

**AFRICAN REGIONAL PEACE AND SECURITY UNDER THE AU'S
CONSTITUTIONAL FRAMEWORK: CONFLICT OR COMPATIBILITY
WITH THE UN AND INTERNATIONAL LAW?**

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Volume I

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ABSTRACT

The Constitutive Act that contains the right to intervene by the African Union (AU) in member states, being the first and only international treaty to contain this novel right, has the potential to redraw the landscape of international law, with significant ramifications for the UN, member states and regional organisations as well as for the way in which we understand and interpret mechanisms for conflict security. This is because until now, the general understanding has been that regional organisations' right to intervene has been secondary and ultimately under the express authorisation from the United Nations.

Therefore, the purpose of this study is to address the different questions raised by the AU's institutional framework of regional security and explore how its constituent norms sit alongside the more established rules of international law. In doing so, the thesis aims to offer a better understanding of the evolving mechanism of African regional security and the developing relationship between the UN and the AU. This study builds on recent UN reform proposals and uses the Darfur conflict (2003) in the Sudan as its case study. Finally, it concludes by assessing the longer term prospects that the concerted efforts of the AU and the UN hold in the promotion of regional and international peace and security.

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DECLARATION

I declare that this thesis is my own work and that it has not, in whole or in part, previously been presented by me to this or any other university for the conferment of any degree.

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1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security
2000 Constitutive Act of the African Union
2001 OAS Inter-American Democratic Charter
2002 Protocol on Amendments to the Constitutive Act of the African Union
2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union
2003 Protocol of the Court of Justice of the African Union

TABLE OF ABBREVIATIONS

ACP	African Caribbean Pacific countries
AJIL	American Journal of International Law
AMIB	African Union Mission in Burundi
AMIS	AU Mission in Sudan
ASF	African Standby Force
AU	African Union
ASEAN	South East Asian Nations
ASF	African Standby Force
AU	African Union
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
BYB IL	British Year Book of International Law
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
ECOMOG	ECOWAS Cease-Fire Monitoring Group
EDF	European Development Fund
EJIL	European Journal of International Law
ESDP	European Security and Defence Policy
EU	European Union
HRQ	Human Rights Quarterly
DRC	Democratic Republic of Congo
DPMF	Development Policy Management Forum
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR	International Criminal Tribunal for Yugoslavia
ICSS	International Commission on Intervention and State Sovereignty
IGAD	Intergovernmental Authority on Development
KFOR	NATO Kosovo Force
JEM	Justice and Equality Movement

ILA	International Law Association
MLR	Modern Law Review
MONUC	United Nations Mission in the Democratic Republic of Congo
NATO	North Atlantic Organisation
NEPAD	New Partnership for Africa's Development
NILR	Netherlands International Law Review
OAS	Organisation of American States
OAU	Organisation of African Unity
OSCE	Organisation for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SC	Security Council
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNGA	United Nations General Assembly
UNMIS	UN Mission in Sudan
UNOSOM	UN Operations in Somalia
UNPROFOR	United Nations Protection Force
U.S.	United States of America
SADC	Southern African Development Community
SLA	Sudan Liberation Army/Movement
SPLM/A	Sudan People's Liberation Movement
WEU	Western European Union
WTO	World Trade Organisation

Introduction

A. Analytical Framework

1.1 The Background to the Thesis

The UN's failure and the international community's sheer inaction to prevent and punish the 1994 genocidal massacre in Rwanda and the recent indecisiveness in the Darfur conflict, which could potentially be the first case of genocide in the 21st century,¹ highlighted the world's ambivalent attitude towards conflicts in Africa. In his speech, Kofi Annan addressed the perception brought about by:

..the failure of the international community, including the United Nations, to intervene to prevent genocide in Rwanda. That failure has had especially profound consequences in Africa. Throughout the continent, the perception of near indifference on the part of the international community has left a poisonous legacy that continues to undermine confidence in the Organization.²

The speech by Annan was made in a broader context; the UN's own acknowledged failure in post Cold War Africa.³ In spite of its primary responsibility for peace and security,⁴ the UN's deplorable response to the conflicts in Liberia, Sierra Leone, Ethiopia, Eritrea, DR Congo, Uganda, Sudan, Somalia, Burundi, and Cote d'Ivoire⁵ led Africa to hold 'the record of [...] wars and conflicts.'⁶ In turn, the ensuing scenario ensured that violent combat killed and displaced more people in Africa than in any other continent in the post-Cold War period.⁷ As it turned out, the UN's ambivalence towards conflicts in

¹ See chapter nine. See also the Darfur Peace and Accountability Act 2006 (US). See also The US Secretary of State Colin L. Powell, 'Testimony Before the Senate Foreign Relations Committee', Washington, DC September 9, 2004. See also, 'Powell declares genocide in Sudan', *BBC News*, Thursday, 9 September, 2004. However, see the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, UN Doc. S/2005/60, 25th January 2005.

² Report of the Secretary General, *The causes of conflict and the promotion of durable peace and sustainable development in Africa*, S/1998/318/37/ILM (1998) 913 para 11

³ UN Secretariat, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, Doc. S/1999/1257(1999) December 16 (1999), 3.

⁴ See chapter three and article 24 (1) of the UN Charter.

⁵ For a historic account of some of these conflicts, see Adekeye Adebajo & Chris Landsberg, 'Back to the Future: UN Peacekeeping in Africa', in Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century*, (Frank Cass Publishers, 2001).

⁶ Yaounde Declaration (Africa: Preparing for the 21st Century), adopted 8-10 Jul. 1996, ¶ 6, O.A.U. Doc. AHG/Decl.3 (XXXII). See also chapters three and five.

⁷ The Commission for Africa, *Our Common Interest: Report of the Commission for Africa* (The Commission for Africa, London and Addis Ababa, 2005), p. 200.

the continent reached its watermark during the world's 'sin of omission'⁸ in the Rwandan genocide.⁹ In a mere 100 days, up one million Tutsis and moderate Hutus were slaughtered.¹⁰ And more so, this tragedy occurred as 'the majority of the international community, impassive and apparently unperturbed, sat back and watched the unfolding apocalypse or simply changed (TV) channels.'¹¹

The 'lack of political will'¹² to act during those dark days leading to the catastrophic period not only unearthed the utter failure of humanity,¹³ but also rode roughshod over a clear legal obligation under international law.¹⁴ Significantly, the genocide amounted to a violation of a peremptory norm of law that obligated states and other international legal persons (primarily inter-governmental organisations) not to commit genocide, but also (according to Article I of the Genocide Convention) to prevent and punish the crime of

⁸ Term used by the Secretary General to describe the world's failure to prevent and halt the Rwandan genocide. See 'UN Chief's Rwanda Genocide Regret' *BBC News*, World Edition, March 26, 2004.

⁹ See chapter five.

¹⁰ See *Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, CM 12048 (LXVII), 29 May 2000. See *Question of the Violation of Human Rights and Fundamental Freedoms, In Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, ¶ 24, U.N. Doc. E/CN.4/1994/7 (1994). See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, U.N. Doc. S/1994/1405 (1994); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1996/68 (1996); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1995/7 (1995).

¹¹ Romeo Dallaire, *Shake hands with the Devil: The failure of Humanity in Rwanda* (Arrows Books, London, 2003) p. xvii.

¹² Kofi Annan, speech, 'Secretary-General Observes International Day of Reflection on 1994 Genocide,' Geneva, April 7, 2004. <http://www.unog.ch/news2/documents/newsen/sg04003e.htm>. See also Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch; Paris: International Federation of Human Rights, 1999); Astri Suhrke and Bruce Jones, 'Dilemmas of Protection: The Log of the Kigali Battalion,' in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick: Transaction Publishers, 1999); Gerard Prunier, *The Rwanda Crisis, 1959—1994: History of a Genocide* (London: Hurst & Co., 1995); Scott Feil, *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda: A Report to the Carnegie Commission on Preventing Deadly Conflict* (Washington, DC: Carnegie Commission on Preventing Deadly Conflict, 1998); Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict — Final Report*; UN Secretariat, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* supra note. 3, p. 1; and Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience* (Copenhagen: Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 1996).

¹³ See Romeo A. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, supra, note 11. General; For the Rwandan President Paul Kagame, the agenda of the international community was 'dictated by racist considerations or the colour of the skin.' See 'Rwanda Genocide 'Failure' Berated', *BBC News*, April 5, 2004.

¹⁴ Article I of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

genocide.¹⁵ Tragically, and typical of African regional conflicts, the repercussions of the 1994 Rwandan massacre went beyond the border of the small East African country.¹⁶ It 'ultimately triggered a conflict in the heart of Africa that [...] directly or indirectly touched at least one-third of all the nations on the continent.'¹⁷ And as the remnants of the genocide spilled over to the Democratic Republic of Congo, the UN approached it with the same lack of urgency and limited itself to sending a mere 5000 troops to a country the size of Western Europe.¹⁸

Coincidentally, as the UN Secretary General stood at the Memorial Conference on the Rwanda Genocide in 2004 to mark the 10th anniversary of the 1994 genocide and express his deep sense of remorse on behalf of the world,¹⁹ a somewhat similar catastrophe was underway in the Darfur region of the Sudan.²⁰ The rapid escalation of the new conflict a mere 10 years after the genocide aroused disturbing questions, particularly with regard to the lessons learnt by the UN the Security Council.²¹ However, the international community's ambivalence towards Africa can be traced from as early as the UN's inception in 1945. The controversial role played by the ONUC Forces in Congo between

¹⁵ See *Reservations to the Convention on Genocide*, 1951 I.C.J. Rep. 15, 23; see also *Case Concerning Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J., Rep. 3, 32). For discussion of the content of the treaty norm see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ 26 Feb. 2007 at paras. 161-7, where the Court analysed the obligation to prevent and punish as the express duty upon states in the Convention and found that this implied a duty on states not to commit genocide. 'In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide' (para. 166). Thus the treaty norm (upon which the rule of *jus cogens* is founded) is firstly one of preventing and punishing, but this necessarily implies that states should not commit genocide themselves. Given that this norm, as a rule of *jus cogens*, binds international organisations with separate personality as well as states, the imperative for organisations such as the AU to prevent genocide is clear.

¹⁶ See 'In Africa, Wars Spill over Borders', *Associated Press*, 9 March, 2008; Christian R. Manahl, 'From Genocide to Regional War: The Breakdown of International Regional Order in Central Africa', *African Studies Quarterly*, 2000; Human Rights Watch, 'Leave No One to Tell the Story; Genocide in Rwanda', *Human Rights Watch Publications*, 1 April, 2004, Peter Uvin, 'Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence', *Comparative Politics*, Vol. 31, No. 3 (Apr., 1999), pp. 253-271.

¹⁷ Organisation of African Unity, 'The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events', 2000, Introductory Chapter, para.3.

¹⁸ Ademola Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Hart Publishing Ltd., 2004), p.vii; Phoebe Okowa, 'Congo's Rebels and the Responsibility of Non-State Groups in Situations of Armed Conflict', *Paper*, International Law Association, A More Secure World: Our Shared Responsibility – What is the Role for International Law? University of Sussex, April 20 & 21, 2007.

¹⁹ See Secretary-General Kofi Annan's remarks at the Memorial Conference on the Rwanda Genocide, UN Press Release, SG/SM/ 9223/AFR/870, HQ/631, New York, 26 March, 2004.

²⁰ See chapter nine. See also Hugo Salim, 'Dithering over Darfur? A Preliminary View of the International Response', *International Affairs*, vol. 80, no. 5, pp. 811-828(18), (2004). See also International Crisis Group, 'Sudan: Now or Never in Darfur', *Africa Report N°80*, 23 May 2004.

²¹ See chapters three and nine. See article 24 (1) of the UN Charter.

1960 and 1964²² remained the UN's sole peace operation in Africa in the first four and a half decades of the organisation's existence.²³ However, until the fall of the Berlin wall, the UN's practice had been dominated by the power rivalry that characterised it, coupled with the threat and use of the veto.²⁴ Therefore, the organisation's disastrous record in the African continent was often excused on the grounds that the UN Security Council was divided on Cold War lines.²⁵ But despite the excuses, the enmity within the Council had not stopped the organ from functioning during the duration of this period that lasted until 1989.²⁶

²² Deployed by SC Res. 161, UN Doc. S/Res/161 (1961); See Osman Mohamed Awad, *The United Nations and Peace Enforcement : Wars, Terrorism and Democracy*, Aldershot: Ashgate, 2002.p. 153-165. See also Abi-Saab, Georges. *The United Nations operations in the Congo 1960-1964* (Oxford: Oxford University Press, 1978); Amirie, Abbas. *The United Nations intervention in the Congo crisis, 1960-1961: with special emphasis on the political role of the late Secretary-General, Dag Hammarskjold*, Ann Arbor (MI : University Microfilms, 1967); Burns, Arthur Lee and Nina Heathcote., *Peacekeeping by UN forces, from Suez to the Congo* (New York: Praeger; 1963); Dayal, Rajeshwar, *Mission for Hammarskjold: the Congo crises*, (London: Oxford University Press; 1976). Lefever, Ernest Warren, *Crisis in the Congo: a United Nations force in action*, (Washington, D.C.: Brookings Institution; 1965); Parsons, Anthony, *From cold war to hot war: UN interventions, 1947-1995* (London; Penguin Books, 1995) ; Adekeye Adebajo & Chris Landsberg, 'Back to the Future: UN Peacekeeping in Africa', in Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century* (Frank Cass Publishers , 2001); Ralph Zacklin', 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force: Theory and Reality-A Need for Change?* (Leiden, Martinus Nijhoff, 2005), p. 94; Christine Gray, *International Law and the Use of Force: Foundations of Public International Law*, (Oxford University Press, 2nd edition), 2004), pp. 202-204.

²³ Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf: Essays on Africa and the United Nations* (Johannesburg: Jacana, 2006). On African perspectives on UN peacekeeping, see Adekeye Adebabo, 'From Congo to Congo: United Nations Peacekeeping After the Cold War' in Ian Taylor and Paul Williams (eds.) *Africa in International Politics: External Involvement on the Continent* (London: Routledge, 2004); Ibrahim Gambari, 'The United Nations' in Mwesiga Beregu and Christopher Landberg (eds.), *From Cape to Congo: Southern Africa's Evolving Security Challenges*, (Boulder and London: Lynne Rienner, 2003); James Jonah, 'The United Nations', in Adekeye Adebabo and Ismail Rashid (eds.) *West Africa's Security Challenges: Building Peace in a Troubled Region* (Boulder and London: Lynne Rienner, 2004) and Agostinho Zacarias, *The United Nations and International Peacekeeping*, (London: I.B. Tauris and Co., 1996); Norrie MacQueen, *United Nations Peacekeeping in Africa Since 1960* (Longman; 1st edition, 2002).

²⁴ See chapter eight. See also Article 27 (3); N.D. White, *The United Nations and the Maintenance of International Peace and Security*, (Manchester, England; New York: Manchester University Press; (1990), p.10; Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra note 22*, pp. 1-29.

²⁵ N.D. White, *The United Nations and the maintenance of international peace and security*, (Manchester, England; New York: Manchester University Press, 1990), p.10. See also Christine Gray, *International Law and the Use of Force* (2nd edition, Oxford University Press, 2004) p. 195.

²⁶ N.D. White, 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17 (2004), pp.645-672.

1.2 The Entry of the Post Cold War Era: Towards the Regionalisation of African Peace and Security

In spite of the uncertainties that would later emerge, the end of the Cold War period 'gave rise to hopes of a new era for the UN and of a New World Order'²⁷ founded on the rule of international law.²⁸ Indeed, for some, it represented a new dawn which laid down the requisite 'conditions for the United Nations to fulfil completely the promise and the vision of its founders.'²⁹ Certainly, the enthusiasm prevailing at the time saw the famous publication of the Secretary General's *Agenda for Peace*³⁰ (1991). However, despite the buoyancy, the UN's ambivalent approach towards Africa and the marginalisation of the continent continued well beyond the immediate post Cold War era.³¹

The situation in Africa at the time found expression in the OAU's Yaoundé Declaration of 1996. At 'the close of the 20th Century [...] of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed, and the most vulnerable as far as peace, security and stability are concerned.'³² As it turned out, the UN's hasty retreat during the Somali debacle³³ (1992-95) and other episodes of UN failure subsequently shifted greater responsibility to African sub regional organisations.³⁴ Therefore, after much dithering, African leaders finally established the crucial link between wars and economic development and placed the concept of peace and security into its proper perspective.

It was in this context that agencies such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC)

²⁷ Christine Gray, *International Law and the Use of Force*, supra note 22, p. 153, citing UN Blue Book Series, Vol IX *The UN and the Iraq/ Kuwait Conflict 1990-1996*; mention by G Bush Senior, Speech to Congress, "New World Order" March 6th, 1991; Jean Allain 'The True Challenge to the United Nations System of the Use of Force: The failures of Kosovo and Iraq and the Emergence of the African Union,' *Max Planck Yearbook of United Nations Law*, Vol.8, 2004, pp. 237-289.

²⁸ See chapter three. See also Niels Blokker and Nico Schrijver, 'Introduction', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, supra 22. p.xii.

²⁹ See Osman Mohamed Awad, *The United Nations and Peace Enforcement : Wars, Terrorism and Democracy* (Aldershot: Ashgate, 2002), p 25. Osman quotes the Financial Times, 17 July 1991, p.4.

³⁰ See B. Boutros- Ghali *An Agenda for Peace* (United Nations, New York, 1992).

³¹ See chapter three.

³² See Organisation of African Unity (OAU), *Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaounde Declaration (Africa: Preparing for the 21st Century)*, AHG Decl. 3, pmb. para. 2, OAU AHG/Res. 247-257 (XXXII) (8-10 July 1996).

³³ See chapters five and eights.

³⁴ See chapters four-nine.

transformed themselves from mere trading blocks to peace and security regimes.³⁵ Meanwhile, the 38 year old Organisation of African Unity (OAU), 'like the prehistoric dinosaurs, was facing the threat of extinction for failing to adapt itself to changed global and regional political, social and economic settings and rising up to the new challenges faced by the continent in the post Cold War era.'³⁶

1.3 The Emergence of the African Union in the 21st Century: The 'New Dawn on Africa and for Africa'?³⁷

Although the UN had clearly failed its responsibilities, Africans similarly conceded that the systematic human rights abuse in the continent had also been as a result of their own inaction and failure due to the strict adherence to the notion of sovereignty.³⁸ However, the painful lessons learnt in the aftermath of the Rwandan genocide subsequently led the OAU to institute a Panel of Eminent Personalities³⁹ in 1998, whose mandate⁴⁰ included making 'recommendations about how to avert similar tragedies in the future.'⁴¹ The Panel in turn called upon the OAU 'to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations.'⁴²

³⁵ See chapter Four.

