international peace and security, and with its compelling mission to promote the interests and welfare of people within those states experiencing armed conflicts.<sup>44</sup>

This dilemma applies equally to the African Union, whose objective is, among others, to defend the sovereignty, territorial integrity and independence of its member states.<sup>45</sup> At the same time it is entrusted with the responsibility of promoting peace, security, and stability on the continent,<sup>46</sup> which may arguably entail a 'violation' of the principle of sovereignty. Since member states of international organizations (such as the UN and AU) voluntarily accept international obligations and are welcomed as responsible members of the community of states, they also voluntarily accept the responsibilities of membership that go with belonging to such organizations. Treaties of international organizations are binding once ratified, accepted, approved or acceded to.<sup>47</sup>

There is no doubt that treaties entail international obligations and that these sometimes 'interfere' with state governance. Sarkin and Paterson argue that in practice the character of national sovereignty changes as the state's international obligations change and that the ratification of treaties and participation in international organizations limits the extent of a state's sovereign independence.<sup>48</sup> They further maintain that the level of sovereign independence enjoyed by African states has been diminished by their

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<sup>43</sup> ICISS Report, page 13.

<sup>44</sup> As above.

<sup>45</sup> Art. 3(b) of the Constitutive Act.

<sup>46</sup> Art. 3(f) of the Constitutive Act.

<sup>47</sup> Art. 2(1)(b) of the Vienna Convention on the Law of Treaties of 1969 provides that 'ratification', 'acceptance', 'approval' and 'accession' means in each case the international act so named, whereby a state establishes on the international plane its consent to be bound by a treaty.

<sup>48</sup> Sarkin & Paterson (n 1 above) 348.

membership in the AU, with its Constitutive Act reflecting the responsibility to protect principle.<sup>49</sup>

On the other hand it has been argued that the ratification of treaties, which in turn create international obligations for a state, do not transfer or dilute state sovereignty in any way. According to the ICISS report, '[t]here is no transfer or dilution of state sovereignty. However, there is a necessary re-characterization involved: from *sovereignty as control to sovereignty as responsibility* in both internal functions and external duties'.<sup>50</sup>

The argument that there is no transfer or dilution of state sovereignty in the application of the responsibility to protect was supported by the 2009 UN secretary-general's report titled *Implementing the Responsibility to Protect*, in the following words:

The responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower ideas of humanitarian intervention. By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it. It seeks to help States succeed, not just to react when they fail...<sup>51</sup>

In dissecting the notion of sovereignty as responsibility, the ICISS report states that it has a threefold significance.<sup>52</sup> Firstly, that it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare; secondly, that it suggests that national political authorities are responsible to the citizens internally and to the international community through the UN; and thirdly, that it means that the agents of the state are responsible for their

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<sup>49</sup> As above.

<sup>50</sup> ICISS Report, page 13.

<sup>51</sup> United Nations, *Implementing the Responsibility to Protect* (2009) 8. On the notion of sovereignty as responsibility, see Francis M. Deng 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 353-370.

<sup>52</sup> As above. See also Mwanasali (n 18 above) 391.

actions, that is, they are accountable for their acts of commission and omission. It is through this way of thinking that international human rights norms are strengthened. The principle of accountability, especially on the part of state agents, is important, since any acts of commission or omission that seriously violate human rights automatically attract international criminal responsibility. In this way, sovereignty cannot be a justification for non-observance of human rights norms and standards.

The third dimension of the responsibility to protect as proposed by the ICISS emphasizes the 'responsibility to prevent' and the 'responsibility to rebuild' over and above the 'responsibility to react'. One of the most important aspects of the responsibility to protect is that of undertaking measures to prevent the occurrence of serious violations of human rights. In the event that such violations occur, it is critical that once the protection aspect of the responsibility is undertaken, the state has a responsibility to rebuild in collaboration with other states and through international organizations. It is for this reason that the AU designed a policy on Post-Conflict Reconstruction and Development (PCRD), which is intended to curb the severity and the repetitive nature of conflicts in Africa as well as bring about sustained development.<sup>53</sup> The PCRD policy is comprised of six indicative elements, namely: security; humanitarian/emergency assistance; political governance and transition; socio-economic reconstruction and development; human rights, justice and reconciliation; and women and gender.

The responsibility to protect is especially relevant within the concept of human security, as understood in contemporary times. As a concept, the focus of human security is on the individual – his/her physical safety, economic and social well-being, respect for his/her dignity and worth as a human being, and the protection of his/her human rights and fundamental freedoms.<sup>54</sup> In bringing a new dimension to the concept of human security, Kofi Annan, in 2000, stated:

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<sup>53</sup> See Policy on Post-Conflict Reconstruction and Development <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/index.html>(Accessed 30 January 2010).

<sup>54</sup> Report of the International Commission on Intervention and State Sovereignty *The Responsibility To Protect* (2001) 15.

Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human, and therefore national, security.<sup>55</sup>

As a concept the responsibility to protect, therefore, also seeks to ensure the continuity of human security. That is to say there is no way that human rights, good governance, access to education and health care, for instance, can be enjoyed without a state also protecting human rights. In the event that human security is threatened the responsibility to protect takes precedence in the sense that the international community has to step in and protect those seeking protection or assistance. Thus the ICISS notes:

[t]he emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.<sup>56</sup>

This reflects a more nuanced and comprehensive notion of intervention and the responsibility to protect, which is invoked only in exceptional cases as an extraordinary measure. It means that the measure should be sanctioned only as a last resort with the aim of halting or averting

large-scale loss of life, actual or apprehended with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a

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<sup>55</sup> Kofi Annan. 2000. Secretary-General Salutes International Workshop on Human Security in Mongolia. Press Release SG/SM/7382. <http://www.un.org/News/Press/docs/2000/20000508.sgsm7382.doc.html> (Accessed 29 March 2010).

<sup>56</sup> Report of the International Commission on Intervention and State Sovereignty *The Responsibility To Protect* (2001) 16.



failed state situation; or a large-scale “ethnic cleansing”, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>57</sup>

For situations like Somalia where a state has failed, and there is chaos and loss of life, Kioko argues, ‘intervention becomes a necessity and not an academic issue’.<sup>58</sup>

According to the African Union’s Non-Aggression and Common Defence Pact, ‘human security’ means

the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development.<sup>59</sup>

This makes it clear that human security goes beyond a state-centric approach to security. Human security, therefore, centres on the human being and can only be achieved once basic human needs are satisfied. Again this requires states to ensure that human rights and fundamental freedoms are respected and protected. The definition also underscores the importance of enabling the creation of social, economic, political, environmental and cultural conditions that are essential for survival and dignity. More importantly, the definition directly incorporates the concept of human rights as an adjunct of human security.<sup>60</sup> This strengthens the view that human security and human rights are not mutually exclusive and that as such they have much more to do with each other than is

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<sup>57</sup> As above at p. 19.

<sup>58</sup> Ben Kioko, ‘The Right of Intervention Under the African Union’s Constitutive Act: From Non-interference to Non-intervention’ (2003) 85(853) *International Review of the Red Cross* 819.

<sup>59</sup> Adopted by the Fourth Ordinary Session of the Assembly, Held in Abuja, Nigeria on Monday, 31 January 2005 and entered into force on 18 December 2009.

<sup>60</sup> Abass Ademola, ‘African Peace and Security Architecture and the Protection of Human Security’ in Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 258.

presently realized.<sup>61</sup>

Human security guarantees that each individual is afforded opportunities and choices for his or her full development. To this end, states, being the primary duty-bearers, have an enormous responsibility to ensure that human security is achieved. In terms of the AU Non-Aggression and Common Defence Pact 'State Parties undertake to promote such sustainable development policies as are appropriate to enhance the well being of the African people, including the dignity and fundamental rights of every human being in the context of a democratic society'.<sup>62</sup> This provision underscores the importance of promoting sustainable development, in the pursuit of which the AU has a significant role to play. This ties in well with Africa's contemporary development blueprint, the New Partnership for Africa's Development (NEPAD).<sup>63</sup> NEPAD's main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the increasing marginalisation of the continent.<sup>64</sup> Thus, NEPAD's role in the promotion of human rights in Africa cannot be over emphasised as it addresses the issue of development, which is essential for the survival and well being of the individual.<sup>65</sup>

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<sup>61</sup> As above. See also Ademola Abass, 'An Introduction to Protecting Human Security in Africa' in Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 1.

<sup>62</sup> Art. 3(c) of the AU Non-Aggression and Common Defence Pact. (adopted 31 January 2005) Assembly/AU/Dec.71 (IV).

<sup>63</sup> The NEPAD was launched at a special summit in Abuja, Nigeria on 23 October 2001. See the NEPAD available at <[http://www.nepad.org/documents/nepad\\_english\\_version.pdf](http://www.nepad.org/documents/nepad_english_version.pdf)> (Accessed 1 January 2009). On the progress on the NEPAD, see a Report by Prof. Wiseman L Nkuhlu, *The New Africa's Partnership for Africa's Development: The Journey So Far* (June 2005) available at <<http://www.nepad.org/2005/files/documents/journey.pdf>> (Accessed 1 January 2010). The NEPAD document is available at <<http://www.nepad.org/AA0010101.pdf>> (Accessed 1 January 2010).

<sup>64</sup> Para. 67 of the NEPAD document.

<sup>65</sup> See generally Sabelo Gumedze, 'The New Partnership for Africa's Development (NEPAD) and Human Rights' (2006) 22 (1) *South African Journal on Human Rights* 144.

Inherent to the responsibility to protect is human security, which means protecting the fundamental freedoms that are the essence of life. Application of the responsibility to protect, therefore, prevents or minimises violation of these fundamental freedoms. It protects people from severe and pervasive threats and situations such as those arising from protracted conflict. The main focus of human security is the human being as opposed to state security. The people-centric approach to security, in the form of human security, therefore, goes hand in glove with the responsibility to protect.

### 3.3 RESPONSIBILITY TO PROTECT UNDER THE AU

That the maintenance of international security is the primary responsibility of the UN, particularly the UN Security Council is now settled.<sup>66</sup> Within the African context, it may be argued that the maintenance of security, which is regional in nature, is the primary responsibility of the African Union, particularly the Peace and Security Council. Thus, the AU's work on peace and security contributes to international security. According to Sutterlin '[n]ow, as the definition of international security has broadened to encompass not only peace between states but also the security of populations within states, economic and social progress are increasingly seen again as essential to international security and peace.'<sup>67</sup> The AU has in effect become the vanguard of an emerging regional African government aimed at fostering cooperation among African states and one of its main objectives is to promote peace, security and stability on the continent.<sup>68</sup>

According to Evans,

[i]t is a central characteristic of the responsibility to protect norm, properly understood, that it should only involve the use of coercive military force as a last resort: when no other options are available, this is the right thing to do morally and practically, and it is lawful under the UN Charter.<sup>69</sup>

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<sup>66</sup> See art. 24 of the UN Charter.

<sup>67</sup> James S. Sutterlin, *The United Nations and the Maintenance of International Security: A Challenge to be Met* (2<sup>nd</sup> edition, Westport, CT: Praeger; 1995) 4.

<sup>68</sup> See generally art. 4 of the Constitutive Act.

In the event that governments are unable or unwilling to protect their citizens from genocide, war crimes, crimes against humanity and ethnic cleansing, the international community has a responsibility to protect vulnerable populations. The responsibility to protect at the UN level cannot be said to be satisfactory and it is sometimes incumbent upon regional organizations, such as the AU, to fill in the gaps that the UN leaves. For this reason the AU has developed its own security architecture, the aim of which is to ensure that the responsibility to protect is effected at the regional level in order to complement the implementation of the responsibility to protect at the the UN level. The focus of the chapter now turns more to the responsibility to protect as provided for in the Constitutive Act.

### **3.3.1 COLLECTIVE INTERVENTION: ARTICLE 4(h)**

In establishing the AU, the member states were determined to promote and protect human rights on the continent, thus operationalizing the responsibility to protect at the regional level.<sup>70</sup> This responsibility is solidified and elaborated upon through the AU's express objective to promote and protect human and peoples' rights.<sup>71</sup> The objective gives a clear and unambiguous directive that it shall be undertaken 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. The AU is also meant to function in accordance with respect for human rights.<sup>72</sup> This principle therefore informs the responsibility to protect at the AU level.

The ICISS report argues that while sovereign states have the primary 'responsibility to protect' their own citizens, if they prove unwilling or unable to do this, then the international community must act regardless of political sensitivities. According to Sarkin and Paterson, as a norm, the responsibility to protect finds expression in the

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<sup>69</sup> Evans (n 32 above).

<sup>70</sup> See para. 9 of the preamble to the Constitutive Act.

<sup>71</sup> Art. 3(h) of the Constitutive Act.

<sup>72</sup> Art. 4(m) of the Constitutive Act.

African Charter's emphasis on the rights of groups or peoples.<sup>73</sup> This is due to the fact that intervention is cast as a responsibility or duty that must be exercised when the need arises, and, as such, this duty has been adopted within the rubric of 'duties' provided for in the African Charter.<sup>74</sup> Sarkin and Paterson further argue that both the African Commission and the African Court on Human and Peoples' Rights represent potential continental bodies to facilitate the implementation of the responsibility to protect.<sup>75</sup>

As discussed in Chapter 2, the Constitutive Act recognizes the contested principle of non-interference by any member state in the internal affairs of another.<sup>76</sup> As already established, this principle, which is also reflected in article 4(f) of the PSCAU Protocol, however, does not preclude the AU (as opposed to its member states) from interfering in the internal affairs of its member states. Article 4(h) of the Constitutive Act provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly with respect to grave circumstances, namely war crimes, genocide and crimes against humanity. This principle, therefore, formalizes and operationalizes the responsibility to protect at the AU level. The Constitutive Act recognizes war crimes, genocide and crimes against humanity as serious violations of human rights, which it describes as 'grave circumstances'. According to Kioko, article 4(h) was intended to give the AU 'the necessary flexibility in deciding on intervention'.<sup>77</sup> He further argues that the addition to article 4(h) was adopted 'with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without having to sit back and do nothing because of the notion of non-interference in the internal affairs of member states'.<sup>78</sup>

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<sup>73</sup> Sarkin & Paterson (n 1 above) 347.

<sup>74</sup> As above.

<sup>75</sup> As above.

<sup>76</sup> Art. 4(g) of the Constitutive Act.

<sup>77</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 812.

<sup>78</sup> As above, 817.

However, the principle of non-interference, arguably, limits the responsibility to protect, in the sense that no state may interfere in the affairs of another, without the AU sanctioning a collective action in order to implement the responsibility to protect in accordance with the Constitutive Act as stated above. It is argued here that the Constitutive Act should have gone beyond the so-called 'grave circumstances' because by the time the 'grave circumstances' exist, many people will have lost their lives.

According to Mwanasali, collective action to respond to emerging crises forms the cornerstone of the notion of 'responsibility to protect'.<sup>79</sup> This responsibility can only be invoked in so far as it is implemented collectively under the direction of the AU. Thus, unilateral interventions are prohibited outright. After all, the AU member states are prohibited from unilaterally interfering in one another's internal affairs.

Confirming the intervention principle, article 4(j) of the PSCAU Protocol provides that the Peace and Security Council shall, in particular, be guided by

the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act.

Article 4(h) of the Constitutive Act is yet to be amended so as to include among the listed international crimes, a grave circumstance described as a 'serious threat to legitimate order'.<sup>80</sup> This crime is however not defined. According to Baimu and Sturman,<sup>81</sup> this proposed amendment clause is inconsistent with the other grounds for intervention, which aim to protect African peoples from grave violations of human

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<sup>79</sup> Mwanasali (n 18 above) 394.

<sup>80</sup> See art. 4(h) of the Protocol on Amendments to the Constitutive Act of the African Union. Adopted by the 1<sup>st</sup> Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003. As at 3 February 2010, only 25 member states had ratified this protocol.

<sup>81</sup> See Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's right to intervene: A shift from human security to regime security?' (2003) 12/2 *African Security Review* 37.

rights when their governments are unable or unwilling to do so. They argue that rather than upholding human security, the amendment is aimed at upholding state security.<sup>82</sup>

Save for the proposed amendment, article 4(j) of the PSCAU Protocol is identical to article 4(h) of the Constitutive Act. The omission of the proposed amendment from the PSCAU Protocol does not seem to have any effect, as article 4(j) of the PSCAU Protocol makes reference to article 4(h) of the Constitutive Act, which in turn, will include the proposed amendment. The confirmation of the principle of intervention in the PSCAU Protocol further gives the responsibility to protect the prominence it deserves. The AU may also be requested by a member state to intervene in order to restore peace and security in accordance with article 4(j) of the Constitutive Act. The decision by the AU to intervene cannot be taken blindly. The advice of the Peace and Security Council is important in this regard as it seeks to enable the Assembly to make an informed decision on whether or not to intervene in a particular member state.

According to article 4(h) of the Constitutive Act, circumstances warranting the AU's right to intervene in a member state should be considered to be 'grave'. The question of what constitutes 'grave circumstances' is likely to present a challenge, as the term 'grave' is relative. While the Constitutive Act does not precisely define what are to be considered 'grave circumstances', it nevertheless lists international crimes that qualify under such a meaning, namely, war crimes, genocide and crimes against humanity. This is arguably a very simplistic approach in that confining 'grave circumstances' to a small number of crimes narrows the scope of application of article 4(h) of the Constitutive Act.

The above-mentioned crimes, which constitute 'grave circumstances', have been defined in the 1998 Rome Statute of the International Criminal Court.<sup>83</sup> Over and above these, a somewhat ambiguous 'grave circumstance', namely, 'a serious threat to legitimate order' is to be added to the list through a proposed amendment, which is not yet in force. It cannot be explained why this proposed amendment is not as yet in force since most

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<sup>82</sup> As above.

<sup>83</sup> See <<http://www.icc-cpi.int/>> (Accessed 19 March 2010). The Rome Statute entered into force on July 2002. The definitions are found in: - art. 8 for war crimes; art. 6 for genocide; and art. 7 for crimes against humanity.

African states participated in the process and adopted the amendment without any debate.<sup>84</sup> This proposed amendment, at least in theory, illustrates the ability of the AU to develop the concept of the responsibility to protect. While this may be viewed as a classical example of international law in the making,<sup>85</sup> it remains to be seen how the term 'a serious threat to legitimate order' will be interpreted, especially given the somewhat despotic systems of governance in a number of African states. Such states may (mis)use this proposed 'grave circumstance' as a justification for suppressing opposition within their territories. In fact, these autocratic systems of governments may themselves be characterised as serious threats to legitimate order, and the question then would be whether the AU would be bold enough to intervene in such circumstances. Levitt views this kind of intervention as a pro-democratic intervention (PDI), where the AU exercises the use of force in order to safeguard legitimate order.<sup>86</sup> Accordingly, he argues that

[t]he AU Constitutive Act and the [PSCAU] Protocol clearly delineate the circumstances under which PDI may take place: when regimes come to power extraconstitutionally, to protect against a serious threat to legitimate order, and during any other breakdown of law and order as determined by the organization.<sup>87</sup>

In so far as the right to intervene is concerned, the AU will most definitely face a dilemma in making a decision on whether or not to intervene in a member state. Sarkin poses a number of pertinent questions relating to the decision-making process as follows: '[u]nder what circumstances would the AU take action against individual African states? What would be the character of the action taken? How likely is the AU to move from policy to action in its fulfilment of its objectives?'<sup>88</sup> In view of these

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<sup>84</sup> See Baimu & Sturman (n 81 above).

<sup>85</sup> See generally Tiyanjana Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?' (2004) 98 *Am. Soc'y Int'l L. Proc.* 232.

<sup>86</sup> Jeremy Levitt, 'Pro-Democratic Intervention in Africa' (2006) 24 *Wis. Int'l L.J.* 825.

<sup>87</sup> As above 831.

<sup>88</sup> Jeremy Sarkin, 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 380.



questions, before any decision is taken, a strong case has to be made in order to bring article 4(h) of the Constitutive Act into operation. Kioko argues that '[i]n deciding on intervention, the competent organs of the Union will have to establish threshold criteria along the lines proposed in *The Responsibility to Protect* [ICISS Report], or deal with the matters arising on a case-by-case basis'.<sup>89</sup>

The proposition by the ICISS states that 'conscience-shocking situations' which warrant military intervention for humanitarian protection include: acts defined by the provisions of the 1998 Genocide Convention that involve large scale threatened or actual loss of life; the threat or occurrence of large-scale loss of life whether the product of genocidal intent or not, and whether or not involving state action; different manifestations of ethnic cleansing including the systematic killing of members of a particular group; crimes against humanity and violations of the laws of war as defined in the Geneva conventions and Additional Protocols, among others; situations of state collapse and the resultant exposure of the populations to mass starvation and or civil war; and overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope.<sup>90</sup>

From the above proposition, it is clear that these 'conscience-shocking situations' may be said to be 'grave circumstances'. On the question what the term a 'grave circumstance' means, Maluwa draws an analogy with terms such as 'threat to peace', 'breach of the peace', and 'acts of aggression', which are not defined in the UN Charter, but which the General Assembly and the Security Council of the UN have been able to determine precisely.<sup>91</sup> Based on this reasoning, Maluwa notes that the establishment of the Peace and Security Council provides a clearly defined mechanism that will be useful in determining which situations represent serious threat to legitimate order.<sup>92</sup>

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<sup>89</sup> Kioko (n 77 above) 818.

<sup>90</sup> ICISS Report (n 38 above) 33. See also Kioko (n 77 above) 818.

<sup>91</sup> Maluwa (n 85 above) 236-7.

<sup>92</sup> As above.

The right to intervene in member states must be sanctioned by the AU Assembly, which takes its decisions by consensus or, failing which, by a two-thirds majority of the member states of the AU.<sup>93</sup> Regarding the decision-making powers of the AU in respect of this right to intervene in a member state, Packer and Rukare raise a critical point. They argue that the fact that the Assembly is the only organ responsible for deciding to intervene, arguably, raises the risk of inaction.<sup>94</sup> This scepticism is based on the OAU experience of inaction in conflict situations in Africa, which has had the effect of impairing the credibility of the organization particularly in the 1994 Rwanda genocide. According to Kioko '[w]hen setting up the [AU], the heads of State intended to endow their continental organization with the necessary powers to intervene if even the spectre of another Rwandan genocide loomed on the horizon'.<sup>95</sup>

On the question of article 4(h) of the Constitutive Act, Kindiki argues that since the provision is couched in terms of a 'right', in other words meaning that the AU Assembly has the discretion to decide whether or not to intervene, the consent of the target state will not be required.<sup>96</sup> He further suggests that it would have been much better had the provision been couched as a 'duty', which, in his opinion, would have created a sense of obligation to intervene, which in turn would be more likely to propel the AU into action.<sup>97</sup> Whether the 'intervention' is couched as a 'right' or 'duty', there seems to be no way in which the AU can be held accountable for not exercising such a 'right' or undertaking such a 'duty'. One way of making the AU accountable is to enable it to accede to the African Charter in the same way that Protocol No. 14 of the European

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<sup>93</sup> Art. 7(1) of the Constitutive Act.

<sup>94</sup> Corinne A. Packer & Donald Rukare, 'The New African Union and its Constitutive Act' (2002) 96 *Am. J. Int'l L.* 373.

<sup>95</sup> Kioko, Ben, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *IRRC* 815.

<sup>96</sup> Kithure Kindiki, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and The Maintenance of International Peace and Security: A Critical Appraisal' (2003) 3 *AHRLJ* 107.

<sup>97</sup> As above.

Convention on Human Rights makes a provision for the European Union to accede to the European Convention on Human Rights.<sup>98</sup>

Accession by the AU to a human rights instrument will create a binding mechanism and give essence to the AU's functional principle of respect for democratic principles, human rights, the rule of law and good governance as provided for in the Constitutive Act. It is also in this way that the responsibility to protect by the AU can be enforceable through a judicial or quasi-judicial process. Of course, unless and until the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (which both provide for an implementation mechanism for the African Charter) were made organs of the AU, this recommendation would be futile. Transforming these organs to make them part of the AU will ensure that there is an internal checking and balancing system. The organs will then be given the authority to challenge the very institution which establishes them, namely the African Union. Even though this may create tension between the AU and these mechanisms, the responsibility to protect requires effective mechanisms to keep the AU in check and ensure its effectiveness in protecting the citizens of its member states from serious human rights violations.

The AU's right to intervene is simply left to the 'whim' of the Assembly, which is made up of member states, some of which, as stated earlier, have very poor human rights records. On this point, Sarkin argues that for the AU to live up to the ideals of article 4(h) of the Constitutive Act, the political will requirement must be fulfilled, and funds and adequately trained personnel to carry out future missions must be available.<sup>99</sup> In contextualizing the political will requirement, Kioko notes that the African Standby Force, which plays a critical role in the AU's exercise of the right to intervene, operates at three possible levels: as an African Force under the AU; as a Regional Brigade at the level of a sub-regional mechanism for conflict prevention, management and resolution; and at the level of a lead nation intervening on behalf of the AU.<sup>100</sup> He argues therefore

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<sup>98</sup> See Art. 17 of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13.V.2004.

<sup>99</sup> Sarkin (n 88 above) 380.

<sup>100</sup> Kioko (n 77 above) 823-824.

that any lack of political will on the part of the African leadership can negatively affect any or all three of these levels of political intervention.<sup>101</sup>

Contributions to the Peace Fund (discussed in Chapter 2) remain critical in the implementation of article 4(h) of the Constitutive Act. Adopting an optimistic view, Mwanasali argues that the commitment by the AU to the 'promotion of a stable, secure, peaceful and developed Africa', and the desire of African leaders 'to assume a greater role in the maintenance of peace and security in Africa' is not in doubt.<sup>102</sup> He bases this argument on the fact that,

African leaders have adopted Article 4(h) of the Constitutive Act, and created the [PSCAU] in 2004 as a standing decision[-]making organ, explicitly to facilitate timely and efficient responses to regional security threats. They have also adopted protocols and decisions to regulate the AU'S efforts in this field with the support of other members of the international community.<sup>103</sup>

While the Rwanda genocide remains an indictment of Africa, it is hoped that history will not repeat itself during a time when the AU has in place, arguably, a forward-looking peace and security regime. If a situation calls upon the AU to exercise its right to intervene in a member state, then, such a right must, without any delay, come into operation for the sake of restoring peace and security. In this respect, the record within the AU is not positive, with the Union being either very slow to intervene in cases of human rights violation by member states (as in Zimbabwe,<sup>104</sup> Cote d'Ivoire and Libya),

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<sup>101</sup> As above 824.

<sup>102</sup> Mwanasali (n 18 above) 395.

<sup>103</sup> As above.

<sup>104</sup> Zimbabwe was one of the States that questioned the whole idea of the responsibility to protect. In a Statement by Zimbabwe's President Robert Mugabe to the High-Level Plenary Meeting of the UN General Assembly, New York, 14 September 2005, the notion of the responsibility to protect was criticized on the basis that 'the vision...for a future United Nations should not be filled with vague concepts that provide an opportunity for those states that seek to interfere in the internal affairs of other states.' On those States that were opposed to the idea of the responsibility to protect see Mwanasali (n 18 above) 392-393.

or else unable to effectively address gross violations of human rights within grave circumstances, as in Darfur, Sudan.

In the case of the Darfur crisis, by establishing the African Union Mission in Sudan (AMIS), the AU applied the responsibility to protect, based on the principle of intervention under article 4(h) of the Constitutive Act, but not invoking the provision explicitly.<sup>105</sup> Originally founded in 2004, with a force of 150 troops, AMIS was a peacekeeping force operating primarily in Darfur. By mid-2005, its numbers were increased to about 7,000. Despite the AU's intervention, the peacekeeping mission was not able to contain the violence in Darfur. This is significant in understanding the practical application of the responsibility to protect within the African context as championed by the AU. No doubt, many lessons were learnt by the AU through this intervention, one of these being the need for a strong peace and security architecture in Africa, which has the capacity to deal with grave circumstances such those in Darfur.

In Darfur, the AU's responsibility to protect was complemented by the UN. For instance, through UN Security Council (UNSC) Resolution 1706, the Security Council requested that the secretary-general 'take the necessary steps to strengthen AMIS through the use of existing and additional United Nations operation in Darfur'.<sup>106</sup> Through the UNSC Resolution 1769, on 31 July 2007, the Security Council authorised and mandated 'the establishment, for an initial period of 12 months, of an AU/UN Hybrid operation in Darfur (UNAMID)'. According to the Resolution 1769, UNAMID

shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS, and shall consist of up to 19, 555 military personnel, including 360 military observers and liaison officers, and an appropriate civilian component including up to 3, 772 police personnel and 19 formed police units comprising of up to 140 personnel each.<sup>107</sup>

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<sup>105</sup> See website on the situation in the Darfur region of the Sudan <http://www.africa-union.org/DARFUR/homedar.htm> (Accessed 30 March 2010).

<sup>106</sup> UN Security Council 2006. Resolution 1706 (2006), S/RES/1706 (2006), 31 August 2006.

<sup>107</sup> UNSC Resolution 1769 (2007), S/RES/1769 (2007), 31 July 2007.

The mandate of UNAMID was subsequently extended for a further 12 months, to 31 July 2009, through UNSC Resolution 1828 (2008),<sup>108</sup> and for a further 12 months to 31 July 2010, through UNSC Resolution 1881 (2009).<sup>109</sup>

It is not every time that the UN will complement the efforts of the AU in exercising the responsibility to protect. Nevertheless, the AU must be proactive in ensuring its application with the tools at its disposal. The responsibility to protect, therefore, should be applied objectively and its application must be guided by carefully assessing the existence of grave circumstances, namely war crimes, genocide and crimes against humanity as provided for under article 4(h) of the Constitutive Act. By word of caution, Fombad notes that with the existence of article 4(h) of the Constitutive Act

there should be no excuse for inaction by the AU, but, as we shall soon see, the ongoing atrocities of the Sudanese government acting through its proxies, the Janjaweed militias, show that fine words on their own will not solve any problem: what is needed is concerted political will.<sup>110</sup>

In the spirit of accountability and transparency, the African Union must as a matter of principle, give an explanation for any inaction relating to a situation that *prima facie* points to the existence of grave circumstances.

### **3.3.2 REQUEST FOR INTERVENTION: ARTICLE 4(J)**

The responsibility to protect can also be effected by a member state requesting the AU to intervene in order to restore peace and security in accordance with article 4(j) of the Constitutive Act. In this case, the importance of the decision by the AU to intervene cannot be over emphasised. The advice of the Peace and Security Council is also important in this regard, since it seeks to enable the Assembly to make informed

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<sup>108</sup> UNSC Resolution 1828 (2008), S/RES/1828 (2008), 31 July 2008.

<sup>109</sup> UNSC Resolution 1881 (2009), S/RES/1881 (2009), 6 August 2009.

<sup>110</sup> Charles, Manga Fombad, 'The African Union, Democracy and Good Governance' in Melber, Henning, (ed.) *AU, NEPAD and the APRM: Democratisation Efforts Explored Current African Issues* No. 32, Nordiska Afrikainstitutet (Nordic African Institute), Uppsala (2006) 21.

decisions on whether or not to intervene in a particular member state. From the above, it can be observed that not only does the AU exercise its responsibility to protect on its own volition but it is also prompted to act by its member states. It is however not clear if the AU can be compelled by the citizens in their individual capacity or through representation by the civil society to fulfil its responsibility to protect. Having observed that the AU is not in support of its own member states' leadership being subjected to international court proceedings, it is doubtful whether such intervention can be undertaken in the case where an African leader is responsible for perpetrating violations of human rights, including the right to peace and security.

In an attempt to clarify the need to transform the 'right to intervene' into a 'responsibility to protect', Evans and Sahnoun state the following:

If the international community is to respond to this challenge, the whole debate must be turned on its head. The issue must be reframed not as an argument about the 'right to intervene' but about the 'responsibility to protect.' And it has to be accepted that although this responsibility is owed by all sovereign states to their own citizens in the first instance, it must be picked up by the international community if that first-tier responsibility is abdicated, or if it cannot be exercised.<sup>111</sup>

An important point raised by Evans and Sahnoun, is that if this alternative language were to be used, the change in terminology (from 'intervention' to 'protection') would avoid the language of 'humanitarian intervention'.<sup>112</sup>

According to Evans and Sahnoun the application of 'the responsibility to protect' rather than 'the right to intervene' has three big spin-offs. Firstly, it implies an evaluation of the issues from the point of view of those needing support, as opposed to those who may be considering intervention. Secondly, it implies that the state concerned bears the primary responsibility to protect its citizens from violation of human rights. Thirdly, as an umbrella concept (i.e. the 'responsibility to protect'), it embraces other responsibilities of 'reacting', 'preventing' and 'rebuilding'.<sup>113</sup> What is of paramount importance is the fact

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<sup>111</sup> Evans and Sahnoun (n 33 above).

<sup>112</sup> As above.

that the responsibility to protect at the international level is triggered by a state's inability or unwillingness to fulfil its primary responsibility to protect, or is itself the perpetrator.

Evans and Sahnoun argue that 'even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people'.<sup>114</sup> They argue that it is now commonly acknowledged that sovereignty represents a two-pronged responsibility, namely external responsibility, wherein states are responsible for respecting the sovereignty of other states, and internal responsibility, wherein states are responsible for respecting the dignity and basic rights of all the peoples within its territory.<sup>115</sup>

The dual responsibility which sovereignty implies is now understood within the contemporary human rights discourse. The culture of impunity and indifference is the antithesis of sovereignty. The absence of this dual responsibility has allowed certain African states to turn a blind eye to gross human rights violations within their territories, which has brought about untold suffering to African people.

At face value, the right of the AU to intervene in a member state seems to be in conflict with the principle of non-interference under articles 4(g) of the Constitutive Act and 4(f) of the PSCAU Protocol, thus, arguably, impeding the responsibility to protect at the AU level. Article 4(f) of the PSCAU Protocol provides for the principle of non-interference by any member state (and not the AU) in the internal affairs of another and the Constitutive Act provides for the same principle of guiding the workings of the Peace and Security Council. What is noteworthy is that both the Constitutive Act and the PSCAU Protocol do not preclude the AU, as a continental body responsible for peace and security in Africa, from exercising the right to intervene. The reading of these instruments suggests that no AU member state may interfere in the internal affairs of another member state but may intervene through the AU which has a right to do so in terms of the Constitutive Act. It is unfortunate, however, that these instruments do not

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<sup>113</sup> As above.

<sup>114</sup> As above 3.

<sup>115</sup> As above.



define the terms 'interfere' and 'intervene', which, while generally meaning one and the same thing, may in fact mean different things, conceptually speaking.

Over and above the responsibility to protect, the AU's right to intervene in a member state also operationalizes the right of all peoples to peace and security under article 23(1) of the African Charter and the right of member states to live in peace and security under article 4(1) of the Constitutive Act. What remains a problem with this right is its content and extent. As rightly pointed out by Parker and Rukare, the Constitutive Act is not clear on whether the definition of intervention is to be limited to the use of force or viewed broadly as including mediation, peace keeping missions, sanctions and any other non-forcible measures.<sup>116</sup> Based on the fact that article 13(2) of the PSCAU Protocol envisages the establishment of an African Standby Force, Baimu and Sturman prefer to confine such intervention to one by means of military force.<sup>117</sup>

In support of the above assertion by Baimu and Sturman, Kindiki is of the view that considering the fact that the intervention under article 4(h) of the Constitutive Act will entail responding to 'grave circumstances', which include war crimes, genocide and crimes against humanity, the presumption is that the intervention will be by use of armed force because only proportional use of armed force is likely to address these 'grave circumstances'.<sup>118</sup> According to Kuwali, given that the AU's right to intervene is statutory, (as provided by article 4(h) of the Constitutive Act), and not humanitarian in the strict sense, it therefore follows that the use of force ought to be used on condition that consent is given by the AU member states and that the purpose of the use of force is to prevent or stop war crimes, genocide and crimes against humanity.<sup>119</sup>

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<sup>116</sup> Packer & Rukare (n 94 above) 372.

<sup>117</sup> Baimu & K Sturman (n 81 above).

<sup>118</sup> Kindiki (n 96 above) 107.

<sup>119</sup> Daniel Kuwali, *Persuasive Prevention: Implementation of the AU Right of Intervention* (Published PhD thesis, Faculty of Law, Lund University, 2009) 212.

Packer and Rukare,<sup>120</sup> however, do concede that this right to intervene may also involve non-forcible measures such as mediation, peacekeeping missions, sanctions or any other measures. This viewpoint is informed by the AU's principles of peaceful resolution of conflicts between member states;<sup>121</sup> prohibition of the use or threat of force among member states;<sup>122</sup> peaceful coexistence of member states and the right to live in peace and security;<sup>123</sup> and respect for the sanctity of human life and condemnation and rejection of impunity, political assassination, acts of terrorism, and subversive activities.<sup>124</sup>

This study adopts the view that the right of the AU to 'intervene' in a member state encompasses both forcible and non-forcible measures depending on the nature of the threat to peace and security. The question would be what is deemed to be 'the best cause of action' in the circumstances as recommended by the chairperson of the AU Commission under article 12(5) of the PSCAU Protocol. The circumstances prevailing in the member state would therefore inform the nature of the intervention strategy, whether forcible or otherwise. The main objective of such intervention, however it is shaped, is to ensure that the responsibility to protect is achieved in order to afford protection, especially to the most vulnerable groups who suffer in the hands of the AU's member states. This view is further supported by the *Ezulwini Consensus* which gives an allowance to the approval for intervention (which may comprise the use of force) by the UN Security Council after the fact.<sup>125</sup>

Another point, which is closely linked to the risk of inaction by the AU, is that a difference of opinion between the Assembly and the Peace and Security Council is

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<sup>120</sup> Packer and Rukare (n 94 above) 372.

<sup>121</sup> Art. 4(e) of the Constitutive Act.

<sup>122</sup> Art. 4(f) of the Constitutive Act.

<sup>123</sup> Art. 4(i) of the Constitutive Act.

<sup>124</sup> Art. 4(o) of the Constitutive Act.

<sup>125</sup> See also Mwanasali (n 18 above) 404.

bound to occur especially when a decision arises as to whether or not the AU should intervene in a particular member state. However, the Assembly has the final word on the matter. Assume the Peace and Security Council determines that a situation represents a 'threat to legitimate order' and duly reports to the Assembly with the backing of the institutions closely working with it, such as the African Commission. If the Assembly assesses such a situation differently, tension would be inevitable between these organs, resulting in the peace and security framework being jeopardized, and the responsibility to protect being compromised.

### **3.3.3 PROHIBITING UNCONSTITUTIONAL CHANGES OF GOVERNMENT**

Unconstitutional changes of governments remain a threat to Africa's peace and security, while unconstitutional governments breed violations of human rights. During its 164<sup>th</sup> and 165<sup>th</sup> meetings, the Peace and Security Council condemned the *coup d'état* in the Republic of Guinea which took place on 24 December 2008.<sup>126</sup> The Peace and Security Council stated in no uncertain terms that the *coup* was a flagrant violation of the Constitution of Guinea and other relevant AU instruments. As a result of the *coup*, the Council decided to suspend the participation of Guinea in the activities of the AU until the return to constitutional order in accordance with the relevant provisions of the AU Constitutive Act and the Lomé Declaration of July 2000 on unconstitutional changes of Government.<sup>127</sup>

Despite receiving the negative reports of Southern African Development Community, the African Union and the Pan-African Parliament, observers of the Zimbabwean presidential run-off election held on 27 June 2008,<sup>128</sup> the AU recognized Mr Robert

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<sup>126</sup> See Communiqué, Peace and Security Council 165<sup>th</sup> Meeting, 29 December 2008, Addis Ababa, Ethiopia. PSC/PR/Comm (CLXV).

<sup>127</sup> As above.

<sup>128</sup> See for instance, the Report of the Pan African Parliament Election Observer Mission. PAP/S/RPT/76/08. Available at [www.pan-africanparliament.org/Controls/Documents.aspx?DID=1029](http://www.pan-africanparliament.org/Controls/Documents.aspx?DID=1029) (Accessed 12 April 2010).

Mugabe as the president of Zimbabwe in contravention of the principle under article 4(p) of the Constitutive Act on the condemnation and rejection of unconstitutional changes of governments. The AU instead, supported the call for the creation of a government of national unity, by implication legitimising Mugabe's illegal presidency.<sup>129</sup> The AU further issued a stern warning, while appealing to states and state parties concerned to refrain from any action that may negatively impact on the climate of dialogue. As regards the states' 'interference' in Zimbabwean affairs, the AU's message was loud and clear: no AU member states had the right to interfere in the internal affairs of another member state. This approach is, with respect, counter-productive in effecting the responsibility to protect by the AU.

Article 4(p) of the Constitutive Act clearly condemns and rejects unconstitutional changes of government. A punitive measure found in the Constitutive Act against unconstitutional governments is that they shall not be allowed to participate in the activities of the Union.<sup>130</sup> In terms of article 5(2)(g) of the PSCAU Protocol one criterion used in electing members of the Peace and Security Council is respect for constitutional governance in accordance with the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). Among other things, the Peace and Security Council is empowered under article 7(g) of the PSCAU Protocol to institute sanctions whenever an unconstitutional change of government takes place in a member state, as provided for in the Lomé Declaration. The problem with sanctions (no matter what form they take) is that they tend to impact negatively upon civilian populations. Article 7(g) of the PSCAU Protocol empowers the Peace and Security Council to institute sanctions, and Rule 36(c) of the Rules of Procedure of the Executive Council of the AU empowers the Executive Council to apply sanctions imposed by the AU Assembly in respect of unconstitutional changes of government, as specified in Rules 35, 36, and 37 of the Rules of Procedure of the AU Assembly.

The problem of unconstitutional changes of government remains one of the challenging issues facing the African Union. Following the unconstitutional change of government that occurred in Madagascar on 17 March 2009, the Peace and Security Council held

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<sup>129</sup> See Resolution on Zimbabwe (Assembly/AU/Res.1 (XI)).

<sup>130</sup> Art. 30 of the Constitutive Act.

several meetings,<sup>131</sup> wherein it strongly condemned this action and subsequently decided to suspend the country from participation in AU activities, in conformity with the Lomé Declaration and the AU Constitutive Act.<sup>132</sup> During its 216<sup>th</sup> meeting held on 19 February 2010, the Council issued a communiqué<sup>133</sup> condemning the 18 February 2010 seizure of power by force in Niger. Among other things, the PSC decided to suspend Niger's participation in all AU activities until the constitutional order was restored to the way it had been before the referendum of 4 August 2009.