³⁶ E Baimu, K Sturman, 'Amendment to the African Union's Right to Intervene', A shift from Human Security to Regime Security?', *African Security Review*, Vol.12. No 2, (2003).

³⁷ See Opening Statement by Mr Amara Essy, Secretary-General of the OAU, 38th Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban South Africa.

³⁸ See chapter five.

³⁹ The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events (IPEP) was set up by decision of the Council of Ministers of the OAU (CM/Dec.409 (LXVIII)), and endorsed by the Assembly of Heads of State and Government at its 34th Ordinary Session, Ouagadougou, June 1998.

⁴⁰ The mandate of the High level panel was to inquire into the underlying causes of the mass killings in Rwanda, look at their consequences throughout the Great Lakes region, assess the roles and responsibilities of the various local, regional and international actors including the UN and its agencies and make recommendations about how to avert similar tragedies in the future. It comprised of seven members headed by Botswana's former President, Sir Ketumile Masire. Other members included senior UN official such as Mr. Stephen Lewis (UNICEF), Ms. Ellen Johnson Sirleaf who is current president of Liberia, Ms. Lisbet Palme of Sweden (UNICEF), Justice P.N. Bhagwati a former Chief Justice of the of India and member of the Permanent Court of Arbitration at The Hague., General Amadou Toumani Touré of former head of state of Mali. Organisation of African Unity, See '*The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*,'2000.

⁴¹ Organisation of African Unity, '*The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*', 2000, Conclusions at Chapter 24.

⁴² *Ibid.*

It was in July 2000 that African leaders replied to this challenge through the adoption of the Constitutive Act of the AU.⁴³ This treaty gives the Union, acting collectively, the right to intervene in order to stop war crimes, genocide, crimes against humanity as well as serious threats to legitimate order to restore peace and security.⁴⁴ Further, member states have a right to request such intervention.⁴⁵ As shown in the coming chapters, this being the first and only international treaty to contain such a right, it raises fundamental questions relevant to international law, particularly with respect to the Act's compatibility with traditional concepts such as the key provisions on the use of force contained in article 2(4) and Chapter VIII of the UN Charter.

The object of this thesis is therefore to demonstrate the manner in which the AU's security institutional framework possesses the potential to redraw the landscape of international law, with significant ramifications for the UN, member states and regional organisations, as well as for the way in which we understand and interpret mechanisms for conflict security. This is mainly because during the drafting of the UN Charter, regionalism was accepted conditionally in that it was subordinate to universalism.⁴⁶ Hence, until now, the general understanding has been that a regional organisations' right to intervene has been viewed as secondary and ultimately under the express authorisation from the UN.⁴⁷

2.1 The Purpose, Research Questions and the Major Arguments of Thesis

The creation of the AU as Africa's response to the return to mass murder in the continent at the turn of the new millennium also occurred at a significant period in world history and in particular, the year of the tragic events of September 11, 2001. During this age, the combination of challenges 'revealed that that states, as well as collective security institutions, [had] failed to keep pace with the nature of threats facing the international community.'⁴⁸ Yet, although it was the underdevelopment

⁴³ The Constitutive Act of the AU entered into force on 26 May 2001, after Nigeria became the 36th member state to deposit its instrument of ratification.

⁴⁴ Article 4 (h) of the Constitutive Act of the African Union.

⁴⁵ Article 4 (j).

⁴⁶ See chapter four. See also I.Claude, *Swords into Plowshares: The Problems of International organizations* (Random House, 1965) p.106.

⁴⁷ See chapter four. See also Article 53 UN Charter.

⁴⁸ See the Report of the United Nations High Level on Threats Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, 12, December 2004.p. 13.

caused by catastrophic conflicts, such as Rwanda and Darfur that was most pressing for Africa,⁴⁹ much ink was instead spilled on the impact of the war on terror.⁵⁰

Although the continent had also suffered as a result of the terrorism phenomenon, such as the bombing of the American embassies in East Africa (1998), these attacks were mainly directed at Western interests and therefore formed part of the threats facing the developed world. As it turned out, it was against this background that with the continent having 'witnessed the horrors of genocide and ethnic cleansing perpetrated on its own soil and against her own kind,'⁵¹ African leaders created a robust security institutional framework unparalleled in the Asian, Middle East and South American regions.

Therefore, it is within this context that African regional security deserves special attention, particularly given that it brought the question of intervention by regional bodies into sharper focus. And it does so more than other treaties establishing other major regional arrangements, such as the Organisation of American States (OAS) Charter 1948 and the North Atlantic Treaty (NATO) 1949.⁵² This is primarily because, as shown in chapter four, the Charters of the latter organisations clearly 'subordinate themselves to the dictates of the United Nations system.'⁵³ In sharp contrast, the institutional set up of the AU departs from this practice in a number of ways, the majority of which form the subject matter of the thesis.

Firstly, the Constitutive Act of the AU brought the relationship between universalism and regionalism with respect to peace and security to the fore. Significantly, it seeks to institutionalise other grounds for intervention wider than those established under the universal system contained in the UN Charter; namely self-defence and measures

⁴⁹ South African president Thabo Mbeki quoted in Angela Quintal, 'Mbeki sees the Awful Truth: The UN is but a Charade', *The Sunday Independent*, 26 September, 2004; Chris Landsberg, 'The UN High-Level Reports and Implications for Africa', *Security Dialogue*, Vol. 36, No. 3, 388-391 (2005) and chapter eight.

⁵⁰ See e.g Paul Eden, Thérèse O'Donnell, *September 11, 2001: A turning Point in International Law?* (Transnational Publishers, inc. 2005); N.J. Schrijver, 'September 11th and Challenges to International Law', in Boulden Weiss (eds), *Terrorism and the UN: Before and After September 11*, (Indiana University Press, 2004), pp. 55-73; A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law,' 12 *EJIL* (2001), 993.

⁵¹ T Maluwa 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union' (2002) 8 *African Yearbook of International Law* 28.

⁵² See chapter four.

⁵³ Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 27.

under Chapter VII.⁵⁴ Furthermore, while the grounds of intervention under the Act, including genocide, war crimes and crimes against humanity are relatively clear,⁵⁵ it also curiously introduces a new concept of 'threat to legitimate order' which is not defined in the Act or in subsequent protocols.⁵⁶ Finally, given the UN High Level Panel's fear that 'allowing one to act is to allow all,'⁵⁷ the AU's right to intervene further raises the questions as to whether it amounts to an opening of the flood gates i.e. for other regional organisations such as NATO and OAS.⁵⁸ Most significantly, the overall abstract nature of certain key provisions further raised serious questions in regard to the appropriate relationship between the AU and the UN, which require clarification and elaboration.

Indeed, the unfolding AU framework challenges the manner in which states and international commentators understand, interpret and apply international law, particularly within the area of collective security. It is against this background that this study aims to make a contribution to both academic and policy debates around the issues relating to Africa's evolving security and its relationship with the UN and general international law. Although considerable literature⁵⁹ on this area of law has

⁵⁴ See chapter three.

⁵⁵ See chapter seven. See also art 5 Rome Statute establishing the International Criminal Court.

⁵⁶ Evarist Baimu & Kathryn Sturman, Amendment to the African Union's Right to Intervene, *supra* note 36; B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention,' *International Law Review of the Red Cross*, 85 (2003); C Packer and Rukare, 'The New African union and its Constitutive Act', *96 American Journal of International Law* (2002) 372.

⁵⁷ UN High Level Report, *A More Secure World*, *supra* note 48, p.63, para.191.

⁵⁸ See chapter seven.

⁵⁹ Eg. Tim Murithi, 'Institutionalising Pan-Africanism: Transforming African Values and Principles into Policy and Practice,' *ISS Paper 143*, (2007); Paul D. Williams, 'From the Norm of Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture', *African Affairs*, (March 2007); See also Kithure Kindiki, 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives', Monograph 131, in *Rethinking the Role of the United Nations and the African Union in Darfur*, *Institute of Security Studies*, (May 2007); T Maluwa 'Reimagining African unity,' *supra* note 51; Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union', *Netherlands International Law Review*, Volume 51, Issue 02, (2004), p. 195; B.Kioko, 'The Right to Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention,' *supra* note 56; Cilliers, J. and Sturman, K. 'The Right Intervention: Enforcement Challenges for the African Union,' *Africa Security Review* Vol.11. No.3 (2002.); Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to intervene, *supra* note 36; Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 27. K. 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', 3 (1) *African Human Rights Law Review Journal* (2003); Jakkie Cilliers, 'Commentary: Towards the African Union', *African Security Review* Vol 10 No 2, (2001); Nsongurua J. Udombana, 'Critical Essay: Can the Leopard Change Its Spots? The African Union Treaty and Human Rights', Vol.17, No.6, *American*

increased in recent years, this study takes up a timely opportunity to embark on methods that present a rounded picture of the AU's regional approach in the promotion of peace and security against the background of Rwanda. It also comes seven years after the establishment of the AU⁶⁰ and five years into the Darfur conflict which forms the first critical test of the organisation and its relationship with the UN.⁶¹

The thesis posits that there needs to be a serious rethink of the UN's approach to the post Cold War African regional conflicts. One of its major arguments is that despite the danger of fragmentation to the international system due, in part, to regionalism, the recent practice of Africa's evolving regime of peace and security and its relationship with the UN, demonstrates the manner in which the decentralisation of the collective security system may offer viable prospects for promoting peace. In doing so, the study aims at enhancing our understanding of the legal and actual capabilities of the AU to create norms and practices that promote regional peace and security and in the process, compliment the UN's wider role of the maintenance of international peace and security.

2.2 Introducing the Major Themes, Perspectives and Approaches of the Thesis

Having set the conceptual background to the detailed discussions that form the basis of this study, the rest of this introductory chapter sets the main approaches to the discourse with particular emphasis of the recurring themes which resonate throughout the thesis. It starts with an explanation of the major methods and theoretical framework employed, in order to answer the underlying research questions. Having discussed the interplay of the main themes, it ends with an outline of the thesis structure.

In addressing the controversial and topical nature of the current debate with regard to the function of regionalism in collective security, a conceptual analysis is important as a useful tool for enhancing scholarly argument, communication and clarification. For this

University Law Review, (2002); Magliveras K.D and Naldi G.J, 'The African Union: A New Dawn for Africa', *International and Comparative Law Quarterly*, Volume 51, Number 2, (April 2002), pp. 415-425(11)

⁶⁰ See chapter five.

⁶¹ See chapter nine.

reason, what follows is an explanation of the different approaches and perspectives that have shaped the thesis and its insights into current trends in international legal studies. The background presented in this section highlights the themes and perspectives that shape the study in regard to the formulation of the research questions, thesis format and the conclusions reached.

The starting point to attaining the outlined objectives is to explore the international legal theories that suit this study. Although the issues surrounding the emergence of regionalisation of peace and security involve diverse theoretical and practical areas of examination, this section restricts itself to a review of the major theories employed. Therefore, it needs to be said from the onset that the approaches, themes and perspectives discussed herein are by no means exhaustive. Nevertheless, the ones described in this section immensely assist the thesis in examining the debates. In doing so, the study bears in mind the different contexts in which existing practice and literature have been understood.

The thesis starts from an international perspective, which is partly borne out of the realisation that, in a time of rapid globalisation, key academics have tended to adopt this approach in interpreting their perceptions of the activity of international legal entities operating on the international plane.⁶² It thus relies heavily on the theoretical approaches by eminent scholars such as Christian Tomuschat,⁶³ Anne-Marie Slaughter⁶⁴ and Antonio Cassese.⁶⁵ The use of this approach in this study is useful in examining Africa's security system which is inextricably linked to independent sovereign states, which in turn, are related to the UN, other international and regional organisations, as well as individuals. Though forming an autonomous system on its own, this

⁶² On this perspectives, See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004); Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' 87 *American Journal of International Law*, (1993), pp. 205-239.

⁶³ C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Receuil des Cours* (1999).

⁶⁴ See Anne-Marie Slaughter, *A New World Order*, *supra* note 62; Slaughter Burley, 'International Law and International Relations Theory', *supra* 62; Anne-Marie Slaughter, 'International Law in a World of Liberal States.' *EJIL*, Vol. 6, No. 1, (1995) pp. 503-538; Slaughter Burley, 'International Law and International Relations Theory,' *supra* note 62.

⁶⁵ Antonio Cassese, *International Law* (Oxford University Press, 2005); Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008).

arrangement represents only a part of a structure embedded within a wider international legal system that is underpinned by certain fundamental values.⁶⁶

Therefore, this approach challenges the traditional belief of international law as the mere legal regulation of relations between states.⁶⁷ This perspective is immediately evident in chapter one on the thesis. The discussion contained therein explores the major features of the evolving international legal system, including the nature, principles and values that bind the international community with regard to peace and security. This analysis in turn introduces a key theme of the thesis which highlights the manner through which the international legal system is constantly compelled to develop and live up to the challenges facing the international community amidst diverse political and geostrategic realities, as well as contemporary threats in order to assert its legitimacy and effectiveness in peace and security issues.

As stated earlier, this study advocates the decentralisation of certain aspects of universalism through streamlined regionalisation of peace and security. However, it acknowledges that any regional action must be carried out within the permissible ambits of the law. Therefore, in the various discussions, the study engages legal positivism in order to identify, analyse and explain the relevant law as it stands.⁶⁸ This approach will be particularly evident in the examination of the rules within the UN Charter, which have dominated the international legal system since 1945. However the study does not restrict itself to this rather 'conservative approach.'⁶⁹ Instead, it merely uses it as a foundational base prior to critiquing the law from other points of view.⁷⁰

⁶⁶ For a display of this approach, see Paul D. Williams, 'From Non-Intervention to Non-Indifference' *supra* note 59.

⁶⁷ For a similar approach, see Robert McCorquodale, 'The Individual and the International Legal System', in Malcolm D. Evans, *International Law* (Oxford University Press, 2006), pp. 307-332.

⁶⁸ On legal positivism, see Brownlie, *The Rule of Law in International Affairs* (The Hague/London/Boston: Martinus Nijhoff, 1998), chapter 1.

⁶⁹ Term used in regard to legal positivism in Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts-A Positivist View,' 93 *American Journal of International Law*, (1999) p.302.

⁷⁰ On critical approaches, see Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton, New Jersey: Princeton University Press, 2005); Carty, A. 'Critical International Law: Recent Trends in the Theory of International Law' 2 *European Journal of International Law* (1991) 66; Kennedy, D. *International Legal Structures* (Baden-Baden: Nomos, 1987); M. Koskenniemi, 'The Politics of International Law' (1990-1991) 1 *European Journal of International Law* 4; N. MacCormick, *Questioning Sovereignty, Law, State and Practical Reason* (Oxford: Oxford University Press, 1999) and ; I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism' 61 *British Year Book of International Law* (1990), 339.

Indeed, the study challenges the traditional positivist law. This is because legal positivism, 'even in its purest form, is never immune to changes in meaning and to the consequent informal development of law.'⁷¹ However, although the thesis is heavily grounded on the need for reform, the study in no way subscribes to the idealist attempts to reimagine the entire legal system.⁷² Instead, the thesis attempts to strike the right balance in its formulation of a framework through which the regionalisation of peace and security may occur in a practical manner and also within the ambit of the law.

It was mentioned earlier that the thesis presupposes the existence of an international legal system. Therefore, in discussing the fundamental values uniting the international community, as well as their enforcement, the thesis borrows from the emerging constitutional approach.⁷³ And although warning has been made against this approach to international law,⁷⁴ the domestic analogy is useful in demonstrating the manner through which the law seeks to promote and protect certain values, particularly the

⁷¹ U. Fastenrath, 'Relative Normality in International Law', (1993) 4 *EJIL*, 305.

⁷² For an idealistic perspective, see Philip Allott, *Eunomia: New Order for a New World* (Oxford: OUP, 1990); Philip Allott, 'International Law and International Revolution: Reconceiving the World,' Josephine Onoh lecture (1989) (reprinted in Scott Davidson *et al* (eds), *Contemporary Approaches to International Law* (The Hague: Kluwer Law International 2002). Available at http://www.hull.ac.uk/law/pubs/studiesinlaw/sil_papers.html.; Allott, 'The European Community is not the True European Community' (1990-1991) 100 *Yale Law Journal* 2485.

⁷³ On constitutional approaches to law, see B Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* 539 (1998); Fassbender, Bardo, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague; Boston [MA]: Kluwer Law International, 1998); Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004); Sandra Szurek 'La Charte des Nations Unies: Constitution Mondiale?', in J-P Cot, A Pellet, M Forteau, *La Charte des Nations Unies: Commentaire article par article* (3rd ed., Economica, Paris, 2005). See also Joseph Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (Cambridge CUP: 2003); Neil Walker, 'Post-national Constitutionalism and the Problem of Translation', in Weiler and Wind (eds) *European Constitutionalism Beyond the State* (Cambridge CUP: 2003); Weiler, *The Constitution of Europe* (Cambridge: CUP 1999); de Búrca, 'The Constitutional Challenge of New Governance in the European Union,' 28(6) *ELRev*, (2003), 814 at 821.

⁷⁴ E.g, the Appeals Chamber of the Yugoslav Tribunal warned that 'the transposition on to the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and apprehension.' See the *Blaskic Case, the Judgement on by the Appeals Chamber of the Yugoslav Tribunal on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber*, 110, *ILR*, 1997; paras.30-31. See also Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law', *Paper*, University of Leeds; 14 March 2007. Available at <http://www.law.leeds.ac.uk/leedslaw/webdocs/leedslaw/uploadeddocuments/cfig-wood.doc>; Michael Wood, 'The UN Security Council and International Law,' *Paper*, Sir Hersch Lauterpacht Memorial Lectures, University of Cambridge 7-9 November, 2006;

peremptory norms that seek to protect fundamental human rights, through creating 'rudimentary structures for its enforcement.'⁷⁵

In determining the effective methods for international law enforcement, highlight is made of a central theme of this study which relates to the debate surrounding regionalism and universalism. The regionalism versus universalism debate reflects the traditional disagreement between the proponents of centralism and local governance that persist at the domestic level.⁷⁶ These disagreements centre on the effectiveness of both forms of governance and enforcement mechanisms. Despite the assertion that 'the use of domestic law analogies in international law is often misleading,'⁷⁷ Gattini makes a compelling argument. He argues that international law undergoes a process just 'as much as the domestic constitutional systems historically experience two different pulls, the one towards a greater centralisation of competences, in order to better fasten the system, and the other towards greater decentralisation, in order to better respect local specificities.'⁷⁸

This hypothesis is useful in assisting the thesis to trace, explore as well as analyse the most desirable framework in which peace and security issues within the international arena ought to be addressed and also the extent to which the two regimes can be reconciled. In doing so, what becomes clear is that the regionalisation of peace and security within universalism 'is not a sign of disruption but quite on the contrary as evidence of a more developed stadium of its constitutionalization.'⁷⁹

In doing so, this approach encounters a major theme that runs throughout the thesis, which is that of tension between two fundamental norms underpinning the existing international legal system. With this regard, the strain revolving around the imperatives of state sovereignty and recent demands for the protection of fundamental human rights

⁷⁵ See, Erika de Wet, 'The International Constitutional Order,' *International and Comparative Law Quarterly*, 55, (2006), 51-76.