The question posed here is whether the AU has a right to intervene in the circumstances given under article 4(h) of the Constitutive Act read together with article 4(j) of the PSCAU Protocol. The underlying principle behind the AU's right to intervene is to restore peace and security. While it remains a problem to define the intended meaning of the term that is likely to feature in article 4(h) of the Constitutive Act, that is, 'serious threat to legitimate order', it would seem that unconstitutional changes of government are classic cases of serious threats to legitimate order.

It is noteworthy, however, that not all unconstitutional changes of government present serious threats to legitimate order. Assuming a democratically elected government becomes autocratic during its tenure and that one way of remedying the situation is to stage a *coup d'état*, the question then becomes whether the AU would be justified in intervening in such circumstances. The answer then hinges on whether such an unconstitutional change of government threatens peace and security, in which case the AU would be justified in intervening in the member state concerned.

Linked to this issue is the question of whether the AU has a right to intervene to keep a regime, democratic or not, in power. In answering this, careful scrutiny of the nature of

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<sup>131</sup> The meetings took place as follows: 16 March 2009 (179th meeting), 17 March 2009 (180th meeting), 20 March 2009 (181<sup>st</sup> meeting), 21 August 2009 (200th meeting), 10 September 2009 (202nd meeting), 9 November 2009 (208<sup>th</sup> meeting) and 7 December 2009 (211th meeting).

<sup>132</sup> See the Report of the Chairperson of the Commission on the Situation in Madagascar. Peace and Security 216<sup>th</sup> Meeting of the Peace and Security Council. 19 February 2010. Addis Ababa. PSC/PR/2(CCXVI).

<sup>133</sup> Communiqué of the 216<sup>th</sup> Meeting of the Peace and Security Council. 19 February 2010. Addis Ababa. PSC/PR/COMM.2(CCXVI).

the government in power is needed. According to Kioko, 'intervening to keep in power a regime that practices bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the standards that the [AU] has set for itself'.<sup>134</sup> The fact that the AU will not intervene to keep an unconstitutional regime in power has been illustrated in Libya. In the face of mass rebellion against the ruling regime the AU did not intervene but simply underscored its 'conviction that only a political solution will make it possible to fulfil the legitimate aspirations of the Libyan people and preserve the unity and territorial integrity of the country'.<sup>135</sup>

While the Constitutive Act deals with unconstitutional changes of government, it is silent on the unconstitutional perpetuation of government. This has become a disturbing trend in which a number of African leaders have remained in power though elections that are deemed not to be free and fair. The AU has made an attempt to address the problem of both unconstitutional government and unconstitutional continuation of government through the African Charter on Democracy, Elections and Governance, which was adopted by the AU member states on 30 January 2007.<sup>136</sup>

The Charter, which forms one of the foundational policy pronouncements for the African Governance Architecture,<sup>137</sup> prohibits, rejects and condemns unconstitutional change of government in any member state as a serious threat to stability, peace,

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<sup>134</sup> Kioko (n 77 above) 816.

<sup>135</sup> Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa Doc. Assembly/AU/4(XVII). P. 7, Para. 27. Assembly/AU/Dec. 369(XVII).

<sup>136</sup> Adopted by the 8<sup>th</sup> Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007. Available at [http://www.au.int/en/sites/default/files/AFRICAN\\_CHARTER\\_ON\\_DEMOCRACY\\_ELECTIONS\\_AND\\_GOVERNANCE.pdf](http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf) (Accessed 29 March 2011). For a discussion on the African Charter on Democracy, Elections and Governance in Africa, see Abass (n 60 above) 277-282.

<sup>137</sup> See the Decision of the 15th Ordinary Summit of the Assembly of Heads of State and Government of the African Union (Assembly/AU/Dec.304 (XV)).

security and development.<sup>138</sup> It also promotes adherence, by each member state, to the universal values and principles of democracy and respect for human rights. Despite the fact that the Charter was adopted in 2007, as of October 2011 it had not come yet into force.<sup>139</sup> At the time of writing, out of the 53 member states of the AU, only 10 had ratified the Charter. The number of ratification instruments required to bring the Charter into force is 15. Whether or not the Charter will be effective in addressing the problem of unconstitutional changes of government, only time will tell. It is hoped that the Charter will be effective in promoting good governance, popular participation, the rule of law and human rights in Africa.

### 3.4 CONCLUSION

This chapter has discussed the African Union as a contributor to peace and security through exercising its responsibility to protect human rights within the African continent. The question is whether 'the story of our human factory on the continent'<sup>140</sup> can be reversed through the various structural arrangements within the AU. While the principle of the responsibility to protect remains controversial, the AU has taken the lead in embedding it within article 4(h) of the Constitutive Act. This is significant in addressing peace and security on a continent that has been described as 'the most threatened of all the other continents'.<sup>141</sup>

The new faces of international security in the 21<sup>st</sup> century require much more emphasis on the responsibility to protect, especially in Africa. The three-dimensional definition of the responsibility to protect introduces a powerful tool for the AU in addressing the continent's challenges. It is a responsibility that builds a solid bridge between human rights and international security. This chapter highlighted the fact that the responsibility to protect incorporates the responsibility to prevent, the responsibility to rebuild and the

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<sup>138</sup> Art. 2(4) of the African Charter on Democracy, Elections and Governance.

<sup>139</sup> Art 2(1) of the African Charter on Democracy, Elections and Governance.

<sup>140</sup> Soyika (n 12 above).

<sup>141</sup> Arthur P. Mutharika, 'The Role of the United Nations Security Council in African Peace Management: Some Proposals' (1996) *17 Mich.J.int'l L.* 561.

responsibility to react. Whether these associated responsibilities can be assumed in practice in Africa remains a question. It would seem that the AU has not yet achieved enough, considering the serious human rights violations and insecurity that engulfs the continent.

The conflicts and unconstitutional changes of government in Africa require that the responsibility to protect be enforced by the AU. The fact that article 4(h) of the Constitutive Act has already been applied in a number of African states points to the fact that the AU is at least embracing the responsibility to protect. There is no doubt that more robust debate on the responsibility to protect *vis-à-vis* the principle of intervention is still required in Africa. As a matter of fact, the Peace and Security Council has a critical role to play in addressing conflicts in Africa. As Kioko argues, '[i]t should be borne in mind that the Peace and Security Council was intended, and should be able, to revolutionize the way conflicts are addressed on the continent'.<sup>142</sup>

Summarising the African story, Jones sees the continent as having many challenges and much hope.<sup>143</sup> While the AU offers some hope in addressing some of the Africa's many challenges, it is also faced with structural challenges, which include the fact that some member states are not prepared to ensure that human rights are respected, protected, promoted and fulfilled. This is a major challenge that not only frustrates sustainable development but also undermines human security. Article 4(h) of the Constitutive Act offers some hope, which AU member states should take advantage of.

That Africa generally remains a continent of perpetual suffering resulting from the African states' inability to promote, protect and respect human rights is not in dispute. It was almost a decade ago that Tony Blair, in his most defining moment as British prime minister, declared: '[t]he state of Africa is a scar on the conscience of the world'.<sup>144</sup> Unfortunately, this still remains a reality, especially in so far as implementing the responsibility to protect within the continent is concerned. But is there any hope that a scar on the conscience of Africa itself can begin to heal? Adopting a more optimistic

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<sup>142</sup> Kioko (n 77 above) 817.

<sup>143</sup> See Thomas Jones 'Africa: Many, Challenges, Much Hope' (1995) 89 *Am. Soc'y Int'l L. Proc.* 484.

<sup>144</sup> The speech was given to the Labour Party conference in October 2001.



approach, the AU has what it takes to ensure that the responsibility to protect is effectively upheld and implemented in grave circumstances, such as war crimes, genocide and crimes against humanity, in order to uphold the responsibility to protect.

## CHAPTER 4: RELATIONSHIP WITH UN SECURITY COUNCIL

### 4.1 INTRODUCTION

This chapter seeks to answer the following question: *Based on article 17 of the PSCAU Protocol, which requires the Peace and Security Council to cooperate and work closely with the UN Security Council, to what extent can the relationship between these two institutions effectively contribute to peace, security and stability in Africa.* As discussed in Chapter 2, the Peace and Security Council has a short history, having been in existence less than a decade. This has not prevented the Council from making inroads in terms of addressing peace, security and stability issues in Africa. Despite the fact that the Council was established largely because of the failure of the UN system to address African conflicts, the drafters of the PSCAU Protocol provided for cooperation between the Peace and Security Council and the UN Security Council.

At the time that the Council was established, there was already in place at the international level the well-established UN Security Council, set up under the UN Charter, with the primary responsibility of maintaining international peace and security.<sup>1</sup> The UN Security Council is, together with the UN General Assembly and the Office of the Secretary-General (Secretariat), charged with the task of taking 'effective collective measures for the prevention and removal of threats to peace'.<sup>2</sup> The Security Council operates under the auspices of the UN, whose main purpose is the maintenance of peace and security.

Underscoring the need for the maintenance of peace and security, the former UN secretary-general noted:

there is no higher goal, no deeper commitment and no greater ambition than preventing armed conflict. The main short- and medium-term strategies for preventing non-violent conflicts from escalating into war, and preventing earlier

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<sup>1</sup> Art. 24 of the UN Charter.

<sup>2</sup> Art. 1(1) of the UN Charter.

wars from erupting again, are preventive diplomacy, preventive deployment and preventive disarmament.<sup>3</sup>

Ensuring peace and human security is, therefore, in the broadest sense, the cardinal mission of the United Nations. This is particularly relevant in Africa, given the plethora of challenges it faces, especially in the sphere of human security, as broadly defined. According to article 1 of the UN Charter, one of the purposes of the UN is

to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The PSCAU Protocol makes reference to the UN Security Council, particularly on the 'provisions of the Charter of the United Nations, conferring on the [UN] Security Council primary responsibility for the maintenance of international peace and security'.<sup>4</sup> This acknowledgement by the PSCAU Protocol is important, especially when it comes to the exercise of the Peace and Security Council's mandate. The Council, therefore, cannot claim to have the primary responsibility for the maintenance of peace and security in Africa as the UN Security Council has this mandate. The PSCAU Protocol further underscores the 'need to forge closer cooperation and partnership between the United Nations ... and the African Union, in the promotion and maintenance of peace, security and stability in Africa'.<sup>5</sup>

According to the Statement of Commitment to Peace and Security in Africa, the heads of state and government of the member states of the Peace and Security Council, stated

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<sup>3</sup> See Report of the Secretary-General on the work of the Organization, para. 36. General Assembly Official Records, 54<sup>th</sup> Session, Supplement No. 1 (A/54/1) <<http://www.un.org/Docs/SG/Report99/intro99.htm>> (Accessed 4 January 2006).

<sup>4</sup> Para 5 of the preamble to the PSCAU Protocol.

<sup>5</sup> As above.

We shall continue to strengthen our close working relations with the United Nations Security Council, bearing in mind that the UN Security Council has the primary responsibility for the maintenance of global peace and security, and Africa is part of that international community.<sup>6</sup>

In support of this statement, article 7(1)(k) of the PSCAU Protocol provides that the Peace and Security Council is given the task of promoting and developing ‘a strong partnership for peace and security’ between the AU and the UN and its agencies, as well as with other relevant international organizations. This relationship is confined to the African Union and the United Nations and does not necessarily include the Peace and Security Council and the UN Security Council. In some instances a broad generalization of the relationship between the AU and the UN is assumed to involve the relationship between the Peace and Security Council and the UN Security Council. Despite some overlaps, as we shall see in this chapter, this broad generalization does not hold where specific organs, such as the Peace and Security Council and the UN Security Council, are involved.

It is not the first time that an African mechanism has been mandated to have a relationship with the United Nations. This innovation dates back to the OAU era. For example, the OAU Mechanism for Conflict Prevention, Management and Resolution was mandated to seek the assistance of the UN and the international community in general ‘in the event that conflicts degenerate to the extent of requiring collective international intervention and policing’.<sup>7</sup> This is an indication that the OAU was not able to address the peace and security challenges without joining forces with a more advanced, experienced and better resourced international organization such as the UN.

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<sup>6</sup> Para 13 of the Statement of Commitment to Peace and Security in Africa Issued by the Heads of State and Government of the Member States of the Peace and Security Council of the African Union. Solemn Launching of the Peace and Security Council 25 May 2004, Addis Ababa, Ethiopia. PSC/AHG/ST.(X).

<sup>7</sup> Solomon Gomes, ‘The Peacemaking Role of the OAU and the AU: A Comparative Analysis’ in Akokpari *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 121.

Gomes<sup>8</sup> outlines some of the innovative means adopted by the OAU and the UN to address conflict situations in Africa as follows: the first preventive peacekeeping deployment in Africa in the Central African Republic; the UN co-deployment with regional and sub-regional organizations in Liberia and Sierra Leone – UN military observers were deployed alongside the troops of the Economic Community of West African States Ceasefire Monitoring Group (ECOMOG) working together in the implementation of the peace agreement; the UN Support for Togo's mediation efforts over Bakassi Peninsula; the appointment in 1997 of a Joint UN/OAU Special Representative for the Great Lakes sub-region; and the establishment of a UN Liaison Office in Addis Ababa, Ethiopia, to liaise with the OAU on issues relating to conflict management and resolution.

Based on the collaboration between the UN and the OAU, as described above, the context in which the Peace and Security Council is mandated to forge links with the UN is one that is a continuation of what existed prior to its establishment, that is, during the time of the OAU. This continuity was important for the new AU organ, which had so to speak to 'think on its feet' in terms of addressing the various conflicts undermining peace, security and stability.

This chapter discusses the relationship between the Peace and Security Council and the UN Security Council. First, it discusses this relationship as a *sine qua non* for the fulfilment of the mandate of the Council. Second, it discusses the historical role of the UN Security Council in promoting peace and security in Africa. Third, it analyses the envisaged cooperation and the close working relationship between the Peace and Security Council and the UN Security Council. This includes a discussion on the issue of financial, logistical and military support of the UN towards peace efforts in Africa. Fourth, the chapter considers the question of whether the Peace and Security Council is a regional arrangement or an agency in terms of the UN Charter. Fifth, it discusses the provision on the PSCAU's recourse to the UN for financial, logistical and military support. Sixth, the chapter discusses and recommends how the Council should maintain a close and continued interaction with the UN Security Council. Seventh, it discusses the relationship between the Peace and Security Council and the UN Security Council, particularly on the exercise of the use of force. Eighth, the chapter discusses the

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<sup>8</sup> As above 122.

challenges in the relationship between the Peace and Security Council and the UN Security Council. Lastly, a conclusion is drawn.

#### 4.2 FULFILMENT OF PSCAU MANDATE

Murithi argues that the impetus for adopting a new paradigm in the promotion of peace and security in Africa emerged in the wake of the Rwanda tragedy wherein both the UN and the OAU failed to prevent the genocide.<sup>9</sup> To this effect, the OAU and the UN issued reports acknowledging their failures.<sup>10</sup> In fulfilling its mandate, the Peace and Security Council was to ensure that past failures, such as that of the Rwanda genocide, would never be repeated. It is within this context that the Council's mandate should be understood.

According to article 17(1) of the PSCAU Protocol, one of the requirements for the fulfilment of the mandate of the Council is to 'cooperate and work closely with the [UN Security Council], which has the primary responsibility for the maintenance of international peace and security'. This collaboration extends beyond the UN Security Council to other relevant UN Agencies involved in the promotion of peace, security and stability in Africa.<sup>11</sup> As already alluded to above, this chapter is mainly focussed on the relationship between the Peace and Security Council and the UN Security Council.

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<sup>9</sup> Tim Murithi, 'The Evolving Role of the African Union Peace Operations: The AU Mission in Burundi, Darfur, and Somalia' *Africa Security Review*, Vol.17, No.1, (March 2008) 73. It is for this reason that in terms of art. 7(e) of the PSCAU, the PSCAU can recommend to the Assembly of Heads of State intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity, as defined in relevant conventions and instruments.

<sup>10</sup> See OAU (2000) *Rwanda: The Preventable Genocide. Report by an International Panel of Eminent Personalities*. Addis Ababa: OAU. See also UN (United Nations) 1999. Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda. New York: UN.

<sup>11</sup> Art. 17(1) of the PSCAU Protocol.

What is of importance is that the envisaged relationship has two components. Firstly, it must be one of cooperation and secondly it must be a close working relationship. These relationship components apply only in respect of the role played by the Peace and Security Council in the promotion of peace and security, which also happens to be an objective of the AU. In this study, the terms 'cooperation' and 'working closely', although they are closely related, are clearly distinguishable from one another. If these words were meant to mean the same thing, then the drafters of the article would not have included both of them.

This relationship between the Peace and Security Council and the UN Security Council, however, must not be confused with that between the mother body AU and the UN in addressing peace and security in Africa which operates at an institutional level. By contrast, the primary focus of the relationship between the Peace and Security Council and UN Security Council is at the level of the organs within the institutions. As highlighted in the literature review, many commentators confuse the relationship between the PSC and the UN Security Council with the one between the AU and the UN. While both organs are part of international organizations (the UN and the AU), they are not in themselves international organizations. The distinction here is that the relationship between the AU and the UN is at a more general level and the one between the Peace and Security Council and the UN Security Council is at a very particular level, albeit that the two levels are interdependent.

The question that could be posed is what exactly could have triggered this particularization. The Constitutive Act provides that one of the objectives of the AU is to encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>12</sup> It further provides that another objective of the AU is to promote peace, security, and stability on the continent.<sup>13</sup> When one reads the articles of the Constitutive Act together with article 7(1)(k) of the PSCAU Protocol, it is clear that 'international cooperation' also includes the general relations between the AU and the UN. The PSCAU Protocol, however, does not end there. The significance of the relationship between the Peace and Security

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<sup>12</sup> Art. 3(e) of the Constitutive Act.

<sup>13</sup> Art. 3(f) of the Constitutive Act.

Council and the UN Security Council cannot be overemphasized. In analysing this relationship it is critical to consider the role of the UN Security Council as a 'principal organ of the UN', which has a 'primary responsibility' to maintain international peace and security, in the promotion of peace and security in Africa.

In most of the communiqués of the Peace and Security Council, there is a lot of emphasis on cooperation between the AU and the UN, and not necessarily on the Council and its UN counterpart, the UN Security Council. For instance, the PSCAU recalled the communiqué of its 68<sup>th</sup> meeting held on 14 December 2006 and the outcome of its 98<sup>th</sup> meeting held on 8 November 2007, relating to the cooperation between the AU and the UN in peace-building and post-conflict reconstruction and development.<sup>14</sup> It is clear that in some instances the relationship must be pitched at a more general level, while in others, emphasis must be placed on the specific organs in terms of cooperation.

#### **4.3 MAINTAINING PEACE AND SECURITY – ROLE OF UN SECURITY COUNCIL**

As mentioned above, the UN Security Council is the principal organ of the UN with the primary responsibility for peace and security. The UNSC consists of 15 member states, five of which are permanent (China, France, Russia, the United Kingdom, and the United States). These five permanent members (also known as 'P-5') possess a veto power with respect to all UN Security Council decisions on non-procedural matters. Dugard argues that all the permanent members have invoked this veto when they are of the view that their own interests are to be threatened, thus undermining the UNSC's effectiveness.<sup>15</sup> Member states of the UN confer on the UN Security Council 'primary responsibility' to maintain international peace and security, and agree to 'accept and carry out' the UN Security Council's decisions in accordance with the UN Charter. In

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<sup>14</sup> See Press Statement. Peace and Security Council 114<sup>th</sup> Meeting 10 March 2008, Addis Ababa, Ethiopia. PSC/PR/BR(CXIV).

<sup>15</sup> John Dugard, *International Law: A South African Perspective* (3<sup>rd</sup> edition, Juta & Co Kenwyn Cape Town, 2005) 399.



other words, the UNSC is empowered to take decisions binding upon all member states of the UN.<sup>16</sup> All member states of the AU are also member states of the UN.

Mingst and Karns argue that the UN Security Council was deliberately designed to be small in order to facilitate swifter and more efficient decision-making in dealing with threats to international peace and security.<sup>17</sup> This rationale no longer holds, due to the fact that a swifter and more efficient decision-making process is sometimes stifled by the politics which frustrate intended measures aimed at adequately dealing with threats to international peace and security.

Through the establishment of the Peace and Security Council, it would seem that in respect of the party states to the PSCAU Protocol (which are also member states of the UN), the 'primary responsibility' of the UN Security Council to maintain international peace has been curtailed in so far as it applies to Africa. This is because the Peace and Security Council is conferred (by the state parties to the PSCAU Protocol) with the responsibility of being a 'standing decision-making organ for the prevention, management and resolution of conflicts'.<sup>18</sup> In addition to this responsibility, the Council is responsible for the promotion of peace security and stability in Africa, among other things.<sup>19</sup> It would seem that the Peace and Security Council of the AU is intended to be an extension of the UN Security Council in so far as peace and security is concerned in Africa. Most importantly, in anticipating and preventing conflicts, the Peace and Security Council is given 'the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts'.<sup>20</sup> Again this responsibility makes the Council the most relevant organ mandated to deal with these issues in Africa. It may also be argued that the PSC is aimed at complementing the work of the UN Security

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<sup>16</sup> As above.

<sup>17</sup> Karen A. Mingst & Margaret P. Karns, *The United Nations in the Post-Cold War* (2<sup>nd</sup> edition, Westview: Boulder, 2000) 26.

<sup>18</sup> Art. 1 of the PSCAU Protocol. These responsibilities have already been covered in chapter 2.

<sup>19</sup> Art. 3(a) of the PSCAU Protocol.

<sup>20</sup> Art. 3(b) of the PSCAU Protocol.

Council, as an organ with the primary responsibility for the maintenance of international peace and security.

Rosenne argues that the role of the UN Security Council is not that of an 'executive' organ with any direct responsibilities of the day-to-day activities of the UN, but that its role is limited to what is laid down in those provisions of the UN Charter that refer to it.<sup>21</sup> Accordingly, any member of the UN may bring to the attention of the UN Security Council a dispute or situation that is likely to endanger the maintenance of international peace.<sup>22</sup> The same principle applies in the case of a non-member state, provided that the non-member state is prepared to accept the obligations for pacific settlements provided for in the Charter, the General Assembly, and in the role of the secretary general.<sup>23</sup> The UN Security Council can act under Chapter VI of the UN Charter in order to achieve pacific settlements of any dispute, the continuance of which is likely to endanger the maintenance of international peace and security.<sup>24</sup> Further, the UN Security Council is empowered to investigate such disputes and recommend 'appropriate procedures or methods of adjustment'. What is of great importance is the UN Security Council's power, which goes beyond the making of recommendations under Chapter VII.<sup>25</sup> Accordingly, if the UN Council determines 'the existence of any threat to the peace, breach of the peace, or act of aggression', it can call all member states to apply sanctions of various kinds, including boycotts and embargoes,<sup>26</sup> or to take such military action 'as may be necessary to restore international peace and security'.<sup>27</sup>

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<sup>21</sup> Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2004) 419.

<sup>22</sup> Art. 35(1) of the UN Charter.

<sup>23</sup> See Arts. 35(2), 11(3), and 99 of the UN Charter, respectively.

<sup>24</sup> Arts. 33-38 of the UN Charter.

<sup>25</sup> Arts. 39-51 of the UN Charter.

<sup>26</sup> Art. 41 of the UN Charter.

<sup>27</sup> Art. 42 of the UN Charter.

According to Steiner, the powers conferred to the UN Security Council by articles 39-42 illustrate the 'initial conception of the [UN Security Council] as body not to be occupied with the conventional tasks of monitoring or criticism of States ... but rather to respond to emergency situations threatening international peace and security'.<sup>28</sup> He argues that while the UN Charter provisions do not confer on the UN Security Council any powers or functions specifically related to human rights, in effect human rights constitute a second-order consideration for the UN Security Council. This second-order consideration becomes relevant to its resolutions and exercise of power under articles 41 and 42 in so far as the actual or threatened violations of rights bear on the UN Security Council's responsibility to international peace and security.<sup>29</sup> Steiner further argues that

[w]hen acting under Chapter VII in ways that address human rights issues, the [UN Security Council] has described violations of rights as constituting a threat to international peace and security, and has characterised the action stemming from its decision as contributing to the maintenance or restoration of the peace.<sup>30</sup>

#### 4.4 PSCAU – REGIONAL ARRANGEMENT OR AGENCY?

On the relationship between the Peace and Security Council and the UN Security Council, an implied link between these organs can be found under Chapter VIII of the UN Charter, which deals with regional arrangements.<sup>31</sup> This link is, however, made through the African Union, of which the PSCAU is an organ. In terms of article 52(1) of the UN Charter, there is no preclusion to the existence of regional arrangements or agencies in order to deal with matters relating to the maintenance of international peace and security (as are appropriate for regional action). The only limitation (or condition)

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<sup>28</sup> Henry J. Steiner, 'International Protection of Human Rights' in Malcolm D. Evans, *International Law* (Oxford University Press, Oxford, 2004) 758-9.

<sup>29</sup> As above 759.

<sup>30</sup> As above.

<sup>31</sup> Arts. 52-54 of the UN Charter.

identified in this provision is that such regional arrangements or agencies and their activities must be 'consistent with the Purposes and Principles of the United Nations'.<sup>32</sup>

The question of whether the Peace and Security Council is a regional arrangement or an agency in accordance with the UN Charter is pertinent to the relationship between the PSCAU and the UN Security Council. It is clear that the AU can be defined as a regional arrangement or as an agency. In support of this assertion, Kioko argues that '[t]he African Union is classified by the United Nations as a regional organization within the meaning of Chapter VII of the Charter of the United Nations, whilst the regional mechanisms, such as ECOWAS, are recognized as sub-regional organizations'.<sup>33</sup> However, the answer to the above mentioned question is not clear-cut in so far as it relates to the Peace and Security Council. Hummer and Schweitzer argue that (at the time that they published their work 2002) the literature unanimously conferred the status of a regional agency upon only three international regional arrangements including the OAU,<sup>34</sup> which was later succeeded by the AU. The definition arrived at by Hummer and Schweitzer is that a regional arrangement or agency within the meaning of article 52 of the UN Charter

refers to a union of States or an international organization based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the UN, whose primary task is the maintenance of peace and security under the control and within the framework of the UN. Its members, whose number must be smaller than that of the UN, must be so closely linked in territorial terms that effective local dispute settlement by means of a specially provided procedure is possible.<sup>35</sup>

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<sup>32</sup> Art. 52(1) of the UN Charter.

<sup>33</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 820.

<sup>34</sup> Waldemar Hummer and Michael Schweitzer, 'Regional Arrangements' in Bruno Simma *et al*, (Eds.) *The Charter of the United Nations: A Commentary* (2nd edition, Oxford, Oxford University Press, 2002) 828.

<sup>35</sup> As above 828.

Hummer and Schweitzer note that there is a school of thought that treats the words 'arrangements' and 'agencies' as synonymous, and another that views them as alternatives. These authors are of the opinion that the latter view should be preferred because of the use of the word 'or' and that the existence of regional arrangements is intended to allow states to exercise their discretion 'to choose the form of organization which appears to them to be the most appropriate for their secure political union'.<sup>36</sup> In this respect the statement describes the case of the AU, in which member states chose to form an organization that would be most appropriate for their secure political union.

Hummer and Schweitzer further argue that, depending on the institutional density, the form of union can range from a treaty to a (fully-fledged) international organization and in this sense an 'arrangement' is a (mere) treaty under public international law, whereas in 'agency' has functions exercised by its own organs. These organs may be merely organs of treaty implementation, or they may be international organs, or organs of an international organization. Again the AU fits this characterisation of an 'agency' in that one of its functions is exercised by one of its own organs, that is, the Peace and Security Council.

Hummer and Schweitzer are, however, quick to mention that '[e]ven if this distinction between the concepts of arrangements and agencies can be drawn in theory, it has little practical significance: the requirements for their admissibility and the object of their activities, as well as the resulting legal consequences, are identical'.<sup>37</sup> They further maintain that agencies are based on treaties governed by public international law and are, therefore, 'ultimately arrangements in a larger sense, too'.<sup>38</sup>

Whatever function the Peace and Security Council undertakes as an organ of the AU, it does so under the auspices of the AU. Hence the Council can be characterised as part of a regional arrangement or agency. In this way, therefore, the Peace and Security Council can fit into the broad definition of a representative organ of a regional arrangement or

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<sup>36</sup> As above 822.

<sup>37</sup> As above

<sup>38</sup> As above 823.

agency, the latter being the AU. What is of paramount importance is that the Peace and Security Council, as a representative organ of the AU, should deal with those matters of security policy that are 'appropriate for regional action'. Hence article 2 of the PSCAU Protocol provides that the Council 'shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'.

Hummer and Schweitzer argue that '[a]s every organ, at first by exercising its powers, implicitly determines the conditions in which those powers are to be enjoyed, the regional agencies decide for themselves when a question is appropriate for regional action'.<sup>39</sup> One of the powers vested in the Peace and Security Council is that of deciding on any issue that has implications for the maintenance of peace, security and stability on the African continent.<sup>40</sup>

Based on the above discussion, what is clear is that Chapter VIII of the UN Charter covers the Peace and Security Council, whether viewed as representative of an 'arrangement' or 'agency'. Based upon this premise, a relationship, as envisaged by Chapter VIII of the UN Charter is established. According to article 53(1) of the UN Charter, '[t]he [UN] Security Council shall, where appropriate utilize such arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies, without the authorization of the [UN] Security Council ...' This means that the Peace and Security Council shall, as a representative organ of the AU and where appropriate, be utilized by the UN Security Council for enforcement action under its authority.

On the question of whether intervening under article 4(h) of the Constitutive Act constitutes enforcement action under article 53(1) of the UN Charter, Aneme argues first that the meaning of 'enforcement action' under article 53(1) of the UN Charter can be ascertained by analysing three main factors, namely: the grounds for 'enforcement action', the aims of 'enforcement action' and the role of state consent in such action.<sup>41</sup> He

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<sup>39</sup> As above 824.

<sup>40</sup> Art. 7(r) of the PSCAU Protocol.

avers that the grounds of enforcement action under article 53(1) of the UN Charter are different from those of article 4(h) of the Constitutive Act because the former is focused on 'any threat to the peace, breach of peace, or act of aggression' that endangers 'international peace and security',<sup>42</sup> while the latter focuses on the occurrences of specified massive violations of human and humanitarian laws inside AU member states.<sup>43</sup> In this latter case the intervention is in respect of grave circumstances, namely war crimes, genocide and crimes against humanity and in pursuance of the decision of the AU Assembly.<sup>44</sup>

Another factor to be considered is whether or not a state consents to the intervention. Amene argues that on the one hand, in the case of article 4(h) of the Constitutive Act, there is a requirement that the state parties of the Constitutive Act as well as the target state must consent to the intervention. On the other hand, article 53(1) of the UN Charter does not require any consent from either the state parties to the UN Charter or the target state.<sup>45</sup> In the case of the enforcement action, therefore, the UN Assembly has no role to play as this is within the mandate of the UN Security Council.

On the question of whether article 53(1) of the UN Charter and article 4(h) of the Constitutive Act are compatible, Amene argues that 'both in its ground and aim, intervention under [a]rticle 4(h) of the AU Constitutive Act is different from enforcement action under [a]rticle 53(1) of the UN Charter'.<sup>46</sup> Aneme concludes that

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<sup>41</sup> Girmachew Alemu Aneme, *A study of the African Union's Rights of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD thesis, Faculty of Law, University of Oslo, 2008) 140.

<sup>42</sup> As above 141. See also art. 39 of the UN Charter.

<sup>43</sup> As above 147.

<sup>44</sup> Article 4(h) of the Constitutive Act and 4(j) of the PSCAU Protocol.

<sup>45</sup> Aneme (n 41 above) 147.

<sup>46</sup> As above.

resulting from the issue of consent in the case of the article 4(j) of the Constitutive Act, which is not a requirement in the case of article 53(1) of the UN Charter,

intervention under [a]rticle 4(h) of the AU Constitutive Act does not constitute enforcement action under [a]rticle 53(1) of the UN Charter ...[and] [c]onsequently, there is no legal basis under the UN Charter for mandatory UN Security Council authorization to implement the AU Assembly decision on intervention under [a]rticle 4(h) of the Constitutive Act.<sup>47</sup>

Article 53(1) of the UN Charter governs and limits the permissibility of enforcement measures by regional arrangements or organizations, in this case the AU through its organ the Peace and Security Council. Ress and Bröhmer<sup>48</sup> argue that two distinct possibilities exist in this clause. The first distinction is that the UN Security Council may decide on the necessity of enforcement measures and utilize regional arrangements to carry them out, in this case the AU through the Peace and Security Council. The second distinction is that in the alternative, the regional arrangement, – in this case the AU through the Peace and Security Council – may decide on the necessity of enforcement measures and seek the UN Security Council’s authorization in order to be able to carry them out legally.

Ress and Bröhmer argue that to utilize regional arrangements or regional agencies means to utilize members of a regional organization either directly, or indirectly by utilizing the agency constituted by a regional arrangement.<sup>49</sup> They further argue that the regional organization functions as a subsidiary organ of the UN. Ress and Bröhmer point out that in either case, the UN Security Council retains the responsibility both for the execution of the enforcement action through the regional arrangement under article 53(1) of the UN Charter, or for the authorization of the enforcement measures taken by regional arrangements under article 53(2) of the UN Charter.<sup>50</sup>

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<sup>47</sup> As above 148.

<sup>48</sup> Georg Ress and Jürgen Bröhmer, ‘Article 53’ in Bruno Simma *et al*, (eds.) *The Charter of the United Nations: A Commentary* (2nd edition, Oxford, Oxford University Press, 2002) 859.

<sup>49</sup> As above 850.

<sup>50</sup> As above 860.



On the question of powers, Ress and Bröhmer note that action by the UN Security Council under article 53 must remain within the powers granted to it by articles 24, 39 *et seq.*<sup>51</sup> They further state that article 53(1) and (2) of the UN Charter do not confer any additional legal authority for enforcement measures but instead these provisions broaden the modalities for the execution of the enforcement measures available to the UN Security Council.<sup>52</sup>

The other question that arises is the meaning of 'enforcement action under its authority'.<sup>53</sup> The UN Charter does not define this term, which presents a challenge in terms of understanding what is really expected of a regional arrangement or agency. It is assumed that the enforcement action can only be undertaken in respect of what is already in force. This may be an extension of the UN Security Council's authority in respect of a particular issue. Ress and Bröhmer argue that such enforcement action may originate in diverse circumstances. They conclude that

the term 'enforcement action' should not be interpreted in an overly narrow fashion. The language and systematic structure of the Charter does not warrant such a restrictive view and form a teleological point of view. The term should ... be read as any action which would otherwise be in violation of the prohibition of the use of force as spelled out in Art. 2(4) [of the UN Charter].

Ress and Bröhmer define 'enforcement action' as including measures that fall short of military force, such as peacekeeping measures and 'recommendatory' actions.<sup>54</sup> In order to understand the term 'enforcement action' it is important to appreciate the UN approaches to preventing and managing conflict, since it is within that mandate that any enforcement action may be carried out under the authority of the UN Security Council.

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<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> See Aneme (n 41 above) 140.

<sup>54</sup> Ress and Bröhmer (n 48 above) 860-861.

In other words, the enforcement action cannot go beyond what the UN Security Council has authorised in a given case.

The UN approaches to preventing and managing conflict are numerous. According to Mingst and Karns,<sup>55</sup> these approaches may involve collective security, preventive diplomacy, peaceful settlements, peace making, peacekeeping, peace building, enforcement measures, and/or arms control and disarmament. The choice of approach depends on the circumstances of each case, with some approaches more favoured than others. The test for which approach is most applicable depends on whether it will prevent and manage a conflict effectively in any given situation.

That article 53(1) of the UN Charter and article 4(j) of the Constitutive Act present an AU/UN stumbling block in addressing peace and security challenges in Africa is not disputed. Levitt argues that the AU does not directly acknowledge article 53(1) of the UN Charter, which requires that 'no enforcement action shall be taken under regional arrangements ... without the authorisation of the Security Council', but rather acknowledges Chapter VII as a whole.<sup>56</sup> He further concludes that

[t]aken together, [a]rticles 4(h) and (j) of the Constitutive Act and [a]rticles 4(j) and (k), 6(d), 7(c)-(g), 16(1), and 17(1) and (2) of the AUPSC Protocol reveal that while the AU acknowledges the 'primary' role of the U.N. in maintaining international peace and security, particularly in Africa, it reserves the right to authorise interventions in Africa—seeking U.N. involvement '[w]here necessary'.<sup>57</sup>

Having established that article 53(1) of the UN Charter impliedly creates a relationship between the UN Security Council and the Peace and Security Council, and that there exists a difference between the undertaking of 'enforcement actions' under article 53(1) of the UN Charter and 'intervention' under article 4(h) of the Constitutive Act, on its own accord, the AU is entitled to exercise its right to authorize interventions in Africa

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<sup>55</sup> Mingst and Karns (n 17 above) 76.

<sup>56</sup> Jeremy Levitt, 'The Peace and Security of the African Union: The Known Unknowns' (2003) 13 *Transnat'L. & Contemp. Pros.* 126.

<sup>57</sup> As above 126. Footnotes omitted.

(not 'enforcement actions'), pursuant to the decision of the AU Assembly. As discussed in Chapter 3, this right is in line with the responsibility to protect. Thus far, the UN has not disputed the fact that the AU has a right to intervene in accordance with article 4(h) of the Constitutive Act. As shall be seen in the discussions concerning the AU's interventions, the UN has in fact supported such initiatives, in effect implying no contravention of the UN Charter.

#### 4.5 COOPERATION WITH UN SECURITY COUNCIL

All the member states of the AU are also members of the UN, within which the UN Security Council functions. This means that the AU member states are bound both by the Constitutive Act and the UN Charter. Therefore, there is a need for a collaborative system between the Peace and Security Council and the UN Security Council. The PSCAU Protocol demands that the Council 'shall cooperate ... with the [UN Security Council]'.<sup>58</sup> The kind of 'cooperation' envisaged in this provision is not clearly defined. This has the potential to make such cooperation extremely flexible. It might well be the case that the cooperation is one that should be in line with article 53(1) of the UN Charter and/or in line with article 4(h) of the Constitutive Act, as discussed above. What is clear, however, is that this cooperation is one sided: the Peace and Security Council must cooperate with the UN Security Council and not necessarily vice versa. A classic example dating back to the OAU is found in the UNSC Resolution 199 of 12 December 1964 where the UN Security Council stated as follows:

Convinced that the Organization of African Unity should be able, in this context of Art.52 of the Charter of the United Nations, to help find a peaceful solution to all problems and disputes affecting peace and security in the continent of Africa ... and [r]equests the Organization of African Unity, in accordance with Article 54 of the Charter of the United Nations, to keep the Security Council fully informed of any action it may take under the present resolution.<sup>59</sup>

The envisaged cooperation also carries with it an obligation on the part of the Peace and Security Council to inform the UN Security Council of any action it may take resulting from PSC decisions. In the event that the required information from the Council is not

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<sup>58</sup> Art. 17(1) of the PSCAU Protocol.

<sup>59</sup> This illustrates the significance of enforcement actions under art. 53 (1) of the UN Charter.

forthcoming, there seems to be no sanction against its failure to update the UN Security Council of its actions.

In cooperating with the UN Security Council, the Peace and Security Council must understand the context in which the former operates. Fenton summarises this point as follows:

At its heart, the United Nations Security Council is a political body and the political interests of its constituent members are what drive it. It is a seemingly obvious conclusion but one that is all too frequently forgotten by those who have great[sic] aspirations for the United Nations Organization.<sup>60</sup>

Whether this 'seemingly obvious conclusion' crossed the minds of the drafters of the PSCAU Protocol, who made it an obligation for the Peace and Security Council to cooperate with the UN Security Council in the promotion of peace and security, remains a moot question. In elaborating on the political interests which have become the driving force of the UN Security Council, Fenton<sup>61</sup> argues that it was the interests of the UN Security Council member states that enabled the UN Security Council to authorise the use of force and international intervention in Haiti, Bosnia, Rwanda and Somalia. He further argues that it was the very same interests that were unable to find common ground on the issue of Iraq's weapons of mass destruction in 2003 and consequently resulted in a stalemate within the UN Security Council. For this reason, Mingst and Karns argue that the functioning and prestige of the UN Security Council have waxed and waned.<sup>62</sup> Despite this assessment of the UN Security Council, the PSCAU Protocol makes it obligatory for the Peace and Security Council to cooperate with the UN Security Council.

In support of Fenton, Steiner argues:

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<sup>60</sup> Neil Fenton, *Understanding the UN Security Council: Coercion or Consent?* (Aldershot: Ashgate Publishing, 2004) 221.

<sup>61</sup> As above 221.

<sup>62</sup> Mingst and Karns (n 17 above) 28.

[i]t can cause no surprise that an organ as politically constituted as the [UN Security Council] and empowered to authorize the use of economic and military force has acted inconsistently in deciding whether and how to react to gross human rights crises in a timely effort to forestall or arrest violence. Intense political pressures exerted by its permanent members and other powerful states or coalitions can decide the outcome. At times the use or threat of use of the veto power has blocked the [UN Security Council] from action.<sup>63</sup>

The UN secretary general and a number of states have advocated for a UN Security Council that is more broadly representative of the international community as a whole. In this way, the relationship between the Peace and Security Council and the UN Security Council could be more effective in terms of their cooperation on issues dealing with peace and security in Africa.

Despite the fact that the Peace and Security Council is obliged to cooperate with the UN Security Council, there is no explicit corresponding obligation on the part of the latter. This creates an equilibrium challenge. The level of cooperation between the two organs cannot be same.

Firstly, the UN Security Council is responsible for the maintenance of international peace while the PSCAU is a 'collective security and early warning arrangement to facilitate timely and effective response to conflict and crisis in Africa'.<sup>64</sup> In terms of these organs' respective mandates, the Peace and Security Council is very limited in its operational scope.

Secondly, the composition of these organs is very different in that while the UN Security Council is composed of fifteen members, five of which are permanent and the rest appointed for two years, the Peace and Security Council is composed of fifteen members, ten of which are elected for two years, and five for a term of three years in order to ensure continuity.

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<sup>63</sup> Steiner (n 28 above) 760.

<sup>64</sup> Art. 1 of the PSCAU Protocol.

Third, the presence of veto power in the case of the UN Security Council's P-5 also makes it more powerful than the Peace and Security Council where each member only has one vote. In so far as the PSC is concerned, a simple majority in respect of decisions on procedural matters wins the day, while a two-thirds majority in all other matters wins the day. Adebajo recalls a heated debate that ensued '[a]s the scaffolding of the AU's security structures was being erected' where 'regional hegemony like Nigeria and South Africa' sought to be allowed permanent seats and to acquire veto power on the Peace and Security Council.<sup>65</sup> This move was, however, unsuccessful.