⁷⁶ Christoph Schreuer, 'Regionalism v. Universalism' *European Journal of International Law*, Vol. 6 (1995) No. 3.

⁷⁷ Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law', *Paper*, University of Leeds, 14 March 2007. Available at <http://www.law.leeds.ac.uk/leedslaw/webdocs/leedslaw/uploadeddocuments/cfig-wood.doc>.

⁷⁸ Andrea Gattini, 'Sense and Quasisense of Schmitt's *Großraum* Theory in International Law – A Rejoinder to Carty's 'Carl Schmitt's Critique of Liberal International Legal Order,' *Leiden Journal of International Law* (2002), 15. 53-68.

⁷⁹ *Ibid.*

deserve attention. This is because any tilt within the system would in turn impact on the traditional Westphalian understanding of state sovereignty, which privileges the rights of states, and has been the foundation of the international system,⁸⁰ particularly in Africa.⁸¹ In an attempt to strike a right balance between the two regimes, the thesis suggests that in certain well defined circumstances, the only, or at least the best, way to protect fundamental human rights is for African regional collective mechanisms, acting alone but preferably in concert with the UN, to lift the veil of sovereignty of a particular state in times of grave peril.

2.3. Borrowing from Other Approaches to International Law and Additional Themes informing the Thesis

In support of the theories described above, the thesis bears in mind that, 'international law cannot exist in isolation from the political factors operating in the sphere of international relations.'⁸² For this reason, this study borrows key theories and approaches from other disciplines such as history, politics, sociology and philosophy.⁸³ Therefore, in the majority of its chapters, the thesis begins with a historical approach which sets the contextual background to the problem and highlights the relationship, as well as shortcomings of law and international society.⁸⁴

⁸⁰ See its application in chapters two, three, five and nine.

⁸¹ See chapter five.

⁸² D. W. Greig, *International Law*, (2nd edn., Butterworths: London, 1976), p. 1. See also Shirley V. Scott, 'International Law as Ideology: Theorising the Relationship between International Law and International Politics', *European Journal of International Law*, Vol. 5 (1994) No. 3. Anne-Marie Slaughter, 'International Law in a World of Liberal States', *supra* note 64.

⁸³ On the co-relation of law with these disciplines, see Hueck 'The Discipline of the History of International Law: New Trends and Methods on the History of International Law,' 3 *Journal of the History of International Law*, (2001) 194; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: CUP, 2002); Onuma, Yasuaki, 'When was the Law of International Society Born-An Inquiry of the History of International Law from an Intercivilizational Perspective' 1 *Journal of the History of International Law* (2000), 1; Schwarzenberger, 'Jus Pacis Ac Belli?' 37 *American Journal of International Law*, (1943), pp.460-479; B Lange, 'Researching Discourse and Behaviour as Elements of Law in Action' in R Banakar and M Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005); D Hirsch, 'Cosmopolitan Law, Agency and Narrative' in M Freeman, (ed) *Law and Sociology* (Oxford: OUP, 2006); and D M Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development' 82 *Yale Law Journal*, (1972), pp. 1-50.

⁸⁴ For examples of such approaches, see Martti Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 82; Onuma, Yasuaki, 'When was the Law of International Society Born?' *supra* note 82; David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion,' 17 *Quinnipiac Law Review*, (1997), 99; Hueck 'The Discipline of the History of International Law: New Trends and Methods on the History of International Law' 3 *Journal of the History of International Law* (2001) 194.

Such an approach is visible in the work of Koskenniemi whose historical approach to law asserts that legal rules are apologetic or utopian and attempt to hide the fact conflicts must be solved through politics.⁸⁵ This perspective, though visible across the thesis, is most clear from chapter two whose brief history of international law highlights power politics from the Westphalian stage to the 18th century which stamped international law as a 'product of Western civilization and bore the imprint of Eurocentrism, Christian ideology, and of a 'free market' outlook.'⁸⁶

From a realist point of view, history and the balance of power politics is a common phenomenon in any legal system. When tied to an international law perspective, the reality of modern international relations and politics within the legal system is evidenced within the UN Security Council whose practice affirms that powerful states have often devised 'international rules to serve their own interests.'⁸⁷ From this angle, the law represents the 'will of the ruling class,' which in turn represents a classical Marxist perspective.⁸⁸

Although such an analysis immediately raises doubts on the motives of international law,⁸⁹ it is important to emphasise that law is also about values and aspirations of the human race.⁹⁰ Therefore, in examining the application of international law in a world of diversity, the thesis identifies areas of convergence as well as divergence within regions, drawing comparisons between regions to explore the unique mix of cultural, political and security issues that influence the formulation of peremptory legal norms.⁹¹ And given that the majority of these norms emanate from the *inherent* dignity of man, the thesis also makes acknowledgment of natural law perspectives,

⁸⁵ M. Koskenniemi, *From Apology to Utopia*, (Cambridge: Cambridge University Press, 2005); M; Koskenniemi, 'The Politics of International Law' *supra* note 70.

⁸⁶ A. Cassese *International Law*, (Oxford: Oxford University Press, 2001) p. 27. See also Y. Onuma, 'When Was the Law of International Society Born? *Supra* note 82 at p. 27.

⁸⁷ A. Cassese, 'International Law,' *supra* note 65 at p. 27. See also chapters two and eight.

⁸⁸ Chimni, 'An Outline of a Marxist Course on Public International Law,' 17 *Leiden Journal of International Law* (2004) 1-30.

⁸⁹ Higgins R, *Problems and process : international law and how we use it*, (Oxford : Clarendon Press, 2006) p.11.

⁹⁰ See chapter one.

⁹¹ See chapter one and two.

which are useful in explaining the rationale for the special status of *jus cogens* rules within the legal system and the need for their protection.⁹²

Using the sociological perspective,⁹³ a picture is portrayed of international law as a vehicle for achieving universal principles and interests and protecting regional values.⁹⁴ An example of extraterritorial principles are those that forbid catastrophic crimes such as genocide, war crimes and crimes against humanity,⁹⁵ through regional and universal initiatives by organisations such as the AU's right to intervene⁹⁶ and the UN's responsibility to protect.⁹⁷ Furthermore, these crimes also form the *ratione materiae* of the Yugoslav and Rwandan International Criminal Tribunals⁹⁸ and fall under the jurisdiction of the International Criminal Court where they have been termed as 'serious crimes of concern to the international community as a whole.'⁹⁹

Finally, given that this study focuses on the relationship between African regional law, the UN and general international law, consideration of particular theories is given due to their relation with the traditional discourse on Africa. Of particular importance is the post colonial theory which asserts that the law maintains relations based on colonial domination and does not always reflect the consent of the formerly colonised countries.¹⁰⁰ This approach is closely tied to the majority of theories described above, as

⁹² For a modern defence of naturalism, see, Robert P George, *In Defence of Natural Law* (Oxford: OUP, 1999). See also Lauterpacht, 'The Grotian Tradition in International Law' 23 *British Yearbook of International Law* (1946) 1; Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals-A Critique' 3 *European Journal of International Law* (1992), 65.

⁹³ On the relation between sociology and law, see Schwarzenberger, 'Jus Pacis Ac Belli?' 37 *American Journal of International Law* (1943), 460-479; B Lange, (2005) "Researching Discourse and Behaviour as Elements of Law in Action" in R Banakar and M Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart); D Hirsch, 'Cosmopolitan Law, Agency and Narrative' in M Freeman, (ed) *Law and Sociology* (Oxford: OUP, 2006); and D M Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development' 82 *Yale Law Journal*, (1972), pp. 1-50.

⁹⁴ Higgins R, *Problems and process*, *supra* note 89 at p.11.

⁹⁵ See chapters one and two.

⁹⁶ Article 4 (h) of the Constitutive Act of the African Union. See also chapter six.

⁹⁷ 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, para 138 &139, U.N. Doc A/60/L.1 (Sept.20,2005). See also chapter eight.

⁹⁸ See article 3, 4 and 5 of the Statute of the International Tribunal for Former Yugoslavia and article 2, 3 and 4 of the Statute of the International Criminal Tribunal for Rwanda.

⁹⁹ Article 5 of the Rome Statute of the International Criminal Court 1998.

¹⁰⁰ For more on post-colonial theories, see B.S. Chimni's *International Law and World Order: A Critique of Contemporary Approaches* (London/Delhi: Sage, 1991); Balakrishnan Rajagopal's *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: CUP, 2003); Anthony Anghie's *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005); Anthony Anghie's 'Francisco de Vitoria and the Colonial Origins of International Law,' 5 *Social & Legal Studies* (1996), 321; Orford, A. 'Muscular Humanitarianism:

none denies the fact that during the formative years of international law, most African states were colonies and thereby 'powerless to influence the decisions being taken.'¹⁰¹

As it were, their initial interaction with the law was animated by 'civilizing missions,'¹⁰² followed by arbitrary importation of norms that were a 'pretender to the status of universal validity.'¹⁰³ With Africa having come of age to assert itself at a time of rapid globalisation, a common thread that runs throughout the thesis highlights African perspectives on international law, particularly in demonstrating the continent's understanding, interpretation and application of key provisions of the UN Charter, international custom and other general principles of international law. Finally, taking a constructivist approach,¹⁰⁴ the thesis looks at the longer prospects that the AU and the UN possess in the promotion and maintenance of regional and international peace and security.

3.1 Structure of the Thesis

Having outlined some of the approaches, themes and perspectives which relate directly to the thesis study and the practicalities of carrying out the research, what follows is an outline of the structure of the study which is organised in three parts and in turn divided into ten chapters.

3.2 Part One

The first part of the thesis focuses on the evolution of the international legal system, including the function of the UN and the doctrine of regionalism within the legal system. In doing so, it presents an analytical framework for the major issues addressed throughout the thesis. Therefore, chapter one will specifically examine the nature of the principles, norms and values that bind the international community and

Reading the Narratives of the New Interventionism', 10 *European Journal of International Law*(1999), 679.

¹⁰¹ See Statement of Kofi Annan, UN Secretary General on the Occasion of the 4th Ordinary Session of the Assembly of African Union, 30 January, 2005. Abuja, Nigeria.

¹⁰² See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 100.

¹⁰³ Prof Ali Mazrui, 'Pretender to Universalism: Western Culture in the Globalising Age', *BBC World Service, World Lectures* (2000). Available at http://www.bbc.co.uk/worldservice/people/features/world_lectures/mazrui_lect.shtml

¹⁰⁴ On constructivism, see Bruneé and Toope, 'International Law and Constructivism' (2000-2001) 39 *Columbia Journal of Transnational Law* 19; Shaw, 'Postnational Constitutionalism in the European Union,' 6 (4) *Journal of European Public Policy* (1999), 579-97.

argue that these are better achieved collectively, through institutional regimes, such as regionalism and universalism, as opposed to unilateralism.

Having traced the roots of international law to the regionalism phenomenon, chapter two highlights the journey of international law, from being purely of European origin to true universality. In the process, highlight is made of the tension between Western and universal values as the interaction of norms from different regions intensify. What will become obvious from this discussion is that rather than treating the relationship between regionalism and universalism as one of contest, it is their coherent cooperation, and not their opposition which should lie at the heart of the debate.

This discussion paves way for an analysis of the peace and security system under the UN framework, explored in chapter three. Such an analysis is useful in setting the background for demonstrating the similarities, differences as well as relationship between the AU's right to intervene and the UN's prohibition of the use of force contained in article 2(4) of the Charter, discussed in chapter seven. Meanwhile, the analysis of the UN collective security system in chapter three sets a foundation for the next chapter, which narrows on the regional legal principles under the UN Charter, particularly those contained in Chapter VIII and their relationship with article 103 of the Charter.

The aim and purpose of chapter four is to demonstrate the evolving function of regionalism within the UN system. The general lessons and uncertainties that emerge from this focus will ultimately assist in drawing the pattern that the UN and regional organisations are likely to follow in pursuit for peace and security in later chapters. The key theme that is raised by this chapter is not at what level the area of peace and security is best placed, but rather on the direction that the relationship between regionalism and universalism must take in order to meet the challenges brought about by potential threats, and ultimately promote and maintain peace and security.

3.3 Part Two

Part two explores Africa's emerging architecture of regional peace and security, in order to better understand the envisaged relationship with the UN and international law. With this objective in mind, chapter five offers a chronological historical,

political and legal synopsis, including an exploration of the rationale that led to the formation of the AU. This approach magnifies a recurring theme of the thesis that represents the AU as a radical departure from the peace and security framework of the former Organisation of African Unity (OAU). Furthermore, in addition to setting the scene for a discussion of the new peace and security regime, this chapter also introduces a comparative tone and engages in a more specific examination of the differences and similarities and relationship between the Charter of the OAU and the Constitutive Act of the AU.

What will become clear from this discussion is that the AU's institutional framework is founded on new approaches to peace and security, which are explored in chapters six and seven. In particular, chapter six engages in a qualified analysis of the roles and functions as well as the differences in its internal composition of the major organs of the AU, as well as the designated relationship with the UN. Having made the case for a division of responsibilities between the AU and the UN, this examination paves way for a more specific discussion of the relationship between African regional security and its relationship with the UN's collective system.

Therefore, chapter seven narrows in on the legal issues surrounding the AU's 'right to intervene' in member states.¹⁰⁵ In particular, this chapter will examine and explore the provisions contained in the Constitutive Act and assess their compatibility with traditional concepts, such as the key provisions in article 2 (4) and Chapter VIII of the UN Charter. It finally concludes by providing legal and other justifications for the ability of the AU to legally intervene including, under certain circumstances, without authorisation of the UN Security Council but still be in apparent conformity with the principles and purposes of the UN. Having done so, the latter point is reinforced in chapter eight which begins by looking at African perspectives on UN reform and argues that the AU's recent contribution to the formulation of the current reform agenda further displayed Africa's intention to strengthen cooperation, rather than usurp the UN's role in peace and security

3.4 Part Three

¹⁰⁵ Article 4 of the Constitutive Act of the African Union.

Part One: Theoretical Framework

The final part brings together the major legal-political issues explored throughout the thesis and acts as a forum through which major norms may be tested, including the right to intervene and the responsibility to protect, as well as how the relationship between the UN and AU is useful in drawing future patterns. Hence chapter nine looks at the manner in which the lessons from the Darfur conflict provide a framework of cooperation between the UN and the AU. It does so by examining the approaches and actual operations of the AU and the UN in the conflict in Darfur, including their deployment of the AMIS and UNAMID peace operations.

Finally chapter ten concludes the study by articulating the framework which allows for these two organisations to authorise legal, political and military action and suggests how the emerging norms may develop general international law. In this regard, it concludes by looking at future prospects and proposes a way forward through which the AU and the UN organisations can better promote and maintain regional and international peace and security.

Chapter One

The International Legal System: Community Values, Principles and their Enforcement

The international legal system is inherently unique. In sharp contrast to domestic legal systems, which primarily regulate the behavior of human beings, the international system 'consists of rules and principles of general application dealing with the conduct of states and international organisations, and their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.'¹ For Rosalyn Higgins, international law reflects a normative system 'harnessed to the achievement of common values —values that speak to us all, whether we are rich or poor, black or white, of any religion or none, or come from countries that are industrialized or developing.'² The legal rules embodied in the international system emanate from three primary sources which are international treaties, custom, and general principles of law.³

This chapter presents an analytical framework for the discussion of the building blocks of the international legal system with a particular focus on the area of peace and security. In doing so, it introduces the key principles and values to which the subjects of international law, the majority of which are discussed in the coming chapters, interact, including their obligations to adhere to the rule of law, through regional and universal regimes. In the course of discussion, a major theme that arises concerns the serious debate of whether international law should be based on the

¹ See Section 101 of the Restatement of the Law Third, The Foreign Relations Law of the United States, 1988.

² Higgins R, *Problems and process: International law and how we use it* (Oxford: Clarendon Press, 2006), p. 2.

³ See article 38 (1) of the Statute of the International Court of Justice. There is general agreement that article 38 of the Statute of the International Court of Justice represents the sources of international law. On this point, see DJ Harris, *Cases and Materials on International Law*, (Sweet& Maxwell, 2004, 6th edition). However, the list is not meant to be exhaustive. See Mark E. Villiger, *Customary international law and treaties : a manual on the theory and practice of the interrelation of sources* (2nd ed, Hague ; Boston : Kluwer Law International, 1997), p. 17. Generally on sources and article 38 (1) of the ICJ Statute, see Danilenko, *Law making in the International Community*, (Martinus Nijhoff, 1993); Degan, *Developments in International Law: Sources of International Law* (Kluwer Law International, 1997); Szasz, in Schachter and Joyner, eds, *United Nations Legal Order*, (Cambridge University Press, 1995), Vol.1,Ch.1; See also Van Hoof, *Rethinking the Sources of International law* (Deventer, Kluwer 1983), pp. 187-189.

Grotian model whereby the rule of law is one of maintaining tolerance and coexistence between states in pursuit of their interests or whether it should be based on the Kantian model, which provides a framework of cosmopolitan outlook based on active cooperation in support of trans-regional solidarity amongst states and international organisations.⁴

In order to achieve its objective, the chapter precedes in three main sections. The first section introduces the concept of an international community. What will become clear from this discussion is the move towards the 'prioritization of community interests as against the egoistic interests of individual states.'⁵ Although some of the community values, particularly those western in nature are challenged in chapter two, the second section identifies the effect of *jus cogens* norms which are universal in application. The discussion therein paves way for part three which explores the enforcement of international norms and legitimacy in international law. What will become clear is the favour found in collectivity, as opposed to unilateral actions, in pursuing the common interests of the international community.

1.1 Establishing a Common Value Based International Community

The international legal system is largely based on respect for the autonomy and sovereignty of states established by Peace of Westphalia in 1648, described in chapter two.⁶ However, these states are said to form a society tied together by rules and principles to form what is commonly referred to as the international community.⁷ Indeed, the major UN institutions, such as the General Assembly and the Security Council,⁸ have used the term international community in 'an almost inflammatory way.'⁹ Similarly the International Court of Justice (ICJ) has, in various cases, also

⁴ On this theme, see Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* Cambridge University Press, 2004), p. 5; See also A. Cassese, *International Law* (Oxford University Press, 2001), p. 18.

⁵ See Bruno Simma and Andreas L. Paulus, 'The 'International Community': Facing the Challenge of Globalization,' *European Journal of International Law*, Vol. 9 (1998) No. 2.

⁶ On African perspectives on sovereignty, see chapter five.

⁷ See Bruno Simma and Andreas L. Paulus, 'The 'International Community,' *supra* note 5.

⁸ See the examples given by R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, (Paris, Economica, 1986) p. 12.; Tomuschat, 'Die internationale Gemeinschaft', 33 *Archiv des Völkerrechts* (1995).

⁹ See Bruno Simma and Andreas L. Paulus, 'The 'International Community,' *supra* note 5.

acknowledged the existence of an international community.¹⁰ However, despite the numerous references¹¹ to the 'new doctrine of international community,'¹² the arbitrary use of the term fails to explain its distinctive elements and in particular, whether it is international law that binds states together.¹³

According to Bull, such a community comes into existence 'when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'¹⁴ However, and perhaps not surprisingly, the notion of an existing international community has, on occasion, been vigorously disputed.¹⁵ For example, in 1968, De Visscher forcefully argued that it is 'pure illusion to expect from pure arrangement of inter-State relations the establishment of a community order.'¹⁶

In return, Christian Tomuschat argues that although states, as a mere juxtaposition of individual units may not in themselves constitute the international community, the 'concept denotes an overarching system which embodies a common interests of all states and, indirectly, of mankind.'¹⁷ In this context, the 'sufficient degree of

¹⁰ See the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the World Court uses the term seven times, see also the *US Hostages in Tehran*, ICJ Reports (1980), at 43 where it referred to the international community. See also ICJ in its *obiter dictum* in the *Barcelona Traction* ICJ Reports (1970), at 32 where it characterised the obligations amounting to *erga omnes* as commitments towards the international community as a whole.

¹¹ For example, references to this concept is made in key documents such as the Rome Statute of the International Criminal Court (1998); The Vienna Convention of the Law of Treaties, 8 ILM (1969), article 53; The Convention on the Law of Treaties between States and International Organizations of between Organizations, 25 ILM (1986), article 53. See also article 40 (1) and (2) of the Articles of State Responsibility adopted by the International Law Commission at its fifty-third session (2001). Supplement No. 10 (A/56/10), chp.IV.E.1).

¹² Speech by Prime Minister Tony Blair to the Economic Club of Chicago, 22 April, 1999. See also Blair, 'A moment to Seize: Let us Reorder this World Around Us', *The Guardian* (London), 3 October, 2001, p. 4.

¹³ Dino Kritsiotis, 'Imagining the International Community', *EJIL*, vol. 13, No. 4 (2002).

¹⁴ H. Bull, *The Anarchical Society: A study of Order in World Politics* (Mackmillan, 1977), p. 13. On the same, see H. Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons Limited, 1950), p. 65.

¹⁵ S. Toope, 'Emerging Patterns of Governance and International Law', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000), p. 91, at 103; P.E. Corbett, *Law in Diplomacy* (Princeton, NJ: Princeton UP, 1959), p. 273.

¹⁶ De Visscher, *Theory and Reality in Public International Law* (translated from French by P.E. Cornett, Princeton Univ Pr; Revised edition rev.ed., 1968), p. 94.

¹⁷ C. Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *RdC* (1993), p. 227.

interdependence and contact'¹⁸ between states has led to a factual element of a community.¹⁹ This development has in turn resulted in the evolution of the international legal system to include other legal subjects whose link to certain common traits enjoins them to the community.²⁰ Therefore, in this context, although states remain the primary subjects and possess full legal capacity,²¹ others who may possess international legal personality include international organisations²² and human beings.²³

In this regard, the international community 'represents a normative entity, characterised by shared norms and understandings, common sensibilities and a shared feeling of collective destiny.'²⁴ For this community to thrive, it needs 'certain interests common to all its members and a certain set of common values, principles and procedures.'²⁵ The values of the community 'contains as much aspiration and reality,'²⁶ whose binding traits are embodied in the 'sense of shared opportunity,'²⁷ and the need to act on the society's 'high values'²⁸ in pursuit of 'shared vision of a better world.'²⁹ Therefore, the international legal system is 'like a modern

¹⁸ See Bruno Simma and Andreas L. Paulus, 'The 'International Community,' *supra* note 5.

¹⁹ From a political science point of view, see R.O. Keohane and J.S. Nye, *Power and Interdependence* (2nd ed., Second Edition. Glenview: Scott Foresman. 1989), p. 1 & 122; McDougal, Reisman & Willard, 'The World Community: A Planetary Social Process', 21 *U.C. Davis L. Rev.* (1988) 807, at 089.

²⁰ For a historical account, see Abi-Saab, *International Law and The International Community: The Long Road to Universality* in R. MacDonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff, 1994) p. 31; A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press 1986). See also Fassbender who makes references to the international community as including all subjects of international law. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529, at 532.

²¹ A. Cassese, *International Law*, *supra* note 4, p. 46.

²² See *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Reports 174 at 178. See also N.D White, *The Law of International Organisations* (second edition, Juris Publishing, Inc, 2005); Jean d'Aspremont, 'The Abuse of Legal the Personality of International Organizations and the Responsibility of Member States,' *International Organizations Law Review*, Volume 4, Number 1, (2007) , pp. 91-119(29)

²³ See G. Tarello, *Storia della cultura giuridica moderna* (Bologna: Il Mulino, 1976), p.473.

²⁴ See Nicholas Tsagourias, 'International Community, Recognition of States and Plotical Cloning', in Colin Warbrick and Stephen Therny, *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, 2006), p. 211.

²⁵ B. Simma, & A. Paulus, 'The International Community,' *supra* note 5.

²⁶ *Ibid.*

²⁷ See Nicholas Tsagourias, 'International Community, Recognition of States and Plotical Cloning', in Colin Warbrick and Stephen Therny, *Towards an International Legal Community* *supra* note 24, p. 217.

²⁸ P. Allot, *Eunomia : New Order for a new World* (Oxford, Oxford University Press, 2001), p. xx.

²⁹ See Secretary General 'Meaning of International Community,' Address to the DPI/NGO Conference, Press Release SG/SM/7133, PI/1176 (15 Sept 1999). See also K.A. Annan, ' Problems without

constitution' which not only 'comprises of principles and rules, but also basic values,' according to Tomuschat.³⁰ And although some of these may not, as yet, amount to legal rules in the strict sense, they are reflective of the values of the international system, whose reiteration and practice may lead to their elevation as legal principles.³¹

The generally accepted principles and values include those enshrined in article 1 of the UN Charter³² and those contained in key documents,³³ including those on UN reform.³⁴ However, as will be shown in chapter two, 'suspicion remains that they [values] are simply the fruits of cultural history belonging to the West.'³⁵ Yet, not only has the concept of a community been deemed to exist, the Secretary General has ruled it as 'the only way forward.'³⁶ Importantly, the community and its values act 'as a limitation of political power,'³⁷ particularly of states and other influential international actors.³⁸ It does so through its description of certain rights and the imposition of duties on international players within the whole international system.³⁹ In spite of the above, the contemporary diversity of state and regional priorities not only leads to the difficulty of arriving at a 'global consensus on values,'⁴⁰ its

Passport', (Sept/ Oct 2002). For a general discussion., see Anne Orford, 'The Gift of Formalism', *European Journal of International Law*, (2004), Vol.15.

³⁰ C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Receuil des Cours* (1999), p. 23, at 28.

³¹ N.D. White, 'The Ties that Bind: The EU, The UN and International Law,' *Netherlands Yearbook of International Law*, Vol. XXXVII, 2006. On the differences, similarities and relationship between legal rules and values see K. Zemanek, 'Basic Principles of UN Charter Law', in R.St.J. Macdonald and D.M. Johnston, eds., *Towards World Constitutionalism*, (Leiden, Nijhoff 2005).

³² On a discussion on some of these and their relationship with legal principles, see N.D. White, 'The Ties that Bind,' *Ibid*.

³³ E.g. The 2005 World Summit Outcome Document, U.N. Doc A/60/L.1, Sept.20,2005; The Rome Statute of the International Criminal Court, 1998; the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970); The Vienna Convention on Diplomatic Relations (1961)

³⁴ See chapter eight.

³⁵ P. Ricoeur, *Oneself as Another* (trans.K.Blamely, 1992) at 262-263. See also Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' *EJIL*, Vol. 1, No. 3, (2007); Dino Kritsiotis, 'Imagining the International Community,' *supra* note 13.

³⁶ See Secretary General 'Meaning of International Community'; *supra* note 29.

³⁷ P. Allot, *Eunomia* *supra* note 28, p. 104.

³⁸ N.D. White, 'The Ties that Bind,' *supra* note 31. See also N.D. White, *The UN System: Toward International Justice* (Boulder CO, Lynne Rienner 2002), p. 47.

³⁹ Abi-Saab, 'International Law and The International Community: The Long Road to Universality', in R. MacDonald (ed.), *Essays in Honour of Wang Tieya*, *supra* note 20, p. 31; A. Cassese, *International Law in a Divided World*, *supra* note 20, p. 1.

⁴⁰ R. Foot, 'Introduction' in R. Foot, J. Gaddis & A. Hurrell, eds., *Order and Justice in International Relations* (Oxford, Oxford University Press, 2003), p. 2.

association with politics often compromises the instruments through which the community finds expression, as shown below.

1.2 Differing Levels of the International Community in Peace and Security

The UN Charter has often been described as the constitution of the international community.⁴¹ As stated above, the UN Security Council has, in carrying out its peace and security mandate on behalf of UN member states,⁴² increased its references to the international community. Acting under Chapter VII of the UN Charter, the Council has passed binding resolutions not only on states but also other legal subjects such as individuals,⁴³ liberation and guerrilla movements,⁴⁴ as well as outlaws, such as the Al Qaeda network.⁴⁵ What is important to appreciate here is the fact that the rules regulating peace and security are primarily drawn from the UN strengthens the belief that the international 'community remains the source of legitimacy and authority of the undertaken action.'⁴⁶

However, this should not obscure the fact that, as shall be shown in the coming chapters, the sovereign state is still widely perceived as both the main instrument for implementing the decisions of the UN.⁴⁷ Furthermore, the decisions and practice of the UN hardly apply uniformly across the whole of the international community with 'fairness,'⁴⁸ as discussed elsewhere in this study.⁴⁹ It is partly because of this reason that the use of the term 'community' is easily subject to manipulation and it can be applied in one context and be wholly inappropriate in another, with varying degrees of intensity.⁵⁰ With this regard, actions that have been justified as beneficial to the common interests have often led to serious disagreements.

⁴¹ See discussion in chapter three.

⁴² Article 24 of the UN Charter.

⁴³ E.g. see SC Res. 1532 (2004), 12 March 2004, on the former Liberian President Charles Taylor.

⁴⁴ E.g. see SC Res. 864 (1993), 15 September 1993, concerning UNITA and SC Res. 942 (1994), 23 September 1994, concerning the self-proclaimed Serb Republic in Bosnia- Herzegovina.

⁴⁵ E.g. see SC Res. 1267 (1999), 15 October on individuals and entities associated with Al-Qaida.

⁴⁶ See Nicholas Tsagourias, 'International Community, Recognition of States and Political Cloning', in Colin Warbrick and Stephen Therny, *Towards an International Legal Community*, *supra* note 24, p. 213.

⁴⁷ N Schrijver, 'The Changing Nature of State Sovereignty', (2000) 71 *BYIL* 65, p. 65.

⁴⁸ See T. M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995), p. 232.

⁴⁹ See chapters three, five and eight.

⁵⁰ See Georges Abi-Saab, 'Whither the International Community?', *EJIL*, Vol. 9 (1998), No. 2. See also Bruno Simma and Andreas L. Paulus, 'The 'International Community,' *supra* note 5.

This was clear in the speech by the Representative of India in the Security Council in stating that the West was *not* acting on behalf of the international community during NATO's bombing of Serbia in 1999.⁵¹ However, this assertion does not signify the absence of an international community. Rather, it can be interpreted as questioning the unilateral NATO action whose membership represented under ten percent of the world's population, and rejecting the notion that the intervention represented the will of the international community, particularly given that at no time had NATO been appointed the world's representative.⁵²

Indeed, the whole of the international community is riddled with 'many diversions and differences.'⁵³ In this regard, due to the nature of fragmentation in the international system, Abi-Saab argues that the application of legal rules does not signify the presence of community in the group concerned in the same manner, and with the same intensity on all subjects.⁵⁴ Instead, he takes the view that, for the sake of precision, it is better to speak of a degree of community within a specific context, rather than referring to a group as a community in general. It is 'therefore in essence made up of different, sometimes overlapping communities, each with its own normative (value) system, which can be of national, regional or functional (sectoral) nature.'⁵⁵ Borrowing from this perspective, a major approach of this study treats regional organisations, such as the EU and AU, as representing regional communities while the UN and WTO would amount to sectoral communities.

Hence, for the purposes of this study, the term international community is used to demonstrate the different points of extraterritorial agreement by international society, at which there is clear embodiment of commonly shared values, particularly those that seek to protect the peremptory norms of international law. Therefore, heavy reliance is made on the principles contained in key treaties, including the Vienna Convention on the Law of Treaties 1969, which defines *jus cogens*, as norms 'accepted and

⁵¹ See Representative of India in UNDOC S/PV 3988 (24 March 1999), at 15-16.

⁵² Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal,' *EJIL* Vol. 16 (2005) No. 1.

⁵³ A. Cassese, *International Law in a Divided World*, *supra* note 20 p. 32.

⁵⁴ Georges Abi-Saab, 'Whither the International Community?' *supra* note 50.

⁵⁵ See, Erika de Wet, 'The International Constitutional Order,' *International and Comparative Law Quarterly*, (2006) 55: 51-76.

recognized by the international community of states as a whole.’⁵⁶ As shown in the following section, failure to abide by these norms incurs state responsibility for violating states.⁵⁷

2.1 The Rationale and Justification for the Protection of Peremptory Norms of International Law

In spite of the horizontal nature of international law with its restricted grip on universally entrenched ideological, political, cultural and economic links, there have emerged a series of community duties, obligations and rights agreed upon both at the universal and regional level, and which have special protection under regional and multilateral treaties. According to Hedley Bull’s formulation, these norms arise whereby ‘states have sufficient contact between them, and have sufficient impact on one another’s decisions to cause them to behave- at least in some measure-as parts of a whole.’⁵⁸ Also commonly referred to as *jus cogens*, these norms emanate from the advent of international law conferment on each state *obligatio erga omnes*.⁵⁹ In other words, the obligations contained therein are owed to the international community as a whole.⁶⁰ Therefore, the implication of *jus cogens* are those ‘of a duty and not optional rights’ and it is this unique feature that makes them acquire the special status of peremptory norms of international law.⁶¹

A key feature of peremptory norms is that states, be it in times of war or peace, are not allowed to derogate from the commonly agreed values and rules that amount to *jus cogens* or attempt to justify their breach on the concept of sovereignty.⁶² For Kelsen, this notion applies uniformly across all states. He asserts that the international ‘legal system is

⁵⁶ Article 53 of the Vienna Convention on the Law of Treaties (1969).

⁵⁷ On the international community and its relationship with the law of state responsibility, see, Erika de Wet, ‘The International Constitutional Order,’ *supra* note 55.

⁵⁸ Hedley Bull, *The Anarchical Society : A Study of Order in World Politics* (Macmillan: London, 1995), pp. 9-10.

⁵⁹ Cherif Bassiouni, ‘International Crimes, Jus Cogens and *Obligatio Erga Omnes*,’ 59 *Law & Contemp. Probs.* 63, 68 (1996), p.266; M. Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law,”’ 11 *MICH. J. INT’L L.* 768, 801 (1989-1990).

⁶⁰ *Case Concerning Barcelona Traction, Light and Power Co. Ltd., Belgium v. Spain*, ICJ Reports [1970] 3, at 31; *Case Concerning East Timor, Portugal v. Australia*, ICJ Reports [1995], at 102; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia*, ICJ Reports [1996] 616.

⁶¹ M. Cherif Bassiouni, ‘International crimes,’ *supra* note 59

⁶² A. Cassese, *International Law*, *supra* note 4 See also M. Cherif Bassiouni, ‘States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law’, in *Non-Derogable Rights and States of Emergency* (Daniel Premont ed.1996), p. 125 See also M. Cherif Bassiouni ‘International crimes,’ *supra* note 59.

superior equally' to all states and that the 'natural law' nature of this sort of foundation of international law cannot and should not be denied.'⁶³ The reason that these natural rights are of special importance is principally because they contain principles that are considered as universal in nature. Significantly, they have come to be regarded as worthy of the duty of protection for the benefit of the international community, notwithstanding the structural differences in the political, economic and social settings across the diverse regions.⁶⁴

The rationale behind the status of *jus cogens* in international law is also given by Vitoria, who referred to these rules as '*una respublica*', with the purpose of the general well-being of all human beings (*bonum commune omnium*).⁶⁵ Francisco Suarez developed Vitoria's ideas further and in a classic exposition observed that however 'divided into different peoples and kingdoms it may be, mankind has nevertheless always possessed a certain unity, not only as a species, but also, as it were, as a moral and political unity, called for by the natural precept of mutual love and mercy, which applies to all, even to the foreigners of any nation.'⁶⁶ Accordingly, the subjects within the international legal system 'constitute a perfect community' with each being 'a member of that universal society.'⁶⁷

In modern international law, the legal protection of these rules finds expression in article 53 of the Vienna Convention of the Law of treaties, which prohibits any treaty law from running contrary to the peremptory norms of international law.⁶⁸ It is worth mentioning however, that this convention deals with treaties and its application to custom is subject to dispute.⁶⁹ Furthermore, problems arise because not only do key documents, such as the UN Charter, hardly mention or refer to any peremptory

⁶³ Quoted in Danilo Zolo, 'Hans Kelsen: International Peace through International Law', *EJIL*, Vol. 9 (1998) No. 2.

⁶⁴ See *Furundzija* (Trial Chamber, ICTY), 38 ILM (1999), 349; Frowein, 'Jus Cogens', 7 *EPIL* (1984) 329. See also Articles on State Responsibility, Art. 19. 2 *Yearbook of the ILC* (1976 II) 73. See also J.H.H. Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (European University Institute, Series A., 1989).