Fourth, in so far as intervention is concerned, Chapter VII of the UN Charter permits the UN Security Council to take legally binding decisions directing all member states to impose sanctions or to use force to maintain international peace.<sup>66</sup> On the other hand, the Peace and Security Council must in conjunction with the chairperson of the AU Commission 'recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.<sup>67</sup>

The provision does not clarify the question of what exactly should the Peace and Security Council cooperate with the UN Security Council on, except to say that this should be in the fulfilment of the PSC's mandate in the promotion and maintenance of peace, security and stability in Africa. It is not clear whether this cooperation should be confined to the functions of the Council as provided for under article 6 of the PSCAU Protocol or to the powers of the Council as provided for under article 7 of the PSCAU Protocol. Note that the functions and powers of the Peace and Security Council are entirely different.

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<sup>65</sup> Adekeye Adebajo, 'The Peacekeeping Travails of the AU and the Regional Economic Communities' in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 133.

<sup>66</sup> Art. 25 of the UN Charter.

<sup>67</sup> Art. 7(1)(e) of the PSCAU Protocol.

As mentioned in Chapter 2 of this study, article 6 of the PSCAU Protocol lists a number of functions to be performed by the Peace and Security Council. The cooperation between the PSCAU and the UN Security Council must, therefore, be confined to these functions. In light of this, there is a big challenge as the Council's functions are many and also open-ended. These functions also include 'any other function as may be decided upon by the Assembly'. When one considers the powers of the Peace and Security Council,<sup>68</sup> which sometimes overlap with its functions, they are so vast that they include deciding on 'any other issue having implications for the maintenance of peace, security and stability on the Continent'.<sup>69</sup>

It must be noted that this cooperation with the UN Security Council must be undertaken '[i]n the fulfilment of the [Peace and Security Council] mandate in the promotion and maintenance of peace, security and stability in Africa'. The functions and powers associated with the Peace and Security Council are all within its mandate of promoting and maintaining peace, security and stability in Africa. It may be argued that the reason why this cooperation is a requirement is due to lack of expertise. Murithi, for instance, argues that the AU has only been in operation for five years and that it inherited both assets and liabilities from the OAU. He further notes that the AU has not conducted extensive peacebuilding operations on the continent despite the significant need for peacebuilding.<sup>70</sup> The need to cooperate with a more experienced institution is therefore critical in the fulfilment of the Peace and Security Council's mandate.

#### **4.6 WORKING CLOSELY WITH UN SECURITY COUNCIL**

Over and above cooperating with the UN Security Council, the PSCAU Protocol demands that the Peace and Security Council shall 'work closely with the UNSC'. The UN Security Council has in the past arguably failed to fulfil its primary responsibility for the maintenance of international peace and security in Africa. The Peace and Security Council has, nevertheless, deemed it fit that this is a very important organization, with

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<sup>68</sup> Art. 7(1) of the PSCAU Protocol.

<sup>69</sup> Art. 7(1)(r) of the PSCAU Protocol.

<sup>70</sup> Murithi (n 9 above) 74.

which it should work closely. Writing in 2004, Fenton argued that the UN Security Council appeared to be marginalized and seemingly unable to fulfil its main role to 'save succeeding generations from the scourge of war' as intended in the UN Charter.<sup>71</sup> He argued that until this time, the UN Security Council was hailed as the 'focal point of international peace and security, emboldened to address the myriad conflicts that arose following the end of the Cold War and the collapse of the bi-polar order that structured international politics'.<sup>72</sup> The question that could be posed on this point is what kind of close working relationship could be forged by the Peace and Security Council with an organization that has arguably not been able to fulfil its primary responsibility in the past and which still needs to be reinvigorated.

The former UN secretary general, Kofi Annan warned

a renewal of the effectiveness and relevance of the Security Council must become a cornerstone of our efforts to promote peace and security in the next century ... there has been regrettable tendency of the Security Council not to be involved in efforts to maintain international peace and security.<sup>73</sup>

The failure of UN Security Council to address the Rwanda crisis in 1994 calls into question the willingness of its members to take action to protect human rights in the post-Cold War period.<sup>74</sup> Working closely with this UN Council is not an easy task due to a number of challenges it faces. A relationship between the Peace and Security Council and an arguably divided UN Security Council presents a complicated situation. Fenton<sup>75</sup> gives the example of the United States, which chose to pursue a doctrine of pre-

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<sup>71</sup> Fenton (n 60 above) 1.

<sup>72</sup> As above.

<sup>73</sup> UN Press Release, 'Text of Kofi Annan's Speech in The Hague', *UN Press Release SG/SM/6997*, 18 May 1999.

<sup>74</sup> Fenton (n 60 above) 147. On the question of how the UNSC reacted to the 1994 Rwanda Genocide, see Fenton (n 60 above) 125-147.

<sup>75</sup> As above 222.



emptive intervention in Iraq, in which action it was not supported by the UNSC. The US was driven by its own national interests and was unwilling to relax international restrictions on intervention and the use of force. Based on previous experience Fenton is unable to see the UN Security Council fulfilling its primary role because of the challenges it constantly faces. He notes:

[d]uring the challenging times of the post-Cold War period the members of the Security Council have repeatedly and consistently acted towards preserving a state system based on the sovereign equality of each member state and similar consideration will continue to permeate the decision making of the UN Security Council as it confronts new threats to international peace and security *including those which affect the African continent*.<sup>76</sup>

Murithi argues that the AU and the UN have in the past made a concerted effort to prevent the genocidal tendencies that have so devastated the Great Lakes region from resurfacing in Burundi.<sup>77</sup> He makes reference to the UNSC Resolution 1545, which was passed on 21 May 2004 to deploy a peacekeeping mission in Burundi.<sup>78</sup> Murithi recalls the incorporation of the troops of the African Union Mission in Burundi (AMIB) into the UN Peace Operation in Burundi (ONUB), which by October 2006 had demobilised 20 000 military personnel.<sup>79</sup> He argues that the demobilised military personnel unfortunately still lack economic opportunities and could pose a potential security threat. The peacebuilding challenges in Burundi, therefore, still require a close and continued interaction between the Peace and Security Council and the UN Security Council.

The close working relationship between the Peace and Security Council and the UN Security Council is manifested in the creation of the AU/UN hybrid operation in Darfur (UNAMID). Muruthi argues that this is but one of the efforts aimed at reassuring

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<sup>76</sup> As above. My emphasis.

<sup>77</sup> Murithi (n 9 above) 74.

<sup>78</sup> As above 75.

<sup>79</sup> As above 76.

'observers that this is not an effort to re-establish the asymmetrical relationship that prevailed in the early decades of the UN, but rather an effort to create something new – a hybrid partnership'.<sup>80</sup>

Sometimes the close working relationship between the Peace and Security Council and the UN Security Council is through the office of the chairperson of the AU Commission. Following a decision on the unconstitutional change of government in Madagascar in 2009 which led to the Council suspending Madagascar from participating in the activities of the AU (until the restoration of constitutional order), the Council requested

the Chairperson of the Commission to work closely with SADC and all AU partners, notably the United Nations and its Security Council, the European Union and the International Organization of la Francophonie, to contribute to the rapid restoration of constitutional order, and to take all the initiatives he deems necessary to this effect.<sup>81</sup>

#### **4.7 UN FINANCIAL, LOGISTICAL AND MILITARY SUPPORT**

Article 17(2) of the PSCAU Protocol further provides that should the need arise, recourse would be made to the UN for the provision of necessary financial, logistical and military support for the AU's activities in so far as the maintenance of peace, security and stability in Africa is concerned. This is done in pursuance of Chapter VIII of the UN Charter on the role of regional organizations in the maintenance of international peace and security. Murithi argues that in Darfur, the AU found itself with a test case that it was ill-equipped institutionally and under-resourced to resolve successfully.<sup>82</sup>

Through UNSC Resolution 1706, the UN Security Council requested the secretary-general 'to take the necessary steps to strengthen AMIS through the use of existing and

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<sup>80</sup> As above 78.

<sup>81</sup> See the para. 5 of the Communiqué of the Peace and security Council 181<sup>st</sup> Meeting held on 20 March 2009 in Addis Ababa, Ethiopia. PSC/PR/COMM.(CLXXXI).

<sup>82</sup> Murithi (n 9 above) 78.

additional United Nations operation in Darfur'.<sup>83</sup> Through UNSC Resolution 1769, on 31 July 2007, the UN Security Council authorised and mandated 'the establishment, for an initial period of 12 months, of an AU/UN hybrid operation in Darfur (UNAMID)'. UNSC Resolution 1769 states that the UNAMID

shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS, and shall consist of up to 19, 555 military personnel, including 360 military observers and liaison officers, and an appropriate civilian component including up to 3, 772 police personnel and 19 formed police units comprising of up to 140 personnel each.<sup>84</sup>

Murithi<sup>85</sup> further argues that the UN Department of Peacekeeping Operations (DPKO) is already supporting AMIS through its (UN) assistance cell in Addis Ababa, Ethiopia, where the AU has its headquarters. He further states that more specifically, the DPKO and the AU Peace Support Operations Division signed an agreement to develop a joint action plan, and in July 2006 the UN created a dedicated integrated capacity to oversee the implementation of the action plan. The integrated capacity will involve what is known as the 'collocation' of UN staff within the AU Commission in Addis Ababa, which represents a completely new form of partnership.<sup>86</sup> Hence Murithi notes: '[t]here is an emphasis on the fact that this is not an asymmetrical partnership, but an entirely new arrangement established through the mutual consent of both parties'.<sup>87</sup>

While the source for establishing the hybrid operation within the AU may be said to stem from article 17 of the PSCAU Protocol, there seems to be no explicit provision for this under the UN Charter. As Murithi observes, Chapter VIII of the UN Charter is not explicit on the possibility of establishing such a hybrid partnership if both the UN and

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<sup>83</sup> UN Security Council 2006. Resolution 1706 (2006), S/RES/1706 (2006), 31 August 2006.

<sup>84</sup> UNSC Resolution 1769 (2007), S/RES/1769 (2007), 31 July 2007.

<sup>85</sup> Murithi (n 9 above) 79.

<sup>86</sup> As above.

<sup>87</sup> As above.

the regional organizations are compliant.<sup>88</sup> He solves the seeming problem by referring to article 52 of the UN Charter, which provides that 'the Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council'.<sup>89</sup> This therefore provides, from the UN side, a legal basis for embedding UN staff within the AU. On the AU side, this is in line with article 17 of the PSCAU Protocol.

On 16 January 2009, the UN Security Council, through Resolution 1863(2009) expressed an intention to establish a UN peacekeeping operation in Somalia as a follow-on force to the African Union Mission in Somalia (AMISOM). On 19 December 2008, the UN secretary-general made proposals for a logistical package to support AMISOM, including equipment and services. Over and above this, the Peace and Security Council requested the secretary-general to establish a trust fund in order to provide financial support to AMISOM until a UN peacekeeping operation was deployed and to assist in the re-establishment, training, and retention of all-inclusive Somali security forces.<sup>90</sup>

Noting that the primary responsibility for the maintenance of international peace and security remained with the UN Security Council, the Peace and Security Council reiterated its call to the UN Security Council and the General Assembly to authorize, as soon as possible, the expected support package for AMISOM as contained in the UNSC Resolution 1863 (2009).<sup>91</sup>

The Peace and Security Council cannot rely heavily on the United Nations for the provision of financial, logistical and military support for the AU's activities. Past experience has shown that sometimes the UN does too little too late, as was the case in Somalia, Sudan, Angola and Rwanda. What makes things worse is the fact that many

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<sup>88</sup> As above.

<sup>89</sup> As above.

<sup>90</sup> See Communiqué. Peace and Security Council 177<sup>th</sup> Meeting, 11 March 2009, Addis Ababa, Ethiopia. PSC/PR/COMM.(CLXXVII).

<sup>91</sup> As above.

UN members have in the past refused to provide the human and financial resources needed to enable peace-keepers and humanitarian workers to fulfil mandates that the UN Security Council has authorized or that appeared to be required in situations where there were alarming outbreaks of violence.<sup>92</sup> The UN Security Council's decision to withdraw all but 270 of 1,700 UN peace-keepers in Rwanda as genocidal massacres began to erupt and spread in April 1994 furnishes a good example in this regard.

Mingst and Karns argue that the UN has frequently experienced difficulties in getting states to pay their contributions and the reasons for this failure range from budget technicalities to poverty, to politics, or unhappiness with the UN in general, or with specific programmes and activities.<sup>93</sup> As the PSCAU Protocol provides for recourse to be made to the UN for the provision of the necessary financial, logistical and military support for the AU's activities in so far as the maintenance of peace, security and stability in Africa is concerned, the financial challenges of the UN are likely to render this provision ineffective.

Within the UN, a key partner of the Peace and Security Council is the UN Peacebuilding Commission (PBC), which was established in 2006 as 'an intergovernmental advisory to support peace efforts in countries emerging from conflict, and as a key addition to the capacity of the International Community in the broad peace agenda'.<sup>94</sup> Among other things, the PBC brings together all relevant actors such as international donors, international financial institutions, national governments and troop contributing countries.<sup>95</sup> The PBC mobilizes resources and gives advice on integrated strategies for post-conflict peacebuilding and recovery.<sup>96</sup> At its 208<sup>th</sup> meeting, held on 9 November

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<sup>92</sup> Robert C. Johansen, "Enhancing United Nations Peace-keeping" in Chadwick F. Alger, *The Future of the United Nations System: Potential for the Twenty-First Century* (1998) 89.

<sup>93</sup> Mingst and Karns (n 17 above) 41.

<sup>94</sup> See the Peacebuilding Commission's website at <http://www.un.org/peace/peacebuilding/index.shtml> (Accessed 31 August 2011).

<sup>95</sup> See UN Resolution 60/180 and UN Resolution 1645 (2005) of 20 December 2005.

<sup>96</sup> As above.

2009, the Peace and Security Council had an exchange of views with a delegation of the PBC on ways to enhance peace-building efforts in Africa and to strengthen the relationship between the Council and the PBC.<sup>97</sup> Since then the PBC has held annual meetings with the Council.<sup>98</sup>

#### 4.8 ONGOING INTERACTION WITH UN SECURITY COUNCIL

As if cooperating and working closely with the UN Security Council is not sufficient, article 17(3) of the PSCAU Protocol provides that the Peace and Security Council together with the chairperson of the AU Commission shall 'maintain close and continued interaction' with the UN Security Council, its African members, as well as with the secretary general, including holding periodic meetings and regular consultations on questions of peace, security and stability in Africa.<sup>99</sup> While the UN Security Council's primary responsibility lies at an international level, the Peace and Security Council's primary responsibility lies at a regional level. The latter is therefore aimed at complementing the efforts of the former.

On the example of Burundi, Murithi argues: '[e]ven though the UN took over from the AU, the case of Burundi demonstrates that the continental body can in fact make useful peacebuilding interventions on the continent'.<sup>100</sup> Making a case for close and continued cooperation, he states: '[t]he AU, UN and its partners will of course need to continue their concerted effort to ensure that peace prevails in Burundi'.<sup>101</sup> This cooperation cannot take place without the Peace and Security Council and the UN Security Council maintaining the required close and continued interaction.

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<sup>97</sup> Press Statement, Peace and Security Council 208<sup>th</sup> Meeting, 9 November 2009, Addis Ababa, Ethiopia. PSC/PR/BR(CCVIII).

<sup>98</sup> The most recent meeting between the Peace and Security Council and the PBC took place on 21 July 2011 at the African Union Headquarters in Addis Ababa, Ethiopia.

<sup>99</sup> Art. 17(3) of the PSCAU Protocol.

<sup>100</sup> Murithi (n 9 above) 76.

<sup>101</sup> As above.

In expressing the importance of the AU Policy Framework on Post-conflict Reconstruction and Development, adopted by the executive council of the AU in Banjul in June 2006, and the need to accelerate its implementation, the Peace and Security Council stressed the need for closer cooperation between the AU and the UN.<sup>102</sup> Over and above this, the PSC appealed to the UN and its relevant organs to extend the necessary support to this end.

It is gratifying to note that progress is being made towards ensuring much closer cooperation between the Peace and Security Council and the UN Security Council. According to Wane, for instance, the industry that the PSC has devoted to addressing most of the conflicts and crisis situations facing Africa, has in the short period of its existence given it undeniable credibility.<sup>103</sup> Wane argues that the annual meetings that the PSCAU now holds with the UN Security Council illustrate this credibility. In an endeavour to strengthen the relationship between the PSC and the UN Security Council, on 1 July 2010, the UN General Assembly established its office at the AU, which is known as the United Nations Office at the African Union (UNOAU).<sup>104</sup> The UNOAU was inaugurated on 8 February 2011. The primary aim of establishing the UNOAU is to enhance the partnership between the UN and the AU in the area of peace and security, and to also provide support to better engage the AU in the peace and security area. The establishment of the UNOAU will no doubt strengthen the relationship between the Peace and Security Council and the UN Security Council.

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<sup>102</sup> See Press Statement. Peace and Security Council 114<sup>th</sup> Meeting 10 March 2008, Addis Ababa, Ethiopia. PSC/PR/BR(CXIV).

<sup>103</sup> El Ghassim Wane, Challenges for Peace and Security in Africa, Paper presented during the International Forum for the Challenges of Peace Operations, 27 April 2010. Available at [http://www.challengesforum.org/cms/images/pdf/Forum2010\\_MrElGhassimWane.pdf](http://www.challengesforum.org/cms/images/pdf/Forum2010_MrElGhassimWane.pdf) (Accessed 26 August 2011).

<sup>104</sup> The current Head of the United Nations Office to the African Union (UNOAU) is UN Assistant Secretary-General, Zachary Muburi-Muita. See the UNOAU/AUC Joint Press Release. Addis Ababa, 21 January 2010. Available at [http://www.au.int/en/sites/default/files/PR\\_EN\\_20\\_JANUARY\\_2011\\_CP\\_UNOAU\\_AUC\\_JOINT\\_PRESS\\_STATEMENT\\_ON\\_CHAIRPERSON%27S\\_MEETING\\_WITH\\_ASG.doc](http://www.au.int/en/sites/default/files/PR_EN_20_JANUARY_2011_CP_UNOAU_AUC_JOINT_PRESS_STATEMENT_ON_CHAIRPERSON%27S_MEETING_WITH_ASG.doc) (Accessed 26 August 2011).

According to the UN assistant secretary-general and the head of the UNOAU, Zachary Muburi-Muita, the UNOAU's key objectives are four-fold. Firstly, to assist the AU in the development of a more effective peace and security partnership; secondly, to improve coordination and cooperation between the two organizations; thirdly, to ensure an appropriate level of representation to enhance the strategic and operational partnership between the UN, the AU and the regional economic communities, as well as the sub-regional mechanisms; fourthly, to deliver key outputs according to the work plan of the substantive and support components, which derive from the previous entities now integrated into the UNOAU.<sup>105</sup> From these key objectives, it is apparent that article 17(3) of the PSCAU Protocol, which provides for the maintenance of close and continued interaction between the Peace and Security Council together with the chairperson of the AU Commission and the UN Security Council, will be fully implemented.

#### 4.9 USE OF FORCE

The cooperation required between the Peace and Security Council and the UN Security Council needs further clarification, especially with regard to the use of force by the AU in the context of its right to intervene in a member state under article 4(h) of the Constitutive Act. It must be recalled that article 2(4) of the UN Charter provides that

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

Since all AU member states are also members of the UN, the above-mentioned article is equally applicable to them. The prohibition against the use of force is regarded as the cornerstone of the UN and a rule of customary international law.<sup>106</sup> Article 53 of the Vienna Convention on the Law of Treaties further provides that '[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international

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<sup>105</sup> See report by Xinhua, China Radio International, 'UN Officially Inaugurates Office to AU'. Available at <http://english.cri.cn/6966/2011/02/23/2021s622215.htm> (Accessed 26 August 2011).

<sup>106</sup> See the *Nicaragua case* 1986 ICJ Reports 14.



law'. The first question is whether the use of force in the context of the AU's right to intervene in a member state violates this rule against the prohibition of force, which is also recognized as a norm with a status of *jus cogens*? The second question is whether the Constitutive Act is void, as it seems to be in conflict with a peremptory norm of general international law.

On this first question, Kindiki argues convincingly as follows:

the means of force prohibited by article 2(4) [of the UN Charter] is that which is 'against the territorial integrity or political independence of States'. Intervention under article 4(h) [of the Constitutive Act] would not infringe upon the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states may not have agreed to allow the provisions in the Act.<sup>107</sup>

The right of the AU to intervene in a member state can only be exercised to the extent that it does not infringe upon the territorial integrity or political independence of such a state. On the second question, since the Constitutive Act is not in conflict with a peremptory norm of general international law, then, as Kindiki rightly argues, it is not void. At this level, the cooperation between the Peace and Security Council and the UN cannot encounter any problems in so far as allowing the AU to intervene in a member state. This is however not the end of the matter.

Under international law, the use of force is only permitted, firstly, under the authority of the UN Security Council in terms of article 53(1) of the UN Charter, and secondly, in the exercise of the right of individual or collective self-defence in terms of article 51(1) of the UN Charter. Article 53(1) of the UN Charter specifically proscribes any action undertaken at a regional level without the authorization of the UN Security Council as follows:

The Security Council shall where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the

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<sup>107</sup> Kithure Kindiki, *Humanitarian Intervention in Africa: The Role of intergovernmental Organizations* (unpublished LLD thesis, Faculty of Law, University of Pretoria, 2002) 107.

authorization of the Security Council, with the exception of measures against any enemy state.<sup>108</sup>

The question raised here is whether the AU's right to intervene without the authority of the UN Security Council is in fact in conflict with the principle against the use of force and in particular article 53 of the UN Charter without prior authorisation. If a 'regional arrangement' in this article is interpreted to also include the AU, needless to say, the cooperation between the Peace and Security Council and the UN is bound to be strained at this level. A closer look at article 53(1) confirms that the AU is indeed a 'regional arrangement' envisaged therein. The PSCAU Protocol, however, does not provide quick solutions to this issue. On this very point, Kindiki<sup>109</sup> together with Abass and Baderin<sup>110</sup> confirm the view that the AU is a regional arrangement within the meaning of article 53(1) of the UN Charter.

On the assumption that the African Union is in fact a regional arrangement whose action is proscribed under article 53(1) of the UN Charter, for a fact the relationship between the Peace and Security Council and the UN would be strained as this renders the provisions of the Council to be in conflict with international law should the latter resort to the use of force. Avoiding the question of whether or not the Constitutive Act is in contravention of international law, Kindiki simply argues that this conflicting stance of the Constitutive Act regarding the use of force without the authorization of the UN Security Council

...may imply that the AU considers that it will not be expedient to wait for UN Security Council authorization before responding to situations of war crimes, genocide and crimes against humanity ...[and] the reason behind the increasing tendency by regional organizations [such as the AU] to intervene in member

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<sup>108</sup> The term enemy state applies to any state which during the Second World War has been an enemy of any signatory of the UN Charter. See art. 53(1) of the UN Charter.

<sup>109</sup> Kindiki (n 107 above) 108.

<sup>110</sup> Ademola Abass & Mashood Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union' (2002) 49 *Netherlands International Law Review* 20.

states, to use the words of the AU Act, in 'grave circumstances', arises from the fact that the UN Security Council's bureaucratic procedures cannot guarantee a quick response in cases of gross human rights violations.<sup>111</sup>

Kioko avoids this question by underscoring the issue of common values and standards which should guide the AU in deciding on any intervention that warrants the use of force. He argues that '[i]n deciding on intervention, the African Union will have to consider whether [or not] it will seek the authorization of the UN Security Council as it is required to under Article 53 of the UN Charter'.<sup>112</sup> Kioko avers that the question of whether the African Union could possibly have an inherent right to intervene other than through the UN Security Council was never entertained. According to Kioko, the decision to empower the AU with this right to intervene 'reflected a sense of frustration with the slow pace of reform of the international order, and with instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa'.<sup>113</sup>

If one were to labour under the impression that the AU retains an absolute right to intervene, as suggested in Kindiki's and Kioko's arguments, which may be incorrect, a rift or discrepancy between international law and international human right law may occur. This discrepancy can only be resolved by an international court. From one angle, leaving a regional organization such as the AU to decide independently whether or not it is appropriate to intervene in a member state may lead to abuse of power or to inaction. From another angle, leaving the decision to the UN Security Council is riddled with problems that potentially involve even more acute abuses of power and inaction, especially with the permanent members wielding veto power. Be that as it may, given the nature of conflict situations in Africa, it would be better for the AU to go against the dogmatic principles of international law than to risk gross violations of human rights, as has been the norm in most African conflicts. Kioko argues that by defying these dogmatic principles, the African leaders 'have shown themselves willing to push the

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<sup>111</sup> Kindiki (n 107 above) 108-9.

<sup>112</sup> Kioko (n 33 above) 821.

<sup>113</sup> As above.

frontiers of collective stability and security to the limit without any regard for legal niceties such as authorization of the Security Council'.<sup>114</sup>

#### 4.10 RELATIONSHIP CHALLENGES

Just like any other relationship, the relationship between the Peace and Security Council and the UN Security Council is not without challenges. These challenges have presented insurmountable problems in relation to ensuring that the AU Council is able to effectively contribute to peace, security and stability in Africa. The fact that this relationship is pitched at a very general level creates broad speculation as to what roles these two important organs should adopt and what actions they should undertake to achieve their respective objectives. It would seem that the relationship was created by the AU without the proper consultation of the UN Security Council. Be that as it may, the relationship, whether or not its form is desirable, must be made to work and work effectively in order to ensure peace and security in Africa. In order to do so, the existing challenges must be understood and addressed.

As discussed, the first challenge facing the Peace and Security Council and the UN Security Council is that their relationship is not well defined. In many instances, it is simplistically assumed that the relationship between the PSC and the UN Security Council is identical to that of the mother organisations – the AU and the UN. Far more differentiation is needed, since the PSC and the UN Security Council each has a specific mandate, and these mandates should complement each other. In effect, a description of the actual modalities of the envisaged cooperation between the PSC and the Security Council is non-existent. In practice, the way in which cooperation between the two organs has been carried out is purely *ad hoc*. In one of its meetings, the PSC 'stressed the need to explore practical modalities of cooperation between the AU and the UN in peace-building, including in the exchange of information and the conduct of joint fact-finding and other peace and security related missions on conflicts in Africa at their various stages'.<sup>115</sup>

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<sup>114</sup> As above.

<sup>115</sup> See Press Statement, Peace and Security Council 114<sup>th</sup> Meeting 10 March 2008 Addis Ababa, Ethiopia. PSC/PR/BR (CXIV).

The second challenge is that the relationship is too broadly defined. '[T]he promotion and maintenance of peace, security and stability in Africa', is a very general description. There are specific functions, listed under article 6 of the PSCAU Protocol, which could have been identified as those in respect of which these organs would cooperate and work closely.

The third challenge in the relationship is that the two organs are not treated as equal partners within the context of the PSCAU Protocol. The relationship is therefore not balanced. As stated above, these organs are not equal in terms of their power, functioning, resources and political clout. Past experiences of the UN-AU partnership in addressing African challenges, show that the relationship between the Peace and Security Council and the UN Security Council leaves a lot to be desired. Murithi has questioned the nature of UN-AU partnership, especially in the case of Darfur. He asks whether the partnership is in effect 'a hybrid form of paternalism in that AU troops and personnel will do the basic and dangerous work on the ground guided by the all-wise and "fatherly" coterie of UN advisors'. It would seem that this cooperation is one in which the one institution has a right to dictate to the other what should happen in given circumstances. The PSCAU Protocol on the other hand creates a relationship of cooperation as opposed to one that is dictatorial.

The fourth challenge is the different approaches of the two organs to addressing issues relating to peace, security and stability in Africa. This is influenced by the notion held by the AU/PSC of 'African solutions for African problems', which is sometimes applied by the African Union and indeed the Peace and Security Council in rejecting a view coming from outside the African continent. For example, the relationship between the Peace and Security Council and the UN Security Council was strained as a result of the two institution's divergent opinions on the intended prosecution against the Sudanese president, Omar Hassan Al Bashir. To this end, the Peace and Security Council urged the UN Security Council to

heed the AU's call for the deferral of the process initiated by the International Criminal Court (ICC) against President Omar Hassan Al Bashir in the interest of peace, justice and reconciliation. In the meantime, the [PSCAU] reiterates earlier AU

decisions on the ICC process, in particular the non cooperation of AU Member States with the arrest and surrender of President Al Bashir.<sup>116</sup>

The AU Assembly also supported the Peace and Security Council's position on non-cooperation of AU member states with the International Criminal Court (ICC) in the case of recently killed Libya's Colonel Qadhafi. Accordingly, the AU Assembly

[expressed deep concern] at the manner in which the ICC Prosecutor handles the situation in Libya which was referred to the ICC by the UN Security Council through Resolution 1970(2011) ... . In this regard, the Assembly DECIDES that [AU] Member States shall not cooperate in the execution of the arrest warrant, and Requests the UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of justice as well as peace in the country.<sup>117</sup>

The decision of the Peace and Security Council as well as the AU Assembly, which goes against the ICC's process, is also contrary to what is expected of a regional arrangement in terms of article 53(1) of the UN Charter. This provides that the UN Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.

This decision of the Peace and Security Council is also in contravention of article 17(1) of the PSCAU Protocol which provides that 'the [PSCAU] shall cooperate and work closely

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<sup>116</sup> See para. 14 of the Communiqué of the Peace and Security Council 198<sup>th</sup> Meeting on 21 July 2009 in Addis Ababa, Ethiopia. PSC/PR/ /COMM(CXCCVIII). See also Philipp Kastner 'The ICC in Darfur--Savior or Spoiler?' (2007) 14 *ILSA J. Int'l & Comp. L.* 145. See further also p. 1, para. 5 of the Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court(ICC) Doc.Assembly/AU/10(XV), Assembly/AU/Dec.296(XV). Assembly of the African Union 15<sup>th</sup> Ordinary Session, 25 – 27 July 2010, Kampala, Uganda. According to this Decision, the AU Assembly "[r]eiterates its Decision that AU Member States shall not cooperate with the ISS in the arrest and surrender of President El-Bashir of The Sudan."

<sup>117</sup> See p 1, para. 6 of the Decision on the Implementation of the Assembly Decision on the International Criminal Court Doc. Ex.CL/690(XIX). ASSEMBLY/AU/Dec.366(XVII). Assembly of the African Union 17<sup>th</sup> Ordinary Session 30 June – 1 July 2011, Malabo, Equatorial Guinea.

with the [UNSC] ... [and] also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa'. From the above, it is apparent that such a decision not to cooperate and work closely with the UN Security Council and the ICC (being a relevant UN agency), implies that the relationship envisaged between the Peace and Security Council and the UN Security Council is to be one of convenience as opposed to principle, especially on the part of the Security Council.

The Peace and Security Council's non cooperation decision has been fully supported by the AU Assembly. During its 15<sup>th</sup> Ordinary Session, the AU Assembly expressed disappointment that the UN Security Council had not acted upon the request of the AU to defer the proceedings initiated against President El Bashir in accordance with article 16 of the Rome Statute of the ICC, which allows the UN Security Council to defer cases for one year, and reiterated its request in this regard. Furthermore the AU Assembly reiterated its decision that its member states shall not cooperate with the ICC in the arrest and surrender of the president of Sudan.<sup>118</sup>

#### **4.11 CONCLUSION**

This chapter has explored the envisaged relationship between the Peace and Security Council and the UN Security Council. It was established that the relationship between these organs is one of the requirements for the fulfilment of the mandate of the Peace and Security Council. The chapter also established that this envisaged relationship is complementary in the sense that while the UN Security Council focuses on the international level, the Peace and Security Council is confined to the regional/continental level and promotes peace, security and stability in Africa.

In this relationship, the role of the UN Security Council in Africa cannot be over emphasised due to its experience, resources and power in facilitating swifter and more efficient decision-making in dealing with threats to international peace and security. The Peace and Security Council has arguably been established to complement the work of the UN Security Council, especially in urgent and serious matters that need intervention,

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<sup>118</sup> See the Decision on the Progress of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV). Assembly/AU/Dec.296(XV).

and so as to avoid a repetition of Rwanda 1994. The failure of the UN to forestall African conflicts requires an innovative strategy from the AU in order to fill the gap left by the UN Security Council. Over and above the UN's failure, the OAU also acknowledged its failures in addressing the Rwanda genocide in 1994 and other African conflicts. This called for a new approach in addressing conflicts in Africa through the establishment of the Peace and Security Council and fostering a relationship between it and the UN Security Council.

The Peace and Security Council must ensure that the challenges faced by the UN Security Council, such as the opposing political interests of individual states, which sometimes render it ineffective, do not hinder its main objective in Africa. The reliance of the PSC on the financial, logistical and military support of the UN needs to be minimised as the latter is also facing its own challenges in respect of resources. Therefore, the Council must ensure that it becomes self-sustaining as an organ, which is, among other things, tasked with promoting peace, security and stability in Africa; anticipating and preventing conflicts; promoting and implementing peace-building and post-conflict reconstruction activities; and co-ordinating and harmonizing continental efforts in the prevention and combating of international terrorism.

This chapter has also established that the Peace and Security Council is a representative organ of the AU (a regional arrangement or agency), which in terms of the UN Charter is perfectly entitled to deal with matters relating to international peace and security as are appropriate for regional action. This entitlement is limited only in the sense that the activities carried out by the Peace and Security Council must be consistent with the purpose and principles of the UN, and any enforcement action carried out by the PSCAU must be undertaken in consultation with the UN Security Council. This limitation, however, presents a challenge where the Peace and Security Council is not of the same opinion as the UN Security Council, especially on the whole notion of the use of force. Be that as it may, both the UN Charter under article 53 (although only impliedly), and the Peace and Security Council under article 16 sanction the relationship between the UN Security Council and the PSCAU.

The challenges discussed in this chapter point to the fact that the relationship between the Peace and Security Council and the UN Security Council requires further clarification. It is also apparent that this relationship is sometimes one of convenience in the sense that it only works if it gives greater favour to a particular organ, in this case the



UN Security Council. If the reverse is true, then the relationship does not function. In this situation, it may be very difficult for the PSC to effectively achieve its objective. Be that as it may, the relationship between the Peace and Security Council and the UN Security Council must be made to work effectively.

## CHAPTER 5: RELATING TO OTHER AU ORGANS AND CIVIL SOCIETY

### 5.1 INTRODUCTION

The relationship between the African Union's Peace and Security Council and the UN Security Council, although extremely important, is not sufficient to address the peace, security and stability challenges in Africa. This chapter attempts to answer the following question: *Based on articles 18, 19, and 20 of the PSCAU Protocol, do the envisaged relationships between the Peace and Security Council and the Pan-African Parliament, the African Commission (AC), and Civil Society Organizations, respectively, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?* This question is important in the sense that while the UN Security Council is not an organ of the AU, the Pan-African Parliament, the African Commission and CSOs are either organs that operate under the auspices of the AU or that work in close proximity to the Peace and Security Council.

The PSCAU Protocol not only envisages a relationship between the Council and relevant AU organs and/or institutions, namely, the Pan-African Parliament,<sup>1</sup> the African Commission<sup>2</sup> and CSOs,<sup>3</sup> but places a lot of emphasis on such cooperation. The reason for this is not hard to find. Ensuring peace and security throughout the entire continent is not an easy task and the Council cannot achieve this on its own. While the UN Security Council is based in New York, the fact that these institutions are based in Africa makes them in some ways more important, as they arguably understand the peace and security challenges in Africa much better than the UN Security Council.<sup>4</sup> They are also

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<sup>1</sup> Art. 18 of the PSCAU Protocol.

<sup>2</sup> Art. 19 of the PSCAU Protocol.

<sup>3</sup> Art. 20 of the PSCAU Protocol.

<sup>4</sup> The PAP is based in Johannesburg, South Africa; the African Commission on Human and Peoples' Rights is based in Banjul, The Gambia, and ECOSOCC is based in Addis Ababa, Ethiopia.

arguably in a much better position to advise the Peace and Security Council on how best to address African challenges.

Despite the fact that the PSCAU Protocol does not provide much detail on how cooperation with these institutions should work, the Peace and Security Council is given the task of drawing up its own rules of procedure including, among other things, the conduct of its business and any other relevant aspects of its work. These rules are submitted to the AU Assembly for its consideration and approval.<sup>5</sup> In this chapter, more focus will be devoted to the relationship between the Peace and Security Council and the PAP, the African Commission and CSOs respectively in the promotion of peace and security in Africa. The rationale behind discussing these institutions in a single chapter is that their respective work is interrelated, as will be demonstrated.

Firstly, the chapter discusses the relationship between the Peace and Security Council and the Pan-African Parliament, critically analysing the unequal power balance in how the relationship is couched in the PSCAU Protocol. Secondly, it considers the relationship between the PSC and the African Commission (the latter being an institution established under the auspices of the OAU) as not necessarily being an organ of the AU, strictly speaking. Thirdly, the chapter considers the role played by the AU Commission and its chairperson in the workings of the Peace and Security Council. Fourthly, it discusses the relationship to be forged between the Peace and Security Council and CSOs. Under this sub-heading, the chapter considers the Livingstone Formula, a system that is meant to facilitate this relationship. A discussion on the Economic Social and Cultural Council, which has since its establishment operated through the work of an interim standing committee,<sup>6</sup> is also undertaken under this sub-heading. The chapter concludes by providing recommendations on how best these various relationships should be forged in order to ensure peace, security and stability in Africa.

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<sup>5</sup> Art. 8(14) of the PSCAU Protocol.

<sup>6</sup> Charles Mutasa, 'A Critical Appraisal of the African Union-ECOSOCC Civil Society Interface' in Akokpari John, *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 292.

## 5.2 PAN-AFRICAN PARLIAMENT

### 5.2.1 WORKING RELATIONS BETWEEN PSCAU AND PAP

Regarding the relationship between the Peace and Security Council and the Pan-African Parliament, while the former falls under the executive branch of the AU, the latter falls under the legislative branch. The PAP is one of the nine organs that were created by the Treaty Establishing the African Economic Community (AEC) signed in Abuja, Nigeria in 1991.<sup>7</sup> Article 18(1) of the PSCAU Protocol provides that the mechanism of the Peace and Security Council shall 'maintain close working relations with the Pan-African Parliament in furtherance of peace, security and stability in Africa'.

The maintenance of 'close working relations' between the Peace and Security Council and the African people's representatives forming the Pan-African Parliament is in the pursuit of peace and security in Africa. It is a novelty in Africa's peace and security efforts undertaken by the AU through the Peace and Security Council, that African people will, through their representatives at the Pan-African Parliament level, play a significant part. Article 18(1) of the PSCAU Protocol lays down the basis for the cooperation between the Peace and Security Council and the PAP in very broad terms. The finer details of the envisaged relationship, although not sufficient and seemingly one-sided, are provided in the succeeding provisions.

### 5.2.2 REPORTS

In terms of article 18(2) of the PSCAU Protocol, the Pan-African Parliament is empowered to request the Peace and Security Council to submit reports 'in order to facilitate the discharge by the [PAP] of its responsibilities relating to the maintenance of peace, security and stability in Africa'. This provision, however, does not elaborate on the PAP's responsibilities relating to the maintenance of peace, security and stability in Africa. The type(s) of reports, which may be requested by the PAP, are also not specified. This is likely to strain the relationship between the Peace and Security Council and the PAP in the sense that the Parliament may request reports that the Council may

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<sup>7</sup> Baleka Mbete, 'The Pan-African Parliament: Progress and prospects' in Akokpari John *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 307.

not be willing to submit for various reasons. For example, it is possible that the Peace and Security Council may not be willing to provide reports that might contain classified information or intelligence. The type(s) of reports that the PAP is empowered to request from the Council should be clearly spelt out in an instrument, such as a memorandum of agreement, formalising and giving effect to this relationship.

It is also not clear what would happen if the Peace and Security Council refused to submit the reports so requested. The only test that can be used in submitting the reports is whether the required reports will facilitate the discharge of the PAP's responsibilities to maintain peace, security and stability in Africa. In the event that this test fails, there is no point in the Peace and Security Council submitting such reports. The question of who makes the determination of whether or not the reports will facilitate the discharge of these PAP responsibilities is also left hanging.

Over and above the reports referred to above, the chairperson of the Commission is entrusted with the responsibility of presenting to the PAP 'an annual report on the state of peace and security in the continent'.<sup>8</sup> It is not clear whether the annual report referred to in this provision is that of the chairperson of the Commission or of the Peace and Security Council. What is clear is that the chairperson of the Commission must present the annual report to the PAP. Since the chairperson acts as a conduit through which the reports from the Peace and Security Council are submitted to the Pan-African Parliament in terms of article 18(1) of the PSCAU Protocol, it could be assumed that this is in fact an annual report of the Council. After all, the relationship provided under the relevant article is between the Peace and Security Council and the PAP and not necessarily between the PAP and the chairperson of the Commission.

If it is accepted that article 18(3) of the PSCAU Protocol is an elaboration of the relationship between the Peace and Security Council and the PAP, a distinction must be made between the reports submitted by the Council to the Pan-African Parliament through the chairperson of the Commission in terms of article 18(2) of the PSCAU Protocol and the annual report, which the chairperson is required to present to the PAP in terms of article 18(3) of the PSCAU Protocol. This is on the assumption that the annual report is that of the Peace and Security Council. While the reports speak to the need 'to facilitate the discharge by the [PAP] of its responsibilities relating to the maintenance of

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<sup>8</sup> Art. 18(3) of the PSCAU Protocol.

peace, security and stability in Africa',<sup>9</sup> the annual report is to give an account 'on the state of peace and security in the continent'.<sup>10</sup>

### **5.2.3 CHAIRPERSON OF AU COMMISSION AND PAP**

A much closer reading of article 18(3) of the PSCAU Protocol seems to provide for a relationship only between the Pan-African Parliament and the chairperson of the AU Commission, with no mention made of a relationship between the PAP and the PSC specifically. It can therefore be argued convincingly that a direct relationship between the PAP and the PSCAU is not intended. In fact, the Peace and Security Council does not feature at all in this provision and it seems that article 18(3) of the PSCAU Protocol is misplaced within the envisaged relationship.

In establishing the relationship between the chairperson of the AU Commission and the PAP, article 18(3) of the PSCAU Protocol further provides that the former shall take all steps required to facilitate the exercise by the PAP of its powers as stipulated in article 11(5) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament Protocol (PAP Protocol).<sup>11</sup> The same principle applies in relation to article 11(9) of the PAP Protocol in so far as it relates to the objective of promoting peace, security and stability as spelt out in article 3(5) of the same. Again this second part of article 18(3) reaffirms the fact that this relationship is strictly between the chairperson of the Commission and the PAP.

### **5.2.4 PROMOTIONAL MANDATE**

As seen above, article 18 of the PSCAU Protocol is very limited in describing how the relationship between the Peace and Security Council and the Pan-African Parliament should be given effect. Notwithstanding this limitation, there is reference to the PAP Protocol, which gives some direction on the envisaged relationship between the PAP

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<sup>9</sup> Art. 18(2) of the PSCAU Protocol.

<sup>10</sup> Art. 18(3) of the PSCAU Protocol.

<sup>11</sup> Adopted by the 5th Extra-Ordinary OAU Assembly session in Sirte on 2 March 2001.

and the Peace and Security Council. Article 3(5) of the PAP Protocol provides that the PAP shall promote peace, security and stability. This is an important role played by the PAP and is more relevant to the work of the PSC. In a press statement, the Peace and Security Council

stressed the need to enhance cooperation with the PAP in the area of conflict prevention in particular regarding efforts to be made with a view to preventing post-electoral tension and violence, as well as their negative impact on peace, security and stability in Africa.<sup>12</sup>

The Pan-African Parliament was established in terms of article 7(1) of the Constitutive Act in order to ensure full participation of African peoples in the development and economic integration of the continent.<sup>13</sup> It was further established, at least in concrete terms, under article 2 of the PAP Protocol. The composition, powers, functions and organization of the PAP are defined in the PAP Protocol. Among other things, one of the objectives of the Parliament is to promote peace, security and stability.<sup>14</sup> It therefore stands to reason that there is a need for it to forge a collaborative relationship with the Peace and Security Council, especially with regard to peace, security and stability in Africa.

The PAP's role therefore is confined to a promotional one, when it comes to peace, security and stability issues. This is despite the fact that its role is legislative, or rather should be seen as such. It is, however, not so clear how this promotional role could be associated with the PAP's legislative powers. More answers are, however, available when considering the Parliament's powers and functions, beyond its legislative function. It must be recalled that the PAP is an AU organ aimed at ensuring the full participation of African peoples in matters relating to governance, development and

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<sup>12</sup> See Press Statement, Peace and Security Council 148<sup>th</sup> Meeting, 22 August 2008, Addis Ababa, Ethiopia. PSC/PR/BR(CXLVIII). Available at [www.ausitroom-psd.org/Documents/PSC2008/.../PRESSSTATEMENTEng.pdf](http://www.ausitroom-psd.org/Documents/PSC2008/.../PRESSSTATEMENTEng.pdf) (Accessed 13 July 2010).

<sup>13</sup> For more information on the PAP, see <http://www.pan-african-parliament.org/default.aspx> (Accessed 2 January 2010).

<sup>14</sup> Art. 3(v) of the PAP Protocol.

economic integration of the continent.<sup>15</sup> The absence of peace and security in Africa has a negative effect on the above matters and there is a need for the PAP to deliberate on issues touching upon peace and security as a means of advancing governance, development and economic integration.

In so far as its functions and powers are concerned, the Pan-African Parliament is vested with legislative powers as defined by the Assembly.<sup>16</sup> During its first term of existence, the PAP exercises advisory and consultative powers only.<sup>17</sup> Among other things, it is entrusted with the responsibility of examining, discussing or expressing an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make recommendations it may deem fit relating to, *inter alia*, matters pertaining to respect for human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.<sup>18</sup> The express mention of ‘matters pertaining to respect [for] human rights’ is commendable, as it will advance the human rights cause at the PAP level through the participation of the African peoples’ duly elected representatives.

A simple majority constitutes a quorum for a meeting of the Pan-African Parliament.<sup>19</sup> Each parliamentarian has one vote and decisions are made by consensus, failing which, by a two-thirds majority of all members present and voting.<sup>20</sup> In so far as procedural matters and questions of whether a matter is procedural or otherwise are concerned, a simple majority of those present and voting is the decider. In the event that an equal number of votes occurs, the person presiding has the casting vote.<sup>21</sup>

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<sup>15</sup> See art. 17(1) of the Constitutive Act. See also art. 3 of the PAP Protocol.

<sup>16</sup> Art. 11 of the PAP Protocol.

<sup>17</sup> As above.

<sup>18</sup> Art. 11(1) of the PAP Protocol.

<sup>19</sup> Art. 12(11) of the PAP Protocol.

<sup>20</sup> Art. 12(12) of the PAP Protocol.

<sup>21</sup> As above.



Just like other AU organs, the PAP, as already mentioned, is entrusted with the promotion of human rights, among other things. This impliedly includes the right to peace and security, which is more relevant to the work of the Peace and Security Council. In accordance with the provisions of Rule 22 of the Rules of Procedure, the PAP established ten Permanent Committees of the Parliament, each consisting of a chairperson, deputy-chairperson and a rapporteur who form the Bureau of the Committee. These Permanent Committees include the Committee on Justice and Human Rights. According to the PAP Annual Report 2003-2005, the Committee on Justice and Human Rights will develop and promote respect for sound principles, civil liberties, justice, human and peoples' rights and fundamental rights within Africa.<sup>22</sup> All these are important elements for conflict prevention and early warning, peace building and post conflict reconstruction and development.

The other working committee, which is more relevant for our purposes, is the Committee on Cooperation, International Relations and Conflict Resolution. While this committee is responsible for very broad focus areas, as reflected in its title, Mbete argues that it has already developed a common understanding of what challenges could emerge in the said focus areas.<sup>23</sup> The role of the legislature in general is to exercise oversight in relation to the executive, over and above its legislative role, yet article 18 of the PSCAU Protocol does not provide for any oversight role for the PAP in relation to the Peace and Security Council in the maintenance of a close working relationship in furtherance of peace, security and stability on Africa. The infusing of the oversight role of the PAP *vis-à-vis* the Peace and Security Council could have been provided for through a check-and-balance mechanism that would have ensured that the Council is accountable to the African people as represented at the PAP level.

### **5.2.5 PAP CONTRIBUTION TO PEACE AND SECURITY**

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<sup>22</sup> See the Pan-African Parliament 2004-2005 Annual Report. Available at <<http://www.pan-african-parliament.org/Controls/Documents.aspx?DID=350>> (Accessed 13 February 2010).

<sup>23</sup> Mbete (n 7 above) 310.

Despite some of the shortcomings related to the relationship between the Peace and Security Council and the Pan-African Parliament, the latter has made a significant contribution to addressing peace and security issues on the continent. Some of the activities undertaken by the PAP include the following: sending a mission to Darfur; observing elections in member states; putting a management and personnel structure in place and establishing a network of continental and international partners; holding workshops with the RECs on relations with regional parliaments; and deliberating on the Union Government Grand Debate.<sup>24</sup> On 6 May 2008, the PAP issued a Paper on Peace and Security in Africa, which captured the peace and security situations in Sudan-Darfur, Chad, the Central African Republic, the Democratic Republic of the Congo, Somalia, Côte d'Ivoire, and the Sahrawi Arab Democratic Republic (Western Sahara).<sup>25</sup> Through this paper, the PAP acquainted its members with developments in these states that have a bearing on peace and security.

When considering article 18(1) of the PSCAU Protocol in light of the Darfur Fact Finding Mission undertaken by the PAP, it would seem that there was no close working relationship between the PSCAU and PAP as the mission was independently undertaken. This was therefore not in line with article 18 of the PSCAU Protocol, yet no explanation was given, notably, by the PAP, for the flouting of this provision. The Peace and Security Council has also failed to raise the matter, which is unfortunate. According to the PAP Report 2004-2005, in accordance with a resolution establishing a Parliamentary Mission to Darfur, at the conclusion of its Second Ordinary Session, a PAP delegation was dispatched to the Sudan to investigate the situation on the ground and report back to the House. According to the report,

The significance of this virgin Mission by the PAP acts as sound proof that PAP is not simply a 'talk-shop', but is set to fully execute its mandate. In terms of its mandate, this action further entrenches a key role that the PAP has been mandated

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<sup>24</sup> As above.

<sup>25</sup> Paper on Peace and Security in Africa, 6 May 2008. PAP/C.10/CCIRCR/RPT/41/08. Available at [http://www.pan-africanparliament.org/DocumentsResources\\_DisplayDocument.aspx?Type=Docs&ID=746](http://www.pan-africanparliament.org/DocumentsResources_DisplayDocument.aspx?Type=Docs&ID=746) (Accessed 15 July 2010).

to play; that is, the promotion of peace, security and stability for the Peoples of Africa.<sup>26</sup>

While such an action entrenches the key role that the PAP is mandated to play, it is doubtful as to whether it was undertaken in collaboration with the Peace and Security Council. The reason for this is that there is no formalised system aimed at implementing article 18 of the PSCAU Protocol.

### 5.2.6 LIMITATIONS TO THE RELATIONSHIP

As we have observed above, there is no formal relationship between the PAP and other organs/institutions of the AU, most notably the African Commission, which is responsible for the promotion and protection of human and peoples' rights in Africa and the Peace and Security Council, which is responsible for peace and security in Africa. Hence it was recommended in the AU Audit Review of 2007 that the PAP should put in place policy guidelines on its relationship with other organs of the AU subject to the concurrence of the other organs and the approval of the Assembly.<sup>27</sup>

On the relationship between the Peace and Security Council and the PAP, the only source for some kind of cooperation is one-sided: while the PSCAU Protocol dictates that the Council shall maintain close working relations with the PAP in furtherance of peace, security and stability in Africa, the PAP Protocol is silent. If the AU intended to have the relationship formalised, an amendment would have been made to the PAP Protocol effecting such cooperation. Otherwise, the one-sided relationship seems to be *ad hoc* since the Peace and Security Council shall 'whenever requested' by the PAP submit reports to the Parliament (through the chairperson of the Commission), in order to facilitate the discharge by the PAP of its responsibilities relating to the maintenance of peace security and stability in Africa.<sup>28</sup>

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<sup>26</sup> PAP Report 2004-2005 at p. 44. Available at <http://www.pan-africanparliament.org/Controls/Documents.aspx?DID=350> (Accessed 15 July 2010).

<sup>27</sup> P. 59, para. 111 of the AU Audit Review.

<sup>28</sup> Art. 18(2) of the PSCAU Protocol.

It is intriguing to note that the PAP cannot be requested by the Peace and Security Council to submit relevant reports in order to facilitate the discharge of the Council's obligations in terms of the PSCAU Protocol. It is also not laid out how the PAP should handle the reports obtained from the Peace and Security Council and how these reports may be used in promoting peace and security in Africa. One of the most obvious challenges faced by the Parliament is how its members may be effective in playing their roles in accordance with the PAP Protocol and in cooperating with the Peace and Security Council. The PAP was not involved in the process that led to the establishment of the Peace and Security Council in general and or in the consequent formulation of article 18 of the PSCAU Protocol. This could have facilitated a significant input from the PAP in the formulation of the provision, which seems to support a one-sided approach to cooperation between the two institutions.

At its 148<sup>th</sup> meeting held on 22 August 2008, the PSC was briefed in a consultative session by the president of the PAP, the Hon. Gertrude I. Mongella, on the efforts of the PAP towards peace building in Africa. According to a press statement, the PSCAU,

noted with satisfaction that this consultative session is the first step towards the implementation of the provisions contained in article 18 of the [PSCAU Protocol] regarding the role of PAP in furtherance of peace, security and stability in Africa, as well as the relationship between the PSC[AU] and the PAP.<sup>29</sup>

This consultative session marked the beginning of the application of article 18 of the PSCAU Protocol and the Conclusions of the Dakar Peace and Security Council Retreat, which was held in July 2007. It is hoped that, with time, a lasting solution will be found that balances the relationship between the Peace and Security Council and the PAP in fulfilling the overarching objective of the AU. This solution will also address the issue of how the relationship between the two bodies should be conducted by spelling out their respective roles.

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<sup>29</sup> See Press Statement, Peace and Security Council 148<sup>th</sup> Meeting, 22 August 2008, Addis Ababa, Ethiopia. PSC/PR/BR(CXLVIII). Available at [www.ausitroom-psd.org/Documents/PSC2008/.../PRESSSTATEMENTEng.pdf](http://www.ausitroom-psd.org/Documents/PSC2008/.../PRESSSTATEMENTEng.pdf) (Accessed 13 July 2010).

Needless to say, through the establishment of the PAP, the AU opened a new chapter where African citizens and parliamentarians in particular were given an opportunity to play a direct role in the affairs of the Union. As Murithi argues, '[i]n many instances, across the continent, governments do not genuinely represent the interests of the people and rather tend to be advocating the agenda of the ruling elite, which can be one ethnic group or a coalition of ethnic groups'.<sup>30</sup> The involvement of the PAP in peace and security affairs, through its cooperation with the Peace and Security Council, is therefore in order, as African citizens through the PAP are given an opportunity to express their views on peace and security issues to a much wider audience. Murithi further argues that the relationship between the Peace and Security Council and the PAP in addressing peace and security issues in Africa presents is 'a useful alternative forum for raising issues relating to minority rights which can function as a people driven system of checks and balances to ensure that the "politics of indifference" which plagued the OAU does not take root in the evolving African Union'.<sup>31</sup>

Having considered the relationship between the PSC and the PAP, it is important to also consider the interplay between the Council and the African Commission on Human and Peoples' Rights, which is responsible for the promotion and protection of human and peoples' rights in Africa.

### **5.3 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

#### **5.3.1 A TOOL FOR RIGHTS AND FREEDOMS**

The African Commission forms part of the African human rights system, which is based on the African Charter. The African Charter forms the main basis for the promotion and protection of human and peoples' rights in Africa. The African Commission is established under article 30 of the African Charter as an implementation tool for the rights and freedoms guaranteed therein. It is a quasi-judicial institution that has been in existence since 1987 and is composed of eleven members elected by the AU executive committee from member states and appointed by the AU Assembly. According for

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<sup>30</sup> Tim Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Ashgate Publishing Company, London, UK, 2005) 103.

<sup>31</sup> As above 104.

article 31(1) of the African Charter, the members of the African Commission need to be chosen from 'amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'.

The African Commission is not an AU organ, but an institution established in terms of an AU legal instrument, that is, the African Charter.<sup>32</sup> The Commission's protective mandate is complemented by the African Court on Human and Peoples' Rights, which is established through the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).<sup>33</sup> This Court has now merged with the African Court of Justice to become the African Court of Justice and Human Rights.<sup>34</sup>

### 5.3.2 COOPERATION - AFRICAN COMMISSION AND PSCAU

Article 19 of the PSCAU Protocol provides that firstly, the Peace and Security Council 'shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate' and secondly that the African Commission 'shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council'.

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<sup>32</sup> On this point see Frans Viljoen *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2007) 217-219. On the African Commission as a collective human security resource, see Obiora Chinedu Okafor 'The African Commission on Human and Peoples' Rights as a Collective Human Security Resource: Promise, Performance, and Prospects' in Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 313.

<sup>33</sup> Adopted on 10 June 1998 and entered into force on 25 January 2004, thirty days after the deposit of the 15<sup>th</sup> instrument of ratification.

<sup>34</sup> See Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union – Assembly/AU/6 (V). Assembly of the African Union 5<sup>th</sup> Ordinary Session, 4-5 July 2005, Sirte, Libya. See also Kuwali, Daniel, *Persuasive Prevention: Implementation of the AU Right of Intervention* (Published PhD thesis, Faculty of Law, Lund University, 2009) 175 - 180. See also Gino J Naldi 'The Role of the Human and Peoples' Rights Section of the African Court of Justice and Human Rights' in Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 284.

The article 19 use of the words 'its objectives and mandate' is confusing in the sense that it is not clear whether they refer to the objectives and mandate of the Peace and Security Council or those of the African Commission. It may be argued that the intention of the drafters was to refer to the objectives and mandate of the Peace and Security Council. If reference was being made to the African Commission then the words 'latter's objectives and mandate' could have been used.

Unlike that of the Peace and Security Council and the PAP, the close cooperation to be forged between the Council and the African Commission seems to be well balanced in the sense that both the Peace and Security Council, as an organ of the AU, and the African Commission as an institution established under the auspices of the AU, have respective obligations. On the one hand, as long as any matter is relevant to the Peace and Security Council's objectives and mandate, then the Council must seek the close cooperation. On the other, as long as the African Commission stumbles upon any information relevant to the objectives and mandate of the Peace and Security Council, it is obliged to bring it to the attention of the latter. The contribution made by the two institutions to peace and security in Africa is impliedly acknowledged and recognised in article 19 of the PSCAU Protocol.

Looking at the entire PSCAU Protocol there is no mention of the African Charter and in particular of the provision dealing with the right to national and international peace and security provided under article 23(1) of the African Charter, which provides for the right of all peoples to national and international peace and security. This right has both a national and an international dimension. It may well be the case that the drafters of the PSCAU Protocol never realized the need to reaffirm peace and security as a human right. Whether or not they treated peace and security as an objective of the AU or as a human right guaranteed by the African Charter, they could not have escaped the need to involve the African Commission in peace and security matters. For that reason the PSCAU Protocol calls for close collaboration between the Peace and Security Council and the African Commission under article 19 of the PSCAU Protocol, as discussed above.

### **5.3.3 'CLOSE COOPERATION'**

Despite the fact that article 1 of the PSCAU Protocol does not spell out the nature of the envisaged 'close cooperation', the Peace and Security Council is obliged to seek cooperation with the African Commission not just on matters relevant to its objectives and mandate, but on all relevant matters. The reason behind this obligation is not hard to find. The African Commission is entrusted with the mandate of promoting and protecting human rights,<sup>35</sup> and peace and security is a human right guaranteed under the parent treaty, the African Charter.<sup>36</sup> One would therefore assume that such close cooperation would require the Peace and Security Council as well as the African Commission to exchange information about their activities, particularly those dealing with peace and security and human rights issues in Africa. These are after all the obvious matters relevant to both institutions' objectives and mandates.

The obligation should be a mutual one. On the one hand the African Commission should be obligated to bring to the attention of the Peace and Security Council any information relevant to the PSC's objectives and mandate. In this sense the African Commission would complement the work of the Peace and Security Council in cases where the PSC sought to cooperate closely with the Commission in matters relevant to the PSC's objectives. This kind of cooperation could be for instance in the form of information sharing, especially where particular information was relevant to the making of crucial peace and security decisions.

On the other hand, the Peace and Security Council should compliment the work of the African Commission, particularly on its promotional mandate, with the main focus being on the right to peace and security in Africa. By bringing to the attention of the African Commission any information relevant to its objectives and mandate, the Peace and Security Council would also be contributing to the effectiveness of the CEWS established in terms of the article 12 of the PSCAU Protocol. It is, however, very unfortunate that the African Commission's request, in March 2006, to participate in a Peace and Security Council meeting in order to consider the situation in Sudan was rejected. This was done despite the fact that African Commission's mandate in essence

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<sup>35</sup> Arts. 30 and 45 of the African Charter.

<sup>36</sup> Art. 23 of the African Charter.



covered the dossier of human rights, which is without doubt pertinent to any conflict or crisis situation.<sup>37</sup>

The PSCAU Protocol is silent on the relationship between the Peace and Security Council and the African Court of Justice and Human Rights. This court came into being when the Executive Council to the AU Assembly recommended a merger of the African Court of Justice and the African Court on Human and Peoples' Rights.<sup>38</sup> Among other things the African Court of Justice and Human Rights has the mandate to complement the protective mandate of the African Commission in line with the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).<sup>39</sup> Since the African Commission and the African Court on Human Rights and Justice have overlapping responsibilities, including the one described above, the Peace and Security Council logically speaking should have also extended its relationship with the African Commission to the new African Court. This court is the judicial counterpart of the AU's political organs – the Assembly and Executive Council – and of the Economic, Social and Cultural Council.

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<sup>37</sup> See p. 79, para. 195 of the AU Audit Review.

<sup>38</sup> See Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. Doc.Ex.CL/162 (VI). Executive Council 6<sup>th</sup> Ordinary Session, 24-28 January 2005 Abuja, Nigeria. See also Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union – Assembly/AU/6 (V). Assembly of the African Union 5<sup>th</sup> Ordinary Session, 4-5 July 2005, Sirte, Libya. See further also Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice Doc.Assembly/AU/13 (XI). Assembly of the African Union 11<sup>th</sup> Ordinary Session, 30 June – 1 July 2008, Sharm El-Sheikh, Egypt. See also Decision of the Executive Council on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union Doc.EX.CL/431 (XIII).

<sup>39</sup> Adopted on 10 June 1998 and entered into force on 25 January 2004, thirty days after the deposit of the 15<sup>th</sup> instrument of ratification.

Both the Peace and Security Council and the African Commission are answerable to the Assembly. In collaborating in the peace and security agenda, they can speak with one voice especially where human rights violations in a member state are a threat to Africa as a whole. Article 58 of the African Charter obliges the African Commission to draw to the attention of the Assembly special cases, which, (after deliberations consisting of one or more communications) apparently relate to cases revealing the existence of a series of serious or massive violations of human and peoples' rights. One such example, relevant to our discussion, would be the serious and massive violations of the right to peace and security.

As the Assembly may in turn request the African Commission to undertake an in-depth study of such cases and to make a factual report accompanied by its findings and recommendations,<sup>40</sup> background information would be easily available from the Peace and Security Council, which has in place the Situation Room, being the centre responsible for collecting data and analysing it on the basis of an appropriate early warning indicator module.<sup>41</sup> The Assembly may also commission an in-depth study where a case of emergency has been duly noted by the African Commission, beyond the latter's communication procedure.<sup>42</sup>

The PSCAU Protocol offers the African Commission a great opportunity to promote the right to peace and security in Africa in collaboration with the Peace and Security Council. According to the AU's Commissioner for Political Affairs, Julia Joiner '[b]eing the pioneer African human rights body ... the opportunities offered by the African Commission must be fully exploited and effectively utilized if we are to establish a genuine human rights culture and make human rights central to the work of the African Union and all its organs'.<sup>43</sup> These opportunities also include those offered by article 19 of

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<sup>40</sup> Art 58(2) of the African Charter.

<sup>41</sup> Art. 12(2)(a) of the PSCAU Protocol.

<sup>42</sup> Art. 58(3) of the African Charter.

<sup>43</sup> Julia Dolly Joiner, 'Beyond Commitments, Towards Practical Action' in Lennart Wohlgenuth & Ebrima Sall (eds.) *Human Rights, Regionalism and the Dilemmas of Democracy in Africa* (Dakar, CODESRIA book series, 2006).

the PSCAU Protocol. Joiner further challenges the African Commission to be proactive and initiate groundbreaking policies and take decisions that would shape the course of human rights in Africa.<sup>44</sup>

#### 5.3.4 THE FUNDING QUESTION

For any relationship between the Peace and Security Council and the African Commission to be meaningful, there is a need for funds to be made available. It is a known fact, for instance, that the African Commission is short of funds in the form of member state subscriptions. Any commitment to human rights is therefore imperilled by the member states' lack of commitment in this regard. Joiner once admitted that '[t]he African Commission as it stands today lacks the requisite human, material and financial resources to fully respond to the numerous human rights challenges arising from a growing number of countries on the continent'.<sup>45</sup>

According to the 2007 AU Audit Review,<sup>46</sup> in 2006, the Commission was allocated US \$1, 142 436 and the bulk of this amount was spent on operational costs, a fact that is not mentioned in the 22<sup>nd</sup> Activity Report of the African Commission. The Audit Review further states that out of this allocation only US \$ 47, 000 was spent on the Commission's core mandate, namely promotion and protection of human rights. Most disturbingly, as the Audit Review notes, is that had not been for US \$ 530, 000 received from external sources, the African Commission would not have been able to operate. If the relationship between the Peace and Security Council and the African Commission is to be sustained, this state of affairs will need to be rectified.

In 2007, after the African Commission had made repeated appeals to the AU Assembly to be provided with enough resources to carry out its responsibilities,<sup>47</sup> the Executive

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<sup>44</sup> As above.

<sup>45</sup> As above.

<sup>46</sup> See p. 63, para. 122 of the AU Audit Review.

Council authorised the Commission to take full responsibility of its own budget, beginning from the 2008 financial year, and also called on it to propose a new structure to ensure its financial independence within the AU.<sup>48</sup> It was stipulated that the new structure should also accommodate the funds that would be committed to initiating and maintaining the relationship between the African Commission and the Peace and Security Council.

#### 5.4 PIVOTAL ROLE OF AU COMMISSION AND CHAIRPERSON

The PSCAU Protocol does not expressly establish a relationship between the Peace and Security Council and the AU Commission. However, the AU Commission, through its chairperson, plays a pivotal role on the workings of the Peace and Security Council. In terms of the Statutes of the Commission of the African Union, the functions of the Commission include representing the AU and defending its interests,<sup>49</sup> initiating proposals for consideration by other organs,<sup>50</sup> implementing decisions taken by other organs,<sup>51</sup> promoting integration and socio-economic development,<sup>52</sup> ensuring the promotion of peace, democracy, security and stability,<sup>53</sup> and ensuring the mainstreaming of gender in all programmes and activities of the AU.<sup>54</sup> It is therefore in order for the

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<sup>47</sup> See for instance, the African Union (Executive Council) 'Report of the African Commission on Human and Peoples' (ACHPR)' (Accra 2007) EX.CL/346(IX) paras. 101 & 102.

<sup>48</sup> African Union (Executive Council) 'Decision on the 21<sup>st</sup> Activity Report of the African Commission on Human and Peoples' Rights' (Addis Ababa 2007) EX.CL/Dec.344 (X), ART. 2(iv) and (v).

<sup>49</sup> Art. 3(2)(a) of the Statutes of the Commission of the African Union. Adopted by the Assembly during its First Ordinary Session 9 – 10 July 2002, Durban, South Africa.

<sup>50</sup> Art. 3 (2)(b) of the Statutes of the AU Commission.

<sup>51</sup> Art. 3(2)(c) of the Statutes of the AU Commission.

<sup>52</sup> Art. 3(2)(p) of the Statutes of the AU Commission.

<sup>53</sup> Art. 3(2)(r) of the Statutes of the AU Commission.

Commission chairperson to be involved in peace and security matters in collaboration with the Peace and Security Council.

In fact the relationship between the Peace and Security Council and the various organs and institutions can only be given effect through the participation of the chairperson. Among other things, the chairperson's functions are that of the chief executive officer and legal representative of the AU, directly responsible to the Executive Council for the effective discharge of duties.<sup>55</sup> The deputy chairperson assists and is accountable to the chairperson.<sup>56</sup> Equally important and falling under the auspices of the AU Commission is the Peace and Security Department which provides support for efforts to foster peace, security and stability in Africa.<sup>57</sup> Among other things, the PSC is responsible for putting into operation the Continental Peace and Security Architecture as articulated by the PSCAU Protocol.<sup>58</sup> The Peace and Security Department consists of four divisions, namely, the Conflict Management Division, the Peace Support Operations Division, the Peace and Security Council Secretariat, and the Defence and Security Division.<sup>59</sup>

In view of the functions of the AU Commission and the Peace and Security Department, the drafters of the PSCAU Protocol should have included a provision describing the relationship between the Peace and Security Council and the AU Commission. This is especially so, given the fact that the AU Commission, as an organ of the AU, is deeply involved in peace, security and stability issues in Africa. In fact a more formalized system governing the relationship between the Peace and Security Council and the AU Commission is a necessity. This could be a matter of consideration in the event that a decision is taken to amend the PSCAU Protocol.

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<sup>54</sup> Art. 3(2)(cc) of the Statutes of the AU Commission.

<sup>55</sup> Art. 7 of the Statutes of the AU Commission.

<sup>56</sup> Art. 9 of the Statutes of the AU Commission.

<sup>57</sup> See the website of the Peace and Security Department, available at <<http://au.int/en/dp/ps/psd>> (Accessed 25 August 2011).

<sup>58</sup> As above.

<sup>59</sup> As above.

The AU Commission undertakes its core functions through designated portfolios headed by commissioners who are responsible for the implementation of all decisions and programmes in respect of their respective portfolios while being accountable to the chairperson.<sup>60</sup> As stated in the AU Audit Review, one of the challenges related to the organization of the AU Commission is that the relationship between the chairperson, deputy chairperson and the commissioners 'can be best described as dysfunctional with overlapping portfolios, unclear authority and responsibility lines and expectations'.<sup>61</sup>

This 'dysfunctional' relationship is, no doubt, detrimental to relations between the Peace and Security Council and the chairperson of the AU Commission, especially given that the effectiveness of the relationship between the Council and the institutions and organs subject to this study is dependent on the effectiveness of the AU Commission as a whole. At the least, there is a need for these office bearers, particularly, the commissioner on Peace and Security, to devise a strategy on how to work with the Peace and Security Council. This could also be included in the recommended provision in the PSCAU Protocol elaborating on the relationship between the PSC and the AU Commission.

As discussed, the work of the Peace and Security Council cannot succeed without the involvement of the AU Commission and its chairperson. Article 10 of the PSCAU Protocol deals with the role of the chairperson of the AU Commission. The Protocol implicitly creates a relationship between the Peace and Security Council and the chairperson of the AU Commission. According to article 10(3)(a), the chairperson is entrusted with the responsibility of ensuring the implementation and follow-up of the decisions of the Peace and Security Council, including mounting and deploying peace support missions authorised by the Council. This implies that decisions taken by the Council which, respectively, relate to its relationship with the UN Security Council, the PAP, the African Commission, civil society organisations, and the sub-regional mechanisms, must be implemented by the chairperson of the AU Commission.

The chairperson plays a vital role in facilitating the exchange of information among the various organs and institutions dealing with peace and security in Africa. Article

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<sup>60</sup> Art. 11 of the Statutes of the AU Commission.

<sup>61</sup> See p. 33, para. 65 of the AU Audit Review.

(10)(3)(a) of the PSCAU Protocol states that the chairperson of the Commission shall keep the Peace and Security Council informed of developments relating to the functioning of such missions and also refer to the Council for consideration and appropriate action all problems likely to affect the continued and effective functioning of these missions. Again this provision illustrates the need to establish a formal relationship within the PSCAU Protocol between the Peace and Security Council and the AU Commission, within which the chairperson operates.

Over and above this function, the chairperson is entrusted with the responsibility of ensuring the implementation and follow-up of decisions made by the Assembly. This is to be done in conformity with article 4(h) and (j) of the Constitutive Act: article 4(h) being the right of the AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity; and article 4(j) being the right of member states to request intervention from the AU in order to restore peace and security. As discussed in Chapter 3, while the responsibility to protect falls squarely on the AU in general and the Peace and Security Council in particular, it is a fact that this responsibility, as infused into the AU's right to intervene, requires the chairperson of the AU Commission to take the lead in relation to implementation and follow-up processes resulting from decisions made by the AU Assembly and the Council.

To ensure the smooth running of the AU Commission's cooperative relationship with the Peace and Security Council, the Commission chairperson, under article 10(3)(c) of the PSCAU Protocol, is further entrusted with the task of preparing comprehensive and periodic reports and documents, as required to enable the Peace and Security Council and its subsidiary bodies to perform their functions effectively. Again, this strengthens cooperation between the Council and the institutions and organs subject to this study.

Article 10(4) of the PSCAU Protocol provides that in carrying out his/her functions and powers, the chairperson of the AU Commission is assisted by the commissioner in charge of Peace and Security, who is likewise responsible for the affairs of the Peace and Security Council.<sup>62</sup> The relationship between the PSC, the AU chairperson and the

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<sup>62</sup> Article 10(4) of the PSCAU Protocol provides that Chairperson of the AU Commission relies on human and material resources available at the AU Commission, particularly the Commission for Peace and Security, in order to service and provide support to the Council. The article

commissioner in charge of Peace and Security must also be provided for in the PSCAU Protocol in order to avoid duplication of roles and mandates. This could minimise any clashes that may arise. As the drafters of the PSCAU Protocol did not foresee the possibility of any duplication of roles and mandates, an amendment to the PSCAU Protocol would best address this shortcoming.

On the relationship between the Peace and Security Council and the sub-regional mechanisms it is stipulated that the chairperson of the AU Commission should be invited to the meetings and deliberations of regional economic communities and coordinating mechanisms, in accordance with article 16(17) of the PSCAU Protocol.<sup>63</sup> This suggests that the relationship between the Council and the SRMs is not complete without the chairperson of the AU Commission. A detailed discussion on the relationship between the Council and the SRMs is found in Chapter 6 of this study.

## 5.5 PSCAU AND CIVIL SOCIETY ORGANIZATIONS

Over and above seeking close cooperation with the African Commission, the Peace and Security Council is entrusted with the responsibility of working with civil society organisations. This cooperation should be viewed as engendering a viable democratic, responsible and accountable system of governance. According to Murithi, the role that civil society will play in the revival of the African continent is a vital one.<sup>64</sup> In terms of article 20 of the PSCAU Protocol, the Peace and Security Council is obliged to 'encourage non-governmental organizations, community-based and other civil society organizations, particularly women's organization, to participate actively in the efforts aimed at promoting peace, security and stability in Africa'. Sarkin argues that the legitimacy and credibility of the Peace and Security Council largely depend on how widely information about its work is made available and in this respect the involvement

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further states that in this regard, a PSCAU Secretariat shall be established within the Directorate dealing with conflict prevention, management and resolution. The Peace and Security Council Secretariat is based in Addis Ababa at the AU Headquarters.

<sup>63</sup> See art. XVII(3) of the MOU on Cooperation in Area of Peace and Security.

<sup>64</sup> Murithi (n 30 above) 110. See also generally Murithi (n 30 above) 112-136. See also Kuwali (n 34 above) 181 – 184.



of CSOs in the Council's work is a significant feature.<sup>65</sup> Article 20 of the PSCAU Protocol further states that when so required, such organizations may be invited to address the Peace and Security Council. In illustrating the application of this provision, through a press statement communiqué, the Peace and Security Council

encouraged civil society to contribute, in the most appropriate manner, to the implementation of the Protocol on the Rights of Women and the African Charter on the Protection and Welfare of the Child and to participate actively in the overall efforts aimed at promoting peace, security and stability, in conformity with the provisions of article 20 of the [PSCAU Protocol].<sup>66</sup>

While the Council is obliged to have a 'close relationship' with the UN Security Council, the organs and institutions of the AU and the regional mechanisms, its obligation in respect of civil society organisations is simply to 'encourage' their active participation in efforts aimed at promoting peace, security and stability in Africa. Therefore the Peace and Security Council is under no obligation to invite CSOs to address it on particular issues. Article 20 of the PSCAU Protocol does not view civil society organizations as equal partners with the Peace and Security Council in addressing peace and security challenges in Africa. This is unfortunate because as, Mutasa argues, '[t]he importance of civil society in making Africa a more humane continent is everywhere apparent, and its growth over the last decade has been an important part of advances seen on the continent'.<sup>67</sup>

Article 8(10)(c) of the PSCAU Protocol provides that while the CSOs involved and/or interested in a conflict or a situation under consideration by the Peace and Security Council may be invited to participate, they do not have the right to vote in the discussion relating to that conflict or situation. While this provision may be seen as acknowledging the contribution which CSOs make in addressing conflicts in Africa, it is not clear, practically speaking, how much weight CSOs have in influencing the decision-

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<sup>65</sup> Jeremy Sarkin, 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 383.

<sup>66</sup> See PSC Communiqué PSC/PR/COMM.(CCXXIII).

<sup>67</sup> Mutasa (n 6 above) 293.

making processes of the Peace and Security Council. For instance, in Zambia on 30 July 2009, more than 130 civil society and human rights groups from across Africa expressed their support and willingness to cooperate with the ICC process against President Omar Hassan Al Bashir of Sudan.<sup>68</sup>

This was in the same month (July 2009) that the Peace and Security Council urged the UN Security Council to heed to the AU's call for the deferral of the ICC process against the president of Sudan and even went further to state in no uncertain terms that '[i]n the meantime, the [PSCAU] reiterates earlier AU decisions on the ICC process, in particular the non cooperation of AU Member States with the arrest and surrender of President El Bashir'.<sup>69</sup> During its 15<sup>th</sup> ordinary session on 27 July 2010 in Kampala Uganda, the Assembly also reiterated its position on this matter, stating that AU member states would not cooperate with the ICC.<sup>70</sup> The Assembly even went to the extent of deciding to reject, for the period in question, the request by the ICC to open a liaison office to the AU in Addis Ababa, Ethiopia.<sup>71</sup>

The difference of opinion about on the ICC process between the Peace and Security Council and civil society organisations was likely to affect the relations that article 20 of the PSCAU Protocol seeks to establish. The case of the ICC against President Al Bashir was due to be a test that would establish whether article 20 of the PSCAU Protocol would be affected thereafter, especially in the case of ICC warrants of arrest against African leaders. This is especially because CSOs, both within and outside Darfur, were 'actively engaged in lobbying AU member states to follow South Africa and Botswana in rescinding their support for the AU Assembly's decision not to facilitate the arrest of

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<sup>68</sup> See p. 6 of the Peace and Security Council Report. No. 2 September 2009.

<sup>69</sup> See para. 14 of the Communiqué of the Peace and Security Council 198<sup>th</sup> Meeting on 21 July 2009 in Addis Ababa, Ethiopia. PSC/PR/ /COMM(CXCCVIII).

<sup>70</sup> See the Decision on the Progress of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV). Assembly/AU/Dec.296(XV).

<sup>71</sup> As above.

Bashir'.<sup>72</sup> The AU and the Peace and Security Council at the time of writing remained defiant on the ICC's process against President Al Bashir.

The recognition by the PSCAU Protocol that CSOs play a significant role in addressing issues related to peace and security in Africa is nevertheless a step in the right direction. So important is the role of CSOs that article 8(11) of the Protocol goes to the extent of providing that the Peace and Security Council 'may hold informal consultations with parties by or interested in a conflict or a situation under its consideration as well as ... civil society organizations as may be needed for the discharge of its responsibilities'.

A country analysis by a civil society organisation, the Institute for Security Studies (ISS), furnishes a good example on how article 8(11) of the PSCAU Protocol could be implemented. In the case of the Democratic Republic of the Congo, the Institute's PSC Report of 2009 states that

[t]he PSC[AU], in tandem with [the DRC] government and civil society organizations, could adopt a localisation strategy in areas where the security situation allows, to support initiatives aimed at fostering dialogue and finding sustainable solutions to the root causes of conflict, with particular emphasis on addressing the grievances in the Kivus.<sup>73</sup>

The PSCAU Protocol also outlines another dimension of its relations with CSOs in so far as the Peace Fund is concerned. Article 21(2) identifies civil society as one of the sources of funding. This is in addition to financial appropriations from the regular AU budget that makes up the Peace Fund. That the AU has a very lean purse is now well known and CSOs potentially play a pivotal role in ensuring that the relationship between them and the Peace and Security Council works through making contributions to the Peace Fund.

### **5.5.1 THE LIVINGSTONE FORMULA**

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<sup>72</sup> See p. 6 of the Peace and Security Council Report No. 2 September 2009.

<sup>73</sup> See p. 3 of the Peace and Security Council Report No. 3, October 2009.

In line with the provisions of article 20 of the PSCAU Protocol, a system known as the Livingstone Formula, which is the mechanism for interaction between the Peace and Security Council and civil society organizations in the promotion of peace, security and stability in Africa, was established. The Livingstone Formula resulted from a PSC retreat held in Livingstone, Zambia (Livingstone Retreat) from 4 to 5 December 2008.<sup>74</sup> The Livingstone Retreat followed-up on conclusions reached at a previous PSC retreat held in Dakar (Dakar PSC Retreat) from 5 to 6 July 2007. According to the PSC Report, the Livingstone Formula 'is a manifestation of the recognition and political acceptance of the civil society to engage with the PSC[AU]'.<sup>75</sup>

The objective of the Livingstone Retreat was to 'consider an appropriate mechanism for interaction between the Peace and Security Council and Civil Society Organizations (CSOs) in the promotion of peace, security and stability in Africa within the framework of article 20 of the PSC Protocol'. The Livingstone Formula prescribes conditions for the relationship between the Council and CSOs by stating: '[t]o interact with the PSC, Civil Society Organizations must conform to the relevant provisions of the Constitutive Act of the African Union and the provision in the PSC Protocol, especially article 8(10)(c), as well as the Rules of Procedure of the PSC (Rules 21 and 22)'.<sup>76</sup> Rules 21 and 22 of the Rules of Procedure of the PSC spell out the requirements and procedures to be adhered to by CSOs that wish to participate in the activities of the Council.

Accordingly, these rules indicate that a CSO that may be invited to address the Peace and Security Council shall, firstly, have an observer status at the AU; secondly, submit a letter of authority to the chairperson of the AU Commission; and thirdly, obtain approval of the letter of authority by the chairperson of the AU Commission. It has been argued that at face value this seems to be a rather tedious process and it is not clear

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<sup>74</sup> See the Conclusions on a Mechanism for Interaction between the Peace and Security Council and Civil Society Organizations in the Promotion of Peace, Security and Stability in Africa (Livingstone Formula). Annex 3, Retreat of the Peace and Security Council of the African Union 4-5 December 2008, Livingstone, Zambia. PSC/PR/(CLX). Available at [www.iss.co.za/uploads/PSCRETREPDEC08.PDF](http://www.iss.co.za/uploads/PSCRETREPDEC08.PDF) (Accessed 13 July 2010).

<sup>75</sup> P. 13 of the Peace and Security Council Report No.4, November 2009.

<sup>76</sup> Para 4 of the Livingstone Formula.

whether those CSOs that have addressed the Peace and Security Council, either in open meetings or informal consultations, have always complied with all the above-mentioned requirements and procedures.<sup>77</sup> It is also not clear why the Peace and Security Council is not able to process applications for observer status from CSOs or approve letters of authority: this would after all be the most feasible and speedy process to engage CSOs in critical matters dealing with peace and security in Africa.