⁶⁵ Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law,' *EJIL*, Vol. 6 (1995) No. 1. Here, *B Simma quotes Relectio de Indis*, III, Tit. 5, leg. 4; *De potestate civili*, 13, 21

⁶⁶ Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law, *ibid.*

⁶⁷ *Ibid.*

⁶⁸ For a recent study of the legal effects of peremptory norms of international law, see Alexander Orakhelashvili, *Peremptory Norms in International Law*, (Oxford University Press, 2008).

⁶⁹ See chapter two. See also R Bernhardt, 'Article 103', in Simma (ed), *The Charter of The United Nations. A Commentary*, (OUP, 2002), p. 1293; N.D.White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin & Robert Mccorquodale, (eds.) '*Economic, Social and Cultural Rights in Action*', (Oxford University Press, 2007).

norms, there is also no definite list agreed upon as to what amounts or fails to constitute peremptory norms.⁷⁰ However, although the Charter does not expressly refer to *jus cogens*, it can be argued that the principles contained in article 2 largely correspond with well established peremptory norms. Nevertheless, questions still persist with regard to whether there exists a defined hierarchy amongst the more readily identifiable peremptory norms.⁷¹

However, the limitation of article 53 in the Vienna Convention to consensual concepts was favourable because substantive definitions of *jus cogens* would have been controversial due to the doctrine's close connection to natural law philosophy. Disagreement on major issues would have placed the standing of key rules of *jus cogens* in doubt, and for this reason the substance is best left incomplete and the list in-exhaustive, in order to meet the challenges posed by a fast changing world. However, as demonstrated throughout this study, the flexible nature of what amounts to a peremptory norm may be utilised by powerful states to alter and effectively make law.⁷²

Having said so, despite the lack of a clear list of the rules of international law amounting to *jus cogens*, it is beyond dispute that the prohibition against the use of force, genocide, war crimes, crimes against humanity are settled in their classification.⁷³ It is primarily these norms that this thesis chiefly focuses on because these principles are crucial to the maintenance of regional and international peace and security.⁷⁴ However, it also deserves to be mentioned that, in order to prevent their

⁷⁰ See M. Cherif Bassiouni, 'International crimes,' *supra* note 59. See also chapter two on the clash of *jus cogens*.

⁷¹ See Martti Koskenniemi, 'Hierarchy in International Law: A Sketch', *European Journal of International Law*, Vol. 8 (1997) No. 4, Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law,' *European Journal of International Law*, Vol. 8 (1997) No. 4

⁷² See chapter two.

⁷³ See the list provided in the Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in *Official Records of the General Assembly, Fifth-sixth Session (A/56/10)* pp. 283-284. See also Cherif Bassiouni, 'International Crimes,' *supra* note 59; Alexander Orakhelashvili, *Peremptory Norms in International Law*, *supra* note 68, pp. 50-66.

⁷⁴ See chapters three-nine.

offence to 'international order,'⁷⁵ the crimes of piracy, slavery, racial discrimination and torture also amount to peremptory norms.⁷⁶

In order to protect the special nature of *jus cogens* norms and enhance state compliance, article 40 of the Articles of State Responsibility 'applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law' and 'breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil its obligation.'⁷⁷ While the application of the doctrine of state responsibility is discussed elsewhere in this study,⁷⁸ it deserves to be pointed out that the Articles do not allow for a right to intervene in cases of breaches of peremptory norms by states, although such violations attract international responsibility on states and the international community.⁷⁹

Nevertheless, the gap in the law with regard to enforcement has led to the assertions that the obligations deriving from these duties has led to an 'emerging norm' entailing 'a collective responsibility to protect'⁸⁰ citizens from genocide, mass killing, and massive and sustained human rights violations.'⁸¹ However, bearing in mind the emphasis placed on the extraterritoriality of fundamental values discussed in this section, a central theme of the thesis addresses the tension between the major principles of *jus cogens*. This is clear from the dilemma facing the international community in the run up to the Rwandan genocide (1994) where there was a clear conflict between the peremptory norms prohibiting genocide, war crimes, crimes

⁷⁵ R. Higgins, *Problems and Process: International Law and How We Use It*, (Oxford: Clarendon Press, 1994), p. 58.

⁷⁶ See the list provided in the Articles on State Responsibility, Commentary on Article 40, *supra* note 73 paras. 4-6 in pp. 283-284. see also Cherif Bassiouni, 'International Crimes,' *supra* note 59.

⁷⁷ See article 40 (1) and (2) of the Articles of State Responsibility *supra* note 73; see also Iain Scobbie, 'The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law', *EJIL*, Vol. 13, (2002) No. 5; Eric Wyler, 'From 'State Crime' to Responsibility for 'Serious Breaches of Obligations Under Peremptory Norms of General International Law' *EJIL*, Vol. 13, (2002) No. 5; Christian J. Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' *EJIL*, Vol. 13, (2002) No. 5; Pierre Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law', *EJIL*, Vol. 13, (2002) No. 5.

⁷⁸ See chapters seven, eight and nine.

⁷⁹ See article 41 (1), (2) and (3) of the Articles *supra* note 73.

⁸⁰ See Secretary General's report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005, para. 203.

⁸¹ See 2005 World Summit, Sept 11-16, 2005, 2005 *World Summit Outcome*, 138, U.N. Doc. A/60/L.1.(Sept 20, 2005) See also Secretary General's report, *In Larger Freedom*, *ibid*.

against humanity on one hand, and the norm that bans the use of force in international relations on the other.⁸²

Given that the occasional failure by the international community to protect and enforce fundamental values, particularly in Africa has been alarming,⁸³ the recent conflict in Darfur brought the questions with regard to their protection to sharper focus. While the role of the UN in this area is discussed in chapter three, what follows is a general discussion on the available mechanisms for the enforcement of the international norms and the emerging relevance of the concept of legitimacy in this area.

3.1 The Enforcement and Legitimacy of International Law

The aspect of enforcing international legal obligations is closely tied to the legitimacy of international law, as shown in this section.⁸⁴ Traditionally, it is due to the lack of a centralised enforcement system of international law that led to the question as to whether international law was really 'law.'⁸⁵ The answer in turned depended on what one meant by law.⁸⁶ According to H. L. A. Hart, law derives its strength from acceptance by society that its rules are binding and not necessarily from its enforceability.⁸⁷ Similarly, Fitzmaurice argues the law is *not* binding because it is enforced but rather, it is enforced because it already binding.⁸⁸

On the other hand, scholars such as Austin argued that international law was not true law but merely, 'positive morality,' since there were no sovereign capable of sanctioning the violation of its rules.⁸⁹ This viewpoint differed with that of Kelsen who perceived the law as involving submission to rules and not to a particular

⁸² See chapters two, three and seven.

⁸³ See introduction, chapters three, five, six and nine.

⁸⁴ Jacob Katz Cogan, 'Noncompliance and the International Rule of Law', *Yale Journal of International Law*, Vol 31 No. 1 (2006).

⁸⁵ Anthony D'Amato, 'Is International Law Really 'Law'?', *79 Northwestern Law Review* 1293 (1985).

⁸⁶ Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2005).

⁸⁷ Hart, H.L.A. *The Concept of Law* (Oxford: Clarendon Press, 1994)

⁸⁸ G. G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', *The Modern Law Review*, Vol. 19, No. 1. (1956), pp. 1-13.

⁸⁹ J. Austin, *The Province of Jurisprudence Determined*, (W. Rumble (ed.), Cambridge: Cambridge University Press, 1995), p. 24.

sovereign.⁹⁰ Nevertheless, although the debate with regard to whether international law is really law has virtually vanished, focus has since shifted to the problem of enforcement, with a respectable school of international lawyers considering it to be a necessary characteristic of any system of law.⁹¹ Indeed, many international theorists, both traditional and modern, agree that law 'shall be enforced by external power'⁹² since it is a 'coercive order' which contains certain measures of compulsion which are to be taken in case of 'legally wrong conduct.'⁹³ However, although the problem of enforcement is much associated with international law, using a comparative approach, Roger Fisher suggests that much of what is considered as 'law' in the domestic context is also unenforceable.⁹⁴

In any event, opinion on the practical compliance of international law is divided. For example, Louis Henkin, famously observed that '[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'⁹⁵ On the other hand, the UN Secretary General opined that, 'today, the rule of law is at risk around the world. Again and again, we see fundamental laws shamelessly disregarded.'⁹⁶ Despite there being some truth behind Henkin's aphorism,⁹⁷ the Secretary General's frustration was understandable given the return of mass murder at the turn of the 21st century, as shown throughout this study. What remains clear is that 'the rule of [international] law as a mere concept is not enough. Laws must be put into practice.'⁹⁸ Therefore, in order to enforce 'an international culture of compliance,'⁹⁹ the international legal system must be founded

⁹⁰ Charles Leben, 'Hans Kelsen and the Advancement of International Law' *European Journal of International Law*, Vol. 9 (1998) No. 2.

⁹¹ See Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement.' (1956) 19 *M.L.R.* 1.

⁹² Lauterpacht, *Oppenheim's International Law* (Longmans, Green and Co., London, Vol. I (8th Ed), 1955), p.10.

⁹³ Kelsen, *Principles of International Law* (New York: Rinehart & Company, Inc, 1952).

⁹⁴ See R. Fisher. 'Bringing Law to Bear on Governments', 74 *Harv. L. Rev.*, 1130,1132-34 (1961); See R. Fisher, *Improving Compliance with International Law: Procedural Aspects of International Law Series*, (Univ of Virginia Pr, 1981).

⁹⁵ Louse Henkin (2.ed) *How Nations Behave* (New York: Columbia University Press, 1979), p. 47. See also See, DJ Harris, *Cases and Materials on International Law*, (Sweet & Maxwell, 2004, 6th ed.), p.3.

⁹⁶ See 'Rule of law at risk around the world, says Secretary-General in address to General Assembly,' UN Press Release SG/SM/9491, GA/10258 (2004).

⁹⁷ See Harold Hongju Koh, 'Review: Why Do Nations Obey International Law?', *The Yale Law Journal*, Vol. 106, No. 8, Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion (1997), pp. 2599-2659

⁹⁸ UN Secretary-General, 'Rule of law at risk around the world,' *supra* note 96.

⁹⁹ Louse Henkin, 'International Law: Politics, Values and Functions'. 216 *Recueil Des Cours* 9, 86 (1989).

on 'a new world order based on the rule of international law.'¹⁰⁰ Finally, as portrayed by recent trends, in addition to being law, legal rules ought to be legitimate.

Although the concept of legitimacy has traditionally been viewed as secondary and weaker compared to that of legality, it has acquired increased significance since Tom Frank's observation in the late 1980s that no one seemed to be asking fundamental questions about the legitimacy of international law.¹⁰¹ Since then, the concept of legitimacy has attracted much attention across the disciplines of international politics, law and relations.¹⁰² For international law, the growing pre-eminence of the concept of legitimacy is evident in the Independent International Commission's view that the NATO intervention in Kosovo was 'illegal but legitimate.'¹⁰³

Furthermore, key reports, such as that submitted by the International Commission on Intervention and State Sovereignty (ICISS)¹⁰⁴ and the UN High Level Panel,¹⁰⁵ make references to the five criteria of legitimacy against which the authority of action based on the doctrine of responsibility to protect should be measured.¹⁰⁶ Importantly, as shall be shown in chapter seven, the AU's right to intervene has similarly been justified on the fact that it is not assigned to a single or particular group of states but to the AU collectively. In this regard, when acting collectively, the AU represents a

¹⁰⁰ A. Cassese, 'On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *EJIL*, Vol. 9 (1998) No. 1. See also Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society', *EJIL*, Vol. 11 (2000).

¹⁰¹ Frank, T., 'Why a quest for Legitimacy', 21 *UC Davis Law Review* (1987) 535.

¹⁰² For a detailed analysis of the practice of legitimacy in international society, see Ian Clark, *Legitimacy in international society* (Oxford University Press, Oxford, 2005). See also Thomas Frank, *The Power of Legitimacy Among Nations* (New York, Oxford; Oxford University Press, 1990); Thomas Frank, 'Why a quest for Legitimacy', *supra* note 101; Franck, *Fairness in International Law and Institutions* (1995) 38-41; Thomas M. Franck, 'Legitimacy in the International System', *American Journal of International Law*, Vol. 82, No. 4 (1988), pp. 705-759. See also Dworkin, *Law's Empire* (Belknap Press of Harvard University Press, 1986) p. 176-224; Hurd, 'Legitimacy and Authority in international politics', 53 *International Organization* (1999), 379. Roth, 'Governmental Illegitimacy in International Law', (Oxford University Press, 1999); See Weiler, 'The Geology of International Law-Governance, Democracy and Legitimacy', *ZaoRV* 64, No 3, (2004). 547-562.

¹⁰³ Independent International Commission on Kosovo, *Kosovo: Conflict, International response, Lessons Learnt*, (Oxford 2000).

¹⁰⁴ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Council, 2001)

¹⁰⁵ The Report of the United Nations High Level on Threats Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, 12, December 2004.

¹⁰⁶ See chapter eight.

community interest, and not just the interests of one single state and hence, is legitimate.¹⁰⁷

Ian Hurd, a theorist in international relations, defines legitimacy as the 'normative belief by an actor that a rule or institution ought to be obeyed.'¹⁰⁸ For international lawyers, this definition would have to be connected to a legal rule through a pull of compliance towards an established legal system. Nevertheless, the concept of legitimacy has been defined to mean 'that quality of a rule which derives from a perception on the part of those it is addressed that it has come into being in accordance with right process.'¹⁰⁹ Although legitimacy is useful in explaining why states abide by law, despite its lack of a centralised coercive authority, the concept is closely associated with international consensus and is thereby generally abstract and vague given the diversity of state and regional interests.

Nevertheless, from the onset, it can be argued that international law is *prima facie* legitimate and should be obeyed simply by virtue of it being the law of the international community, as described above. This is because international law provides a fair framework for the conduct of international relations for different actors.¹¹⁰ However, the reality of power politics, which often strained multilateralism and made it vulnerable to unilateralism, has often given good cause to question the legitimacy and credibility of international law, as it often proves unable to hold states accountable in their adherence to the law.¹¹¹

Irrespective of the above, there is a common perception that community values and principles are more legitimate when undertaken collectively and that a given act is undertaken by a single state, rather than by the international community, makes it illegitimate.¹¹² A more extreme approach equates unilateralism with illegality.¹¹³ This

¹⁰⁷ See chapter six.

¹⁰⁸ Hurd, 'Legitimacy and Authority in international politics', *supra* note 102.

¹⁰⁹ Thomas M. Franck, 'Legitimacy in the International System', *supra* note 102.

¹¹⁰ See Thoma Franck, 'Fairness in International Law and Institutions', *supra* note 102; p. 38-4; Dworkin, 'Law's Empire,' *supra* note 102, p. 176-224.

¹¹¹ It is within this context that some commentators have gone to the extent of stating that international law is in a legitimacy crisis. See Weiler, 'The Geology of International Law-Governance, Democracy and Legitimacy', *supra* note 102.

¹¹² Dan Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' *EJIL*, Vol. 11 (2000) No. 2.

¹¹³ *Ibid.*

is in spite of the need to evaluate each particular unilateral action 'to determine whether, on the balance, it advances or detracts from the desired ends.'¹¹⁴ Furthermore, the problem with the above presumption is that it ignores the reality that collective decision making 'often reflects the will of a particular state, or a small group of states, which can impose their will on others, rather than an 'authentic' decision of the international community.'¹¹⁵

In demonstrating this point, Hans Morgenthau in his work on *Political Limitations on the United Nations*, noted that the establishment of the UN, which is primarily based on a historic event,¹¹⁶ led to the institutionalisation of power politics, rather than to the latter's elimination.¹¹⁷ It is within this context that the legitimacy of the Security Council has come into question as evidenced in the Secretary General's own admission that many 'decisions lack legitimacy in the eyes of the developing world, which feels that its views and interests are insufficiently represented among the decision-takers.'¹¹⁸

In this context, Christine Chinkin makes the suggestion that there is no dichotomy between unilateralism and collectivism.¹¹⁹ Instead, she argues that the two merge into each other. 'What masquerades as collective action or inaction may be manipulated by a state with a particular interest or take in the issue, be dictated by a single strong actor through the threat or use of the veto, or by a single state taking the lead.'¹²⁰ This practice is manifest in the arm-twisting conducted by powerful states within Security Council that often results in 'coalitions of the willing,' which in the true sense amount to 'coalitions of the coerced.'¹²¹ In particular, reference is often made with

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See chapters three and eight.

¹¹⁷ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* ((New York: Alfred A. Knopf, Fifth Edition, Revised, 1978).

¹¹⁸ See Report of the Secretary-General, *Implementation of the United Nations Millennium Declaration*, UN Doc., A/58/323, 2 September 2003.

¹¹⁹ Christine Chinkin, 'The State That Acts Alone: Bully, Good Samaritan or Iconoclast? Multilateralism à la Carte: The Consequences of Unilateral 'Pick and Pay' Approaches', *European Journal of International Law*, Vol. 11 (2000) No. 1.

¹²⁰ *Ibid.*

¹²¹ See, Sarah Anderson, Phyllis Bennis and John Cavanagh, *Coalition of the Willing or Coalition of the Coerced: How the Bush Administration Influences Allies in its War on Iraq* (Institute for Policy Studies Report, 2003).

respect to the 'arm-twisting' influence that the United States¹²² has in the Council,¹²³ a practice acknowledged by a former US Secretary of State.¹²⁴

Yemen's loss of a \$70 million US aid package in 1990 after its refusal to vote in line with US interests in the Security Council is only one of the more cited illustrations of arm twisting.¹²⁵ Other examples include the threat by the US to block an extension of the UN mission in Bosnia, unless its nationals were protected from prosecution by the ICC¹²⁶ in July 2002.¹²⁷ Similarly, Security Council resolution 1593 of March 2005,¹²⁸ with regard to the Darfur conflict was only agreed upon by the US on condition that it gave blanket immunity from prosecution to designated peacekeepers.¹²⁹ As shown in chapter eight, such behaviour by permanent members of the Council can itself engender a threat to peace and security.¹³⁰

Meanwhile, although this study heavily relies on the institutional methods of enforcement, particularly those undertaken by the UN and regional organisations, it deserves to be mentioned that states and international organisations are also capable

¹²² For detailed discussion on US unilateralism, see Christian Tomuschat, 'Multilateralism in the Age of US Hegemony', in MacDonald, St John Johnston, D. M, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, (Martinus Nijhoff Publishers 2005), p.31-75; Robert F. Turner, American Unilateralism and the Rule of Law', in MacDonald, St John Johnston, D. M, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers 2005), p77-101; Feffer, John, 'Power Trip: U.S. Unilateralism and Global Strategy After September 11', (Seven Stories Press, 2003); John Lewis Gaddis, 'A Grand Strategy,' *Foreign Policy* (November/December 2002); The White House, *The National Security Strategy of the United States of America*, LeClue22, 2008. See also J.R. Bolton, 'Is There Really 'Law' in International Affairs?' *Transnational Law and Contemporary Problems* 10 (2000); Ronald A. McDonald's *Promised Land, Crusader State: American Encounter with the World Since 1776*, (Houghton Mifflin, 1997) and John Lewis Gaddis's *Surprise, Security, and the American Experience* (Harvard University Press, 2004).