Over and above the above conditions, the Livingstone Formula obligates CSOs to comply with the criteria for eligibility for membership as defined in article 6 of the Statutes of Economic, Social and Cultural Council, in particular that:

- i) it shall be registered in an AU member State in accordance with national legislation of the country;
- ii) it shall uphold the objectives and principles of the African Union, as stated in articles 3 and 4 of the Constitutive Act of the African Union;
- iii) it shall be a member CSO of a national, regional and continental organization or the African Diaspora, in pursuit of activities at the national, regional or continental level;
- iv) it shall be accredited, with the African Union or an African Regional Economic Community /Regional Mechanism;
- v) it shall solemnly declare to uphold the objectives and principles of the AU, as well as the provisions governing the CSOs in an observer status with the AU Commission, or working with it, including the principle of impartiality; [and]
- vi) it shall belong to a recognized regional or continental umbrella/network of CSOs.<sup>78</sup>

For any CSO to make a contribution to the work of the Peace and Security Council, all the above-mentioned requirements must be met. The Livingstone Formula further provides that the Council will hold an annual meeting with the Economic Social and

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<sup>77</sup> See p. 19 of the Peace and Security Council Report No. 13, August 2010.

<sup>78</sup> P. 1, para 4 of the Livingstone Formula.

Cultural Council, in relation to the Council's consultative theme relating to peace, security and stability on the continent or a related issue. This gives CSOs that are affiliated to ECOSOCC an opportunity to influence decision-making processes at the level of the Peace and Security Council.

What is of importance is the fact that the Livingstone Formula specifically prescribes that the annual meeting 'should be timed in such a manner that relevant inputs provided by CSOs would be considered before finalization of the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa to the Assembly of the AU during the Summit'.<sup>79</sup> It is critical that the Peace and Security Council considers the inputs provided by CSOs in order to complete its report to the Assembly of the AU, which is the supreme organ of the AU and is composed of heads of state and government of the African<sup>80</sup> Union or their duly accredited representatives.

To further strengthen the relations between the Peace and Security Council and CSOs, the Livingstone Formula prescribes that CSOs should submit reports to the Council for consideration during the preparation of reports for Council meetings.<sup>81</sup> Of equal importance is the provision of information by CSOs to the Peace and Security Council field missions and AU fact-finding missions. Accordingly, the Livingstone Formula states, 'CSOs, to the extent, and concerned by a situation within the mandate of a given mission, may provide information to such missions and may also form part of such missions-in-visit as observers specifically to the affected area, if invited and at their own cost'.<sup>82</sup>

The Livingstone Formula further provides that on a case-by-case basis CSOs may be invited to Peace and Security Council meetings through the chairperson of the AU Commission. The Council may invite CSOs to participate, or CSOs may themselves ask

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<sup>79</sup> P. 1, para 5 of the Livingstone Formula.

<sup>80</sup> The word 'African' was included through art. 1 of the Constitutive Act Amendment Protocol.

<sup>81</sup> P. 2, para 7 of the Livingstone Formula.

<sup>82</sup> P. 2, para 8 of the Livingstone Formula.

to participate in the meetings.<sup>83</sup> The interaction between the PSC and CSOs, therefore, goes beyond the annual meeting between the PSC and the Economic, Social and Cultural Council. It has also been suggested that through the Livingstone Formula the chairperson of the PSCAU can engage directly with civil society organizations on a range of early warning, peacemaking, peacekeeping and peacebuilding issues.<sup>84</sup>

The Institute for Security Studies, a CSO that provides technical support to the Peace and Security Council, publicises important forthcoming dates, including the meetings dates between the Peace and Security Council and various organs and institutions such as the African Commission, the PAP and the Economic, Social and Cultural Council. This is done through the monthly Peace and Security Council Reports (PSC Reports) of the ISS.<sup>85</sup>

The Livingstone Formula also allows civil society representatives to request accreditation for purposes of participating in a Peace and Security Council meeting to which they are invited in accordance with the provisions of Rule 22 in the Rules of Procedure of the PSCAU.<sup>86</sup> In terms of the Livingstone Formula, the chairperson of the PSCAU can consider the requests for accreditation from these representatives.<sup>87</sup> Rules 15 and 16 of the Rules of Procedure of the PSCAU identify the types of meetings in which CSOs may participate, namely meetings upon invitation from the Peace and Security Council in open meetings, and informal consultations.

The Livingstone Formula provides for an innovative system, which identifies areas in which CSOs can contribute to the promotion of peace, security and stability on Africa,

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<sup>83</sup> As above.

<sup>84</sup> P. 5 of the Peace and Security Council Report No. 8, March 2010.

<sup>85</sup> Available at <http://www.issafrica.org/pgcontent.php?UID=4200> (Accessed 14 July 2010). The ISS is a leading African human security research institution that works towards a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy, collaborative security and gender mainstreaming.

<sup>86</sup> P. 2, para 8 of the Livingstone Formula.

<sup>87</sup> As above.

upon invitation by the Peace and Security Council. These are: conflict prevention (early warning); peacemaking and mediation; peacekeeping; humanitarian support, peace-building, post-conflict reconstruction and development; provisional technical support,<sup>88</sup> training; monitoring and impact assessment of the implementation of peace agreements; post-conflict situations; and advocacy/publicity for Peace and Security Council decisions.<sup>89</sup>

The viability of the Livingstone Formula has been viewed through a critical lens. For instance, the PSC Report states 'in practice the institutionalisation of the formal arrangement of the civil society with the PSC is yet to be implemented [and] ECOSOCC is yet to make a mark on engaging the PSC on peace and security issues'. The PSC Report No. 4 of 2009 notes that progress within first few years of the Economic Social and Cultural Council's existence was hindered by administrative and bureaucratic challenges.<sup>90</sup>

The effective implementation of the Livingstone Formula will no doubt take some time, since the necessary systems need to be put in place, especially within the Peace and Security Council. Turning the spotlight on the PSCAU Secretariat, it is suggested in the PSC Report No. 9 of 2010,<sup>91</sup> that the Secretariat could benefit from an additional staff member who could liaise directly with civil society as provided for in the Livingstone Formula. This provides that CSOs 'may provide technical support to the AU by undertaking early warning reporting, and situation analysis which feeds information into the decision-making process of the PSC[AU]'.<sup>92</sup>

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<sup>88</sup> An example of a civil society organization that specialises in conflict management, conflict analysis and conflict prevention is the African Centre for the Constructive Resolution of Disputes (ACCORD) and may be in a better position to provide technical support to the AU. ACCORD has a number of publications including *Conflict Trends*, available at <http://www.accord.org.za/publications/conflict-trends> (Accessed 14 July 2010).

<sup>89</sup> P. 2 - 3, para 9-18 of the Livingstone Formula.

<sup>90</sup> P. 13 of the Peace and Security Council Report No. 4 of 2009.

<sup>91</sup> P. 14 of the Peace and Security Council Report No. 9, April 2010.

<sup>92</sup> See p 3, para 10 of the Livingstone Formula.



While the relationship between the Peace and Security Council and CSOs is on course, particularly through the Livingstone Formula, the question is whether this could be the same with the Economic, Social and Cultural Council, which was established by the African heads of states and governments as a demonstration of the need for a people-centred AU.<sup>93</sup>

### 5.5.2 ECONOMIC, SOCIAL AND CULTURAL COUNCIL

The establishment of the Economic, Social and Cultural Council of the African Union marked the beginning of the struggle by civil society organisations for official space within the AU's machinery. The first official instrument to enshrine ECOSOCC is none other than the Constitutive Act, the African Union founding document under whose mandate the Peace and Security Council functions. While the PSCAU Protocol provides for the relations between the PSC and civil society organisations it is silent on the Economic, Social and Cultural Council's role<sup>94</sup> in forging relations with CSOs. When the Peace and Security Council was established, ECOSOCC already existed in terms of the Constitutive Act. The absence of the Economic, Social and Cultural Council in the PSCAU Protocol is unfortunate in that ECOSOCC's Peace and Security Cluster could serve as a vital link between CSOs and the work of the Peace and Security Council.<sup>95</sup> Notwithstanding this silence in the PSCAU Protocol, the Livingstone Formula provides that the Peace and Security Council remains master of its own procedures and decisions, and that ECOSOCC, as the consultative organ responsible for coordinating the participation of civil society in the work of the AU, particularly the Peace and Security Cluster, is the focal point and plays a consultative role in the interaction between the Peace and Security Council and CSOs.<sup>96</sup>

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<sup>93</sup> Mutasa (n 6 above) 292.

<sup>94</sup> See more information on ECOSOCC at <http://www.ecosocc-au.org/> (Accessed 13 July 2010).

<sup>95</sup> P. 12 of the Peace and Security Council Report No. 4 of 2009.

<sup>96</sup> See p 1 of the Livingstone Formula.

The Peace and Security Cluster is among ten sectoral cluster committees that are aimed at enabling the Economic, Social and Cultural Council to engage with and monitor the work of the AU's corresponding commissions. Of importance is the fact that the ECOSOCC's Peace and Security Cluster was established to engage with peace and security issues and by extension with the Peace and Security Council. Such engagement extends to a wide range of issues including early warning, conflict prevention, peacemaking and mediation, peacekeeping, humanitarian support, peacebuilding and post-conflict reconstruction and development.<sup>97</sup>

The Economic, Social and Cultural Council is an organ of the AU established under article 5 (h) of the Constitutive Act.<sup>98</sup> In terms of article 22 of this Act, ECOSOCC is an advisory organ composed of different social and professional groups of the AU member states. It is worthy of note, however, that ECOSOCC is an organ that is still in the process of being established in its final form.<sup>99</sup> Be that as it may, it should have been included in article 20 of the PSCAU Protocol, which specifically deals with the relations between the Peace and Security Council and CSOs.

The composition of different social and professional groups drastically transforms the African Union in the sense that a variety of opinions, especially from civil society organizations, must be considered at the decision-making level of the continental body. This applies equally to the decision-making processes of the Peace and Security Council, where civil society organizations may be invited to participate or be consulted on issues related to peace and security in Africa.

Mutasa argues that civil society organizations have the ability to reach out to the grassroots in African communities and that they have frequently complemented the welfare efforts of states.<sup>100</sup> For the African Union, and the Peace and Security Council in

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<sup>97</sup> P. 13 of the Peace and Security Council Report No. 4 of 2009.

<sup>98</sup> More information on the ECOSOCC is available at <<http://www.africa-union.org/ECOSOC/home.htm>> (Accessed 13 July 2010).

<sup>99</sup> P. 66, para. 136 of the AU Audit Review.

<sup>100</sup> Charles Mutasa 'The African Union – Civil Society Contract: An African Democracy? Available at <<http://www.un-ngls.org/cso/cso5/AfricaUnion.pdf>> (Accessed 12 July 2010).

particular, to be people-centred, it is important that the Economic, Social and Cultural Council be strengthened. This should be coupled with putting in place a formalised system which will ensure that both the Peace and Security Council and ECOSOCC have a collaborative working relationship. Mutasa observes. '[i]t is common knowledge that a "constipated and bureaucratic African state" has been assisted by non-governmental organizations' work in rural development and other charitable spheres'.<sup>101</sup> The need for a formal relationship between the Peace and Security Council and the Economic, Social and Cultural Council cannot be overemphasised.

The AU Assembly determines the functions, powers, composition and organization of the Economic, Social and Cultural Council. With its own statutes and rules of procedure, ECOSOCC consists of non-state actors and civil society organizations from a wide range of sectors, including labour, business, professional groups, service providers and policy think tanks, including some in the African Diaspora. According to the Preamble to the ECOSOCC Statutes the establishment of this Council resulted from the Assembly being '[c]onvinced that popular participation in the activities of the African Union, as enunciated in the African Charter for Popular Participation, is a prerequisite for its success' and '[g]uided by the common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples'.<sup>102</sup>

The movement to infuse popular participation is welcome, especially on a continent with complex challenges. Mutasa argues

[i]t is an intriguing and powerful message that has sunk into the African Union and there is now a growing understanding that the political leadership alone cannot determine the continent's destiny. People need to be masters of their own destiny. Top-down approaches emanating from the razzmatazz of summits without the people will not change the face of Africa.<sup>103</sup>

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<sup>101</sup> As above.

<sup>102</sup> See para. 3 & 4 of the Preamble to the ECOSOCC Statutes.

<sup>103</sup> Mutasa (n 100 above).

In order to determine how the Peace and Security Council can forge relations with the Economic, Social and Cultural Council, it is important to consider how the latter operates. Its functions are as follows:<sup>104</sup> one, promoting continuous dialogue between all segments of the African peoples on issues concerning Africa and its future; two, forging strong partnerships between governments and all segments of the civil society, in particular women, the youth, children, the Diaspora, organized labour, the private sector and professional groups; three, promoting the participation of African civil society in the implementation of the policies and programmes of the AU; four, supporting policies and programmes that will promote peace, security and stability in Africa, and fostering development and integration of the continent; five, promoting and defending a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice; six, promoting, advocating and defending a culture of gender equality; and seven, promoting and strengthening the institutional, human and operational capacities of the African civil society.

It is very useful that in terms of the ECOSOCC Statutes, one of its functions is to promote, contribute to the promotion of, and defend the culture of human rights.<sup>105</sup> As argued above, this right includes the right of all peoples to national and international peace and security as guaranteed by article 23(1) of the African Charter. In line with the objective of the AU to promote and protect human rights, ECOSOCC is, in terms of its statutes, entrusted with the responsibility of contributing through advice, to the effective translation of the objectives, principles and policies of the AU into concrete programmes, as well as the evaluation of these programmes.<sup>106</sup> More importantly, its function of supporting policies and programmes that promote peace, security and stability in Africa, is critical, particularly in its cooperation with the Peace and Security Council.

Article 11 of the ECOSOCC Statutes establishes Sectoral Cluster Committees as key operational mechanisms in the formulation of opinions and the provision of input into AU policies and programmes. Among these is the Political Affairs Committee which is responsible for the following: human rights; the rule of law; democratic and

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<sup>104</sup> Art. 2 of the ECOSOCC Statutes.

<sup>105</sup> Arts. 2(5) & 7(5) of the ECOSOCC Statutes.

<sup>106</sup> Art. 7(1) of the ECOSOCC Statutes.

constitutional rule; good governance; power sharing; electoral institutions; humanitarian affairs and assistance among other things.<sup>107</sup> As a human rights-infusing organ the Economic, Social and Cultural Council will go a long way to ensuring that African people contribute to the operations of the AU, especially when it comes to the promotion and protection of human rights. This will be more effective if a more formalised mechanism is established between ECOSOCC and the African Commission, which is responsible for promoting and protecting human rights in Africa, and also between it and the Peace and Security Council which is responsible for ensuring peace and security in Africa.

According to Makinda and Okumu the inclusion of ECOSOCC in the AU system is of great historical significance. It recognizes the role of African civil society organizations in the continent's development and reaffirms the 1990 *Arusha Charter on Popular Participation*, which recognizes the importance of civil society organizations. It also represents a radical departure from the OAU days when civil society was viewed with hostility.<sup>108</sup> Makinda and Okumu further argue that not only will the Economic, Social and Cultural Council enable African people to make a contribution to AU programmes and decisions, but also to assume ownership of these programmes and play a role in their implementation.<sup>109</sup>

It is however disturbing that, even before it is fully operational, the Economic, Social and Cultural Council is facing a number of challenges of which Makinda and Okumu identify three. Firstly, it lacks funds just like other AU organs; secondly, it is viewed negatively by African governments which continue to treat civil society organizations with coldness; and thirdly, most African civil society organizations have weak institutional capacity and would fail the 'good governance, transparency and accountability' test.<sup>110</sup> These challenges will have a negative effect to the relationship

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<sup>107</sup> Art. 7(1)(b) of the ECOSOCC Statutes.

<sup>108</sup> Samuel M. Makinda & Wafula F. Okumu, *The African Union: Challenges of Globalization, Security, and Governance* (London and New York: Routledge, 2008) 49.

<sup>109</sup> As above.

<sup>110</sup> As above.

between the Peace and Security Council and civil society organizations, which are represented more formally through ECOSOCC.

According to the AU Audit Review something positive that has come out of the establishment of the Economic, Social and Cultural Council is the fact that the pre-summit forums of various civil society organisations have become a recurring item on the AU Commission's agenda and are held in the lead-up to AU Summits, such that their outcomes feed into Summit deliberations.<sup>111</sup> Since these forums have become a standard part of AU Summit preparations, it is essential that any human rights concerns are addressed in order to feed discussions about such concerns into the Summit deliberations. In this way, the AU human rights agenda can be strengthened. Perhaps the same approach should be adopted before the meetings of the Peace and Security Council in order for the PSC to benefit from the deliberations of CSOs and ECOSOCC on issues dealing with peace and security in Africa.

## 5.6 CONCLUSION

From the above discussion, it is apparent that the relationship between the Peace and Security Council and the AU organs and other institutions is still at a developmental stage and that there is a great need to nurture it. The particular stage reached varies from one organ or institution to the next. Giant strides have been made in relation to how the Peace and Security Council has put into operation article 20 of the PSCAU Protocol dealing with forging relations with CSOs, but a lot still needs to be done in maintaining close working relations with the Pan African Parliament and the African Commission in terms of article 18 and 19 of the PSCAU Protocol, respectively. In addition, the relationship between the Peace and Security Council and civil society organisations should be addressed through an amendment or other legal document in order to best tackle the glaring shortcoming under article 20 of the PSCAU Protocol: this should be done with the involvement of the Economic, Social and Cultural Council.

There is a need to establish an instrument or system that will make the working relations between the Pan African Parliament and the African Commission more formal and better organized. Mentioning a relationship in one legal instrument dealing with a particular institution/organ without an equivalent reference in the reciprocal

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<sup>111</sup> P. 68, para. 146 of the AU Audit Review.

institution's or organ's legal instrument is bound to lead to confusion about the roles of the respective institutions/organs. Thus far, the relationship between these institutions and organs seems to be *ad hoc* and not clear cut enough for a thorough analysis. Any formalised system will clarify the roles that each organ or institution can play. Both the Pan African Parliament and the African Commission must demonstrate their relevance in the promotion of peace and security within the confines of established rules and structural designs. Having discussed the role of the AU Commission and its chairperson in the workings of the Peace and Security Council, there is a need to ensure that a formal relationship between these two AU organs, is expressly provided for in the PSCAU Protocol. This can be achieved through an amendment provision.

While civil society organisations have already taken the lead in supporting the International Criminal Court process against President AL Bashir of Sudan, there is a need for the Pan African Parliament and the African Commission to pronounce on the ICC's process against the Sudanese president in line with the notion of responsibility to protect.<sup>112</sup> After all, as Mbete notes, 'Pan-African Parliamentarians have the mandate to represent all the people of Africa [and] ... [a]t the heart of democratic practice must be a definite involvement and free expression of the views and the will of the citizens of Africa'.<sup>113</sup> Mbete cautions that the Pan African Parliament 'must not become the domain of Africa's elite to the exclusion of millions of marginalized Africans'.<sup>114</sup> The Parliament must therefore show some leadership in issues relating to the ICC as they affect peace and security in Africa. This would be perfectly within its mandate.

The African Commission is responsible for ensuring that AU member states firstly recognize rights, duties and freedoms and adopt measures aimed at giving effect to the said rights, duties and freedoms as guaranteed in the African Charter. The ICC process against the president of Sudan is aimed at addressing human rights and peace and security issues in Africa in general and Sudan in particular. Perhaps, if a relationship between the Peace and Security Council and the African Commission had been extended

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<sup>112</sup> Discussed above in chapter 3.

<sup>113</sup> Mbete (n 7 above) 315.

<sup>114</sup> As above 314.

to the African Court of Human Rights and Justice, the African Court could have given a much better perspective on the ICC process.

The failure of the PSCAU Protocol in identifying and recognizing the role played by the Economic, Social and Cultural Council is unfortunate. Nevertheless, the Livingstone Formula has arguably attempted to correct this oversight through a non-legal approach. It is clear that through the non-legal instrument of the Livingstone Formula, the Peace and Security Council has adhered to and brought into operation article 20 of the PSCAU Protocol. Despite the teething challenges, the Livingstone Formula has been set as a 'benchmark in the process of putting in place clear of engagements between the other organs and units of the ECOSOCC'.<sup>115</sup>

There is a need for the Peace and Security Council to make use of the Livingstone Formula in addressing peace and security challenges in Africa. For instance, the PSC Report No. 5 of 2009 recommended that in view of the Zimbabwe crisis, the Peace and Security Council could invoke the Livingstone Formula in order to initiate a discussion with the Inclusive Government of Zimbabwe, which was established on 11 February 2009, on how civil society organizations could play a more prominent and meaningful role in supporting the implementation of the framework for the signing of the power-sharing arrangement in Zimbabwe, otherwise known as the Global Political Agreement.<sup>116</sup> Such recommendations from CSOs must be seriously considered by the Peace and Security Council and also implemented.

There is no formal relationship between the African Commission and the Pan African Parliament, the Economic, Social and Cultural Council, and the Peace and Security Council.<sup>117</sup> These institutions have a very important role to play, particularly in contributing to peace, security and stability in Africa. It is essential for these

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<sup>115</sup> Report of the President of the Permanent General Assembly of the Economic Social and Cultural Council of the African Union (ECOSOCC), January 2010.

<sup>116</sup> P 12 of the PSC Report No. 5, December 2009.

<sup>117</sup> See p. 31, para. 63 of the 20<sup>th</sup> Activity Report of the African Commission on Human and Peoples' Rights, which covers the period from January to June 2006.



organizations to work closely with one another in a formalised manner in order to fulfil their respective mandates, particularly in so far as human rights are concerned. In fact, the 2007 AU Audit Review recommends that the Pan African Parliament should put in place policy guidelines on its relationship with other organs of the AU subject to the concurrence of the other organs of the AU and the approval of the Assembly.<sup>118</sup> This recommendation should be considered in light of all the institutions that have a close and working relationship with the Peace and Security Council. The absence of a formal relationship between these important institutions, as a collective effort, hampers the objectives of the AU.

The question that this chapter has attempted to address in light of articles 18, 19 and 20 of the PSCAU Protocol, is to what extent do the envisaged relationships between the Peace and Security Council and the PAP, the African Commission and CSOs, respectively, have an actual and potential ability to effectively contribute to peace, security and stability in Africa. While the Peace and Security Council's relationship with the respective institutions/organs differs from one to another, it is quite clear that there is great potential for this collaboration at different levels to contribute to peace, security and stability in Africa. While this great potential exists, the challenges associated with formalising the implementation of these articles still remain. This will have a negative impact in so far as ensuring that these relationships effectively contribute to a more peaceful, secure and stable Africa.

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<sup>118</sup> P. 59, para. 111 of the AU Audit Review.

## CHAPTER 6: PSCAU AND SUB-REGIONAL MECHANISMS

### 6.1 INTRODUCTION

This chapter seeks to answer the following research question: *Based on article 16 of the PSCAU Protocol, to what extent does the envisaged relationship between the Peace and Security Council and the sub-regional mechanisms have an actual and potential ability to effectively contribute to peace, security and stability in Africa?* As Africa's peace and security situation remains tenuous and fragile, there is a great need for the Peace and Security Council to undertake initiatives that go beyond its cooperation with the Pan-African Parliament, the African Commission and civil society organizations.

The PSCAU Protocol acknowledges the contribution of the sub-regional mechanisms to conflict prevention, management and resolution, and to the maintenance and promotion of peace, security and stability in Africa.<sup>1</sup> Since these mechanisms operate at the sub-regional level, the PSCAU Protocol further identifies the need to develop formal coordination and cooperation arrangements between them and the African Union.<sup>2</sup> This is essential for achieving the objectives listed in article 3 of the PSCAU Protocol.<sup>3</sup>

According to Møller, both the African Union and the sub-regional mechanisms have succeeded in bringing at least relative peace to Burundi, Liberia, Sierra Leone and Sudan (except Darfur) and they have done so in situations where the rest of the 'global

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<sup>1</sup> See para. 6 of the preamble to the PSCAU Protocol.

<sup>2</sup> As above.

<sup>3</sup> These objectives are as follows: one, to promote peace and security and stability in Africa; two, to anticipate and prevent conflicts; three, to promote and implement peace-building and post-conflict reconstruction activities; four, to coordinate and harmonize continental efforts in preventing and combating international terrorism; five, to develop a common defence policy of the AU; and to promote and six, to promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

community' procrastinated.<sup>4</sup> It therefore stands to reason that these mechanisms be included in the African Peace and Security Architecture. This will in the long run ensure that the Peace and Security Council forges a strong relationship with these key actors.

For the purposes of this discussion, sub-regional mechanisms mean the African regional mechanisms for conflict prevention, management and resolution as defined under article 1(h) of the PSCAU Protocol. Generally, sub-regional mechanisms are a subset of regional economic communities, which are mainly active in the economic field, even if an extension of their competence into other areas, such as defence and security, has been seen in recent times.<sup>5</sup> According to Viljoen, one of the reasons for the emergence of regional engagements, such as the Economic Community of West African States, the Southern African Development Community, and the Common Market for Eastern and Southern Africa, was the failure of the OAU to address Africa's economic problems.<sup>6</sup> While much focus has been devoted to the relationship between the African Union and sub-regional mechanisms, very little has been suggested about the form that the relationship between the Peace and Security Council and SRMs should take. This chapter seeks to address this conspicuous shortcoming.

According to article 7(j) of the PSCAU Protocol, one of the powers of the Peace and Security Council is to 'promote close harmonization, co-ordination and co-operation between [SRMs] and the [African] Union in the promotion and maintenance of peace, security and stability in Africa'. This is to be undertaken by the Council in conjunction with the chairperson of the AU Commission.<sup>7</sup> Article 7(j) of the PSCAU Protocol, however, is only focused on the relationship between the sub-regional mechanisms and

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<sup>4</sup> Bjørn Møller, *African Union as a Security Actor: African Solutions to African Problems?* Working Paper no. 57 – Regional and Global Axes of Conflict – Crisis States Working Papers Series No. 2 (August 2009) 16. On Darfur (Sudan), see Jeanelle Ferril, 'A Call for New Justice: Victims of Sexual Violence in Africa's Internal Conflicts' (2008) 4 *FIU L. Rev.* 344.

<sup>5</sup> See Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, (6th edition, London, Sweet & Maxwell, 2009) 257-263.

<sup>6</sup> Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2007) 170.

<sup>7</sup> As above.

the AU and not necessarily on the Peace and Security Council. In order to ensure that the relationship between the Council and the SRMs is operational and effective, article 16(9) of the PSCAU Protocol provides that 'a Memorandum of Understanding on Cooperation shall be concluded between the [AU] Commission and the Regional Mechanisms'.<sup>8</sup>

This chapter discusses how the relationship between the Peace and Security Council and the sub-regional mechanisms is to be given effect, with the relevant provision being article 16 of the PSCAU Protocol. First, it considers the sub-regional mechanisms and the African Peace and Security Architecture. The main focus here is on the following: harmonizing and coordinating the activities of the sub-regional mechanisms, ways in which the Peace and Security Council should work closely with the SRMs, and the memorandum of understanding between the AU and the regional economic communities. Secondly, the chapter discusses various SRMs within Africa and the African Standby Force. These SRMs are as follows: the Economic Community of West African States, the Southern African Development Community, the Economic Community of West African States, the Intergovernmental Authority on Development, and the Arab Maghreb Union. Thirdly, the chapter discusses the idea of promoting initiatives for conflict prevention, management and resolution. Fourthly, it considers the obligation by the Peace and Security Council and the SRMs to share information relating to peace and security matters in Africa. Lastly, a conclusion is drawn.

## 6.2 SUB-REGIONAL MECHANISMS AND APSA

The establishment of the African Peace and Security Architecture, was an ambitious and remarkable initiative by the African Union<sup>9</sup> designed to address peace and security challenges in Africa. Central to APSA, of which the African Standby Force forms part, is the Peace and Security Council, which is a 'standing decision-making organ for the prevention, management and resolution of conflicts', which operates as 'a collective

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<sup>8</sup> On the discussion relating to the Memorandum of Understanding between the AU and the RECs, see chapter 6, section 6.2.3.

<sup>9</sup> Solomon A. Dersso, *The Role and Place of the African Standby Force Within the African Peace and Security Architecture* ISS Paper No. 209 (January 2010) 3.

security and early warning arrangement to facilitate timely and efficient response to conflict to crisis in Africa'.<sup>10</sup> The SRMs form an integral part of the Peace and Security Architecture and also contribute to the establishment of the Standby Force through the formation of sub-regional brigades.

The African Peace and Security Architecture cannot function effectively without the sub-regional mechanisms, which have arisen as a result of the concept of regionalism. Akokpari argues that the post-Cold War era (beginning from 1990) ushered in a 'new' wave of regionalism.<sup>11</sup> In effect, this 'new' wave of regionalism is distinguished from the 'old' regionalism, which was witnessed between 1950 and the late 1980s.<sup>12</sup> Akokpari further argues that the new regionalism is a 'multi-dimensional process of regionalism' which essentially pursues objectives that transcend the narrow confines of security and provides a more holistic rationale for integration.<sup>13</sup>

Regionalism or regional integration, *per se*, is not a new phenomenon. The African continent emulated ideas of regionalism from other continents. McCarthy observes that the enthusiasm for regional integration started in Western Europe from where it spread to the developing world, especially Latin America, and then to Africa.<sup>14</sup> Regional integration has its own advantages and disadvantages. For instance, member states could introduce a single currency through this process, which could prove to be beneficial for trade and economic purposes. The downside of regional integration could arguably be the giving up of member states' sovereignty wherein laws governing an

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<sup>10</sup> Art. 2 of the PSCAU Protocol.

<sup>11</sup> John Akokpari, 'Dilemmas of Regional Integration and Development in Africa' in Akokpari, John, *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009) 88. See also Jeremy Sarkin 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 383-386.

<sup>12</sup> As above.

<sup>13</sup> As above 89.

<sup>14</sup> Colin L. McCarthy, 'Regional Integration of Developing Countries at Different Levels of Development – Problems and Prospects' (1994) 4 *Transnational Law and Contemporary Problems* 3.

integrated region supersede domestic laws. As shall become clear, the advantages of regional integration outweigh the disadvantages, when considering the role that SRMs play in collaborating with the Peace and Security Council.

According to article 16(1) of the PSCAU Protocol, '[SRMs] are first and foremost part of the overall security architecture of the [African] Union, which has the primary responsibility for promoting peace and security and stability in Africa'. This article, which introduces the African Peace and Security Architecture is carefully worded. While the UN Security Council's primary responsibility is to maintain international peace and security, as discussed in Chapter 4, the primary responsibility of the AU is to promote peace, security and stability in Africa. The sub-regional mechanisms form part of the Security Architecture, which is established under the auspices of the Peace and Security Council. While the AU's domain is in the area of promoting or advancing regional/continental peace, security and stability, the UN Security Council's domain is in the area of preserving international peace and security.

This differentiation of roles is important in understanding that the African Union was not established to usurp the UN Security Council's role but to complement its mandate in so far as Africa is concerned.<sup>15</sup> The AU, however, cannot achieve this alone. There is a need to join forces with organizations in close proximity to conflict areas, as shall be seen later in this chapter. Since the UN Security Council is also facing challenges resulting from the way in which it is composed, as discussed in Chapter 4, it makes a lot of sense for the Peace and Security Council to have relations with RECs/SRMs, beyond its relationship with the UN Security Council.

The relationship between the Peace and Security Council and the sub-regional mechanisms must be understood within the context of the UN's failure to address some of the conflicts that have destabilised the continent. Levelling a damning criticism against the UN, Wokoro argues

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<sup>15</sup> See para. 5 of the preamble to the PSCAU Protocol, which provides that in establishing the PSCAU, the member States were "mindful of the provisions of the Charter of the United Nations, conferring on the Security Council primary responsibility for the maintenance of international peace and security..."

[a]s the U.N. has become merely another tool for advancing the national interests of its members, the resulting impact has been systemic paralysis, distrust, and impatience. This explains the various unilateral, multilateral, or regional military actions that have been taken in disregard of endless, enervating debates at the U.N., debates which give the illusion of international concern but which lack concrete action.<sup>16</sup>

The relationship between the Peace and Security Council and the sub-regional mechanisms is, therefore, aimed at providing concrete action in the event that Africa's peace, security and stability is challenged or compromised. What is also noteworthy is the fact that African conflicts tend to be regionalized,<sup>17</sup> that is, they involve a number of actors (state and non-state) within a region and also affect states within a region. A classic example is the Great Lakes Region (comprising Burundi, Rwanda, the Democratic Republic of Congo, Uganda, Kenya and Tanzania), which was affected by the conflicts in Burundi, Rwanda, and the DRC. This is one of the main reasons why regional economic communities like ECOWAS and SADC, established mechanisms aimed at promoting peace, security and stability. The other reason for the establishment of regional economic communities was the realization that development and regional integration initiatives were constantly undermined by insecurity within a region.<sup>18</sup> These mechanisms are therefore essential in the pursuit of development within a particular region.

The sub-regional mechanisms should be seen as complementing the AU's responsibility of promoting or advancing regional/continental peace, security and stability. Together with the AU's relevant structures they add up to what is otherwise known as the African Peace and Security Architecture. The Peace and Security Council is one of the structures falling under the AU that has a specific mandate to work closely with the sub-regional mechanisms in addressing peace and security issues. Article 16(1) of the PSCAU Protocol lays down the foundation for the relationship that must be forged by the Peace

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<sup>16</sup> Emeka J. Wokoro, 'Towards a Model for African Humanitarian Intervention' (2008) 6 *Regent J. Int'l L* 15.

<sup>17</sup> Samuel Makinda & Wafula F. Okumu, *The African Union: Challenges of Globalization, Security, and Governance* (London and New York: Routledge, 2008) 53.

<sup>18</sup> As above 53.

and Security Council with SRMs, particularly in the area of conflict prevention, management and resolution. As stated, the meaning given to SRMs is that they are 'African Regional Mechanisms for Conflict Prevention, Management and Resolution'<sup>19</sup> and nothing more. This PSCAU Protocol definition, however, is not helpful, as it does not list the mechanisms it is referring to. It may well be the case that the definition was drafted in such a way that it created some flexibility in order to accommodate new SRMs over and above the existing ones, which are unfortunately not mentioned in the provision.

It is worthy of note that while sub-regional mechanisms are not necessarily regional economic communities, the practice seems to suggest that the SRMs operate under the auspices of the RECs, which are vehicles through which regional integration within Africa is to be strengthened. It is for this reason that most of the literature makes reference to regional economic communities when in fact it is discussing sub-regional mechanisms as defined in the PSCAU Protocol. Other commentators, such as Dersso, prefer to use the term 'REC/RM' (regional economic community/regional mechanism),<sup>20</sup> to refer to what others such as Adebajo, call 'regional security institutions'.<sup>21</sup> The regional economic communities are also viewed as economic blocs aimed at ensuring Africa's regional economic integration.

Article 3(1) of the Constitutive Act states that the African Union shall 'coordinate and harmonize policies between existing and future [RECs] for the gradual attainment of the objectives of the [AU]'. This section, although not as comprehensive, illustrates the point that for the gradual attainment of the AU's objectives, there is a need for various actors

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<sup>19</sup> See art. 1(h) of the PSCAU Protocol.

<sup>20</sup> Dersso (n 9 above).

<sup>21</sup> See generally, Adekeye Adebajo, 'The Peacekeeping Travails of the AU and the Regional Economic Communities, in Akokpari, John, *et al* (eds.) *The African Union and Its Institutions* (Auckland Park: Jacana Media, 2008, reprinted 2009). See also Adetula, Victor A.O., & Zeleza, Paul, Tiyambe, (eds.) 'The Role of Sub-Regional Integration Schemes in Conflict Prevention & Management in Africa: A Framework for a Working Peace System' in Alfred Nhema, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post-Conflict Reconstruction* (Oxford: James Currey – Published in Association with OSSREA, Addis Ababa, 2008) 9.



to coordinate and harmonise their policies. Abass makes reference to article 4(d) of the Constitutive Act, which provides for the establishment of a common defence policy for the African continent and argues that this provision infers an 'intention, on the part of the AU, to develop a synergetic relationship with other actors in defence policy'.<sup>22</sup>

According to Amin, regionalization or regional integration may be conceived of as a subsystem submitted to the rationale of globalisation, or as a substitute to it, or as a building block for the reconstruction of a different global system.<sup>23</sup> It is this global system which dictates that innovative ways are to be designed in order to address the contemporary challenges. There is a growing trend for regional economic communities to play an increased role in the promotion and protection of human rights in Africa.<sup>24</sup> This includes the promotion and protection of the right to international and national peace and security. Among other things, regional economic communities play an important role in addressing unconstitutional changes of government, a phenomenon that continues to undermine human rights in Africa. In this regard, the chairperson of the AU Commission (in consultation with the chairperson of the Assembly) must enlist the cooperation of the regional economic community/s to which the concerned country belongs in order to reverse the illegality.<sup>25</sup>

The regional economic communities that have been officially recognized by the AU, eight in total, are: the Economic Community of Western African States, the Common Market for Eastern and Southern Africa, the Economic Community of Central African States, the Southern African Development Community, the Intergovernmental Authority on Development, the Arab Maghreb Union (*Union du Magreb Arabe*), the

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<sup>22</sup> Ademola Abass, 'African Peace and Security Architecture and the Protection of Human Security' in Abass, Ademola, (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 252.

<sup>23</sup> Samir Amin, 'Regionalization in Response to Polarizing Globalisation' in B Hettne Ainotlai and Osunkel (1999) 54. Also quoted in Tiyanjana Maluwa 'Reimagining African Unity: Preliminary Reflections on the AU Treaty of the African Union' (2001) 9 *African Yearbook of International Law* 1.

<sup>24</sup> See generally Viljoen (n 6 above) 495.

<sup>25</sup> Rule 37 (6) of the Rules of Procedure of the Assembly of the Union (2002).

Community of Sahel-Saharan States and the East African Community (EAC).<sup>26</sup> According to Adebajo, of the above, the principal regional security institutions are ECOWAS in West Africa, SADC in southern Africa, ECCAS in Central Africa, IGAD in East Africa, and AMU in North Africa.<sup>27</sup>

The regional economic communities are neither AU organs nor institutions established under the Union's auspices. This fact means that the Peace and Security Council, as an organ of the AU, needs to work even harder to forge relations with the sub-regional mechanisms throughout the African continent. There are already spin-offs that have been witnessed through the collaboration between the AU and the SRMs, which will be discussed in this chapter in more detail. It has been observed that the AU and the continent's key sub-regional mechanisms have increasingly taken leading roles in implementing the responsibility to protect.<sup>28</sup>

Resulting from the foundation laid down in the first part of article 16 of the PSCAU Protocol, article 16(1)(a) and (b) of the PSCAU Protocol provides that the Peace and Security Council and the chairperson of the AU Commission shall, firstly, 'harmonize and coordinate the activities of Regional Mechanisms in the fields of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the [African] Union' and secondly, 'work closely with Regional Mechanisms, to ensure effective partnerships between them and the [PSCAU] in the promotion and maintenance of peace, security and stability'. The following discussion focuses on article 16(1)(a) and (b) of the PSCAU Protocol.

### **6.2.1 COORDINATING SRM ACTIVITIES**

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<sup>26</sup> See Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs). AU Doc Assembly/AU/Dec.112 (VII) (July 2006). According to this decision, the AU urged the recognized RECs to coordinate and harmonize their policies among themselves and with the AU Commission with a view to accelerating Africa's integration process.

<sup>27</sup> Adebajo (n 21 above) 132.

<sup>28</sup> See Jeremy Sarkin & Mark Paterson, 'Special Issue for GR2P: Africa's Responsibility to Protect: Introduction' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 343.

Giving effect to article 16(1) of the PSCAU Protocol, in July 2007, during the Dakar Retreat, the Peace and Security Council discussed the implementation of article 16 of the PSCAU Protocol. This article deals with its relations with the regional economic communities and sub-regional mechanisms on issues pertaining to conflict prevention, management and resolution.<sup>29</sup> The 'Conclusions of the Dakar Retreat' were issued thereafter, on 30 July 2007.<sup>30</sup> Among other things, the question of harmonizing and coordinating the activities of SRMs was considered during the Dakar Retreat. Harmonizing and coordinating activities of SRMs will always present challenges, as shall be seen in the following discussion.

The first challenge faced by the Peace and Security Council and the chairperson of the AU Commission is that while the Council and the chairperson of the AU Commission are part and parcel of the AU, the SRMs and RECs are independent of the Union. As such they have their own dynamics in various fields, including the fact that their member states conclude and ratify treaties independently. Moreover, neither the AU nor its organs have direct peremptory authority or jurisdiction over the SRMs/RECs.

Linked to this challenge is the complication arising out of an attempt to harmonize and coordinate the activities of the regional economic communities and the African Economic Community, which is established through the Treaty Establishing the African Economic Community (AEC Treaty).<sup>31</sup> According to Oppong, while the AEC Treaty is the foundation of an attempt to create an economic community covering the entire African continent, the relationship between the AU, the African Economic Community and the regional economic communities remains complex.<sup>32</sup> Compounding this complexity is the addition of the Peace and Security Council to this relationship. While

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<sup>29</sup> See p. 9 of the Peace and Security Council Report. No. 3, October 2009.

<sup>30</sup> See PSC/PR/2(LXXXIII).

<sup>31</sup> Treaty establishing the African Economic Community, 3 June 1991, (1991) 30 *International Legal Materials* 1241 (AEC Treaty).

<sup>32</sup> Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92.

the RECs are building blocks of the African Economic Community, they are neither members of the African Economic Community, nor parties to the AEC Treaty. It is only individual states that are members of the AEC, which are at the same time members of various regional economic communities. The PSCAU Protocol only makes reference to RECs and not to the AEC, which is the equivalent of a 'supreme REC' intended to cover the entire continent as opposed to a particular sub-region. A substantive provision on the AEC Treaty is found in the Constitutive Act in terms of article 33(2) which states that '[t]he provisions of this [Constitutive Act] shall take precedence over and supersede any inconsistent or contrary provisions of the [AEC Treaty]'. Since the PSCAU Protocol is by extension an offshoot of the Constitutive Act, it may be argued that the non-recognition of the African Economic Community in the former implies that the AEC was not intended to be part of the African Peace and Security Architecture.

As shall become clear in this chapter, the various regional economic communities have different legal systems. These systems differ also from the AU/PSCAU legal regime, which is in turn different to the AEC legal regime. The AEC Treaty provides that one of the objectives of the African Economic Community is '[t]o coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the [AEC]'.<sup>33</sup> The Constitutive Act also provides that one of the objectives of the AU is to '[c]oordinate and harmonize policies between existing and future [RECs] for the gradual attainment of the objectives of the [AU]'.<sup>34</sup>

The application of 33(2) of the Constitutive Act means that the provision in the Constitutive Act takes precedence over and supersedes the one in the AEC Treaty. This means that the AU has taken over the task of coordinating and harmonizing policies within the regional economic communities for the gradual attainment of the AU's objectives. One of these objectives is the promotion of peace, security, and stability on the continent.<sup>35</sup> The question of whether the AU's legal regime should take precedence over and supersede the treaties establishing the regional economic communities remains complex, particularly because these bodies and the AU are independent from each other.