¹²³ See chapters three, five, eight and nine.

¹²⁴ Former US Secretary of State James Baker discussed U.S arm-twisting in his autobiography. See James A. Baker III, *The Politics of Diplomacy: Revolution, War and Peace, 1989-1992* (New York: G.P. Putnam's Sons, 1995). See also Martin Walker, 'Baker's Quest for Bloodless Victory', *The Guardian*, 9 December, 1990

¹²⁵ *Ibid.*

¹²⁶ For US policy regarding the International Criminal Court, see Jennifer K.Elsie., *U.S Policy Regarding the International Criminal Court*, (Congressional Research Service Report for Congress, 2006). See also chapter nine.

¹²⁷ SC Res. 1422 (2002), 12 July 2002.

¹²⁸ SC Res. 1593 (2005), 31 March, 2005.

¹²⁹ For discussion on the question of immunity and the relationship between the Security Council and the ICC, see Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court', 16 *EJIL*, (2005), 239. See also Robert Crier and N.D. White, 'The Security Council and the International Criminal Court: Who is feeling Threatened?' 8 *Yearbook of International Peacekeeping* (2002), 141 and Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', (2003) 14 *EJIL* 85.

¹³⁰ N.D White, 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17 (2004), pp.645-672.

of compelling other legal subjects to abide by the rule of law. These entities have traditionally enforced international obligations by utilising actions that inflict damage or deprives the violating state of the advantage of a privilege.¹³¹ Mention should also be made of the functions of judicial and arbitration bodies such as the International Court of Justice, which is the primary judicial organ of the UN and the International Criminal Court (ICC),¹³² designated as ‘the first new major international institution of the twenty-first century’¹³³ and is empowered to exercise its jurisdiction on ‘the most serious crimes of international concern,’¹³⁴ such as those committed in Darfur.¹³⁵

On the regional front, the activity of regional organisations in the enforcement of law has dramatically increased in recent years.¹³⁶ It is in this context that the thesis aims to demonstrate the challenges and prospects of the AU’s right of intervention, as a potential method of enforcement.¹³⁷ Clearly, its evolving architecture of peace and security has brought the debate on the function of regionalism within the international legal system to sharper focus.¹³⁸ As shown in the coming chapters, when acting collectively, the AU perceives itself as representative of community values, and not just the interests of one single state and hence, is legitimate. With this regard, what is clear from the onset is the international community’s clear favour of institutionalised methods of enforcement, as opposed to unilateral acts by states, some of which have now been rendered illegal, for example, reprisals.¹³⁹

¹³¹ Georges Abi-Saab, ‘Whither the International Community?’ *supra* note 50.

¹³² On the ICC, see Benjamin Schiff, *Building the International Criminal Court*, (Cambridge University Press; 1 edition, 2008). Another important judicial institution is the International Tribunal for the Law of the Sea (ITLOS) established under the 1982 U.N Convention on the Law of the Sea (UNCLOS). See, DP O’Connell, IA Shearer, *The International Law of the Sea*, (Oxford University Press, USA, 1984).

¹³³ D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004), p. 40. See also see Oscar Solera, ‘Complementary jurisdiction and international criminal justice’, *International Review of the Red Cross* (2002) No. 845, pp. 145-171.

¹³³ See SC Res. 1593 (2005), March 31st 2005.)

¹³⁴ Article 1 of the Rome Statute of the International Criminal Court.

¹³⁵ See chapter nine. See SC/Res/1593 (2005) adopted on March 31st 2005)

¹³⁶ See chapter four.

¹³⁷ Article 4(h) of the Constitutive Act of the African Union.

¹³⁸ See chapter two on the function of regionalism.

¹³⁹ See *Advisory Opinion on the Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Reports 226.

3.2. Conclusion

This opening chapter introduced a conceptual and theoretical framework, including the key concepts informing the study, some of whose definitions and classifications, as well as relationships are elaborated in the coming chapters. Such an analysis offers valuable insights into current trends in international law, as they provide a forum through which existing practice may be measured, hence providing an important tool for enhancing scholarly debate, particularly in the area of peace and security, which forms the basic subject matter of this study.

The first section argued that in spite of whether the international community, is 'imagined, asserted or realized,'¹⁴⁰ the world is 'no longer an ordered anarchy.'¹⁴¹ And although the peaceful coexistence of states has often seemed 'unachievable and illusionary,'¹⁴² it was shown that there are particular rules that bind all states, which can be referred to as universal international law.¹⁴³ These principles of universalism are not designed to protect the individual interests of states but to affirm the common interest of mankind.¹⁴⁴ In this regard, taking a constitutional approach, the peremptory norms have arguably led to 'verticalisation of international law.'¹⁴⁵

As will become clear from the coming chapters, the impact of these rules, including their gradual erosion of the doctrine of state sovereignty,¹⁴⁶ demonstrate 'an emerging international constitutional order consisting of an international community, an

¹⁴⁰ Dino Kritsiotis, 'Imagining the International Community,' *supra* note 13.

¹⁴¹ Brun-Otto Bryde, 'International Democratic Constitutionalism', in MacDonald, St John Johnston, D. M., *Towards World Constitutionalism*, *supra* note 122, p.104-125.

¹⁴² Quoted in Ruth Wedgwood, 'Unilateral Action in the UN System' *European Journal of International Law*, Vol. 11 (2000) No. 2. Franklin Roosevelt, Message to Congress Regarding the Yalta Conference, March 1945, President's Personal File 1820, (speech 1572), FDR Library, Hyde Park, New York. Also in the Department of State, *Bulletin*, 4th March 1945, vol 12, at 321-326. See T. Hoopes and D. Brinkely, *FRD and the Creation of the United Nations* (New Haven, London: Yale University Press, 1997) 172-179.

¹⁴³ C.G. Weeramantry, *Universalising International law* (Leiden: M. Nijhoff Publishers, 2004).

¹⁴⁴ See Brun-Otto Bryde, 'International Democratic Constitutionalism', in MacDonald, St John Johnston, D. M., *Towards World Constitutionalism*, *supra* note 122, pp.104-125.

¹⁴⁵ *Ibid.*

¹⁴⁶ See B. S.Chimni, 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, Vol. 15 (2004) No. 1. See also James N. Rosenau, 'Organizational Proliferation in a Changing World,' in *Issues in Global Governance* (Kluwer, 1995), pp. 371-403; Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL*, (1993), 447,469; A. Cassese, *International Law*, *supra* note 4, p.10.

international value system and rudimentary structures for its enforcement.’¹⁴⁷ However, as shown throughout the thesis, the problem of enforcing international legal obligations has continued to significantly affect the legitimacy of international law.¹⁴⁸ This anomaly is attributed to the lack of a central authority, which means that most of its legal functions are, to a large extent, decentralised.¹⁴⁹

Therefore, as shown in chapters two and three, the horizontal nature of this system traditionally promoted realist notions and meant that it was largely up to each state to decide how to handle their disputes either, peacefully or forcefully, unilaterally or collectively. Nevertheless, given the special nature of fundamental community values, unilateral enforcement has been perceived as ‘the one that puts the triumph of its interests before that of the collective interest’¹⁵⁰ and therefore, ‘dangerous and ultimately counter-productive.’¹⁵¹ Furthermore, prevailing conditions suggest that ‘history is on the move from state sovereignty to international community,’¹⁵² within ‘a space in which the strict dichotomy between domestic and international has largely broken down.’¹⁵³

Therefore, bearing in mind the deficiency of the UN system,¹⁵⁴ this thesis switches the focus to other institutions, which arguably possess the legality and sufficient legitimacy to carry out the enforcement of community values on behalf of the international community. Using the model provided by regional organisations, in particular the AU, it argues that it is their coherent cooperation, and not their opposition to universality, which should lie at the heart of the debate.

¹⁴⁷ See, Erika de Wet, ‘The International Constitutional Order’, *supra* note 55. See also Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, *EJIL*, 2006 17(3):483-529; Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations*, (Oxford: Clarendon Press 1992).

¹⁴⁸ Jacob Katz Cogan, ‘Noncompliance and the International Rule of Law’, *The Yale Journal of International Law*, Vol 31 No. 1 (2006).

¹⁴⁹ A. Cassese, *International Law*, *supra* note 4, p. 4; Higgins R, *Problems and process*, *supra* note 75, p. 39.

¹⁵⁰ Dupuy, P.-M. ‘The Place and Role of Unilateralism in Contemporary International Law’, *European Journal of International Law*, 11 (2000) pp. 19-30.

¹⁵¹ Sibylle Kapferer, ‘Ends and Means in Politics: International Law as Framework for Political Decisionmaking’, in Paul Eden, *September, 11 2001: A Turning Point in International Law?* (Transnational Publishers inc., 2005) p. 26.

¹⁵² Koskenniemi, ‘Repetition as Reform: George Abi Saab Cours Général de droit international public’, 9 *EJIL* (1998) 104, at 411.

¹⁵³ Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, *EJIL* 2006 17(1):1-13.

¹⁵⁴ See chapters three and eight.

Chapter Two

The Function of Regionalism within the International Legal System

A: Introduction

One of the most notable trends in international law is the increasing emphasis placed on the important role of regionalism within the international legal system. The effect of the regionalism phenomenon on universalism at a time of rapid globalisation has been the subject of intense study and analysis by international lawyers,¹ political scientists,² historians³ and economists.⁴ These diverse schools of thought grapple with the question: does regionalism embodied in regional organisations encourage or discourage the trend towards the attainment of universally shared values, such as those discussed in chapter one? However, and somewhat unfortunately for many international legal commentators, while these disciplines, through their respective methodologies, may advance the understanding of this subject, one may still have a few misgivings regarding their findings.

Indeed, a serious problem with this debate is that, with a few exceptions, its focus has largely been dominated by a narrow empirical focus on Europe, North America and the Pacific-Asia region.⁵ This means that the origins, dynamics and institutionalisation, along with the effects of regionalism in other parts of the globe and its application on a universal scale have been severely restrained. It therefore follows that there needs to be a rethinking of the examination of this concept, and in particular an informed scrutiny of the impact of other regions, such as those in Africa,

¹ Christoph Schreuer, 'Regionalism v. Universalism', *European Journal of International Law*, Vol 6, (1995) No. 3.

² L. Fawcett & A Hurrell, (eds.), *Regionalism in World Politics: Regional Organization and International Order* (Oxford: 1996); Pitman B. Potter, 'Universalism Versus Regionalism in International Organization', *The American Political Science Review*, Vol. 37, No. 5. (Oct., 1943), pp. 850-862.

³ G. Lundestad, *Empire by Integration: The United States and European Integration 1945-1997*, (Oxford: Oxford University Press, 1998); L. Fawcett, 'Regionalism in Historical Perspective' in L. Fawcett, & A. Hurrell, . *Regionalism in World Politics*, (Oxford, 1995).

⁴ Andrew T. Guzman & Alan O. Sykes, *Research Handbook in International Economic Law*, (Edward Elgar Publishing, 2007); Tsuneo Akaha, *Politics and Economics in Northeast Asia: Nationalism and Regionalism in Contention*, (Palgrave Macmillan, 1999); Pomfret, Richard, *The Economics of Regional Trading Arrangements*, (Oxford University Press, 2001).

⁵ Ademola Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII Of The UN Charter* (Hart Publishing Ltd., 2004), p. xxiv.

South America and the rest of Asia, have on universalism. However, when faced with a universal system divided into a diverse array of states, regions, and organisations, it is difficult to convincingly come up with comprehensive results outlining the specific function of regionalism in the international legal system. Nevertheless, the present chapter shows the role of regionalism in the development of international law and sets the background for the discussion with regard to the potential that Africa possesses in the development of peace and security.

B: Aims, Purposes and Structure

The object of this chapter is to look at the developing impact of regionalism with a particular focus on regional trends in the area of peace and security. It argues that the function of regionalism in the birth and development of the current legal system, confirms its potential to bring unprecedented opportunities for peace and security, as shown in chapter four and part three of the thesis. Importantly, this chapter fits in with the central theme of this study, which addresses the developing relationship between the concept of universalism and regionalism, including their strengths and limitations within the international system.

In order to achieve its aims, the discussion herein is divided into three parts. The first section looks at the asserted role of regionalism in the history and evolution of universalism and the balance of power. This is achieved through a chronological analysis of the birth and development of international law, which emanated from regionalism. Therefore, the section traces the journey of European regional law of the 16th and 17th centuries, whose universality attained its pinnacle with the penetration of Europe into the Americas, Asia, Africa and other regions in the late 18th and early 19th centuries, mainly by way of colonialism and other 'civilization' missions. Here, it is noted that, although there has been a decline in the accusations that rules of international law are rooted in Euro centrism, 'suspicion remains that they are simply the fruits of cultural history belonging to the West.'⁶

The second section looks at the key factors influencing the rapid growth and development of regionalism in the 20th century and thereafter. Having demonstrated

⁶ P. Ricoeur, *Oneself as Another* (trans.K.Blamely, 1992), pp. 262-263.

its chameleonic evolution in the American, European, African, the Middle East and Asian regions, this section sets the background for an introduction of the contemporary function of regionalism in peace and security, particularly in the protection of universally shared values, such as those that seek to protect human rights. This discussion is followed by section three which presents the key questions that will fall for in-depth examination throughout the study, including the legal capacity, competence and viability of regional organisations in peace and security functions, particularly those touching upon peremptory norms of international law. What will become clear is the rejection of the hypothesis stating that a series of acts by a fragmented system of regional organisations necessarily leads to a collapse of the universal system.

I.1 The Birth of European Regionalism as the Source of Universalism

Universalism in its historic context is rooted in the Stoic-Christian premise that advances the view 'that mankind as a whole forms a moral-legal unity anchored in natural law.'⁷ In this regard, 'the international society adheres to the ideals of universality,'⁸ through accepted rules of universal law that are all binding.⁹ In its original form, this presumption can be traced to the influential work of St. Augustine of Hippo, one of most respected thinkers of the Middle Ages. In his *City of God*, Augustine wrote of one divine order of God which would be reflected in the one earthly order of Rome; 'God himself gave dominion to the Romans.'¹⁰

However, the origin of universalism in its present structure has traditionally been traced to the 16th century and in particular, the Thirty Years' War involving the major countries of Europe. Largely based, but not necessarily restricted to religious grounds between Catholic and Protestant countries, it evolved into an all-out struggle for military and political hegemony in Europe.¹¹ The war narrowed down to the intense

⁷ Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law,' *EJIL*, Vol. 6 (1995) No. 1. See also Christoph Schreuer, 'Regionalism v. Universalism' *supra* note 1.

⁸ Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*, (Cambridge University Press (2004), p.1. See W.W Rostow, 'The Coming Age of Regionalism. A 'Metaphor' for our Time?,' *LXXIV(5), Encounter*, (June 1990), p. 3-7.

⁹ C.G. Weeramantry, *Universalising International law*, (Leiden: M. Nijhoff Publishers, 2004).

¹⁰ St. Augustine, *The City of God*, (Modern Library, 1994).

¹¹ Gutmann, Myron P. 'The Origins of the Thirty Years' War', *Journal of Interdisciplinary History*, Vol. 18, No. 4. (1988), pp. 749-770; Langer, Herbert. *The Thirty Year's War*. (Poole, England:

struggle that ensued between two warring factions.¹² On one hand were the 'universalist' actors, who were members of the Habsburg dynasty, i.e. the emperor and the Spanish King. On the other hand lay the 'particularist' actors, i.e. the Denmark, Dutch Republic, France, Sweden and the German Princes.¹³

The universalists asserted their right, and that of the Pope, to control Christendom in its entirety. Meanwhile the particularists rejected the imperial lordship of the emperors and challenged the authority of the Pope by upholding the sovereignty and full independence of the state.¹⁴ This chain of events led to the final settlement of Westphalia (1648), which displayed the classic tension between unilateralism, regionalism and universalism in international relations. In essence, the settlement reached at Westphalia was designed 'to undermine the hegemonic aspirations of the Habsburgs.'¹⁵ According to Michael Sheehan, the peace 'refuted the aspirations of the papacy and the Holy Roman Empire to recreate a single Christian imperium'¹⁶ while Hedley Bull adds that the settlement 'marked the end of Habsburg pretensions to universal monarchy'¹⁷ and put a halt to their aspiration of a 'supranational empire.'¹⁸

Furthermore, the Peace of Westphalia saw not only the end of a brutal war that had caused 'great effusion of Christian blood and the desolation of several provinces,'¹⁹ it also led to the rapid decline of the church.²⁰ The further disintegration of the Empire in turn resulted in the establishment of independent and equal units as a way of

Blandford Press, 1980); Rein Müllerson, 'Jus Ad Bellum: Plus Ça Change (Le Monde) Plus C'Est La Même Chose (Le Droit)?', *Journal of Conflict and Security Law* 7(2): 2002, 149-190; J.V. Polišínský, 'The Thirty Years' War and the Crises and Revolutions of Seventeenth-Century Europe', *Past and Present*, No. 39. (Apr., 1968), pp. 34-43; C.V. Wedgwood, and Paul Kennedy, *Thirty Years War* (New York: The New York Review of Books, Inc., 2005); Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order, 1648-1989*, (Cambridge University Press, 1991); Antonín Gindely, *History of the Thirty Years' War*, (Putnam, 1884).

¹² Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization*, , vol. 55, issue 2, (2001) pp. 251-287.

¹³ *Ibid.*

¹⁴ Antonio Cassese, *International Law* (Oxford Press, 2005), p. 23.

¹⁵ David Boucher, *Political Theories of International Relations* (Oxford: Oxford University Press 1998), p. 290. See also Graham Evans and Jeffrey Newham, *Dictionary of World Politics* (New York: Harvester Wheatsheaf, 1992).

¹⁶ Michael Sheehan, *The Balance of Power: History and Theory*, (London: Routledge 1996), p. 38.

¹⁷ H. Bull, *Anarchical Society* (Columbia University Press, 1977), p. 32.

¹⁸ Graham Evans & Jeffrey Newham, *The Dictionary of World Politics: Reference Guide to Concepts, Ideas and Institutions*, (London: Harvester Wheatsheaf, 1990), p. 420.

¹⁹ See Preamble of Munster 1648.

²⁰ Antonio Cassese, *International Law*, *supra* note 14. p. 24.

ensuring peace and stability in Europe.²¹ However, as will become clear throughout the thesis, the historic events surrounding the Peace of Westphalia went beyond the shores of Europe and penetrated further into other regions to establish an international system based upon the independence and sovereign equality of states.²² Certainly, as shown below, these events were to have major repercussions for the American, the Middle East, Asian and Africa regions.²³

Meanwhile, the sovereignty of states that emerged denoted the competence, independence and legal equality of states that became prominent through the 17th, 18th and 19th centuries.²⁴ However it was not until December 1933 that the Montevideo Convention on the Rights and Duties of States, itself a regional treaty, was signed and thereby set out the four criteria for statehood. Basically, in order to qualify as a state, an entity had to possess a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.²⁵ As will be shown throughout this study, the doctrine of sovereignty of states based on this model, though constantly challenged, lies at the heart of the post 1945 international legal system, three hundred and sixty years later.²⁶ It is against this background that a key theme of this thesis addresses the tension between the imperatives of state sovereignty and recent demands for the protection of human rights, which portrays a paradigmatic shift.

Meanwhile, the state system established by the Peace of Westphalia meant that the new international community belonging to different geographical, political, cultural and religious backgrounds in Europe would enter into relations by signing treaties both with one another and also with other states that the European region had come

²¹ Stephen D. Krasner, 'Compromising Westphalia,' *International Security* 20 (Winter 1995—1996), p. 115.

²² Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', *EJIL*, vol. 16, (2005) No.1.

²³ On its impact on Africa, see chapter five.

²⁴ Antonio Cassese, *International Law*, *supra* note 14, p. 24.

²⁵ See article 1 of the Montevideo Convention on the Rights and Duties of States 1933. See also Opinion No 1., Badinter Arbitration Committee, Arbitration Commission, EC Conference on Yugoslavia, November 29, 1991. 92 I.L.R.162.

²⁶ See article 2(1) & (7) of the UN Charter. See ICJ decision in the *Corfu Channel case*, (UK v. Albania) ICJ Reports, 1949, p. 4. On a summary of the scope and significance of state sovereignty, see Nico Shrijiver, 'The Changing Nature of State Sovereignty', *The British Year Book of International Law* 1999 (Oxford: Clarendon Press, 2000), pp. 69-70.

into contact with.²⁷ Therefore, treaties were conducted with the Mogul Empire in India, the Ottoman Empire, Persia, China, Japan, Burma, Siam (Thailand), Ethiopia, Liberia, Haiti and later, with the Americas.²⁸ During this period, Europe remained the 'theatre of World History' and where 'World Spirit' found its home.²⁹ As shown below, the contact which Europe made with other regions entrenched major principles whose Western characteristics ensured that for centuries to come, international law remained mainly Eurocentric.³⁰

1.2 The Importation of the Westphalian State System to Non-European Regions

The international law based on the Westphalian state system that became prominent in Europe through the 17th, 18th centuries was to be later imposed in an imperialistic manner during the 19th and the first half of the 20th centuries.³¹ As demonstrated in this section, this was primarily achieved by way of colonialism whereby European states extended their sovereignty over the territories which they acquired through conquest.³² Led by Germany, Britain, France, Italy and Portugal, colonial powers penetrated into Asia, Middle East, America and Africa and partitioned these regions into independent units, which eventually met the legal status of statehood as outlined by the Montevideo Convention, described above.

Furthermore, the artificial creation of these states was further entrenched by the principle of *uti possidetis juris*, a European concept that emanated from the Roman republic's *jus civile*, which was originally aimed at the settlement of private property

²⁷ Antonio Cassese, *International Law*, *supra* note 14, p. 25. Matti Koskeniemi, 'Legacy of the 19th Century', *Paper* given at Erik Castrén Institute of International Law and Human Rights, 2007. Available at http://www.helsinki.fi/eci/Publications/Talks_Papers_MK.htm.

²⁸ Antonio Cassese, *International Law*, *supra* note 14, p. 25.

²⁹ *Ibid.*

³⁰ Y Onuma, 'When was the Law of International Society Born?-An Inquiry of the History of International Law from an Intercivilisation Perspective', *Journal of the History of International Law* 2 (2000) 1-66.

³¹ Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' *EJIL*, Vol. 1, No. 3, (2007).

³² On the importation of international law through colonialism, see generally, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005); Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2006); Martti Koskeniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, Cambridge University Press, 2002); Mutua, wa Makau, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' 16 *Michigan Journal of International Law* (1995), 1113; Okafor, Obiora Chinedu, 'Newness, Imperialism, and International Legal Reform in our Time; A Twail Perspective,' 43 *Osgoode Hall Law Journal*, 171(2005); Okafor, Obiora, Chinedu, 'The Third World, International Law and the Post 9/11 Era: An Introduction,' 43 *Osgoode Hall Law Journal*, (2005), 1.

conflicts between citizens.³³ However, this norm was later established as a binding a nascent international norm with regard to Latin America and, whose status as a principle of international law, was later judicially confirmed in each of the main regions, including Africa,³⁴ the Middle East,³⁵ the Americas³⁶ and Asia.³⁷

Having evolved from its European origins and developed in Latin America, the journey of the principle of *utis possidetis* finally reached its pinnacle in the African continent,³⁸ as shown in chapter five. Now a well recognised rule of international law, the ICJ in *Burkina Faso/Mali* case affirmed that its purpose 'lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.'³⁹ However, in another ruling, the ICJ Chamber cautioned that the *uti possidetis juris* is essentially 'a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.'⁴⁰

Furthermore, in apparent superiority over the rights of people under alien domination, the principle of *uti possidetis juris* prevails over the well established principle of self determination.⁴¹ This is in spite of the overwhelming consensus on the importance of the right to determination as expressed in the principles and purposes of the UN Charter,⁴² General Assembly Declarations,⁴³ resolutions,⁴⁴ and judicial decisions,⁴⁵ as

³³ J. Moore, 'Memorandum on *Uti Possidetis*: Costa Rica-Panama Arbitration 1911', *The Collected Papers of John Bassett Moore*, vol. III (1944) p. 328; M Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *BYbIL* (1996) 75, at 98.

³⁴ See the *Burkina Faso/Mali* case, ICJ Reports (1986), at 565. See also the *Guinea-Bissau v. Senegal* case, 83 *ILR*, at 35; and the *Libya/Chad* case, ICJ Reports (1994), at 83 *et seq.* (Judge Ajibola);

³⁵ The *Dubai/Sharjah* case, 91 *ILR* 543, at 578.

³⁶ The *El Salvador/Honduras* case, ICJ Reports (1992) 351.

³⁷ The *Temple* case, ICJ Reports (1962) 6, at 16.

³⁸ M. Shaw, 'Peoples, Territorialism and Boundaries', *EJIL*, Vol 8. (1997) No. 3.

³⁹ ICJ Reports (1986) 554, at 566.

⁴⁰ The *Land island and Maritime Dispute* ICJ Reports (1992) 351, at 386.

⁴¹ See EC Arbitration Commission on Yugoslavia, *supra* note 22, Opinion No. 2 (1992) *ILR*.

⁴² See articles 1(2) and 55 of the UN Charter.

⁴³ See GA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960; GA Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations, 1970; and common article 1 of the International Covenant on Civil and Political Rights, 1966, and of the International Covenant on Economic, Social and Cultural Rights, 1966.

⁴⁴ See e.g. GA Res. 1755 (XVII), 1962; 2138 (XXI), 1966; 2151 (XXI), 1966; 2379 (XXIII), 1968; 2383 (XXIII), 1968; and SC Res. 183 (1963); 301 (1971); 377 (1975) and 384 (1975).

⁴⁵ *Namibia Case*, ICJ Reports (1971) 16, at 31; *Western Sahara Case*, ICJ Reports (1975) 12, at 31; the *Burkina Faso/Mali* case, ICJ Reports (1986) 554, at 567 and *Guinea-Bissau v. Senegal*, 83 *ILR* 1, at 24; the *East Timor Cases*, ICJ Reports (1995) 90, at 102.

well as by commentators.⁴⁶ However, the *uti possidetis juris* norm has been justified as essential to preserve what was achieved by the people who have struggled for their independence.⁴⁷ Yet, the norm's application beyond the colonial context has been confirmed by the Yugoslav Arbitration Commission which held that; 'though initially applied in settling decolonization issues in America and Africa,' the principle of *uti possidetis* 'is today recognised as a general principle.'⁴⁸ Having said so, European states have seemingly since abandoned their imperial conquests and emphasised on the right to self determination, particularly where it serves their national interests. This is visibly clear from the recognition and support by some major European powers of Kosovo's unilateral secession from Serbia in 2008, which challenged the principle of the inviolability of borders. Nevertheless, there still exists 'a double imposition for most European states: the need to repudiate their imperial past, while clinging resolutely to the belief that there can be no alternative to the essentially European liberal democratic state.'⁴⁹

1.3 The Further Universalisation of European Law: The Evolution of History

Having entrenched the principle of *uti possidetis*, other rules of European nature spread on a near universal scale as colonial conquests made further inroads across the major regions throughout the 15th- 19th centuries.⁵⁰ Meanwhile in Europe, the early debates centred on the supremacy of international law over domestic law. During this time, the conservatives insisted on the sovereignty of the state and the primacy of

⁴⁶ For literature on self determination, see generally, Ofuatey-Kodjoe, 'Self Determination', in O. Schachter and C. Joyner (eds.), *United Nations Legal Order, vol. 1* (1995) 349; U.O. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972); R.A. Sureda, *The Evolution of the Right of Self-Determination: A study of United Nations practice*, (Leiden : A. W. Sijthoff, 1973); M. Shukri, *The Concept of Self-Determination in the United Nations* ((Al Jadidah Press, Damascus, 1965)); M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (The Hague/Boston/London, 1982); H. Hannum, *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania, 1990); M.N. Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986), p. 59-144; M.N. Shaw, *International Law* (Cambridge University Press, 2003). C. Tomuschat (ed.), *Modern Law of Self-Determination* (London: Martinus Nijhoff, 1993); A. Cassese, *Self-Determination of Peoples* (Cambridge University, 1995); T.M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), ch. 5; R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), ch. 7; C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht, Boston and London, 1993); Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* (1994) 24.

⁴⁷ See chapter five.

⁴⁸ Yugoslav Arbitration Commission, Opinion No. 3, 92 *ILR* 168.

⁴⁹ A Pagden, *The Idea of Europe. From Antiquity to the European Union*, (Cambridge University Press 2002).

⁵⁰ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 32.

domestic jurisdiction.⁵¹ On the other hand, scholars such as Grotius, while determined to support the legal supremacy of international law over domestic law, accepted that international law contained a regional character, due to the fact that '*saepe in una parte orbis terrarum est jus gentium quod alibi non est.*'⁵²

Given that 'colonialism defined much of the international law and politics of the 20th century,' Koskeniemi observes that the 'pursuits of 'universal' international law cannot be understood without reference to the colonial experience.'⁵³ Even international lawyers of that period were said to be 'enthusiastic colonialists,'⁵⁴ as evidenced in their pleasure at the allotment of the Congo to King Leopold at the Berlin Conference of 1885.⁵⁵ Indeed, many assumed that the progression to the realisation of the idea of a Kantian universal law could only be achieved through the civilising activity of European law.⁵⁶

However, the First World War has been said to have 'marked the passing of the 'European Age.'⁵⁷ Nevertheless, it was also during this period that colonialism was incorporated as a 'science' within the Mandates system of the then newly established League of Nations in the 1920's.⁵⁸ As it turned out, despite its attempts at universal application, the League consisted of European states and thereby remained, to a large extent, a regional organisation.⁵⁹ In the end, although it was regionalism, albeit European, that had led to the development of the international system, including the creation of the League, the poor drafting of article 21 of the League Covenant

⁵¹ Emmanuelle Jouannet, 'Universalism and Imperialism,' *supra* note 31; Matti Koskeniemi, 'Legacy of the 19th Century', *supra* note 27.

⁵² Translates into, 'Often in one part of the world there is a law of nations which is not found elsewhere.' Grotius, *De Jure Belli ac Pacis (On the Law of War and Peace, 1625)*, vol. I, ch. I, para. 14. Quoted by Vierucci in Vierucci, Luisa 'WEU: A Regional Partner of the United Nations', *EU-ISS Chaillot Paper* 12, December 1993.

⁵³ Matti Koskeniemi, 'Legacy of the 19th Century', *supra* note 27.

⁵⁴ *Ibid.*

⁵⁵ See the declaration of the *Institut de droit international* on the occasion of the 1885 Berlin conference, 8 *Annuaire de l'Institut de droit international* (1885-1886), 17-18. See also The Gentle Civilizer of Nations,' *supra* note 32, p 155-156.

⁵⁶ Martti Koskeniemi, 'The Civilising Mission: International Law and the Colonial Encounter in the Late 19th Century, Paper given at Rechtshistorikertag, Bonn 12-17 September 2004, available at http://www.helsinki.fi/eci/Publications/Talks_Papers_MK.htm.

⁵⁷ A. Cassese, *International Law*, *supra* note 14, p.30. See also R. Albert-Carrie, *The Meaning of the First World War*, Englewood Cliffs, Prentice, (1965), p vi.

⁵⁸ Matti Koskeniemi 'Legacy of the 19th Century', *supra* note 27.

⁵⁸ *Ibid.*

⁵⁹ See chapter three. Christoph Schreuer, 'Regionalism v. Universalism', *supra* note 1.

concerning regional organisations partly led to its demise.⁶⁰ However, as shown in chapter three, it was the failure of this organisation to prevent World War II that marked its fatal end and thereby replaced by the UN in 1945, which devised a key role for regionalism.⁶¹

In contrast to the earlier regime, the decolonisation process that was triggered by the new UN system saw the dramatic increase in its membership, especially in the 1960s, which 'not only led to a strengthening of the groups of African and Asian states, but also to a newly discovered self-confidence of Members from these 'new regions.'⁶² Indeed, it was during this time that the traditional Eurocentric approaches to international law and its purported universal application became susceptible to a certain degree of resistance from other regions. This is particularly due to the fact that it had more to say about Europe than about any real universality of international law. Unsurprisingly, African and Asian states emerged at the forefront to challenge the rules of international law.⁶³ However, it deserves to be mentioned that the entry of European law to other regions had first been challenged at the turn of the 20th century when America engaged in the debate on the rules that were appropriate for the continent.⁶⁴ Subsequently, the regional policy that followed echoed the Monroe Doctrine (1823), which famously proclaimed that 'the American continents [...] are henceforth not to be considered as subjects for future colonization by any European power'⁶⁵ and affirmed that the United States would steer clear of European affairs.⁶⁶

⁶⁰ *Anthoni van Nieuwkerk*, 'Regionalism into Globalism? War into Peace? SADC and ECOWAS Compared' *African Security Review* Vol 10 No 2, 2001.

⁶¹ See chapter four.

⁶² Christoph Schreuer, 'Regionalism v. Universalism', *supra* note 1.

⁶³ Abi-Saab (ed.), *The Concept of International Organization*, (UNESCO: Paris 1981). On Afro-Asian attitude towards colonial international law, see F.E. Snyder and S. Sathirathai (eds.), *Third World Attitudes toward International Law: An Introduction*, (Dordrecht: Nijhoff, 1987).

⁶⁴ See A. Alvarez, 'International Life and International Law in America', 74 *Bulletin of the Pan American Union* (1940) 232.

⁶⁵ See President Monroe's Annual Message to Congress, December 2, 1823.

⁶⁶ For a detailed account of the Monroe Doctrine, see James D. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, (James D. Richardson, vol. 4, ed., 1920), pp. 385-416; Ernest R. May, *The Making of the Monroe Doctrine*, (Cambridge, Mass.: Harvard University Press, 1975); Frederick Merk, *The Monroe Doctrine and American Expansionism, 1843-1849*, (New York: Knopf, 1966); Gretchen Murphy, *Hemispheric Imaginings: The Monroe Doctrine and Narratives of U.S. Empire*, (Duke University Press, 2005); Joel S. Poetker, *The Monroe Doctrine*, (Columbus, Ohio: Charles E. Merrill Books, Inc, 1967); Donald Dozer, *The Monroe Doctrine: Its Modern Significance*, (New York: Knopf, 1965).

Meanwhile, many developing states, although not rejecting international law in its entirety, argued that they were under colonial domination during its formative years and since they played no real part in the structure of the law,⁶⁷ they were not bound by rules which they did not help create.⁶⁸ However, the decision to make their arguments in specific contexts was calculated in a manner that avoided the rejection of the various rules of international law that operated to their advantage.⁶⁹ Hence, in as much as they were defending their own interests, they were also expressing, forcefully, the direction which international law should take.⁷⁰ In doing so, the tensions that emerged over certain values aligned states into national and regional groupings to further shape and affirm the universality of certain principles of law, some of which were discussed in the previous chapter.⁷¹

1.4 Reconciling European Regional Values with Universal Principles

International law, both past and present, has been said to represent a paradox. This irony stems from its reflection of a Western culture 'while at the same time claiming not only to internationalize it but also to almost universalize the values that it conveys.'⁷² For Anghie, international law's attempts at universality have always been animated by the 'civilizing mission.'⁷³ And it was during the colonial period that the importation of western 'civilisation' techniques in non-European regions elevated this law to become truly universal.⁷⁴ Therefore, its importation of Christianity, secular

⁶⁷ See O.C. Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction Legitimate Statehood in Africa', 41 *Harv. Int'l L.J* 513 (2000).

⁶⁸ See Akehurst, *Modern Introduction to International Law* (Routledge 7th ed, 1997). For an analysis of Afro-Asian attitude towards colonial international law, see T.O. Elias, *Africa and the Development of International Law* (Leiden: Sijthoff, 1972); F.E. Snyder and S. Sathirathai (eds.), *Third World Attitudes toward International Law: An Introduction* (Dordrecht: Nijhoff, 1987); R.P. Anand, 'The Role of Asian States in the Development of International Law' in R.-J. Dupuy (ed.), *The Future of International Law in a Multicultural World* (The Hague: Nijhoff, 1983) p. 105.

⁶⁹ Higgins R, *Problems and process: international law and how we use it*, Oxford : Clarendon Press, (2006) p.11.

⁷⁰ Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi,' *EJIL*, Vol 16 (2005) No.1; Higgins R, *Problems and process, ibid*, p.11.