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<sup>33</sup> Art. 4(1)(d) of the AEC Treaty.

<sup>34</sup> Art. 3(l) of the Constitutive Act.

<sup>35</sup> Art. 3(f) of the Constitutive Act.

Thus far, the AU has not succeeded in coordinating and harmonizing policies within the regional economic communities. As a consequence, article 16(1)(a) of the PSCAU Protocol, which obliges both the Peace and Security Council and the chairperson of the AU to 'harmonize and coordinate the activities of [SRMs] in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the [AU]', may not be an easy task for the Council. The effective implementation of article 16(1)(a) of the PSCAU Protocol is dependent upon the successful implementation of article 3(l) of the Constitutive Act, which is aimed at ensuring that the policies between the existing and future RECs are coordinated and harmonized by the AU.

On the face of it, article 16(1)(a) of the PSCAU Protocol seems to demand that the Peace and Security Council and the chairperson of the Commission should 'harmonize and coordinate the activities of the [SRMs]' without the involvement of the sub-regional mechanisms. In fact, the part that provides that they should undertake this task 'to ensure that these activities are consistent with the objectives and principles of the Union' could arguably be viewed as illustrating that the sub-regional mechanisms are simply subjects of the AU and as such should adhere to its stipulations. This, however, is not necessarily the case, as will be discussed when analysing the rest of the provisions of article 16 of the PSCAU Protocol.

The second challenge stems from the structural policy arrangements of the regional economic communities within which the sub-regional mechanisms function. In assessing the current position of the RECs *vis-à-vis* the African Union, the 2007 AU Audit Review states that without convergence of macro and sectoral policies within the regional economic communities, harmonisation and coordination among the RECs, and between them and the AU would be difficult to achieve.<sup>36</sup> This will equally hamper the relationship between the SRMs and the Peace and Security Council.

The third challenge relates to the manner in which the regional economic communities operate within the African Union's integration strategy, which is likely to also affect this

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<sup>36</sup> P.128, para 354 of the AU Audit Review.

process. According to the AU Audit Review,<sup>37</sup> it was discovered that AU member states that belong to more than one regional economic community faced contradictions and tensions with respect to the following: tariff and non-tariff barriers, bureaucratic procedures and formalities in customs and immigration offices, fear of competition, corruption, and the perceived fear of sovereignty loss.

In some cases tariff harmonisation for countries caused disruptions in their trade liberalisation policies. AU member states belonging to a preferential trade area, such as COMESA,<sup>38</sup> and also to a customs union, such as the EAC, furnish a good example. Those AU member states belonging to regional economic communities with divergent timelines for trade liberalisation programmes exacerbated the situation. Although these examples do not deal with security issues, they will no doubt have a negative impact in so far as the relationship between the Peace and Security Council and the SRMs is concerned.

The issue of African states having multiple memberships of RECs is a very serious one. Gibb presents a pessimistic view of the functionality of such multiple membership, particularly in East Africa and southern Africa:

Eastern and Southern Africa has a multiplicity of regional institutions with remarkably similar integrative ambitions. The institutions overlap both geographically, with shared membership, and structurally, with shared desire to create, at the very minimum customs unions. There is also rivalry and tension among some of these regional institutions. The institutional structure supporting regionalism is overcomplicated and incoherent. Put bluntly, the present structure of

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<sup>37</sup> As above 353-358.

<sup>38</sup> COMESA is the largest of Africa's regional economic organizations with 19 member States, namely: Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. For more details on the COMESA, see <http://www.comesa.int/> (Accessed 28 March 2011).

overlapping memberships and shared integrative goals ... is unworkable. It does not work now and it will not work in the future.<sup>39</sup>

Linked to the challenge of multiple memberships is the uncontrolled growth of regional economic communities in Africa. Makinda and Okumu argue that '[t]he uncontrolled establishment of RECs has created serious inefficiencies, duplication, unintended overlap, and even dissipating efforts and scarce resources that should be frugally directed towards the goal of building an effective African Union'.<sup>40</sup> It is hoped that the AU's Decision on the Moratorium on the Recognition of Regional Economic Communities,<sup>41</sup> which urged the recognized RECs to coordinate and harmonize their policies among themselves and with the AU Commission, will to some extent address this challenge. This will no doubt take some time.

The fourth challenge is the fact that regional economic communities, which are primarily economic organizations, are now also assuming security roles. Mixing the economic function with the security (and sometimes political) one may lead to a loss of focus on some areas. It could be argued that no organization is capable of devoting equal attention to both these key areas. There is also the complication that the security roles played by regional economic communities are not necessarily consistent with those of the AU. In some situations, there are tensions between the RECs and the UN. The case of the involvement of ECOWAS in Liberia and Sierra Leone during the 1990s furnishes a good example. The UN deployed military observers alongside much larger ECOWAS forces, but refused to provide the financial and logistical muscle to strengthen the regional peacekeepers.<sup>42</sup>

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<sup>39</sup> Richard Gibb, 'Rationalisation or Redundancy: Making Eastern and Southern Africa's Regional Trade Units Relevant', *Brenthurst Discussion Paper 3* (2006) 2.

<sup>40</sup> Makinda & Okumu (n 17 above) 53.

<sup>41</sup> AU Doc Assembly / AU / Dec.112 (VII) (July 2006).

<sup>42</sup> Adebajo (n 21 above) 135. In order to circumvent this challenge the AU and ECOWAS have devised a mechanism that does not require prior UN authorisation for action in order to save lives and restore order through necessary peacekeeping interventions. In this case, the UN is simply informed *ex post facto*.

In the case of Sierra Leone, there was absolutely no peace to keep yet the UN deployed a peacekeeping mission.<sup>43</sup> ECOWAS decided to deploy an enforcement action, as this was necessary in the circumstances. Abass summarises this situation by stating that '[t]he UN was acting under its Charter and the general law of peacekeeping [and] ECOWAS was acting under its 1999 Protocol which permitted the use of force against its member states under certain circumstances'.<sup>44</sup> The divergent approaches to addressing conflicts between the UN and ECOWAS forced Nigeria, ECOMOG's largest troop contributor, to withdraw its forces from Sierra Leone in 2000.<sup>45</sup>

Achieving a meeting of ideas between the AU and regional economic communities is very difficult due to the fact that these institutions are independent from each other. Adebajo notes that a draft memorandum of understanding between the AU and the RECs went through at least five interactions between 2003 and 2007.<sup>46</sup> Nevertheless, an MOU between the AU and the RECs was eventually concluded in 2008. This memorandum will be discussed in more detail in this chapter. In an attempt to address the challenge relating to achieving a meeting of ideas, article XX(1) of the MOU on Cooperation in Area of Peace and Security states

[w]ithout prejudice to the primary role of the [AU] in the promotion and maintenance of peace, security and stability in Africa, the RECs and, where appropriate, the Coordinating Mechanisms, shall be encouraged to anticipate and prevent conflicts within and among their Member States and, where conflicts do occur, to undertake peace-making and peace-building efforts to resolve them, including the deployment of peace support missions.<sup>47</sup>

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<sup>43</sup> Abass (n 22 above) 267.

<sup>44</sup> As above 267. Footnote omitted.

<sup>45</sup> As above 267.

<sup>46</sup> Adebajo (n 21 above) 134.

<sup>47</sup> Art. XX(1) of the MOU on Cooperation in Area of Peace and Security.



From this provision, the independent use of force by the regional economic communities is arguably not sanctioned. In fact the provision is totally silent on this issue. This may be interpreted in two ways. It may mean that the AU only retains the power to intervene and use force in line with article 4(h) of the Constitutive Act. It may also mean that RECs are not barred from intervening and using force, if this is in line with their protocols. Interestingly, article XX(1) of the MOU on Cooperation in Area of Peace and Security is also silent on the deployment of peacekeeping missions by regional economic communities. It confines their role to 'peace-making', 'peace-building' and 'peace-support'. According to Abass, two issues arise from this provision, namely, that states do not require the approval of any other authority in order to undertake peacekeeping action, and that the provision does not forbid RECs from taking enforcement action without the authorization of the AU.<sup>48</sup> The confusion brought about by this provision in the memorandum requires clarity within a legal instrument such as the PSCAU Protocol, which is more than just a memorandum of agreement (with less binding effect).

The fifth challenge is that the regional economic communities remain weak and lack financial and logistical means.<sup>49</sup> According to Sands and Klein, while the proliferation of intergovernmental organisations across Africa is striking, the issue of their effectiveness and efficiency remains questionable.<sup>50</sup> The lack of financial and logistical means is further aggravated by the fact that the member states of the sub-regional mechanisms have limited resources.

According to Harrel, '[d]eveloping-world militaries frequently lack advanced weaponry and the logistical capabilities – ships, planes, and trucks – required to project and supply forces across national boundaries [and] [s]oldiers are often poorly trained and even officers lack the basic material required to mount an effective intervention'.<sup>51</sup> Since most

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<sup>48</sup> Abass (n 22 above) 268.

<sup>49</sup> Adebajo (n 21 above) 132.

<sup>50</sup> Sands and Klein (n 5 above) 263.

<sup>51</sup> Peter E. Harrel, 'Modern-Day "Guarantee Clauses" and the Legal Authority of multinational Organizations to Authorize the Use of Military Force' (2008) 33 *Yale J. Int'l L.* 445. See also Howe Herbert, 'Lessons of Liberia: ECOMOG and Regional Peacekeeping' (1996-97) 21 *Int'l Security*

African states are part of the developing world, they are not capable of making significant financial, human or material contribution to interventions by the UN, AU or RECs/SRMs. Harrel gives the example of ECOMOG commanders who reportedly planned the initial invasion of Liberia's capital using a tourist map of Monrovia until they were provided with more detailed maps by the American military.<sup>52</sup>

## 6.2.2 WORKING CLOSELY WITH SUB-REGIONAL MECHANISMS

In addition to harmonizing and coordinating the activities of the SRMs, the Peace and Security Council is expected to work closely with them. It is worthy of note, however, that not all sub-regional mechanisms, or, to be more precise, not all regional economic communities, are in fact addressing peace and security issues, at least in practical terms. In seeking to work closely with the SRMs, article 16(1)(b) of the PSCAU Protocol provides that the modalities of such partnership shall be determined by the comparative advantage of each regional mechanism (RM) and the prevailing circumstances. This means the partnership is not cast in stone, but flexible enough to accommodate the prevailing circumstances.

It is intriguing to note that while article 16(1)(a) of the PSCAU Protocol gives a directive on what the Council and the chairperson of the AU Commission should do (without express mention of the input from SRMs), article 16(1)(b) of the PSCAU Protocol talks about a 'partnership', which it would seem does not require the input of SRMs. This proves the point that although this could be a partnership, the relationship between the partners is not necessarily equal.

Adebajo argues that while the AU is explicitly mandated to coordinate the activities of the sub-regional mechanisms, organizations such as ECOWAS and SADC may not be willing to adhere to this because they consider themselves independent and well-organised.<sup>53</sup> It is worthy of note that ECOWAS and SADC established their security mechanisms before the African Union was born in 2002. ECOWAS boasts of solid

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151-52.

<sup>52</sup> As above.

<sup>53</sup> Adebajo (n 21 above) 134.

peacekeeping experience in the West African region and as such it could be that the AU has more to learn from this organisation than vice-versa.<sup>54</sup> This fact is likely to affect the relationship between the Peace and Security Council and the SRMs.

In fostering close cooperation between the Peace and Security Council and the SRMs, article 16(6) of the PSCAU Protocol provides that the chairperson of the AU Commission shall take the necessary measures, where appropriate, to ensure the full involvement of sub-regional mechanisms in the establishment and effective functioning of the Continental Early Warning System and the African Standby Force, respectively. Of importance is the fact that the standby arrangement is to be achieved on the basis of pledges from member states and preparations by SRMs.<sup>55</sup>

Article 16(8) of the PSCAU Protocol provides that in order to strengthen coordination, the AU Commission shall establish liaison offices to the sub-regional mechanisms and these mechanisms shall be encouraged to establish liaison offices to the AU Commission. This also speaks to the need for more structured cooperation between the Peace and Security Council and the SRMs. According to Murithi, it is worthwhile to note that in its intervention, the AU will not always take the lead on specific challenges and will occasionally defer to the efforts of the SRMs.<sup>56</sup> Hence the importance of the Peace and Security Council working closely with SRMs cannot be over emphasised. An analysis of the relationship between the Council and the sub-regional mechanisms should also be seen in the context of the interplay between these mechanisms and the African Standby Force, which should be operationalized by an MOU between the AU and the RECs.

### **6.2.3 MOU BETWEEN AU AND REGIONAL COMMUNITIES**

As early as 2002, Kindiki made a call that '[t]he AU, unlike the OAU, needs to clearly define its relationship with the African sub-regional intergovernmental organization [and] [i]n this regard, procedures should be established for the AU to control and

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<sup>54</sup> As above.

<sup>55</sup> Dersso (n 9 above) 7.

<sup>56</sup> Tim Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Ashgate Publishing Company, London, UK, 2005) 85.

sanction military interventions by sub-regional organizations'.<sup>57</sup> This part discusses how the AU has attempted to respond to this call. In order to strengthen the relationship between the Peace and Security Council and the sub-regional mechanisms, there was a need for the AU to negotiate and conclude an MOU to put into operation article 16(9) of the PSCAU Protocol. This provides that '[o]n the basis of the above provisions, a Memorandum of Understanding on Cooperation shall be concluded between the [AU] Commission and the Regional Mechanisms'. As already stated, in 2008 the Memorandum of Understanding on Cooperation in Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern African and Northern Africa was finalised.<sup>58</sup> On 29 January 2008, the AU, the Community of Sahel-Saharan States, ECOWAS and the Intergovernmental Authority on Development signed an MOU that was aimed at reinforcing cooperation ties.<sup>59</sup> On 18 August 2011, the AU Commission and the Eastern Africa Standby Force Co-ordination Mechanism signed an MOU, which was aimed at enhancing the capabilities of AMISOM, particularly in the areas of operational planning, logistics planning, and operations, training, medical support and assistance.<sup>60</sup>

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<sup>57</sup> Kithure Kindiki *Humanitarian Intervention in Africa: The Role of intergovernmental Organizations* (unpublished LLD thesis, Faculty of Law, University of Pretoria, 2002) 310.

<sup>58</sup> See the Memorandum of Understanding on Cooperation in Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern African and Northern Africa. Available at [http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC%20Publications/MOU\\_AU\\_REC%20E.pdf](http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC%20Publications/MOU_AU_REC%20E.pdf) (Accessed 16 September 2010).

<sup>59</sup> See Press Release N°17/2008 on the Signing of an MOU on the Relationship Between the African Union, CENSAD, ECOWAS and IGAD. Available at [http://www.africa-union.org/root/au/Conferences/2008/january/summit/pr/pr\\_17\\_SUMMIT%20AU%20CENSAD%20ECOWAS%20IGAD%20REV%20-%20ENG.doc](http://www.africa-union.org/root/au/Conferences/2008/january/summit/pr/pr_17_SUMMIT%20AU%20CENSAD%20ECOWAS%20IGAD%20REV%20-%20ENG.doc) (Accessed 16 September 2010).

<sup>60</sup> See Press Release, The AU Commission and the Eastern Africa Standby Force Coordinating Mechanism sign a Memorandum of Understanding to Deploy Personnel to AMISOM, Addis Ababa, 19 August 2011. Available at [http://au.int/en/dp/ps/sites/default/files/Press%20Release%20-AUC%20and%20the%20EASCM%20sign%20MoU\\_EN\\_%202\\_.pdf](http://au.int/en/dp/ps/sites/default/files/Press%20Release%20-AUC%20and%20the%20EASCM%20sign%20MoU_EN_%202_.pdf) (Accessed 26 August 2011).

Accordingly, this memorandum is considered a milestone in making the African Standby Force operational, in the sense that it provides a framework for the first ever deployment of an ASF Regional Standby Force.<sup>61</sup>

While article 16(9) of the PSCAU Protocol states that the MOU should be between 'the Commission and the Regional Mechanisms', technically this has not been translated into practice. First, the relationship to be forged is between the Peace and Security Council and the SRMs and not the AU Commission and the SRMs and the MOU that was concluded in 2008 is in fact between 'the African Union, the RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa'.<sup>62</sup> Be that as it may, this is the MOU that is aimed at bringing to effect article 16(9) of the PSCAU Protocol.

Of significance, the MOU is '[pursuant to the PSC[AU] Protocol, ... a binding legal instrument consisting of principles, rights and obligations to be applied in the relationship between the Union, the RECs and the Coordinating Mechanisms, in matters relating to the promotion and maintenance of peace, security and stability in Africa, subject to their respective competences'.<sup>63</sup> The conclusion of this memorandum is, therefore, part of the AU's strategy for creating what Murithi refers to as 'an amalgamation of institutions and legal instruments which, when they are effectively operationalized and functioning, will lay the foundation for more effective peace and security'.<sup>64</sup> The following discussion dissects some of the salient features of this memorandum.

Having established the binding effect of the memorandum, article III(1) of the MOU on Cooperation in Area of Peace and Security provides that the parties shall institutionalise and strengthen their cooperation and closely coordinate their activities towards their shared goal of ridding the continent of the scourge of conflicts and laying the foundation

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<sup>61</sup> As above. See also Abass (n 22 above) 256-257.

<sup>62</sup> See the MOU on Cooperation in Area of Peace and Security (n 58 above).

<sup>63</sup> Art. II of the MOU on Cooperation in Area of Peace and Security.

<sup>64</sup> Murithi (n 56 above) 85.

for sustainable peace, security and stability. This provision is in line with article 16(1)(b) of the PSCAU Protocol.

The overarching objectives include contributing to the full operationalization and effective functioning of the African Peace and Security Architecture and ensuring the regular exchange of information between the parties on all their activities pertaining to the promotion and maintenance of peace, security and stability in Africa. Equally important is the objective of fostering closer partnership between the parties in the promotion and maintenance of peace, security and stability on the continent, as well as enhancing coordination between their activities. This is achieved through the development and implementation of joint programmes and activities in the area of peace, security and stability in Africa.

Since there is a need for the policies of the AU and the regional economic communities to be in agreement, other objectives of the memorandum are to ensure that the activities of the RECs and the coordinating mechanisms are consistent with the objectives and principles of the AU. Bearing in mind the role played by the UN in peace and security matters, the other objective of the memorandum is to facilitate coordination and enhance partnership between the parties, on the one hand, and the UN and its agencies (as well as other relevant international organizations) on the other hand. Needless to say, the MOU must also contribute to ensuring that any external initiative in the field of peace and security takes place within the framework of the objectives and principles of the AU. All the above objectives may be achieved through building and strengthening the capacity of the parties in the areas covered by the memorandum.

Article 16 of the PSCAU Protocol does not specifically provide for areas of cooperation between the Peace and Security Council and the SRMs. This shortcoming is addressed by article V of the MOU which provides that in order to achieve the above-mentioned objectives of the MOU, the parties shall cooperate in all areas relevant for the promotion and maintenance of peace, security and stability in Africa. These include the following: one, the operationalization and functioning of the APSA, as provided for by the PSCAU Protocol and other relevant instruments; two, the prevention, management and resolution of conflicts; three, humanitarian action and disaster response; four, post-conflict reconstruction and development; five, arms control and disarmament; six, counter-terrorism and the prevention and combating of trans-national organized crime; seven, border management; eight, capacity building, training and knowledge sharing;

nine, resource mobilization; and ten, any other areas of shared priorities and common interest as may be agreed to by the parties.

Among other things, the parties to the MOU should work together to make the Continental Early Warning System, as provided for by article 12 of the PSCAU Protocol, fully operational.<sup>65</sup> The parties also bind themselves to working together to make the African Standby Force, as provided for in article 13 of the PSCAU Protocol, fully operational, on the basis of the Policy Framework on the Establishment of the ASF and Military Staff Committee, which among other things, provides for the establishment of five regional brigades to constitute the ASF.<sup>66</sup>

The memorandum also puts emphasis on the idea of exchanging information between the parties to it. Among other things, article XVI provides that the parties shall regularly exchange information, analysis and assessments on the issues covered by the MOU. In order to enhance cooperation between the parties, article XVII provides that, among other things, the parties shall regularly consult each other, both at political and technical levels, on matters relating to the promotion and maintenance of peace, security and stability. Of importance is that the chairperson of the AU Commission shall be invited to the meetings and deliberations of the regional economic communities and the coordinating mechanisms, in accordance with article 16(7) of the PSCAU Protocol<sup>67</sup> and that a meeting between the chairperson of the AU Commission and the chief executives of the RECs and coordinating mechanisms shall be held at least once a year to discuss matters of peace and security and agree on a programme of work.<sup>68</sup>

In further strengthening the relationship between the Peace and Security Council and the regional mechanisms, the MOU<sup>69</sup> provides that on the one hand, the AU

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<sup>65</sup> Art. VI(2) of the MOU on Cooperation in Area of Peace and Security.

<sup>66</sup> Art VI(3) of the MOU on Cooperation in Area of Peace and Security.

<sup>67</sup> As above.

<sup>68</sup> Art VIII(5) of the MOU on Cooperation in Area of Peace and Security.

<sup>69</sup> Art XVIII(1) of the MOU on Cooperation in Area of Peace and Security.

Commission shall establish liaison offices to the RECs and the coordinating mechanisms. On the other hand, the RECs and coordinating mechanisms shall be encouraged to establish liaison offices to the AU Commission. This operationalizes article 16(8) of the PSCAU Protocol. Accordingly, the parties to the MOU shall facilitate the establishment of these liaison offices by providing, to the extent possible, the necessary support, including office space, communications, and other administrative and logistical support.<sup>70</sup> This is otherwise known as institutional presence, which is aimed at making the relationship between the Peace and Security Council and the SRMs effective.

Without an implementation mechanism, the MOU is worthless. Firstly, accordingly article IV of the MOU, which deals with principles, provides that the implementation of the MOU shall be guided by the 'scrupulous observance of the principles and provisions of the Constitutive Act and the PSC[AU] Protocol, as well as other relevant instruments agreed to at continental level'. This means that both the Constitutive Act and the PSCAU Protocol rule supreme in the implementation of the MOU. The Constitutive Act, the Peace and Security Council and the MOU remain the three legal instruments governing the relationship between the African Union and the regional economic communities.<sup>71</sup> What is of interest is that the 'other relevant instruments' that could be considered in implementing the MOU are only those 'agreed to at continental level' and not beyond the continent. On the face of it, interpreting and implementing the provisions of the MOU does not require consideration of the UN Charter. However, the reference to the Constitutive Act requires 'taking due account of the Charter of the United Nations'.<sup>72</sup> The implication of this phrase is that the Charter of the UN takes precedence over the provisions of the Constitutive Act.

Secondly, article IV(ii) of the MOU provides for 'the recognition of, and respect for, the primary responsibility of the Union in the maintenance and promotion of peace, security and stability in Africa, in accordance with article 16 of the PSC[AU] Protocol'. This provision is important in the sense that it makes it clear that the role of the sub-regional mechanisms is not to usurp that of the Peace and Security Council. This means that in

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<sup>70</sup> Art XVIII(2) of the MOU on Cooperation in Area of Peace and Security.

<sup>71</sup> Abass (n 22 above) 252.

<sup>72</sup> Art. 3(e) of the Constitutive Act.



carrying out their activities in the field of peace, security and stability, the SRMs must take cognisance of the fact that the AU remains the only organization with the primary responsibility of maintaining and promotion of peace, security and stability in Africa. This provision, again, does not mention the UN, which has the primary responsibility of maintaining international peace and security globally, including in Africa. This may be interpreted to mean that the AU mandate may override that of the UN, yet the Constitutive Act spells out the fact that the AU member states established the AU while taking due account of the UN Charter.

Thirdly, article IV(vi) of the MOU provides for and underscores the adherence to the principles of subsidiarity, complementarity, and comparative advantage, in order to optimise the partnership between the AU, the RECs and the coordinating mechanisms in the maintenance of peace, security and stability. The role that the sub-regional mechanisms play in this regard is therefore subsidiary and complementary to that of the AU. In other words, SRMs cannot undertake any activities without consulting the Peace and Security Council, which falls under the AU, an organization that should take the lead role in addressing any peace, security and stability challenge within the continent.

In order to keep track of what the Peace and Security Council and the RECs/SRMs have done in implementing the MOU, article XVI provides for the exchange of information. Article XVI(1) provides that the parties shall regularly exchange information, analysis and assessments on the issues covered by the MOU. More importantly, article XVI(2) further provides that on one hand, '[t]he RECs and the Coordinating Mechanisms shall submit, whenever required and at least every six (6) months, a comprehensive report on their activities in the area of peace and security to the Chairperson of the [AU] Commission and, through him, to [PSCAU]'. On the other hand, article XVI(2) provides that '[t]he [AU] Commission shall also, whenever required and at least every six (6) months, provide the RECs and the Coordinating Mechanisms with an update on its activities and those of the [PSACU] in the area of peace and security'. This provision will therefore promote the idea of reciprocity between the Peace and Security Council and the RECs/SRMs.

The MOU between the AU and the RECs is critical for the establishment of the African Standby Force, which is the focus of the discussion that follows.

### 6.3 AFRICAN STANDBY FORCE AND SUB-REGIONAL MECHANISMS

As briefly discussed in Chapter 2, the African Standby Force is established in terms of article 13(1) of the PSCAU Protocol as ‘standby multidisciplinary contingents with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice’.<sup>73</sup> The Standby Force was established to enable the Peace and Security Council to ‘perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4(h) and (j) of the Constitutive Act’. The ASF also actualises the Peace and Security Council’s goal of intervening against war crimes, genocide and other crimes against humanity as provided for under article 15(4) of the PSCAU Protocol. This Protocol further provides under article 13(2) that, for this purpose,

the Member States shall take steps to establish standby contingents for participations in peace support missions decided on by the Peace and Security Council or intervention authorized by the Assembly. The strength and types of such contingents, their degree of readiness and general location shall be determined in accordance with established African Union Peace Support Standard Operating Procedures (SOPs), and shall be subject to periodic reviews depending on prevailing crisis and conflict situations.

In line with this provision, member states identify and earmark military, police and civilian personnel and forward their names and details to the regional economic communities or sub-regional mechanisms.<sup>74</sup> It is on the basis of these pledges that each REC/SRM raises and prepares the regional brigade and develops the standby roster, after which it forwards all the data on the capabilities raised and the developed standby

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<sup>73</sup> For more information on the ASF, see <http://www.africa-union.org/root/au/auc/departments/psc/asf/Documents.htm> (Accessed 11 September 2010). On the technical development of the ASF, see Jakkie Cilliers & Johann Pottgieter, ‘The African Standby Force’ in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa’s new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 111. See also Daniel Kuwali, *Persuasive Prevention: Implementation of the AU Right of Intervention* (Published PhD thesis, Faculty of Law, Lund University, 2009) 170 – 174.

<sup>74</sup> Dersso (n 9 above) 7.

roster to the AU.<sup>75</sup> A very important point raised by Dersso is that by the nature of being a standby arrangement, the identified personnel making up the contingents remain in their countries of origin and can only be deployed once they are called up to assemble at a certain point and jointly deployed to the mission area.<sup>76</sup>

The ASF is organized into five sub-regional brigades covering southern, eastern, western, central and northern Africa. These are the Southern African Development Community Brigade (SADCBRIG); the East African Peace and Security Mechanism 23 Brigade, known as the Eastern Africa Standby Brigade (EASBRIG); the Economic Community of West African States Brigade (ECOBRIIG); the North African Regional Capacity Brigade, known as the North African Standby Brigade; and the Economic Community for Central African States Brigade, or Multinational Force of Central Africa (*Force Multinationale de l'Afrique Centrale* (FOMAC)).

In terms of the original plan set out in the Roadmap for the Operationalisation of the ASF (Roadmap I), each regional mechanism should establish a small full-time planning element, a brigade headquarters, and pledged brigade units. According to Roadmap I, the planning element's responsibility is to raise and maintain the pledged units, for the purpose of developing the police and civilian rosters and making the necessary arrangements for deployment. Roadmap I envisaged that by 2010 every SRM would have prepared a capability consisting of military, police and civilian elements of about 5 000 personnel. Had this been accomplished (or should this be accomplished at a future date) the overall size of the African Standby Force would be between 25 000 and 30 000 troops.<sup>77</sup>

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<sup>75</sup> As above.

<sup>76</sup> As above 7-8.

<sup>77</sup> See Dersso (n 9 above) 7. See also J Potgieter, Peacekeeping forces for peace support operations in Africa, 4 August 2009 available at <http://www.apsta-africa.org/news/article040809.php> (Accessed 14 August 2010). According to the decision of May 2009 meeting of the African Chiefs of Defence and Staff and Heads of Security to increase the Police Standby Arrangements from 240 individual police officers per RM to 720 and the Formed Police Units from two to six per RM, which means a total force of about 40 000.

Roadmap II, which covers the period from 2008 to 2010, required the consolidation of the ASF Policy Documents, the development of concepts of operation, the identification of capacities for deployment, and the development of the capability development. At the of writing, neither of these Roadmaps had been fully realized, as the Africa's five regions were still in the process of setting up their sub-regional brigades and agreeing on issues of harmonization and standardisation.<sup>78</sup> No doubt this process will take some time. Over time every SRM must complement the AU through the establishment of fully-fledged standby forces up to brigade size, which will be able to handle peacekeeping missions with varying degrees of complexity, thereby allowing the ASF to maintain a purely supplementary role.

As noted in the introductory remarks to this chapter, the focus of this is on the principal security institutions or sub-regional mechanisms, namely ECOWAS,<sup>79</sup> SADC,<sup>80</sup> the Economic Community for Central African States,<sup>81</sup> IGAD<sup>82</sup> and the Arab Maghreb Union.<sup>83</sup> The manner in which these regional organizations address peace and security issues in their respective regions differs from one organization to another, and is largely dependent upon what challenges they face in given situations. According to Kuwali, '[i]n recognition that chronic human insecurity had been a leading cause of state and regional insecurity, ECOWAS and SADC have the authority to use force against a member state to stop a humanitarian emergence in their respective members states'.<sup>84</sup>

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<sup>78</sup> For more information on the ASF see <http://www.africa-union.org/root/au/auc/departments/psc/asf> (Accessed 29 March 2011).

<sup>79</sup> [www.ecowas.int/](http://www.ecowas.int/) (Accessed 30 August 2010).

<sup>80</sup> <http://www.sadc.int/> (Accessed 30 August 2010).

<sup>81</sup> <http://www.cceac-eccas.org/> (Accessed 30 August 2010).

<sup>82</sup> <http://igad.int/> (Accessed 30 August 2010).

<sup>83</sup> <http://www.maghrebarabe.org/en/> (Accessed 30 August 2010).

<sup>84</sup> Dan Kuwali, 'Art.4(H) + R2P: Towards a Doctrine of Persuasive Prevention to End Mass Atrocity Crimes' (2008-2009) 3 *Interdisc. J. Hum. Rts. L.* 366.

This codification by the RECs of the legal right of humanitarian intervention<sup>85</sup> in their respective regions calls for the relationship between the Peace and Security Council and the sub-regional mechanisms to be strengthened so as to create the context for coordinated action when it is needed in a particular African member state.

Murithi refers to the speech by Joaquim Chissano, who in 2004 was chairman of the AU and president of Mozambique. At the 25 May 2004 inauguration of the PSCAU in Addis Ababa Chissano argued that 'it is important that pragmatic solutions be considered to make it possible to mobilize, in less than a week, the observers and troops who we may need each time when necessary'.<sup>86</sup> He further advised that the success of the Peace and Security Council was dependent on the willingness of Africa's five regional economic communities, namely the Economic Community of West African States, the Southern African Development Community, the Intergovernmental Authority on Development, the Economic Community of Central African States and the Arab Maghreb Union, in order to mobilize the necessary personnel to work under the auspices of the AU in war-affected regions of the African continent.<sup>87</sup> The following paragraphs discuss these regional economic communities in more detail.

### **6.3.1 ECONOMIC COMMUNITY OF WEST AFRICAN STATES**

ECOWAS was formally established in 1975,<sup>88</sup> but its constituent treaty was extensively revised in 1993.<sup>89</sup> The principal objective of this body is the creation of an economic and

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<sup>85</sup> See e.g. the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 25, Dec. 10, 1999, ECOWAS Doc. A/P10/12/99, available at <http://www.sec.ecowas.int/sitecedeo/english/ap101299.htm> (Accessed 31 August 2010). This Protocol has not been ratified by all member states.

<sup>86</sup> Murithi (n 56 above) 87.

<sup>87</sup> As above.

<sup>88</sup> During this time, there was an interim agreement of May 4, 1967 (595 U.N.T.S. 287).

<sup>89</sup> On 24 July 1993.

monetary union of 15 member states, namely, Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. In reaction to the civil war in Liberia, ECOWAS established a military force, the ECOWAS Cease-Fire Monitoring Group (ECOMOG), which was sent to Liberia in August 1990 to help restore peace.<sup>90</sup>

In 1998, ECOWAS adopted a Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS Protocol).<sup>91</sup> This Protocol resulted from the successful interventions by ECOWAS in reaction to the civil wars in West Africa. The ECOWAS leadership was convinced that a sub-regional approach to addressing conflicts, whose effects spread across borders, was of paramount importance. With this in mind and drawing on its 1978 Protocol on Non-Aggression, the 1981 Protocol on Mutual Assistance on Defence and other norms, the ECOWAS Protocol, was therefore in order. The Protocol established a nine-member Mediation and Security Council, empowered to decide by two-thirds vote on ECOWAS responses to conflicts in member states in terms of articles 4(8)-(10) of the ECOWAS Protocol. In terms of article 10 of the Protocol the Mediation and Security Council decides 'on all matters relating to peace and security' and has the authority to 'authorise all forms of intervention and decide particularly on the deployment of political and military missions'.

The intervention by ECOWAS is triggered by 'serious and massive violation of human rights and the rule of law'; 'an overthrow or attempted overthrow of a democratically elected government'; and '[a]ny other situation as may be decided by the Mediation and Security Council' as provided for under article 25 of the ECOWAS Protocol. It is clear that this provision, which gives effect to the right to intervene by an intergovernmental organization, inspired the crafting of article 4(h) of the Constitutive Act, which asserts

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<sup>90</sup> See the Profile of the Economic Community of West African States (ECOWAS) available at [www.africa-union.org/Recs/ECOWASProfile.pdf](http://www.africa-union.org/Recs/ECOWASProfile.pdf) (Accessed 29 March 2011).

<sup>91</sup> Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, available at [http://www.iss.co.za/af/regorg/unity\\_to\\_union/pdfs/ecowas/ConflictMecha.pdf](http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf) (Accessed 31 August 2010).

'the right of the [AU] to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. It is in relation to these provisions that Wippman argues that 'ECOWAS and AU claims of a right to intervene in grave circumstances have garnered surprisingly little attention, in part because most states would welcome any means to curtail Africa's many festering conflicts and because the United Nations has repeatedly proven unwilling to tackle such conflicts itself'.<sup>92</sup>

According to Mohamed, even though it was technically organized as a traditional peacekeeping body, the deployment of ECOMOG was undoubtedly a use of force in that it aggressively used armed force in response to attacks, conducted aerial bombings, and relied on heavy artillery and tanks.<sup>93</sup> In reaction to ECOMOG's action, which was the preserve of the UN Security Council, the president of the UN Security Council 'commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia'.<sup>94</sup> It could be argued that despite the fact that ECOMOG acted in contravention of the UN Charter, it nonetheless applied what Franck refers to as 'the common sense of moral justice'.<sup>95</sup> The 'common sense of moral justice' referred to by Franck is usually triggered by unsuccessful efforts to persuade the UN Security Council to take meaningful action in conflict situations, as was the case in Liberia and Sierra Leone. Hence Wippman argues '[s]o long as future actions by ECOWAS and the AU fit that pattern, they are unlikely to attract much criticism, even if they do not fit with the [UN] Charter scheme for the use of force'.<sup>96</sup> After all, article 3(e)

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<sup>92</sup> David Wippman, 'The Nine Lives of Article 2(4)' (2007) 16 *Minn. J. Int'l L.* 405. See also Fredrik Söderbaum & Björn Hettne 'Regional Security in a Global Perspective' in Engel, Ulf, & Porto, João Gomes, (eds.) *Africa's new Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (Farnham: Ashgate, 2010) 25.

<sup>93</sup> Saira Mohamed, 'Restructuring the Debate on Unauthorized Humanitarian Intervention' (2010) 88 *N.C.L.Rev.* 1294.

<sup>94</sup> Note by the President of the Security Council, U.N. Doc. S/22133 (Jan. 22, 1991).

<sup>95</sup> Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* 139 (Cambridge University Press 2002) 183-84.

<sup>96</sup> Wippman (n 92 above) 405.

of the Constitutive Act provides that one of the AU's objectives is to encourage international cooperation, taking account of the UN Charter and the Universal Declaration of Human Rights.

This exercise of the common sense of moral justice, however, was not legal and perhaps the relationship between the Peace and Security Council and the regional economic communities will ensure that such illegality does not recur in the future and that the AU will play a role in ensuring that peace and security challenges are addressed within the confines of international law. The problem with allowing sub-regional mechanisms, such as ECOWAS, to independently decide what action to take in given circumstances, and particularly without the involvement of the Peace and Security Council, is that it opens up the floodgates for other SRMs to do as they deem fit and sometimes in contravention of international law.

The need for the Peace and Security Council to forge relations with RECs/SRMs is of critical importance in implementing democratic principles. For instance, ECOWAS assumed a central role in Guinea's return to democratic rule in February 2010 following a December 2008 military coup after the death of General Lasana Conté, who ruled Guinea for 24 years. ECOWAS suspended Guinea's membership within the regional organization, convened negotiations between the coup leaders and pro-democracy groups, and marshalled diplomatic pressure from Western and African countries.<sup>97</sup> In Niger, ECOWAS also played a central role by suspending Niger's membership from the regional organization in October 2009. This was done in response to President Mamadou Tandja's action of dissolving Niger's Parliament and Constitutional Court, thereby flouting the country's obligation to promote democratic governance under article 4(j) of the ECOWAS Revised Treaty.<sup>98</sup> It is of interest that in the wake of a military coup against the government of President Tandja in February 2010, the AU swiftly suspended Niger's membership.<sup>99</sup>

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<sup>97</sup> Andrew W Maki, 'African Regional and Sub-regional Systems' (2009) 17 (3) *Hum.Rts.Brief* 59.

<sup>98</sup> See ECOWAS Press Release No. 113/2009: ECOWAS Suspends Niger from Membership of Organization. <http://news.ecowas.int/presseshow.php?nb=113&lang=en&annee=2009> (Accessed 29 March 2011).

<sup>99</sup> Abass (n 22 above) 281.



Since the AU and ECOWAS have their own permanent institutions tasked with organizing and coordinating interventions – the Peace and Security Council and the ECOWAS Mechanism for Conflict Prevention, Resolution, and Peace-keeping –<sup>100</sup> there is a need to create a formal and legal document, beyond the MOU. Such a document will ensure that these permanent institutions coordinate their work in addressing peace, security and stability in the ECOWAS region. The document will apply equally to the other RECs/SRMs, such as SADC, ECCAS, IGAD and the AMU. At best, such a legal instrument will standardize the relationship between the PSCAU and the sub-regional mechanisms operating under the auspices of the regional economic communities. Having an MOU as a tool for standardizing the relationship between the Peace and Security Council and the SRMs is not enough.

### **6.3.2 SOUTHERN AFRICA DEVELOPMENT COMMUNITY**

According to Adebajo, like ECOWAS, the Southern African Development Community is currently attempting to create a security mechanism with clearly articulated structures to promote more predictable decision-making.<sup>101</sup> SADC is the successor of the Southern African Development Coordination Conferences, established in 1979 to reduce the region's dependence on South Africa due to its apartheid policy. Formally established through the Treaty of 17 August 1992,<sup>102</sup> SADC's main objective is clearly economic in nature.<sup>103</sup> In 1996, SADC launched the Organ on Politics, Defence and Security, whose mandate included provisions on the settlement of disputes and on the measures for doing this: these encompass 'punitive measures' to be taken in the last resort, in

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<sup>100</sup> See art. 6 of the PSCAU Protocol and art. of the ECOWAS Conflict Protocol.

<sup>101</sup> Adebajo (n 21 above) 146.

<sup>102</sup> This Treaty replaced the Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference dated 20th July, 1981.

<sup>103</sup> Art 1 of the SADC Treaty, SADC or Community means the organisation for economic integration established by art. 2 of the SADC Treaty.

accordance with the UN Charter.<sup>104</sup> To ensure effectiveness of the Organ on Politics, Defence and Security, SADC developed the Regional Indicative Strategic Plan and the Strategic Indicative Plan for the Organ (SIPO), which set the policies, strategies and priorities for achieving SADC's long-term goals of deeper regional integration and poverty eradication. Based on these plans, the region identified peace, political stability and security in the region as one of its critical priority areas.

In line with article 4 of the Constitutive Act and article 13 of the PSCAU Protocol and the SADC Protocol on Politics, Defence and Security Cooperation, SADC established the SADC Brigade through the Memorandum of Understanding Amongst the SADC Member States on the Establishment of a SADC Standby Brigade in August 2007 (SADCBRIG MOU).<sup>105</sup> This provides a legal basis for the operationalisation of the SADCBRIG. Accordingly, the brigade consists of a military, police and civilian component.<sup>106</sup> According to article 4 of the MOU, the functions of the SADCBRIG shall be to participate in missions as envisaged in terms of article 13 of the PSCAU Protocol, which include performing the following functions:

- a) observations and monitoring missions;
- b) other types of Peace Support Missions;
- c) interventions in a State Party in respect of grave circumstances or at the request of that State Party, or restore peace and security in accordance with Article 4(h) and (j) of the Constitutive Act;
- d) preventive deployment in order to prevent:
  - (i) a dispute or conflict from escalating;
  - (ii) an on-going violent conflict from spreading to neighbouring areas or States; and
  - (iii) the resurgence of violence after parties to a conflict have reached an agreement;
- e) peace-building, including post-conflict disarmament and demobilization;

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<sup>104</sup> See art. 15 of the Protocol on Politics, Defence and in the Southern African Community of 1997. See also art. 10A of the Treaty of the Southern African Development Community (As Amended).

<sup>105</sup> See MOU Amongst the SADC Member States on the Establishment of a SADC Standby Brigade available at <http://www.sadc.int/attachment/download/file/382> (Accessed 30 August 2010).

<sup>106</sup> Art. 3 of the SADCBRIG MOU.

- f) humanitarian assistance to alleviate the suffering of civilian population in conflict areas and support;
- g) any other functions as may be authorised by the SADC Summit.

From the reading of the SADC BRIG MOU, the relationship between the Peace and Security Council and the brigade is not provided for. What seems to be clear is the relationship between the SADC as a regional mechanism, and the AU and UN. According to article 12(1) of the SADC BRIG MOU, on the issue of command and control, '[t]he SADC BRIG command and control shall be harmonized to enable it to interact with the AU and UN command arrangements in the field'. Article 12(3) further provides that '[t]he SADC BRIG shall be subject to the standard command and control arrangements of the AU and UN operations'. Article 13(2) provides that '[c]ommon training standards shall be developed by the Regional Peacekeeping Training Centre (RPTC) to be compatible with the developed standards of the AU/UN'. The Regional Peacekeeping Training Centre of the Southern African Development Community (SADC-RPTC) was established in the early 1990s and while its initial focus and emphasis was on the military aspects of peacekeeping, there has since been a significant broadening of scope to include police, and a range of civilian partners.<sup>107</sup>

### **6.3.3 ECONOMIC COMMUNITY FOR CENTRAL AFRICAN STATES**

The Economic Community for Central African States was created in 1981 primarily to promote regional integration in Africa's Great Lakes region. ECCAS is made up of Burundi, Rwanda, the Democratic Republic of the Congo, Cameroon, the Central African Republic, Chad, Congo, Gabon, Guinea, Sao Tome and Principe, and Angola. While it has been largely moribund since its creation,<sup>108</sup> ECCAS undertook a few initiatives to promote regional peace and security. In 1996 it concluded a non-aggression

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<sup>107</sup> SADC RPTC Vision for the Future – Final Report of an Independent Study Commissioned by the Directorate of the SADC Organ on Politics, Defence and Security Cooperation on the Vision of the Regional Peace keeping Training Centre (2 May 2008) 2. Available at <http://www.sadc.int/attachment/download/file/413> (Accessed 30 August 2010).

<sup>108</sup> E. Berman & K. Sams, *Peacekeeping in Africa: Capabilities and Culpabilities* (2000) 201. See also Kindiki (n 57 above) 269.

pact.<sup>109</sup> This initiative was achieved through a UN Standing Advisory Committee on Security Questions in Central Africa, which was established in response to a UN General Assembly Resolution.<sup>110</sup>

Of significance was the creation of a mechanism for the promotion and maintenance of sub-regional peace and security by the ECCAS heads of state and government in 1999, known as the Council of Peace and Security in Central Africa, otherwise known as the *Conseil de Paix et de Sécurité de l'Afrique Centrale* (COPAX).<sup>111</sup> The creation of this Council resulted from a proposal made by the Central African leaders at a meeting in Gabon in 1977.<sup>112</sup> Its main aim is to prevent, manage and settle conflicts in Central Africa, and undertake activities to promote, maintain and consolidate peace and security in the sub region.<sup>113</sup>

In 1999, the mandate of the Economic Community of Central African States was broadened to emphasise conflict prevention and peace building, and a Central African Early Warning System (*Mécanisme d'alerte rapide de l'Afrique centrale* (MARAC)) was established at its secretariat in Libreville, Gabon. Moreover a Defence and Security Commission, consisting of sub-regional defence chiefs was also ambitiously announced to coordinate future peace support operations and to plan for the establishment of a Central African Multinational Force, known by the acronym FOMAC.<sup>114</sup>

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<sup>109</sup> See UN DOC A/51/274-S/1996/631 Annex Final Declaration of Heads of State and Government of Countries Members of the United Nations Standing Advisory Committee on Security Questions in central Africa 8 July 1996, August 1996, Para 4.

<sup>110</sup> UN DOC A/RES/46/37B, 6 December 1991.

<sup>111</sup> UN DOC A/53/868-S/1999/303, 17 March 1999.

<sup>112</sup> See Adebajo (n 21 above) 150.

<sup>113</sup> See art. 1 of the Decision on the Creation and of a Mechanism for Promotion, maintenance and Consolidation of Peace and Security in Central Africa; Annex II Yaounde Declaration on Peace, Security and Stability in Central Africa, adopted on 25 February 1991.

<sup>114</sup> Adebajo (n 21 above) 150.

For ECCAS, the successful addressing of peace and security issues in Central Africa has remained a pipe dream. Adebajo points to the technical challenges in creating the ECCAS structures and the 'pursuit of parochial national interests by member states' as the main culprits in defeating the organisation's peace and security agenda.<sup>115</sup> As a result of these challenges, some member states joined alternative sub-regional organizations. For instance, in 1997 the DRC joined SADC, and in 2006 Burundi and Rwanda joined the East African Community, consisting of Kenya, Tanzania and Uganda. On a more optimistic note Adebajo states that between July 2003 and December 2004, senior ECCAS officials met six times and began to establish a 2,177-strong regional brigade as their contribution to the ASF.<sup>116</sup>

According to Kindiki, the Economic Community of Central African States is one of the sub-regional intergovernmental organizations that have not been involved in actual humanitarian intervention.<sup>117</sup> The International Conference on the Great Lakes Region (ICGLR) could complement the work of ECCAS. Founded in 2000, the ICGLR is an intergovernmental organization of countries in the African Great Lakes Region.<sup>118</sup> These countries are Angola, Burundi, the Central African Republic, the Republic of Congo, the DRC, Kenya, Uganda, Rwanda, Sudan, Tanzania, and Zambia. Save for Kenya, Uganda, Sudan, Tanzania and Zambia, the rest of the ICGLR member states are also members of ECCAS.

The International Conference on the Great Lakes Region is founded upon UN Security Council Resolutions 1291 and 1304, which called for an international conference on peace, security, democracy and development in the Great Lakes Region. Both

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<sup>115</sup> As above.

<sup>116</sup> As above.

<sup>117</sup> Kindiki (n 57 above) 274. Other African sub-regional intergovernmental organizations that have not been involved in actual humanitarian intervention are AMU, COMESA, the EAC and the IGAD.

<sup>118</sup> More information of the ICGLR is available at <http://www.icglr.org> (Accessed 29 March 2011).

resolutions reaffirm the importance of holding such a conference under the auspices of the UN and the AU, with the participation of all governments and concerned parties in the region.<sup>119</sup>

In 2000, the secretariat of the International Conference was established in Nairobi, Kenya, under the umbrella of the UN and the AU.<sup>120</sup> In Dar es Salaam, Tanzania, in 2004 the ICGLR member states adopted the Declaration on Peace, Security and Development in the Great Lakes Region,<sup>121</sup> and this was a political statement intended to address the causes of conflict in the region. Further to the adoption of the Salaam Declaration, in 2006, the ICGLR member states signed the Pact on Security, Stability and Development in the Great Lakes Region, which serves as a legal framework and an agenda of the ICGLR with the aim of creating the conditions for security, stability and development between the member states.<sup>122</sup>

While the International Conference on the Great Lakes Region is not a sub-regional mechanism *per se*, it could play a role in addressing peace and security challenges within the region. It is therefore important for the Peace and Security Council to work closely with this body, especially given the volatility of the Great Lakes Region. There is no doubt that the ICGLR has comparative advantage in addressing peace and security challenges in the region. It could also be a workable solution to merge the ICGLR and

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<sup>119</sup> Para. 18 of the UNSC Resolution 1291 (2000) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/313/35/PDF/N0031335.pdf?OpenElement> and Para. 18 of the UNSC Resolution 1304 (2000) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/485/59/PDF/N0048559.pdf?OpenElement> (both Accessed 29 March 2010).

<sup>120</sup> See the background to the establishment of the ICGLR at <http://www.icglr.org/spip.php?article1> (Accessed 29 March 2011).

<sup>121</sup> Available at [http://www.icglr.org/IMG/pdf/Dar\\_Es\\_Salaam\\_Declaration\\_on\\_Peace\\_Security\\_Democracy\\_and\\_Development.pdf](http://www.icglr.org/IMG/pdf/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf) (Accessed 29 March 2011).

<sup>122</sup> Available at [http://www.icglr.org/IMG/pdf/Pact\\_on\\_Security\\_Stability\\_and\\_Development\\_in\\_the\\_Great\\_Lakes\\_Region\\_14\\_15\\_December\\_2006.pdf](http://www.icglr.org/IMG/pdf/Pact_on_Security_Stability_and_Development_in_the_Great_Lakes_Region_14_15_December_2006.pdf) (Accessed 29 March 2011).

ECCAS in order to avoid duplication of efforts, particularly those relating to peace and security in the Great Lakes and central African regions.

#### **6.3.4 ROLE OF IGAD**

Originally formed in 1986, as the Inter-Governmental Authority on Drought and Development (IGADD), the objectives of this organisation have since broadened significantly. The original body was composed of six member states – Djibouti, Eritrea, Ethiopia, Kenya, Sudan, and Uganda – with the objective of combating the effects of drought and desertification. In 1996, however, with most of its members battling their own security problems, the heads of IGADD amended the charter to cover conflict resolution, hence the name change to the Intergovernmental Authority on Development.

IGAD currently has seven member states from East Africa and the Horn of Africa, namely, Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. The Authority's attention since 1996 has turned largely to peace and security issues in these countries. One of the successes is IGAD's mediation in a number of conflicts in the sub-region, undertaken in collaboration with the United Nations, the OAU and subsequently the AU. Significantly IGAD has separated its political from its humanitarian affairs with the latter including a section for conflict prevention, management and resolution.<sup>123</sup> IGAD has also developed a five element programme on conflict prevention, management and resolution, which entails the following: one, developing capacity building for conflict prevention; two, documenting demobilization and post-conflict peace-building experience; three, elaborating a culture of peace and tolerance; four, developing a conflict early warning mechanism; and five, creating an emergency relief fund.

Coming to the relationship between the Peace and Security Council and IGAD, work must be done to strengthen cooperation between these institutions. According to Adebajo, although both the AU and IGAD early warning systems are based in Addis Ababa, there has been only limited contact between the two institutions.<sup>124</sup> Just like the Economic Community of Central African States, IGAD has not been involved in

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<sup>123</sup> See generally the IGAD's website <http://igad.org/generalinf> (Accessed 17 September 2010).

<sup>124</sup> Adebajo (n 21 above) 134.

humanitarian intervention.<sup>125</sup> This places heavy reliance on the Peace and Security Council in so far as humanitarian intervention is concerned. Hence the need for stronger collaboration between the Peace and Security Council and IGAD.

Adebajo argues that like Africa's other regional economic communities, IGAD remains poorly-staffed, poorly-funded and poorly-equipped and in 2007, only four professional staff worked in the organisation's Division of Peace and Security, and six in the early warning system.<sup>126</sup> Despite these shortcomings, IGAD is coordinating the Eastern Africa Standby Brigade, which is part of the African Standby Force. In addition to the IGAD members, EASBRIG involves Comoros, Madagascar, Mauritius, Seychelles, and Rwanda. The establishment of this standby brigade is seen by Adebajo as a 'great leap forward' in that East African states were able to establish their own security mechanism in 2005, and to call for the establishment of a brigade and logistical headquarters in Addis Ababa as well as a planning cell in Nairobi.<sup>127</sup>

While applauding the 'great leap forward', the security situation in the Horn of Africa presents complications that are likely to hamper relationships among IGAD members states on one hand, and the Peace and Security Council and IGAD on the other. Apart from this, the sub-region presents its own dynamic, yet complicated Afro-Arab security challenges. Adebajo speaks of the alliance between Sudan, Ethiopia and Yemen; the influence of Saudi Arabia's Wahabi movement in Ethiopia and Eritrea; a Jihad movement in Uganda; and an alleged terrorist cell in Somalia.<sup>128</sup> He argues that in light of its divisions, IGAD has failed to coordinate its peacemaking efforts effectively. Clearly a divided REC is not capable of maintaining a close working relationship with the Peace and Security Council. Before rushing into a collaborative relationship with the Peace and Security Council, it is important for IGAD to address its own divisions, otherwise there is little chance of the relationship working effectively. Be that as it may, it is encouraging

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<sup>125</sup> Kindiki (n 57 above) 274. On the 2005 proposed Peace Mission to Somalia that never took place, see Söderbaum & Hettne (n 92 above) 27.

<sup>126</sup> Adebajo (n 21 above) 152.

<sup>127</sup> As above.

<sup>128</sup> As above.



that IGAD, with the financial support of the US and the EU, has devoted much time and many resources to peacemaking initiatives in Sudan and Somalia.<sup>129</sup>

### 6.3.5 ARAB MAGHREB UNION

The Arab Maghreb Union was established by the Treaty of Marrakech of 1989.<sup>130</sup> Kindiki describes the creation of the Union as a notable accomplishment, given the level of mistrust that existed between some member states.<sup>131</sup> The member countries, all North African, are Algeria, Libya, Mauritania, Morocco and Tunisia. The main objectives of the AMU are to strengthen ties between member states and liberalise the movement of goods and services between members. This includes the adoption of a common policy in various fields, such as economy and culture.<sup>132</sup> The AMU's supreme institutional organ is the Council of Heads of State, decisions of which are adopted by unanimity.

According to Sands and Klein, the AMU constitutes the first move to promote economic cooperation through institutional means in the history of North Africa.<sup>133</sup> The 1989 Treaty provides for the possibility of other Arab and African states joining the AMU. A minimum of 40 conventions aimed at addressing economic, social and cultural issues have already been adopted by the AMU. Unlike SADC and ECOWAS, the AMU has not been involved in humanitarian intervention.<sup>134</sup>

The mandate of the AMU in relation to peace and security issues is minimal. This is despite the fact that one of the Union's aims is to promote regional security. Other aims include the achievement of viable sub-regional economic integration and development

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<sup>129</sup> As above.

<sup>130</sup> Initially concluded between Mauritania, Morocco, Algeria, Tunisia and Libya.

<sup>131</sup> Kindiki (n 57 above) 273.

<sup>132</sup> Arts. 2 and 3 of the 1989 (AMU) Treaty of Marrakech.

<sup>133</sup> Sands & Klein (n 5 above) 258.

<sup>134</sup> Kindiki (n 57 above) 274.

of trade and other links with the European Union.<sup>135</sup> Any relationship forged between the Peace and Security Council and the AMU should be preceded by a process to set up a regional peace and security mechanism within the AMU. According to Kindiki the potential for humanitarian intervention under the auspices of the AMU is very limited considering the fact that its mandate at the moment does not include human rights matters.<sup>136</sup>

The relationship between the Peace and Security Council and the AMU is challenged by the fact that the member states are by no means integrated. Adebajo portrays the AMU as a bird, with Algeria, Mauritania and Tunisia constituting the body, and Morocco and Libya being the wings that make it fly.<sup>137</sup> He argues that this bird has been so incapacitated by conflict between the various body parts that it has difficulty lifting off. Morocco and Algeria have used Western Sahara as a stage to play out their rivalry over leadership of Northwest Africa for the past three decades.<sup>138</sup> It must be recalled that Morocco is not a member state of the AU and the Peace and Security Council. It cannot therefore be expected to be part of the relationship between the Peace and Security Council and the AMU. This is bound to create complications, particularly because it cannot be expected that Morocco will want to share AMU resources with the AU or the Peace and Security Council. Morocco has to agree to the setting up of any AU liaison office within its secretariat and it cannot be expected to fund the establishment of a liaison office to the AU Commission as provided by article 16(8) of the PSCAU Protocol.

The other concern is that the member states of the AMU, in Adebajo's words: 'have their bodies in Africa and their heads and hearts in the Middle East'.<sup>139</sup> This will no doubt affect any efforts by the Peace and Security Council to forge relations with the AMU because it also seems that the members are much better at dealing with the Middle East

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<sup>135</sup> As above 273.

<sup>136</sup> As above.

<sup>137</sup> Adebajo (n 21 above) 153.

<sup>138</sup> As above.

<sup>139</sup> As above 154.

in solving their peace and security challenges than the AU is. To a large extent the AMU appears to be dormant, and as Adebajo points out, it has 'held only one summit, over a decade ago [which] suggests that the AMU is more virtual than real'.<sup>140</sup> He notes that in comparison to the other regional economic communities, the AMU has made the least progress in establishing a brigade for the African Standby Force, despite the fact that NATO offered rapid reaction training to sub-regional states in 2004.<sup>141</sup>

#### 6.4 INITIATIVES FOR DEALING WITH CONFLICT

For the first time, input from the sub-regional mechanisms is required when it comes to the promotion of initiatives for conflict prevention, management and resolution. Article 16(2) of the PSCAU Protocol provides that '[t]he [PSCAU] shall, in consultation with [SRMs], promote initiatives aimed at anticipating and preventing conflicts have occurred, peace-making and peace-building functions'.

The promotion of such initiatives will not be an easy task. Levitt has identified serious stumbling blocks related to inter-African regional conflicts of law, between the AU, the Economic Community of West African States and SADC.<sup>142</sup> First, Levitt argues that the Peace and Security Council had been given a regulatory or quality control function in relation to the regional organizations and responsibility to ensure effective partnership between them and the Council in the promotion and maintenance of peace, security and stability in terms of article 16(1)(b) of the PSCAU Protocol. This is the case despite the existence of some discord between the AU and these regional mechanisms on the law *jus ad bellum*.<sup>143</sup>

Secondly, Levitt argues that while the laws of intervention for the AU and ECOWAS are complementary in the sense that both organisations may authorize intervention to

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<sup>140</sup> As above 155.

<sup>141</sup> As above.

<sup>142</sup> Jeremy Levitt, 'The Peace and Security of the African Union: The Known Unknowns' (2003) 13 *Transnat'L. & Contemp. Pros.* 131-135.

<sup>143</sup> As above 133.

forestall deadly conflict and remedy large-scale human suffering with or without prior authorization from the UN Security Council, the ECOWAS legislation goes further by providing a pro-democratic right of intervention.<sup>144</sup> Levitt questions the rationale behind the fact that the African Union does not have a military remedy for unconstitutional changes (as is the case for ECOWAS), especially since 'respect for democratic principles, human rights, the rule of law and good governance' are core underlining principles of AU law and vital for sustainable peace and security on the continent as provided for under article 4(m) of the Constitutive Act.<sup>145</sup>

Thirdly, Levitt identifies the conflict in the law *jus ad bellum* between the AU and SADC by arguing that the law of SADC as prescribed in the SADC Organ on Politics, Defence and Security, and the SADC Protocol on Politics and Security Co-operation contradicts both the law of the AU and of ECOWAS.<sup>146</sup> According to Levitt, SADC law permits, inter alia, intervention to remedy war crimes, crimes against humanity and genocide<sup>147</sup> and to forestall military coups or other threats to legitimate authority,<sup>148</sup> yet it prohibits such action if it is taken without the authorization of the UN Security Council. According to the SADC Organ's principles, 'military intervention of whatever nature, shall be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the OAU [now superseded by the Constitutive Act of the AU] and the United Nations'.<sup>149</sup> Essentially, this means that for any intervention to take place under the auspices of SADC, the UN Security Council must give an authorization. This is very different from the approach of the rules that pertain to ECOWAS and the Peace and

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<sup>144</sup> As above.

<sup>145</sup> As above.

<sup>146</sup> As above 134.

<sup>147</sup> Art. 11(2)(b)(i) of the SADC Protocol.

<sup>148</sup> Art. 11(2)(b)(ii) of the SADC Protocol.

<sup>149</sup> See principle G, at 327 of The SADC Organ on Politics, Defense and Security was adopted in Gaborone, Botswana, June 28, 1996. See also generally, Southern African Development Community (SADC) Organ on Politics, Defense and Security (June 28, 1996).

Security Council. This is likely to interfere with the manner in which the PSC can promote initiatives for conflict prevention, management and resolution.

The fact that the sub-regional mechanisms have different approaches to intervention will also hamper efforts to streamline activities among them, thus affecting their respective relationships with the Peace and Security Council. On the one hand, as Levitt argues, SADC may not 'legally' partake in AU-sanctioned interventions (peace enforcements) without the UN Security Council's approval. By contrast ECOWAS can 'legally' partake in AU-sanctioned interventions (peace enforcements) without the UN Security Council's approval. Levitt also highlights the inconsistent terminology between AU law and the laws of the various sub-regional mechanisms. For instance, he argues that if there are indeed differences in meaning between the terms 'intervention' in AU law, 'humanitarian intervention' in ECOWAS law, and 'peace-enforcement' in SADC law then these need to be clearly spelt out.<sup>150</sup> While the terms may seem easy to understand and more or less interchangeable, they are subject to different interpretations. 'Peace enforcement' for instance, may or may not be the same as 'intervention', or even 'humanitarian intervention', it depends on the context in which it is used and on the assumptions made by those using the term. 'Humanitarian intervention' clearly has a more specific meaning than simply 'intervention', yet in some contexts the word 'intervention' could be assumed to imply 'humanitarian intervention'.

The different approaches and definitions are bound to strain the relationships between the sub-regional mechanisms themselves. One sub-regional mechanism may view an intervention as appropriate in given circumstances while the other may not, regardless of whether or not prior authorization has been given by the UN Security Council. The question that is likely to arise, therefore, is which law should reign supreme in any given circumstance. Should it be that of the sub-regional mechanism, the AU or the UN? The members of the AU are also member states of the SRMs/RECs and the UN, all of which have different legal systems. In providing a solution, Levitt argues that since the member states of SADC, for instance, form a critical bloc in the African Union, and are obliged to ensure that the Union's principles are adhered to, its objectives fulfilled, and its provisions abided by, it therefore follows that 'the AU law should arguably be

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<sup>150</sup> Levitt (n 142 above) 136.

considered supreme law trumping inconsistent regional, national, and local law'.<sup>151</sup> Levitt further states that '[t]he member states of the AU – including the SADC – appear to have a positive duty to amend the laws of their states and regional organizations to comply with AU law'.<sup>152</sup>

Levitt's solution, however, does not resolve the conflict between AU law and UN law. UN law, as opposed to AU law, is strictly international and arguably supersedes AU law, which applies only within the African continent. As a matter of principle UN law should supersede AU law, with the latter complementing UN law, whose foundational document is the UN Charter. What about the fact that the law stemming from the RECs/SRMs, is sometimes in conflict with AU law, as we have seen in ECOWAS? Here in turn, the REC/SRM law should complement AU law, which, as stated, is in turn subject to UN law. It does seem clear that before any meaningful coordination of the activities of sub-regional mechanisms activities, or promotion of initiatives for conflict prevention, management and resolution can be achieved, there is a need to harmonize the different legal regimes. This need to happens at the SRM level, between SRMs and the AU, and between the AU and the UN. Until this happens, the relationship between the Peace and Security Council and the SRMs (as well as the UN Security Council) will remain strained.

## 6.5 INFORMATION SHARING

Article 16(3) of the PSCAU Protocol underscores the power of sharing information between the Peace and Security Council and the sub-regional mechanisms. In relation to efforts made to strengthen the relationship between these institutions, this article provides that SRMs shall through the chairperson of the AU Commission, keep the Peace and Security Council fully and continuously informed of their activities and ensure that these activities are closely harmonised and coordinated with the activities of the Council. The same principle is applicable in so far as the Peace and Security Council in relation to the SRMs is concerned. This therefore is a two-way process, where both the Council and the SRMs will work towards a common goal of addressing peace, security

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<sup>151</sup> As above 135.

<sup>152</sup> As above.

and stability issues in Africa. Abass views article 16(3) as an advancement of the scheme of article 54 of the UN Charter, which obligates states (of the UN) to keep the UN Security Council 'fully informed of actions taken or contemplated with no reciprocal responsibility flowing from the [UNSC] to regional organizations'.<sup>153</sup>

In order to strengthen the information-sharing process and ensure close harmonization and coordination, article 16(4) of the PSCAU Protocol provides that 'the Chairperson of the [AU] Commission shall convene periodic meetings, but at least once a year, with the Chief Executives and/or the officials in charge of peace and security within the [SRMs]'. These meetings are very important in ensuring that the collaboration between the Peace and Security Council and the SRMs remains effective. Abass notes that the AU has faithfully implemented article 16(4) in that it has convened regular meetings with the SRMs, which in itself gives some hope.<sup>154</sup>

Article 16(6) of the PSCAU Protocol provides that sub-regional mechanisms shall be invited to participate in the discussions of any questions brought before the Peace and Security Council whenever an SRM is addressing that question and it is of special interest to that organisation. According to Abass, this article limits the participation of the SRMs in AU meetings to instances where matters before the Peace and Security Council are being addressed by a sub-regional mechanism.<sup>155</sup> Therefore, this implies that SRMs are not as a matter of course invited to discussions on peace and security which are initiated by the AU.<sup>156</sup>

In the same way, the chairperson of the AU Commission shall be invited to participate in meetings and deliberations of SRMs in line with article 16(7) of the PSCAU Protocol. It is however not clear why it should be the chairperson of the AU Commission rather than of the Peace and Security Council who should be invited to participate in such meetings

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<sup>153</sup> Abass (n 22 above) 255.

<sup>154</sup> As above 256

<sup>155</sup> As above 255.

<sup>156</sup> As above.

and deliberations. The supposition would therefore be that the AU Commission chairperson should attend these meetings and deliberations as a representative of the Peace and Security Council, since it is the relationship between the PSC and the SRMs that is thereby being strengthened.

## 6.6 CONCLUSION

In addressing the question of whether Africa can rely on the AU, Wokoro argues

[u]nfortunately, notwithstanding its consensual orientation, the absence of a debilitating veto arrangement, and dedication to human rights, there is scant reason to believe the [PSCAU] 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.<sup>157</sup>

While Wokolo's observation may not be too far from the truth, the Peace and Security Council in collaboration with the SRMs and with the support from the UN may be given the potency that is required to address peace and security matters in Africa. Bearing in mind that the Council was established less than a decade ago, it cannot be expected to perform miracles. What is of importance is that the PSCAU Protocol has, among other things, created a mechanism that will ensure that the Council harmonizes and coordinates the activities of SRMs. This will ensure that the Council and these mechanisms work closely and effectively in addressing peace, security and stability challenges in the various parts of Africa.

Over and above this, the Peace and Security Council has facilitated an innovative system that will enable it to promote initiatives by the SRMs for conflict prevention, management and resolution at the sub-regional levels and also to share relevant information between these institutions so as to form partnerships to minimize conflicts within the continent. While this innovative system cannot be an overnight success, once it is fully realized it is bound to have a great effect in contributing to the promotion of peace and security in Africa.

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<sup>157</sup> Wokoro (n 16 above) 21.



The relationship between the Peace and Security Council and the SRMs cannot be effective without adequate funding. Kioko observes that the African Union will have to bear in mind the high costs involved in the interventions in terms of the Constitutive Act, such as the case in Somalia, where the prospects are that it may be a long-term affair.<sup>158</sup> Such interventions require the involvement of RECs/SRMs. Aneme argues that funding is the most crucial problem that is likely to affect the whole ASF system in terms of its establishment and troop deployment.<sup>159</sup> He avers that funding under the ASF is required for pre-deployment activities such as training, communication, logistical interoperability and planning at the AU, sub-regional and national levels and deployment and post-deployment activities such as transportation and remuneration.<sup>160</sup> Therefore, the AU and the regional economic communities should devise a mechanism for funding the sub-regional mechanisms in order to enable the Peace and Security Council and the SRMs to work closely according to their mandates. Okoth paints a very grim picture of economic conditions. He argues that unless the conditions of African states change dramatically for the better, the AU is likely to face the same financial problems that plagued the OAU.<sup>161</sup> He further states that if African states are serious about asserting their independence, taking their place in the global community, and having other members treat them with respect, they must come up with funds to finance the AU.<sup>162</sup> Indeed, financing the AU amounts to financing the Peace and Security Council in order for it to function effectively and to strengthen its relationships with the relevant institutions and mechanisms.

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<sup>158</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *International Review of the Red Cross* 819.

<sup>159</sup> Girmachew Alemu Aneme, *A study of the African Union's Rights of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD thesis, Faculty of Law, University of Oslo, 2008) 277.

<sup>160</sup> As above 277.

<sup>161</sup> Godfrey P. Okoth, 'Conflict Resolution in Africa: The Role of the OAU & the AU' in Nhema, Alfred, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post-Conflict Reconstruction* (Oxford: James Currey – Published in Association with OSSREA, Addis Ababa, 2008) 36.

<sup>162</sup> As above 37.

In order for the Peace and Security Council to effectively address the peace and security challenges in Africa there is a need to set out specific goals and the means to achieving these. This should be informed by a common vision shared with the regional economic communities in general and the sub-regional mechanisms in particular. The RECs will therefore be required to harmonize their legal instruments in such a way that they are in line with the objectives of the PSCAU Protocol and the AU Constitutive Act. The sub-regional mechanisms should be treated as equal partners to the Peace and Security Council if the relationship between these institutions is intended to work effectively. This means that SRMs should be constantly consulted by the Council, particularly about the development of the African Standby Force, since it plays a crucial role in this regard. As the MOU provides, the parties to it are obliged to 'regularly consult each other, both at political and technical levels, on matters relating to the promotion and maintenance of peace, security and stability'.<sup>163</sup>

Being partners with the Peace and Security Council, however, does not mean that the SRMs should cease to be subsidiary and complementary to the mandate of the AU. This principle is well captured in the MOU between the AU and the RECs and coordinating regional mechanisms. The mandate of the Peace and Security Council should at all times be taken into cognisance by the SRMs, when faced with challenging situations which undermine peace and security within their region.

The relationship between the Peace and Security Council and the SRMs will not only promote peace, security and stability in Africa, but also will create more opportunities for Africa's economic development. According to the AU Audit Review,

[i]f Africa is to tap into contemporary globalization in a manner that enables it to take the various challenges arising in its stride while maximizing opportunities that arise, it is required to strengthen coordination among Member States of the AU and between the AU and the RECs with a view to harmonising concerns, approaches and strategies. It must significantly boost the capacity of the AU Commission and the RECs to play the coordination role required for the forging of a coherent African response to globalization.<sup>164</sup>

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<sup>163</sup> Art XVII(1) of the MOU on Cooperation in Area of Peace and Security.

<sup>164</sup> P. 19, para. 15 of the Audit Review.

In order for the cooperation between the Peace and Security Council and the SRMs to work, there is a need for further elaboration in describing the modalities and mechanisms for effective collaboration between these institutions. There must be clarity on the right to intervene by the SRMs in given circumstances, and international law should always be respected, both by the SRMs and the Council.

From the above discussion, it is clear that only the AU and the Economic Community of West African States have developed formal mechanisms with peace and security responsibilities, as well as put boots on the ground in African conflicts.<sup>165</sup> In its attempts to address peace and security in southern Africa, SADC, although not as challenged as ECOWAS is in West Africa, has also developed an impressive system for collaborating with the Peace and Security Council. In particular, it has developed the SADCBRIG, which forms part of the African Standby Force. Indeed ECOWAS, through its experience of West African conflicts, is more advanced in addressing peace and security issues and has also done extremely well in developing the ECOBRIG. There are still a number of challenges to be addressed in ensuring that the relationships between the Peace and Security Council and the Economic Community of Central African States, the Intergovernmental Authority on Development and the Arab Maghreb Union, respectively, are effective. In addition, the Intergovernmental Authority on Development, which is more focused on the Great Lakes Region, should merge with the Economic Community of Central African States in order to avoid any duplication of roles. If a merger is impossible, then the Peace and Security Council must establish a formal relationship with the ICGLR and treat it as a key sub-regional mechanism for the Great Lakes Region.

Sands and Klein argue that, '[i]t also remains to be seen whether the more emphasis on security issues witnessed in all parts of the [African] continent will contribute to establish a more peaceful and stable context for the development of economic activities'.<sup>166</sup> According to Wokoro, multilateral approaches, such as the actions of

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<sup>165</sup> Michael Dana Hollywood, 'It Takes a Village...Or at least a Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions' (2007) 19 *Fla. J. Int'l L.* 142.

<sup>166</sup> Sands and Klein (n 5 above) 264.

ECOWAS, are preferable, given the substantial economic and human costs of military interventions, the fears of hegemony or advancement of national interests, and the necessity of managing post-conflict reconstruction, refugee repatriation, and rehabilitation.<sup>167</sup> Despite the fact that ECOWAS is more advanced in terms of addressing peace and security challenges in West Africa, its relationship with the Peace and Security Council needs to be maintained and any initiatives for conflict prevention, management and resolution should be undertaken in concert with the Council and in line with international law, as provided for under the UN Charter.

The reality today is that Africa can no longer rely solely on the UN, so the need for the Peace and Security Council to forge relations with the SRMs cannot be over emphasized. As Wokolo argues, 'history has shown that the UN structure is incapable of effective and timely interventions unless [the] interests of the five veto-wielding, permanent members of the Security Council are aligned'.<sup>168</sup> The fact that Africa can no longer rely solely on the UN, however, does not mean that the AU or the SRMs should violate the UN Charter. The fact that the PSCAU Protocol creates a system that will enable the Peace and Security Council to forge relations with the UN Security Council at the international level and the SRMs at the sub-regional level is designed to ensure that peace and security challenges, as they affect Africa, are addressed in a manner that will bring all these institutions together and enable them to address African conflicts in accordance with international law.

Despite the fact that the regional mechanisms discussed above are part of the overall African Peace and Security Architecture, they are independent regional organisations and expected to work closely with the Peace and Security Council in line with article 16 of the PSCAU Protocol. This independence should be maintained and respected by the Council. It cannot be seen to be dictating to SRMs and the MOU presents a workable mechanism for collaboration between the PSCAU and these mechanisms, at least on paper. The process of harmonizing and coordinating their activities, therefore, will take some time. What is applauded is that the memorandum between the AU and the RECs is already in place for purposes of fostering a closer collaboration between the AU and

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<sup>167</sup> Wokoro (n 16 above) 22.

<sup>168</sup> As above 13. See also L. Naarden Gregory, 'UN Intervention After the Cold War: Political Will and the United States' (1994) 29 *Tex. Int'l L.J.* 231, 254.

the SRMs. What is now needed is to translate what the MOU provides into practice by both the AU/PSCAU and the RECs/SRMs.

## CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

### 7.1 INTRODUCTION

In the preceding chapters, this study addressed the following main research questions:

*1. Based on article 17 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with the United Nations, and particularly with the UN Security Council, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?*

*2. Based on articles 18, 19 and 20 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with the Pan-African Parliament, the African Commission, and civil society organizations, respectively, have an actual and potential ability to effectively contribute to peace, security and stability in Africa?*

*3. Based on article 16 of the PSCAU Protocol, to what extent does the envisaged relationship of the Peace and Security Council with sub-regional mechanisms for conflict prevention, management and resolution have an actual and potential ability to effectively contribute to peace, security and stability in Africa?*

As illustrated in this study, the above-mentioned research questions require an understanding of the African Union, the continental body within which the Peace and Security Council operates. As the main focus of this study is on the Peace and Security Council, it is essential that one appreciates the Council and the context within which it was established, including its role within the APSA, particularly in conflict prevention, management and resolution. The research questions also require a thorough grasp of the role of the AU and the Peace and Security Council in the exercise of the responsibility to protect and in respect of the right to intervene. Article 4(h) of the Constitutive Act is the most relevant normative provision in this regard. It specifically provides for the right of the AU to intervene in a member state pursuant to a decision of the AU Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity. Article 4(h) of the Constitutive Act is also supported by article 4(j) of the PSCAU Protocol.<sup>1</sup>

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<sup>1</sup> This article provides for 'the right of the Union to intervene in a Member State pursuant to a

Furthermore, the research questions require an understanding of the role of the Peace and Security Council within the global peace and security system, led by the United Nations, and focusing on its relations with the UN Security Council. They require an analysis of the role played by the Peace and Security Council as a collaborating partner with the other AU organs, such as the Pan-African Parliament and ECOSOCC, and the other institutions, such as the African Commission and civil society organisations. The research questions necessitated an analysis of the link between the Peace and Security Council and the sub-regional mechanisms, focusing on the regional economic communities (within which the SRMs operate) that are legally recognised by the AU.

Other related questions linked to these main research questions include the question of whether the relationship between the Peace and Security Council and the UN Security Council, the Pan-African Parliament, the African Commission, CSOs, and SRMs, respectively, has satisfactorily facilitated the promotion of peace, security and stability in Africa. A further question is whether the set of provisions governing these relationships, as reflected in articles 16, 17, 18, 19, and 20 of the PSCAU Protocol, have improved the right to national and international peace and security that is provided under article 23(1) of the African Charter. Connected to the aforementioned and equally important, is the question of the extent to which these respective relationships have contributed to the development of international law.

While accepting that much has arguably changed for the better in the promotion of peace, security and stability in Africa, there are still many challenges which have to be addressed to ensure the effectiveness of the relationship between the Peace and Security Council and the UN Security Council, the PAP, the African Commission, CSOs and the SRMs. Strengthening these relationships will in the long run contribute to the achievement of the objectives of the AU Constitutive Act in general and the PSCAU Protocol in particular. Indeed, one of the reasons why African states ratified the PSCAU Protocol was to ensure that they were binding themselves reciprocally in relation to the provisions of the PSCAU Protocol in order to achieve shared objectives that were, prior to the establishment of the Peace and Security Council, difficult to obtain.

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decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act’.

These shared objectives,<sup>2</sup> in relation to which the Peace and Security Council must now lead the way, and they include the promotion of peace, security and stability in Africa as well as the anticipation and prevention of African conflicts. To do this the Council needs to coordinate and harmonise continental efforts in preventing and combating international terrorism. Other critical activities for the Council are the development of a common defence policy for the AU, and the promotion of democratic practices, good governance, and the rule of law. As part of the Council's efforts to prevent conflicts, it must also ensure the protection of human rights and fundamental freedoms, as well as respect for the sanctity of human life and international humanitarian law. All the above objectives can be achieved only with the commitment of African states.

By way of conclusion, this chapter attempts to answer the overarching research questions by responding to the above-mentioned sub questions and offering specific recommendations. It also provides concluding remarks and recommendations that must be taken into consideration in ensuring that the relationship between the Peace and Security Council and the institutions and organs discussed in this study contribute to peace, security and stability in Africa.

The chapter is divided into three main parts. The first part addresses the question of how the relationship between the Peace and Security Council and the various organs and institutions could contribute to ensuring peace, security and stability in Africa. The second considers the provision dealing with the implementation of the PSCAU Protocol, that is, article 10 of the PSCAU Protocol. This part also discusses the role of the AU Commission and its chairperson in so far as strengthening the relationships between the Peace and Security Council and the organs and institutions under study is concerned. The third part offers specific recommendations and processes to be followed in addressing them in light of the overall discussion in this work.

## **7.2 ENSURING PEACE, SECURITY AND STABILITY IN AFRICA**

The study has established that peace and security is more than just an objective of the AU, is also a human right, which is recognized and guaranteed under article 23 of the African Charter. It must be recalled that in terms of article 1 of the African Charter, the

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<sup>2</sup> See art. 3 of the PSCAU Protocol.



member states of the AU (then OAU) undertook to, among other things, respect the right of all peoples to national and international peace and security as provided for under article 23 of the African Charter. Over and above this, the member states undertook to adopt legislative or other measures to give effect to this right.

The adoption of the PSCAU Protocol by the AU member states, which consequently established the Peace and Security Council, whose objective is to promote peace and security in Africa, should be seen as part of these undertakings under article 1 of the African Charter. The duty bearer for the right to international peace and security is the state and right holders are 'all peoples'. By its nature, the fulfilment of the right of peoples to international peace and security requires states to act individually and collectively. The establishment of the Peace and Security Council is, therefore, one avenue through which member states of the AU may give effect to this right. As Kioko observes, it must be recalled that the Peace and Security Council 'will be responsible for dealing with the scourge of conflicts that has forced millions of Africans, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope'.<sup>3</sup> It is for this reason that the relationship of the Peace and Security Council and the institutions, must be strengthened.

Although the AU, through the establishment of the Peace and Security Council, has made progress in ensuring peace and security in Africa, a number of challenges still remain.<sup>4</sup> Armed conflicts, for instance, continue to undermine the enjoyment of human rights in Africa. In fact, no single internal factor has contributed more to the present socio-economic problems in Africa than the scourge of conflict within and between African countries. Hence, ending African conflicts improves the continent's human rights situation. One way of addressing some of Africa's challenges is to strengthen the relationship between the Peace and Security Council and the UN Security Council, the

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<sup>3</sup> Ben Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(853) *IRRC* 817.

<sup>4</sup> See the Decision of the Assembly on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa. Assembly/AU/Dec.177 (X).

Pan-African Parliament, the African Commission, civil society organisations and the sub-regional mechanisms, as already discussed particularly in Chapters 4, 5 and 6.

It must be recalled that in establishing the Peace and Security Council, the heads of state and government of the AU member states were, among other things, concerned about the continued prevalence of armed conflict in Africa; the fact that conflict had forced millions of African people into becoming refugees and internally displaced persons deprived of livelihoods, human dignity and hope.<sup>5</sup> As a result of these concerns, the Peace and Security Council was established 'as an operational structure for the effective implementation of the decisions taken in areas of conflict prevention, peace-making, peace support operations, and intervention, as well as peace-building and post-conflict reconstruction, in accordance with the authority conferred in that regard by [a]rticle 5(2) of the Constitutive Act of the African Union'.<sup>6</sup> The context within which this Council was established gives an understanding of the reasoning behind the creation of the relationships between it and the UN Security Council, the PAP, the African Commission and CSOs, as analysed in this work.

In establishing the Peace and Security Council, member states agreed to cede their power to it, to accept and implement its decisions, to extend full cooperation to it, and to facilitate action by the Council. In forging relations with the institutions and organs subject to this study, it is important that member states extend full cooperation and facilitate action by the Council. Without the cooperation of member states the Peace and Security Council's objective of addressing peace, security and stability in Africa would be limited if not totally ineffective. The outcome is yet to be seen in respect of Levitt's prediction that the PSCAU Protocol, when it came into force, would significantly impact on the role of the AU in conflict prevention, management, and resolution, by among other things, conferring on it peacekeeping powers unknown to the OAU<sup>7</sup>. The relationship that the Peace and Security Council has, or is obliged to have, with the UN

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<sup>5</sup> Para. 10 - 11 of the preamble to the PSCAU Protocol. See also Kioko (n 3 above) 817.

<sup>6</sup> Para. 17 of the Preamble to the PSCAU Protocol.

<sup>7</sup> Jeremy Levitt, 'The Peace and Security of the African Union: The Known Unknowns' (2003) 13 *Transnat'L. & Contemp. Pros.* 112.

Security Council, the AU and other institutions, as well as with the SRMs, is meant to contribute effectively to conflict prevention, management, and resolution in Africa.

This study demonstrated that in ensuring the effectiveness of the Peace and Security Council in the promotion of peace and security in Africa, it is essential that its relationship with other organs and institutions (with similar or related focus) be strengthened. It examined the relationships between the Peace and Security Council and the aforesaid institutions and mechanisms in light of the most important objectives of the Council, namely to promote peace, security and stability in Africa in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development, among other things.<sup>8</sup> While articles 16, 17, 18, 19, and 20 of the PSCAU Protocol provide for what could be regarded as clear statements of the intention to forge relations between the Peace and Security Council and these organs and institutions, they are very broad and this study has attempted to give interpretations to these.

### **7.3 IMPLEMENTING THE PSCAU PROTOCOL**

A treaty is as good as its implementation. This study discussed in the preceding chapters the various roles of each organ and institution within the AU and beyond in an effort to ensure that the Peace and Security Council's mandate is carried out successfully. It showed that the implementation the PSCAU Protocol is the responsibility of the chairperson of the AU Commission otherwise referred to as the anchor of the AU.<sup>9</sup> It also discussed the role played by the AU Commission, which is the AU's secretariat established under article 20 of the Constitutive Act. The implementation of the PSCAU Protocol automatically includes the implementation of articles 16, 17, 18, 19, and 20, which have been the subject of this study.

The study revealed that the chairperson of the AU Commission cannot be isolated from the AU Commission as the workings of the chairperson in relation to the Peace and

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<sup>8</sup> Art. 3(a) of the PSCAU Protocol.

<sup>9</sup> Nsongurua J Udombana, 'The Institutional Structure of the African Union: A Legal Analysis' (2002) 33 *Cal. W.Int'l L.J.* 114.

Security Council cannot be divorced from the broader context of the Commission's mandate, particularly when it comes to dealing with peace and security issues. Needless to say, the effective implementation of the PSCAU Protocol is largely dependent upon the smooth running of the AU Commission, which the chairperson of the AU Commission oversees.

The following discussion presents specific recommendations to be considered, with a view to strengthening the relationship between the Peace and Security Council and the organs and institution discussed in this study.

#### **7.4 SPECIFIC RECOMMENDATIONS**

That the establishment of the Peace and Security Council marked an historic watershed in Africa's progress towards resolving its conflicts and the building of a durable peace and security order is not in doubt. Through the mechanism that facilitates cooperation between the Peace and Security Council and the UN Security Council, the Pan-African Parliament, the African Commission, CSOs and the SRMs, the resolving of conflicts and the building of a durable peace and security order is made possible. Having considered how the PSCAU Protocol is to be implemented, which includes the implementation of the provisions dealing with the relationships subject to this study, the following specific recommendations are made.

##### **7.4.1 UN SECURITY COUNCIL**

###### **a) Harmonising legal regimes**

This study showed that while the Peace and Security Council is mandated to 'work closely' with the UN Security Council, there still exists a conflict of laws between the AU and the UN, particularly on the law *jus ad bellum*, that is, law on the use of force. There is a need for both the AU and the UN to reconcile article 4(h) of the Constitutive Act with article 2(4) of the UN Charter. This should take into account article 4(j) of the PSACU Protocol.<sup>10</sup> Article 2(4) of the UN Charter specifically obliges all UN member states to

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<sup>10</sup> This article also speaks of the right of the AU to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act.

refrain in their international relations from using force or the threat of using force against the territorial integrity or political independence of any state, in any manner inconsistent with the purposes of the UN. However, article 4(h) of the Constitutive Act arguably waters down this well established principle by giving the AU the right to intervene in a member state pursuant to a decision of the AU Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. The absence of any reference to article 2(4) of the UN Charter, presupposes that the AU may in fact bypass it and intervene in an AU member state in pursuance only of a decision made by the AU Assembly (and not necessarily by the UN Security Council).

On the face of it, article 4(h) of the AU Constitutive Act does not take into account article 53(1) of the UN Charter, in that the envisaged intervention does not explicitly require the authorization of the UN Security Council. Article 53(1) of the UN Security Council specifically provides that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the [UN Security Council]'. This means that if the article 4(h) intervention involves an 'enforcement action', then that intervention would be in violation with article 53(1) of the UN Charter if such an intervention is without the express authorization of the UN Security Council. The fact that this UNSC authorization requirement is not included in article 4(h) of the Constitutive Act (or in 4(j) of the PSCAU Protocol) means that the AU's intervention may in fact be undertaken without such authorization.

In justifying that the authorization by the UN is not necessary for the African Union's intervention, Kioko argues

[i]t would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at that time.<sup>11</sup>

Perhaps, these requirements (as covered in the above quote) could be included in article 4(h) of the Constitutive Act as well as in article 4(j) of the PSCAU Protocol. While the first requirement in respect of the intervention, triggered by the need to support a

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<sup>11</sup> Kioko (n 3 above) 821.

popular cause, is fairly straightforward, the requirement that the UN Security Council had not taken action or was unlikely to do so at that time may be tricky. For instance, the determination of the time frame within which the UN Security Council must intervene will always be subjective. This requirement, therefore, is open to abuse.

In harmonising the provisions of the UN Charter and the Constitutive Act, together with the PSCAU Protocol, guidance must be sought from article 103 of the UN Charter, which provides that in the case of conflict between the obligations of the member states of the UN Charter and their obligations in another legal instrument, such as the Constitutive Act (and the PSCAU Protocol), the obligations of the UN Charter must prevail. The UN Charter, therefore, reigns supreme over the obligations of the AU member states under the Constitutive Act and the PSCAU Protocol. Articles 2(4), 53(1) and 103 of the UN Charter should be included in the PSCAU Protocol in order to ensure that the PSCAU Protocol does not supersede the UN Charter, which confers the primary responsibility for the maintenance of international peace and security on the UN Security Council.

Since one of the objectives of the AU is to '[e]ncourage international cooperation, taking due account of the Charter of the United Nations',<sup>12</sup> article 2(4) of the UN Charter, which contains a well established principle regarding the use of (or threat of using) force, should therefore be taken into account in the pursuit of international cooperation between the AU members states. This well established principle states that all members of the UN (which includes members of the AU) shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.

The reference to 'all members' in article 2(4) of the UN Charter may be interpreted to mean a member of the UN acting individually or collectively. In the case of article 4(h) of the Constitutive Act, it means the member state would be acting in a collective manner. Where the right to intervene in a member state of the AU will comprise the use of force, then article 2(4) of the UN Charter arguably limits that right to the extent that it does not involve the use of force. Further, where the intervention involves an enforcement action, then article 53(1) of the UN Charter arguably limits such an intervention to the extent

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<sup>12</sup> Art. 3(e) of the Constitutive Act.

that it is not authorized by the UN Security Council. Article 4(h) of the Constitutive Act should therefore be amended to reflect these propositions.

The same principle of the UN Charter supremacy also applies to article 4(j) of the Constitutive Act, where a member state requests intervention from the AU in order to restore peace and security. This means that no intervention involving the use of force can be undertaken by the AU without the authorization of the UN Security Council in accordance with article 53(1) of the UN Charter. If such intervention were undertaken, then the AU would be in violation of the UN Charter. This issue should also be addressed by inserting the UN Charter supremacy clause in article 4(j) of the Constitutive Act.

The legal basis for making such a request in terms of article 4(j) of the Constitutive Act (by a member state) is different from article 4(h) of the Constitutive Act in that such a request must be made in order to 'restore peace and security' as opposed to addressing 'grave circumstances, namely war crimes, genocide and crimes against humanity'. Sarkin argues that where the Assembly of the AU agrees to article 4(j) intervention, the Peace and Security Council must 'approve the "modalities" of the intervention'.<sup>13</sup> Examples of such cases may be where an unconstitutional change of government takes place in a member state. In this case, the member state may request the intervention for the purpose of restoring peace and security. Caution must however be taken by the AU in that unscrupulous states may request the intervention under the article 4(j) intervention in order to silence opposition, thereby frustrating genuine aspirations of people to exercise their democratic rights. This would be the case, particularly in undemocratic states.

The request made in terms of article 4(j) of the Constitutive Act may be triggered by circumstances that threaten the national independence and sovereignty of a member state. These circumstances may arguably threaten peace and security and the need for its restoration would be inevitable. Examples in this regard would include acts of aggression, including those by mercenaries.<sup>14</sup> Sometimes the intervention would be in

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<sup>13</sup> Jeremy Sarkin, 'The Responsibility to Protect and Humanitarian Intervention in Africa' (2010) 2(4) *Global Responsibility to Protect (Special Issue: Africa's Responsibility to Protect)* 382.

<sup>14</sup> As above.

the form of support and facilitation of humanitarian action where conflict and major natural disasters have occurred. The critical question is whether or not there is a need for peace and security to be restored in any given situation and in light of circumstances prevailing in the requesting member state. In considering the *modus operandi* after an article 4(j) request is made, the Peace and Security Council must decide which institution or institutions are best placed for it to collaborate with in undertaking such an intervention.

#### **b) Reconciling ‘enforcement action’ and ‘intervention’**

In this study, the possible differences of interpretation between the phrases, ‘enforcement action’ in terms of article 53(1) of the UN Charter and ‘intervention’ in terms of article 4(h) of the Constitutive Act (and 4(j) of the PSCAU Protocol) have been identified as stumbling blocks to the relationship between the AU and the UN. The question of whether an ‘enforcement action’ could be said to include an ‘intervention’ or vice versa remains unanswered. Authoritative guidance from the UN and the AU is therefore required. There is a need for both the UN and the AU to commission a study that will look into the interpretations of these two articles, which have been interpreted differently by commentators. This will allow the AU to make an informed decision on when exactly to intervene in terms of article 4(h) of the Constitutive Act. This means that if such intervention involves an enforcement action, article 53(1) of the UN Charter would give guidance. If there is no ‘enforcement action’, but there is the ‘use of force’ in the intervention, then article 2(4) of the UN Charter would give guidance. If the ‘use of force’ and the ‘enforcement action’ are not part of the 4(h) intervention, then the UN Charter will not be violated.

The study suggests that article 53(1) of the UN Charter, while having been in existence long before the establishment of the AU and the Peace and Security Council, impliedly creates a relationship between the Council and the UN Security Council. This relationship is created in terms of article 53(1) of the UN Charter, which essentially allows the UN Security Council to utilize, where appropriate, such arrangements or agencies for enforcement action. It could be argued that such arrangements could include the AU and the Peace and Security Council, that is, if the UN Security Council authorises that enforcement action. After all, the UN Security Council has the primary responsibility for the maintenance of international peace and security and the Peace and Security Council is responsible for promoting peace, security and stability in Africa.



The importance of having an authoritative interpretation of article 53(1) of the UN Charter in relation to the AU, and particularly the Peace and Security Council, cannot be over emphasised. Such an interpretation will enable the recently established AU and the Peace and Security Council to play their part in addressing peace and security challenges in Africa without violating the provisions of the UN Charter. That the UN Charter remains supreme in relation to both the Constitutive Act and the PSCAU Protocol is not in doubt. The elaboration of article 53(1) of the UN Charter in relation to the AU and the Peace and Security Council will enable the relationship between the UN and the AU, as well as the UN Security Council and the Peace and Security Council, to be clear. Even though the UN has supported the AU's interventions, the *ad hoc* nature of the UN's support for such initiatives cannot go on without an authoritative legal instrument. This legal instrument would state the precise roles of the AU and the UN when it comes to 'interventions' in terms of article 4(h) of the Constitutive Act and 'enforcement actions' in terms of article 53(1) of the UN Charter.

An example of such *ad hoc* support (discussed in Chapter 6) is when following the ECOWAS intervention in Liberia, the president of the UN Security Council 'commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia'.<sup>15</sup> In view of the *Ezulwini Consensus* (discussed in Chapter 3), article 53 (1) would provide that in certain circumstances, which require urgent attention, the approval of the UN Security Council could be granted *ex-post facto*.<sup>16</sup> This is of course in the event that the intervention involved an enforcement action as envisaged in article 53(1) of the UN Charter.

### **c) Defining relationship between PSC and UN Security Council**

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<sup>15</sup> Note by the President of the Security Council, U.N. Doc. S/22133 (Jan. 22, 1991).

<sup>16</sup> *The Common African Position on the Proposed Reform of the United Nations: "Ezulwini Consensus"* is available at [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc](http://www.africa-union.org/News_Events/Calendar_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc) (Assessed 29 March 2010).

This study showed that in many instances the relationship between the AU and the UN is assumed to include the Peace and Security Council and the UN Security Council. The argument that is made is that while working under the auspices of the AU and the UN, the mandates of the Peace and Security Council and the UN Security Council, although complementary, are different. There is a need, therefore, to spell out the modalities of the envisaged cooperation between the Peace and Security Council and the UN Security Council. It has been pointed out that while the PSC arguably emulates the structure of the UN Security Council, particularly on issues concerning membership, core functions, and voting, this should at no point give the impression that the PSC and the UN Security Council are equal partners. The UN Security Council remains the 'principal organ of the UN' with the 'primary responsibility' to maintain international peace and security.

Despite the fact that the AU relied on UN Security Council staffers as advisers during the drafting of the PSCAU Protocol,<sup>17</sup> this study maintains that the UN Security Council should have been consulted in order to give clarity, especially on how the respective institutions were to cooperate and work closely in addressing Africa's peace and security challenges. The study recommends that, whether or not this relationship is desirable, the relationship must be made to work, and work effectively towards ensuring that the continent is more peaceful, secure and stable. It is therefore important for both the UN Security Council and the Peace and Security Council to clarify their mandates. Most importantly, the mandates must clarify the concepts (legal and non-legal) involved in carrying out their respective activities, including the intended application of vague notions such as 'African solutions to African problems'.

#### **7.4.2 PAN-AFRICAN PARLIAMENT**

When considering the relationship between the Peace and Security Council and the Pan-African Parliament, this study highlighted the innovative strategy created by the PSCAU Protocol where African citizens, through their representatives at the PAP, are able to contribute to peace and security in Africa. The study, however, showed that although both the Peace and Security Council and the PAP are organs of the AU, their relationship in terms of the PSCAU Protocol seems to be one-sided, *ad hoc* and not sufficiently elaborate. The study also identified a shortcoming in the PAP Protocol, in

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<sup>17</sup> Levitt (n 7 above) 116.

that it does not provide for the relationship between the PAP with the Peace and Security Council. Further, the study singled out an omission in the PSCAU Protocol, which is that it does not provide for the oversight role of the PAP in relation to the Peace and Security Council's carrying out its mandate.

Applauding the work done thus far by the Pan-African Parliament, particularly in undertaking the mission to Darfur, the study nevertheless established that there was no evidence of collaboration between the PAP and the Peace and Security Council. The study maintains that the mission to Darfur was not in line with article 18(1) of the PSCAU Protocol, which provides for the relationship between these two organs. Despite the fact that the PAP's mandate addresses cross-cutting issues, such as human rights, the study found that there was no formal relationship between the PAP and the African Commission, which is responsible for the promotion and protection of human and peoples' rights in Africa.

The African Commission may, with the permission of the AU Assembly, undertake in-depth studies in cases showing a series of serious violations of human and peoples' rights during the course of its deliberations in terms of article 58 of the African Charter. From 8 to 18 July 2004, the African Commission undertook a mission to Darfur and presented a comprehensive report wherein it, among other things, recommended that the Government of Sudan should allow the International Commission of Inquiry unhindered access to the Darfur region to enable it to thoroughly investigate alleged human rights violations with a view of further investigating whether or not genocide had occurred.<sup>18</sup>

The Pan-African Parliament also undertook a mission to Darfur and on 6 May 2008, it issued a Paper of Peace and Security in Africa, which captured the peace and security

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<sup>18</sup> See the Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region. Done in Pretoria, Republic of South Africa on 20 September 2004. EX.CL/364 (XI). Available at [http://www.achpr.org/english/Mission\\_reports/Sudan/report\\_darfur%20region\\_eng.pdf](http://www.achpr.org/english/Mission_reports/Sudan/report_darfur%20region_eng.pdf) (Accessed 29 March 2011).

situations in Sudan-Darfur, among other things.<sup>19</sup> These separate undertakings by the African Commission and the PAP, such as the missions to Darfur, are likely to create unnecessary duplication of efforts that are not cost-effective. The in-depth studies envisaged in terms of article 58 of the African Charter should, as a matter of fact, include both the African Commission and the PAP in a more organized manner that is also cost-effective. These in-depth study reports should be jointly prepared and presented to the Peace and Security Council by these institutions.

In view of the above, the study recommends that the PSCAU Protocol be amended in such a way that the relationship between the Peace and Security Council, the Pan-African Parliament and the African Commission be elaborated upon. Such an elaboration should enable the relationship to operate as a three-way process in which the institutions are on the same footing. No organ in this relationship should dictate to another, as is the current situation. The study further recommends that the PAP Protocol be amended in order to factor in the relationship between the PAP and the Peace and Security Council. Linked to this, there is a need to gain clarity, within the PAP Protocol, about the role of the PAP Committee on Cooperation, International Relations and Conflict Relations in relation to that of the Peace and Security Council. If this is the Committee that should represent the PAP in its relationship with the Peace and Security Council, this must be clearly spelt out in the PAP Protocol or policy document as the case may be.

Once the reconciliation of the PSCAU Protocol and the PAP Protocol has been achieved, the recommendation by the AU Audit Review should be implemented.<sup>20</sup> This recommendation states that PAP should put in place policy guidelines on its relationship with other organs of the AU, such as the Peace and Security Council.<sup>21</sup> In essence the policy guidelines should identify the various roles to be played by the PAP

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<sup>19</sup> Paper on Peace and Security in Africa, 6 May 2008. PAP/C.10/CCIRCR/RPT/41/08. Available at [http://www.pan-africanparliament.org/DocumentsResources\\_DisplayDocument.aspx?Type=Docs&ID=746](http://www.pan-africanparliament.org/DocumentsResources_DisplayDocument.aspx?Type=Docs&ID=746) (Accessed 29 March 2010).

<sup>20</sup> Para. 59, para. 111 of the AU Audit Review discussed in chapter 5.

<sup>21</sup> This should also include the African Commission.

and the Peace and Security Council, particularly in response to conflict situations where peace and security is threatened. For instance, it should be clear as to which organ of the AU should undertake a mission to a state where there is a conflict. Of paramount importance, it is recommended that the PAP, as the supposedly legislative arm of the AU, must provide oversight in relation to the work of the Peace and Security Council, which is part of the executive branch of the AU, in order to provide a check and balance mechanism for the work of the PSC.

One pertinent question that must be considered in the harmonization of the Peace and Security Council and PAP Protocols is that the ultimate aim of the PAP is to evolve into an institution with full legislative powers.<sup>22</sup> This will depend on member states deciding to amend the PAP Protocol in order to give effect to the full legislative powers.<sup>23</sup> This is likely to affect the relationship between the Peace and Security Council and the PAP, as the Parliament's mandate will no longer be one confined to consultative and advisory powers only. This study recommends that in the development of the policy guidelines, a provision should be included to deal with the likely event of the PAP attaining full legislative powers. This process should as a matter of fact include the PAP, particularly the Committee on Co-operation, International Relations and Conflict Resolutions.<sup>24</sup>

#### **7.4.3 PSC AND THE AFRICAN COMMISSION**

One of the most important findings on the relationship between the Peace and Security Council and the African Commission was that, unlike that of the Council and the PAP, it was well balanced. This study further underscored the importance of the relationship between the Peace and Security Council and the African Commission, which forms an integral part of the African human rights system. It made reference to the Peace and Security Council as forming a vital part of the African human rights system by ensuring the promotion of the right to international and national peace and security as

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<sup>22</sup> Art. 2(3) of the PAP Protocol.

<sup>23</sup> As above.

<sup>24</sup> On the Permanent Committees see [http://www.pan-african-parliament.org/AboutPAP\\_StructureofthePAP\\_Permanent%20Committees.aspx](http://www.pan-african-parliament.org/AboutPAP_StructureofthePAP_Permanent%20Committees.aspx) (Accessed 29 March 2011).

guaranteed in the African Charter. The study pointed out the disturbing omission of article 23 of the African Charter, dealing with the right to peace and security, in article 19 of the PSCAU Protocol.

The study recommends a much more elaborate strategy on the relationship between the Peace and Security Council and the African Commission that will go beyond simply seeking cooperation in relevant matters and the exchange of information. There is a need to develop a policy that will spell out the roles of these two institutions. It is important for the African Commission and the Council to work closely in addressing the peace and security challenges in Africa, particularly where there are serious violations of human rights. Article 19 of the PSCAU Protocol specifically provides that the African Commission must bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the latter. This facilitates an early warning mechanism that would enable the Council to act swiftly in the event that the African Commission has in its possession such vital information obtained during the course of its deliberations.

It is further recommended that since the African Court on Human and Peoples' Rights is an extension of the protective mandate of the African Commission, there is a need to factor it into the relationship between the Peace and Security Council and the African Commission. The African Court may be requested by the Council to provide an opinion on any legal matter relating to the African Charter or any other relevant human rights instrument, such as the PSCAU Protocol, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission.<sup>25</sup> In this way, by including the African Court in the PSCAU Protocol, in addition to the African Commission, the Peace and Security Council will be in a position to request advisory opinions on legal matters, particularly those which relate to the relationship between the Council and the institutions subject to this study.

#### **7.4.4 AFRICAN UNION COMMISSION**

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<sup>25</sup> Art. 4(1) of the African Court Protocol. Art. 4(2) of the African Court Protocol further provides that "[t]he [Human Rights] Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate of dissenting decision."

This study identified the pervasive role of the AU Commission in the various workings of the Peace and Security Council. The Commission plays a role in almost all the relationships between the Council and the organs and institutions subject to this study. However, the relationship between the PSC and the AU Commission is not formalised. Put differently, there is no express provision in the PSCAU Protocol for the relationship between these organs. This study also discussed the role of the chairperson of the AU Commission, whose responsibilities include that of ensuring the implementation and follow-up of decisions of the Peace and Security Council. Such decisions of the Council also involve those relating to its relationship with the organs and institutions discussed in the preceding chapters in this study.

From the analysis of the role of the AU Commission and its chairperson, it may be concluded that the Peace and Security Council cannot function effectively without the chairperson of the AU Commission. This is particularly the case because the chairperson is in fact central to the implementation of the decisions of both the Peace and Security Council and the AU Assembly as they relate to peace and security in Africa. This is clearly spelt out in article 10 of the PSCAU Protocol. In terms of article 20 of the Constitutive Act, the AU Commission is the secretariat of the AU and is comprised of the chairperson, his or her deputy or deputies, and the commissioners.

In view of the importance of the AU Commission, under whose auspices the chairperson operates, this study recommends that a provision should be included in the PSCAU Protocol to provide for the relationship between the Peace and Security Council and the AU Commission. This will be in addition to the existing provisions creating the relationship of the Peace and Security Council with, respectively, the sub-regional mechanisms in article 16; the United Nations in article 17; the Pan-African Parliament in article 18, the African Commission in article 19; and civil society organisations in article 20. The provision formalising the relationship between the Peace and Security Council and the AU Commission should spell out in a detailed form how these two AU organs should work, particularly in relation to achieving the objectives of the Council as provided under article 3 of the PSCAU Protocol.

#### **7.4.5 CIVIL SOCIETY ORGANIZATIONS**

It has been observed in this study that the relationship between the Peace and Security Council and civil society organisations is a step in the right direction. Simply the realization by the drafters of the PSCAU Protocol that these organisations play a vital role in addressing peace and security issues in Africa is commendable. The most striking provision dealing with this relationship is the one stating that the Peace and Security Council shall encourage non-governmental organizations, community-based and other civil society organizations, particularly women's organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa.<sup>26</sup>

Despite the positive language in embracing CSOs within the PSCAU Protocol, this study identified the conspicuous omission in article 20 of the PSCAU Protocol of the Economic Social and Cultural Council, an organ of the AU that was legally established even before the establishment of the Peace and Security Council.<sup>27</sup> It is an advisory organ composed of different social and professional groups of the AU member states.<sup>28</sup> The study identified the Economic Social and Cultural Council as a vital link between the work of civil society organisations and the Peace and Security Council and commended the Livingstone Formula, which creates a relationship between the PSC and ECOSOCC. A civil society organisation wishing to influence the decision-making process of the Peace and Security Council must be affiliated to the Economic Social and Cultural Council. Put differently, no CSO may be invited to address the Peace and Security Council or participate in its deliberations without being affiliated to ECOSOCC. The fact that civil society organisations are not members of ECOSOCC remains a constraining factor as regards the effective participation of CSOs in the Peace and Security Council decision-making processes.

The study analysed the important role of the Livingstone Formula in the implementation of article 20 of the PSCAU Protocol, that is, in ensuring that the relationship between the Peace and Security Council and civil society organisations works effectively. What was of interest was the obligation set out by the Livingstone Formula, with which CSOs are required to comply in order to qualify for an invitation to

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<sup>26</sup> Art. 20 of the PSCAU Protocol.

<sup>27</sup> Art. 5(1)(h) of the Constitutive Act.

<sup>28</sup> Art. 22 of the Constitutive Act.



address the Peace and Security Council. One of the findings of this study was that there is no provision for the Peace and Security Council to process and grant observer status to a CSO in order for it to participate in the open meetings and informal Council consultations. However, the Livingstone Formula requires civil society organisations to comply with the criteria of eligibility for membership as defined in article 6 of the Statutes of the Economic Social and Cultural Council.

The study identified the problem of lack of funds which the Economic Social and Cultural Council was facing, the negative attitude that member states of the AU still had towards civil society organisations, and the weak institutional capacities of these organisations, as some of the challenges affecting the relationship between the Peace and Security Council and CSOs. The study, therefore, recommends that, as a matter of priority, AU member states should ensure that the Economic Social and Cultural Council has adequate funds to operate within the AU system. Further, the participation of civil society organisations in the Peace and Security Council meetings and informal consultations should be strengthened and member states of the AU must appreciate the contribution that CSOs make in addressing peace and security challenges in Africa.

The study further recommends that since the Pan-African Parliament, the African Commission, and civil society organisations (including ECOSOCC) all have relationships with the Peace and Security Council, a policy document must be developed by the AU in consultation with these organs in order to identify how they should relate to each other in their overarching relationship with the Council. This should take into consideration the fact that the Pan-African Parliament is likely to evolve into an institution with full legislative powers, as discussed above.

#### **7.4.6 SUB-REGIONAL MECHANISMS**

This study established that in part the relationship between the Peace and Security Council and the sub-regional mechanisms provides the necessary foundation for establishing the conditions of peace, security and stability in Africa. Abass argues that the ability of the AU and the RECs/SRMs to maintain peace and security is largely dependent upon their ability to operationalize the African Peace and Security

Architecture effectively.<sup>29</sup> The study also emphasised the fact that generally sub-regional mechanisms operate within regional economic communities and that they form an integral part of APSA. The study analysed the five SRMs/RECs (the Economic Community of West African States, the Southern African Development Community, the Economic Community of Central African States, the Intergovernmental Authority on Development and Arab Maghreb Union) and their roles in the development of APSA, particularly on the establishment of the African Standby Force. The study emphasised the fact that SRMs/RECs are neither organs of the AU nor institutions established under its auspices.

In analysing the relationship between the Peace and Security Council and the SRMs, this study revealed that the African Peace and Security Architecture, the establishment of which is a remarkable achievement by the AU, could not function without the sub-regional mechanisms, which exist as a result of (sub) regional integration within Africa. This study maintains that the relationship between the Peace and Security Council and the sub-regional mechanisms must be seen within the context of the UN's failure to address African conflicts, and that such a relationship is aimed at providing concrete action in the event that Africa's peace, security and stability is challenged. The UN's failure to address African conflicts, however, does not suggest that international law should be violated. Rather, it requires a careful alignment of the legal regimes of the sub-regional mechanisms and the AU with the UN Charter.

The study identified that one of the most challenging issues in terms of the relationship between the Peace and Security Council and the sub-regional mechanisms is that the regional economic communities, within which these mechanisms operate, have their own independent mandates, which sometimes contradict that of the AU in general and the Peace and Security Council in particular. This presents a challenge in relation to harmonizing and coordinating the activities of the sub-regional mechanisms in accordance with the mandate of the Peace and Security Council. In view of the different mandates, the structural policy arrangements and the reasons behind their establishment, the study found that neither the AU nor its organs, including the Council, have direct peremptory authority or jurisdiction over the SRMs/RECs. Linked to this

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<sup>29</sup> Abass Ademola, 'African Peace and Security Architecture and the Protection of Human Security' in Ademola Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010) 257.

challenge are the following considerations: the fact that some African states are members of more than one regional economic community, the uncontrollable establishment of RECs within the continent, and the financial challenges that the RECs face.

The study recommends that the provisions of the memorandum of understanding between the AU and the RECs should be implemented as soon as possible in order to give effect to the envisaged relationship between the PSCAU and the SRMs. In light of the fact that the implementation of the MOU is critical, particularly in the establishment and development of the African Standby Force, the study further recommends that the AU should ensure that all the legally recognized RECs sign the MOU as soon as possible.

On the establishment of the five brigades making up the African Standby Force, this study established that progress within the different brigades in the implementation of the Roadmap for the Operationalization of the ASF varies considerably.<sup>30</sup> This is largely due to the fact that the MOUs between the AU and the various SRMs/RECs are yet to be finalised and agreed upon. The study maintains that without the support of the member states of the regional economic communities, the effectiveness of the five brigades will remain out of reach. Therefore, the full support of the African states at the sub-regional levels is of paramount importance in ensuring the success of the African Peace and Security Architecture.

The study identified the conflicts of law with regard to the principle of intervention between that the AU law, and respectively the law of the Economic Community of West African States and that of the Southern African Development Community. In the case of the ECOWAS, article 25 of the ECOWAS Protocol provides for the right to intervene in a member state where there is and of the following: serious and massive violation of human rights and the rule of law; an overthrow or attempted overthrow of a democratically elected government; or any other situation as may be decided by the Mediation and Security Council. It is recommended that the ECOWAS Protocol should be revised in such a way that it is consistent with AU and UN law. This means that the AU must sanction the right of intervention by ECOWAS, after obtaining authorization from the UN Security Council in line with article 2(4) and 53(1) of the UN Charter. This

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<sup>30</sup> EXP/AU-RECs/ASF/4(I).

will avoid unilateral intervention by a sub-regional mechanism in contravention of international law.

In the case of SADC law, article 11(2)(b)(ii) of the SADC Protocol provides for the right to intervene where there is a need to address war crimes, crimes against humanity, and genocide; and to forestall military coups and other threats to legitimate authority. Of importance is the fact that the SADC law of intervention acknowledges the UN by stating that such a right to intervene exists only with the authorization of the UN Security Council. The SADC law is, however, inconsistent with the AU law, which does not seem to require the authorization of the UN Security Council in exercising its right to intervene. The AU and SADC legal regimes need to be harmonised accordingly.

The study has also established that of all the regional economic communities, ECOWAS is the only one that has been active in exercising the right to intervene, which it has done successfully in West Africa, despite the fact that this is arguably contrary to the UN Charter. The SADC law through article 11(2)(b)(ii) of the SADC Protocol does not favour the ECOWAS position and as such, no unilateral intervention has taken place within SADC. While such interventions (where there is the use of force) may obtain *ex-post facto* approval from the UN Security Council and thus be legal, this practice may in the long run render the principle of intervention open to abuse by sub-regional mechanisms. In so far as the approval of the UN Security Council *ex-post facto* is concerned, the *Ezulwini Consensus* must be followed. That is, only in certain circumstances requiring urgent attention should the UN Security Council's approval be obtained 'after the fact', and the UN should assume responsibility for financing such operations.

On the right to intervene by sub-regional mechanisms, this study recommends that within Africa this right must be the preserve of the African Union after an authorization from the UN Security Council and that its implementation must be through the cooperation of RECs/SRMs, particularly where there are a series of serious human and peoples' rights violations. This is where the relationship between the Peace and Security Council and the sub-regional mechanisms becomes even more important in cases where cooperation is required in pursuance of a decision by the AU to intervene in a member state. Mindful of the supremacy of the UN Charter, the AU and not the sub-regional mechanisms should seek the *ex-post facto* approval of the UN Security Council. The study further recommends that the AU law and the laws of the regional economic communities must be harmonised in order to prevent any conflict of law that is likely to

negatively affect the relationship between the Peace and Security Council and the sub-regional mechanisms.

#### 7.4.7 THE PEACE FUND

The study pointed out the importance of a sustainable funding scheme in ensuring the relationship between the Peace and Security Council and the UN Security Council, the Pan-African Parliament, the African Commission and the sub-regional mechanisms. Any commitment to conflict prevention, management and resolution by the member states of the AU requires that the AU budget, which is a major source for the Peace Fund, should be sufficient. There is still pessimism about the AU's funding scheme. Questions have been raised about what guarantee exists that the AU will not be as cash-starved an organization as the OAU.<sup>31</sup>

In so far as the costs of interventions are concerned, Kioko observes that there is no doubt that these will be high and the AU will find that of necessity it has to involve and work with the international community and the UN in particular.<sup>32</sup> It would be interesting to see the AU taking a decision to intervene without the involvement of the UN Security Council and thereafter seeking funding from the United Nations in order to implement that decision. Where an intervention is being considered, the need to involve the UN from the early stages would be essential in order to garner UN support. It has been suggested that AU member states should also devise a sustainable and predictable funding scheme that will enable the Peace Fund to operate without being at the mercy of member contributions.<sup>33</sup>

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<sup>31</sup> Godfrey P. Okoth, 'Conflict Resolution in Africa: The Role of the OAU & the AU' in Nhema, Alfred, *The Resolution of African Conflicts: The Management of Conflict Resolution and Post Conflict Reconstruction* (Oxford: James Currey – Published in Association with OSSREA, Addis Ababa, 2008) 36.

<sup>32</sup> Kioko (n 3 above) 822.

<sup>33</sup> Girmachew Alemu Aneme, *A study of the African Union's Rights of Intervention against Genocide, Crimes against Humanity and War Crimes* (PhD thesis, Faculty of Law, University of Oslo, 2008) 339.

While this suggestion is valuable, this study recommends that over and above devising these schemes, member states of the AU should ensure that they adhere to the principles enshrined in the Constitutive Act, which include respect for democratic principles, human rights, the rule of law and good governance. Among other things, this will serve as a measure to prevent member states from lapsing or relapsing into a state of conflict, which will then require intervention that comes at a very high price. In order to promote adherence to the universal values and principles of democracy and respect for human rights, it is recommended that the AU member states ratify the Charter on Democracy, Elections and Governance, which is currently not in force, pending the ratification by at least fifteen African states.<sup>34</sup>

#### **7.4.8 AMENDMENTS TO PSCAU PROTOCOL**

As this study has identified a number of shortfalls in the PSCAU Protocol regarding the relationship between the Peace and Security Council and UN Security Council, the Pan-African Parliament, the African Commission, civil society organisations, and sub-regional mechanisms, it is recommended that amending the PSCAU Protocol could possibly address some of these shortfalls. These amendments could be considered by 2014, a year that marks 10 years from the launch of the Peace and Security Council. The 10-year period is enough time to take stock of how the Council has performed and how it could be improved. Most importantly, by 2014 the relationship between the Peace and Security Council and the institutions and mechanism subject to this study, would have been thoroughly assessed and analysed and recommendations would have been made in light of its performance during the 10-year period. In amending the PSCAU Protocol, the AU Commission on International Law<sup>35</sup> must play a key role by devoting its efforts to addressing the lacunae in the various legal regimes discussed in this study in order to

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<sup>34</sup> As at 27 January 2011, there were 8 members States that had ratified the Charter on Democracy, Elections and Governance.

<sup>35</sup> The Statute of African Union Commission on International Law is available at <http://www.africa-union.org/root/au/Documents/Treaties/text/STATUTE%20F%20THE%20AUCIL-Adopted%20-%20Feb%202009.pdf> (Accessed 29 March 2011).

ensure that the relationship of the Peace and Security Council with the various institutions is effective.

In terms of article 22(6) of the PSCAU Protocol any amendments of the PSCAU Protocol shall be in accordance with the provisions of article 32 of the Constitutive Act. Under this article a three-stage process must take place before any amendment is effected. The Constitutive Act provides that any member state may submit proposals for the amendment of the PSCAU Protocol. In this case 'any member State' means any 'Member State of the African Union'<sup>36</sup> and not necessarily any member state to the PSCAU Protocol. This definition in itself requires a revision since not all member states of the AU are also member states of the PSCAU Protocol. It is also more appropriate that any amendment to an international treaty, such as the PSCAU Protocol, be proposed by a state party to it and not by a state that is not legally bound by such a treaty.

The three-stage process is outlined in the following paragraphs.

Firstly, in terms of article 32(2) of the Constitutive Act, proposals for amendment shall be submitted to the chairperson of the AU Commission. The responsibility of the latter is to receive and transmit the proposal to member states within 30 days of receipt thereof.<sup>37</sup> This will be member states in the context of the AU Assembly.

Secondly, the AU Assembly, upon the advice of the Executive Council, must examine these proposals within a period of one year following notification of member states, in accordance with the provisions of article 32(3) of the Constitutive Act. While an examination period of one year could have been justifiable in the case of the Constitutive Act, it is a very long period for amending the PSCAU Protocol, which is very critical in the work of the Peace and Security Council in the promotion of peace, security and stability in Africa, among other things. The one year examination period requires a revision so that state parties to the PSCAU Protocol (and not the AU Assembly) are only given six months, at the most, to examine any amendment proposal to the PSCAU Protocol. It is worthy of note that not all the members of the AU Assembly (i.e. the state

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<sup>36</sup> See art. 1(i) of the PSCAU Protocol and art (1) of the Constitutive Act.

<sup>37</sup> Again, it is of no use to transmit a proposal for amendment concerning the PSCAU Protocol to a member State of the AU that is not a State party to the PSCAU Protocol.

parties to the Constitutive Act) are party states to the PSCAU Protocol. The amendment relating to the change of the examination period from one year to six months could be made within the PSCAU Protocol itself and not necessarily in the Constitutive Act.

Thirdly, the amendments shall, in terms of article 32(4) of the Constitutive Act, be adopted by the Assembly by consensus or, failing which by a two-thirds majority and submitted for ratification by all member states in accordance with their respective constitutional procedures. This provision speaks of 'the Assembly', which is defined as the Assembly of Heads of State and Government of the [African] Union.<sup>38</sup> For any amendment proposal to enter into force, it must be ratified by a two-thirds majority of the member states of the AU.<sup>39</sup>

The best practical way to address the anomaly presented by articles 26(2) and 32 of the PSCAU Protocol and the Constitutive Act, respectively, is to amend article 26(2) of the PSCAU Protocol to deal with the amendment of the instrument without referring to the Constitutive Act. Unless this is done, there will be untold confusion between the member states of the AU and the state parties to PSCAU Protocol.

## 7.5 CONCLUSION

This study examined the Peace and Security Council and its relationship with the UN Security Council, the Pan-African Parliament, the African Commission, civil society organisations, and the sub-regional mechanisms. It discussed the extent to which the relationship between the Peace and Security Council and these organisations or mechanisms has an actual and potential ability to effectively contribute to peace, security and stability in Africa. This was addressed in light of articles 16, 18, 19 and 20 of the PSCAU Protocol. The discussion inevitably involved an examination and analysis of other legal instruments dealing with these institutions. The study proceeded from the premise that the envisaged relationship of the Peace and Security Council with the respective organs and mechanisms is comprised of both an actual and a potential ability to effectively contribute to making the African continent more peaceful, secure and stable.

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<sup>38</sup> See arts. 1 of the Constitutive Act and 1(f) of the PSCAU Protocol, respectively.

<sup>39</sup> Art. 32(4) of the Constitutive Act.



On the question of whether the ability is actual, this study demonstrated that while the PSCAU Protocol lays down a normative standard on how this relationship should work in order to achieve the main objective of the Peace and Security Council, there are many challenges which this regime faces. These could be attributed to the fact that the Peace and Security Council has been in existence for less than a decade and to the fact that the African Peace and Security Architecture is still in its developmental stage. Levitt could not have put it any better when he argued, even before the PSCAU Protocol came into force, that '[i]n order for the [PSCAU] to have a semblance of success, African states will need to make realistic commitments about the amount of human and tangible resources needed to "endow" it'.<sup>40</sup> The PSCAU Protocol, as a treaty, introduces a system that if carefully and properly designed and refined, and effectively implemented, will go a long way in addressing peace and security challenges in Africa. Just like the Constitutive Act, the PSCAU Protocol provides only a skeletal framework, when it comes to the manner in which the Peace and Security Council should relate to the various organs and institutions. Many issues still require further fleshing out.

In conclusion, this study adopts an optimistic view of the potential ability of the relationship between the Peace and Security Council and the various institutions and mechanisms to contribute to peace, security and stability in Africa. Achieving peace, security and stability is never the result of a single force or factor. Doubts abound about the how much cooperative relations between the various institutions and mechanisms can achieve given their diverse and sometimes conflicting mandates, principles and practices. In this context successful harmonisation and coordination between the institutions and mechanisms is bound to take some time.

The regime introduced by articles 16, 17, 18, 19, and 20 of the PSCAU Protocol is innovative in that it seeks the collaboration of the Peace and Security Council at the international, regional and sub-regional levels and views its potential to contribute to peace, security and stability in Africa as immense. The study concludes the discussion by offering some specific recommendations on how best the relationship between Peace and Security Council and the UN Security Council, the Pan-African Parliament, the African Commission, CSOs, and sub-regional mechanisms, could be effected, strengthened and sustained. It is hoped that with the above recommendations taken on

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<sup>40</sup> Levitt (n 7 above) 116.

board, particularly by the AU, the Peace and Security Council and the rest of the key actors discussed in this study, the untold human suffering, which has become synonymous with Africa, will be mitigated.

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Despite the fact that untold human suffering has become synonymous with the African continent, the Peace and Security Council of the African Union continues to promote peace, security and stability in Africa. Having been established in 2003 and formally launched in 2004 under the auspices of the African Union, the Peace and Security Council plays a critical role in the implementation of the responsibility to protect. The Peace and Security Council, which is at the epicentre of the African Peace and Security Architecture, has become a beacon of hope in addressing the many conflicts that ravage the continent. This study explores the relationship between the Peace and Security Council and, respectively, the United Nations Security Council, the Pan-African Parliament, the African Commission on Human and Peoples' Rights, civil society organizations and sub-regional mechanisms. The study offers recommendations with a view of making the Peace and Security Council more effective in the fulfilment of its mandate through partnering with these institutions.

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