⁷¹ On the influence of regionalism to universal law, see Robert Jennings, 'Universal International law in a Multicultural World' in Maarten Bos & Ian Brownlie, *Liber Amicorum for Lord Wilberforce* (Oxford: Oxford University Press, 1987) also published in *Collected Essays of Sir Robert Jennings* (The Hague: Kluwer, 1998) p. 341. See also C. G. Weeramantry, *Universalising International Law*, *supra* note 9.

⁷² Emmanuelle Jouannet, 'Universalism and Imperialism,' *supra* note 31.

⁷³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 32. See also Walter Rodney, *How Europe Underdeveloped Africa*, (Howard University Press; Revised edition, 1981).

⁷⁴ See Robert Williams, Jr, 'The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought' (1983) 57 *SCLR*, 1. See also Antony Anghie, *Imperialism*,

statehood and other forms of 'civilisation' through shrewd colonialism means that its legitimacy is often susceptible to doubt. Meanwhile for others, the tensions between the universal and regional values lie at 'a deeper level' of that 'between the rational and cultural.'⁷⁵

Nevertheless, Europe has been accused of engaging in the common trend of 'mistaking one's preferences and interests for one's traditions' and then treating them as universal.⁷⁶ Therefore, according to an African scholar, Ali Mazrui, European civilization, has habitually been a pretender to the status of universal validity.⁷⁷ On the other hand, Koskenniemi seems to defend the Eurocentric nature of international law when he argues that '[t]he fact that international law is European language does not even slightly stand in the way of its being capable of expressing something universal.'⁷⁸ This is because, as he argues, the universal has no voice and 'no authentic representative of its own.'⁷⁹

The problem with this argument is that it ignores the fact that the 'voice' of universal is often expressed in various treaties and customs, particularly those protecting peremptory norms which possess universal reach across all regions.⁸⁰ And these values also exist in other forms, such as, religious, cultural and traditional norms. For example, from an Islamic point of view, mankind is 'one nation'⁸¹ whose 'dignity should be inviolable.'⁸² Similarly 'collective unity is not something new or peculiar to Africa.'⁸³ Indeed, the African philosophy of Ubuntu, which translates as humanity towards others, also emphasises the ethical conduct expected of mankind.⁸⁴

Sovereignty and the Making of International Law, *supra* note 32; Martti Koskenniemi, 'International Law in Europe,' *supra* note 22.

⁷⁵ Emmanuelle Jouannet, 'Universalism and Imperialism,' *supra* note 31.

⁷⁶ See, Martti Koskenniemi, 'International Law in Europe,' *supra* note 22.

⁷⁷ Prof Ali Mazrui, 'Pretender to Universalism: Western Culture in the Globalising Age', *BBC World Service*, World Lectures (2000). Available at

http://www.bbc.co.uk/worldservice/people/features/world_lectures/mazrui_lect.shtml

⁷⁸ Martti Koskenniemi, 'International Law in Europe,' *supra* note 22.

⁷⁹ *Ibid.*

⁸⁰ See article 53 of 1969 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. See also the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, UN Doc. A/Conf. 129/15 (1986).

⁸¹ *Qur'an*, (Translation by Abdullah Yussuf Ali, Dar el-liwa, Riyadh, Saudi Arabia (nd), Reprint of Third Edition, Lahore 1938), 49/13.

⁸² Sheikh Wahbeh al-Zuhili, 'Islam and International Law,' *International Review of the Red Cross* Vol. 87, No. 858, (2005).

⁸³ Nombeko Liwane, 'The Significance of Ubuntu in the Development of an ANC Cadre,' *Agenda* Vol. 8, (1990).

⁸⁴ Desmond Tutu, *Reconciliation: The Ubuntu Theology of Desmond Tutu*, (Pilgrim Press, 1997).

Meanwhile, Koskenniemi also ignores the cosmopolitan nature of the contemporary international legal system. As shown in chapter one, in addition to sovereign states, an array of legal subjects and values within the international community exist and operate on the universal and regional scales to form the most active component of international legal society.⁸⁵ These entities operate within a legal system which 'like a modern constitution' not only 'comprises of principles and rules, but also basic values.'⁸⁶ Nevertheless, despite its noble claims to universality, the law is accused of concealing hidden political, social and cultural forces which immediately raises doubts about its motives.⁸⁷

In this context, the compulsion to look behind the seemingly humanist motives of powerful states in their advancement of assistance to developing countries is visible in an African expression explaining the dilemma facing its natives subsequent to the earlier civilising missions. The famous Bantu saying precedes that; 'At first we had the land and the white man had the bible. Now we have the Bible and the white man has the land.'⁸⁸ However, this is to not to deny the existence of 'genuine humanists and genuine liberals, sharing an authentic faith and thoroughly convinced of the rightness of their cause.'⁸⁹ The point here is that certain principles which were traditionally thought as universal have also been accused of being imperialist in nature.⁹⁰

This reasoning has been extended to the application and enforcement of peremptory norms. Hence, Koskenniemi argues that the rules of *jus cogens* and obligations *erga omnes*, described in chapter one, do not necessarily express anything universal and are more or less used in hegemonic struggles.⁹¹ He argues that *jus cogens* are merely used as a pretext by powerful states as a smokescreen in order to further their selfish

⁸⁵ For a detailed criticism of Martti Koskenniemi, see Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values,' *supra* note 70.

⁸⁶ C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Receuil des Cours* (1999), p. 23, at 28.

⁸⁷ Higgins R, *Problems and process*, *supra* note 69 p. 11; A Cassese, *International Law*, *supra* note. 14, p. 27; Martti Koskenniemi, 'International Law in Europe,' *supra* note 22.

⁸⁸ See H. L. Menckens, *New Dictionary of Quotations*, (Knopf, 1941).

⁸⁹ Emmanuelle Jouannet, 'Universalism and Imperialism,' *supra* note 31. See generally M. Koskenniemi, *The Gentle Civilizer of Nations*, 'supra' note 32.

⁹⁰ Emmanuelle Jouannet, 'Universalism and Imperialism,' *supra* note 31.

⁹¹ See, Martti Koskenniemi, 'International Law in Europe,' *supra* note 22. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review of International Affairs* (2004) 197.

interests.⁹² However, while appreciating the unilateralist propensity and hegemonic power of certain states,⁹³ the problem with this argument is that the rules of *jus cogens* are part of 'a higher law,'⁹⁴ incapable of being measured by way of economic, political or military might.

Therefore, despite the possible truth in this argument, the assertion that *jus cogens* are manipulated by western states to further their own aims is questionable. Indeed, the rules are a matter of law and do not prevent a powerful state from intervening in a case of breach of *jus cogens* e.g. under the obligation to 'prevent and punish'⁹⁵ genocide simply because it is also in its national interests. The problem here seems to be the selective nature of powerful states in their purported crusade in support of the rules of *jus cogens*, and not the legitimacy with regard to the universal application of these rules. Therefore in a response to Koskenniemi, Dupuy argues that more efforts 'should be directed at reminding powerful states that their convictions, which favour the international legal system at the universal level, should be carried out consistently.'⁹⁶

Having traced the function of regionalism in the birth and development of international law, the rest of this chapter considers its current function within the present system. What becomes obvious from the discussion below is that as the universalisation of legal principles intensifies, each region on the globe seeks to consolidate its strength by putting its own values on the universal table while at the same time adjusting and regionalising the commonly agreed values to suit its own.

2.1 The Key Factors Influencing the Growth and Development of Regionalism in the 20th Century and Beyond

As Western values battled and interacted with those of other regions, European law continued to shape the international legal system. Based on geographical relationship and mutual interdependence, states continued to interact through bilateral and regional agreements at the turn of the 20th century. During this time, regionalism grew

⁹² See, Martti Koskenniemi, 'International Law in Europe,' *ibid.*

⁹³ See chapter one.

⁹⁴ Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making', *EJIL*, Vol. 2 (1991) No. 1.

⁹⁵ See article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1949.

⁹⁶ Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values,' *supra* note 70.

in a chameleonic manner, which included constant transformation of regional organisations in order to meet the demands of the evolving international community,⁹⁷ as shown in chapter four. Therefore, what will become clear here is that the concept of regionalism has not always necessarily been desired, but has resulted from what has been perceived as indispensable, not only in support of peace and security, but also for broader issues of integration and economic survival.

In the Americas, the early regional efforts by Latin America and the Caribbean were largely viewed as attempts to develop along the lines of import substitution in isolation from the rest of the world.⁹⁸ However these states are also part of the Organisation of American States (OAS) that was formed in 1948 partly in response to a perceived threat from communism.⁹⁹ The foundational purpose of the OAS was 'to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.'¹⁰⁰ Although its early preoccupations were security-related, the OAS currently takes an active role in key areas particularly in the promotion of democracy,¹⁰¹ as shown in chapter seven.

Meanwhile, in the European context, the current evolution of regionalism began in the early 1950s, in the form of the Organization of European Economic Cooperation and the Coal and Steel Community in Europe. This development reflects the historical and cultural desire to strengthen the political and economic conditions within the region.¹⁰² The European community has since transformed itself to the

⁹⁷ L Fawcett and A Hurrell. *Regionalism in World Politics*, *supra* note 2; Jean Grugel and Wil Hout, *Regionalism Across the North-South Divide*, (London, New York: Routledge, 1999); Hettne Björn, Inotai András, and Sunkel Osvaldo, *Globalism and the New Regionalism*, (London: MacMillan Press Ltd, 1999); Schulz Michael, Söderbaum Fredrik, and Öjendal Joakim, *Regionalization in a Globalizing World* (London, New York: Zed Books Ltd, 2001); Boas Morten, Marchand Marianne, and Shaw Timothy. 'Special Issue: New Regionalisms in the New Millennium.' *Third World Quarterly* 20: 897-1070 (1999).

⁹⁸ On recent trends or Latin American regionalisation, see Robert Devlin, Ricardo French-Davis 'Towards an Evaluation of Regional Integration in Latin America in the 1990s', *The World Economy* 22 (2) (1999), 261–290. See also, generally, Inter-American Development Bank, *Beyond Borders: The New Regionalism in Latin America: Economic and Social Progress in Latin America: 2002 Report*, (Inter-American Development Bank, 2002).

⁹⁹ On the OAS, see David Sheinin, *The Organization of American States*, (Oxford: ABC-Clio Press and New Brunswick, NJ: Transaction Publishers, 1995 and 1996).

¹⁰⁰ Article 1 of the Charter of the Organisation of American States.

¹⁰¹ See the OAS Inter-American Democratic Charter 2001.

¹⁰² Christopher Harvie, *The Rise of Regional Europe*, (London & New York: Routledge, 1994); Ben Rosamand, *Theories of European Integration*, (New York: Palgrave, 2000); Mario Telò, *European*

European Union, (EU)¹⁰³ whose membership, powers and areas of policy has significantly increased.¹⁰⁴ Indeed, the political and legal structure of the EU is widely accepted as representing the most advanced form of regionalism.¹⁰⁵ Therefore it forms an important contribution to international law with valuable lessons for other regions, including Africa.¹⁰⁶

Certainly, the latter point is visibly clear in the fact that the AU, which is the overall continental organisation of the African continent, is modelled around the EU.¹⁰⁷ Established in 2001, the AU represented a seismic shift in the institutional evolution of the continent.¹⁰⁸ However, the early development of regionalism within Africa was manifest in the Pan African struggles that led to the creation of the now defunct Organisation of African Unity (OAU), which the AU replaced.¹⁰⁹ Founded in 1963, the OAU was originally designed to rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of member states and to promote international cooperation within the framework of the UN.¹¹⁰

In contrast, and in a clear attempt to move with the changing times, the AU was formed with the objective of accelerating the process of integration in the continent to

Union and New Regionalism, (Burlington: Ashgate Publishing Company, 2001); Anders Wivel, *Explaining European Integration*, (Copenhagen: Copenhagen Political Studies Press, 1998); Desmond Dinan, *Europe Recast: A History of European Union*, (Palgrave Macmillan, 2004).

¹⁰³ The Maastricht Treaty (the Treaty on European Union, TEU), Maastricht, Netherlands. 7, February, 1992. See also Jan Klabbers, 'Presumptive Personality: The European Union in International Law' in Martti Koskenniemi, *International Law Aspects of the European Union* (The Hague: Nijhoff, 1997) pp. 231-254.

¹⁰⁴ See generally Craig, Paul; Gráinne de Búrca *EU Law, Text, Cases and Materials*, (Oxford, New York: Oxford University Press, 4th ed., 2007); Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (Oxford, New York: Oxford University Press, 2nd ed., 2007); Steiner, Josephine; Lorna Woods; Christian Twigg-Flesner, *EU Law*, (Oxford, New York: Oxford University Press, 9th ed., 2006); John McCormick, *Understanding the European Union*, (Palgrave Macmillan, 3rd ed 2005); John Peterson, & Michael Shackleton, *The Institutions of the European Union* (Oxford University Press, 2nd edition, 2006).

¹⁰⁵ See generally, Jeremy Rifkin *The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream* (Jeremy P. Tarcher, 2004)

¹⁰⁶ See chapter six.

¹⁰⁷ *Ibid.*

¹⁰⁸ T. Maluwa, 'The Constitutive Act of the African Union and Postcolonial Institution-building in Africa', 16 *Leiden Journal of International Law* (2003) p. 157.

¹⁰⁹ See chapter five.

¹¹⁰ See chapter five for a discussion of the principles and purposes of the Organisation of African Unity Charter 1963.

enable it play its rightful role in the global economy, while addressing multifaceted social, economic and political problems compounded as they are by certain negative aspects of globalisation.¹¹¹ Furthermore, its establishment also formed 'one of the greatest achievements' of the continent 'symbolizing the realization of the aspirations of great Pan-Africanists.'¹¹² The historic journey from the OAU to the new AU, particularly with regard to peace and security, is discussed in detail in the second part of this thesis.

Meanwhile, regionalism in Asia remains a relatively new concept when compared with Europe, the Americas and Africa. Unlike the other regions, there is no single dominant organisation, such as the EU, that is responsible for the continental regional integration. However, this may be due to the 'Asian way' of behind the scenes diplomacy based on non-confrontation, informality and lack of rigid structures which they remain hesitant to change.¹¹³ Nevertheless, the main sub-regional organisation includes the Association of South East Nations (ASEAN) founded in 1967.¹¹⁴ As its name suggests, ASEAN is an organization on the Southeast Asian region and aims to accelerate economic growth, social progress, and cultural development among its members and the promotion of regional peace.¹¹⁵ However, there are other agencies

¹¹¹ See the principles and purposes of the AU embodied in the Constitutive Act of the Union 2001.

¹¹² See Statement by Dr Salim Ahmed Salim, Secretary-General of the OAU, at the opening of the 37th Ordinary Session of the Assembly of Heads of State and Government, Lusaka, Zambia, 9 July 2001.

¹¹³ Almonte, Jose T., 'Ensuring Security the ASEAN Way,' *Survival*, Vol. 39, No. 4, Winter 1997–1998, pp. 80–92; See also Acharya, Amitav, 'A Regional Security Community in Southeast Asia?' *The Journal of Strategic Studies*, Vol. 18, No. 3, (September 1995), pp.175–200; Buzan, Barry, and Gerald Segal, 'Rethinking East Asian Security,' *Survival*, Vol. 36, No. 2, (Summer 1994), pp. 3–21; Alagappa, Muthiah (ed.), *Asian Security Practice: Material and Ideational Influences*, (Stanford, CA: Stanford University Press, 1998); Mely Caballero-Anthony, 'Regionalization of Peace Operations in Asia: Experience and Prospects of ASEAN, ARF and UN Partnership,' *Paper presented at the SWP/IPA workshop on Regionalisation of Peace Operations, 11-12 January 2002, Potsdam*. See also Mely Caballero-Anthony, 'Partnership for Peace in Asia: ASEAN, the ARF, and the United Nations,' *Contemporary Southeast Asia*, Vol. 24, (2002)

¹¹⁴ On ASEAN, see Jones, David Martin and Michael L.R. Smith. 'Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order.' *International Security* 32 1 (Summer 2007): 148-184; Paul Bowles, 'ASEAN, AFTA and the 'New Regionalism'.' *Pacific Affairs* 70 (1997), 219-234; Philip Charrier, 'ASEAN's inheritance: the regionalization of Southeast Asia, 1941-61.' *The Pacific Review* 14 (2001), 313-338; James Cotton, 'The 'haze' over Southeast Asia: Challenging the ASEAN Mode of Regional Integration.' *Pacific Affairs* 72 (1999), 331-352; Peter Eng, 'Transforming ASEAN,' *Washington Quarterly* 22 (1999), 49-66.

¹¹⁵ See the Overview, contained in the ASEAN Secretariat official website available at <http://www.aseansec.org/>. See also Evelyn Goh. 'Great Powers and Hierarchical Order in Southeast Asia: Analyzing Regional Security Strategies.' *International Security* 32 3 (Winter 2007/08): 113-157.

within the region, which include the ASEAN Regional Forum¹¹⁶ (ARF). Founded in 1993, the ARF is an informal multilateral dialogue of 25 members that primarily addresses regional security issues in the Southeast Asian region.¹¹⁷

Also, the Asia Pacific Economic Co-operation¹¹⁸ (APEC), which was established in 1989, consists of most 'economies' with a coastline on the Pacific Ocean. The term 'economies,' as opposed to states, is used to describe APEC members because the APEC cooperative process is predominantly concerned with trade and economic issues, with members engaging with one another as economic entities within the Asia-Pacific region.¹¹⁹ Finally, the South Asian Association for Regional Co-operation¹²⁰ (SAARC) that was established in 1985 is an economic and political organization, which although bogged down by the rivalry between India and Pakistan, is aimed at accelerating the pace of socio-economic and cultural development in the Southern Asian region.¹²¹

¹¹⁶ Member states include Australia, Canada, People's Republic of China, European Union, India, Japan, North Korea, South Korea, Mongolia, New Zealand, Pakistan, Papua New Guinea, Russia, East Timor, United States and Bangladesh.

¹¹⁷ Ralf Emmers, 'The Influence of the Balance of Power Factor within the ASEAN Regional Forum', *Contemporary Southeast Asia*, Vol. 23, (2001); John Garofano, 'Flexibility or Irrelevance: Ways Forward for the ARF,' *Contemporary Southeast Asia* 21 (1999), 74-94; Ippei Yamazawa, 'Whither East Asian Regionalism,' *Asia-Pacific Review* 8 (2001), 18-27.

¹¹⁸ Its 21 members include Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong-China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, United States, and Vietnam.

¹¹⁹ On APEC, see M. Dutta, 'Asia-Pacific Economic Cooperation (APEC)', *Journal of Asian Economics*, Vol. 6 No. 4 (1995), pp. 511-588; P.J Lloyd, 'An APEC or Multilateral Investment Code?', *Journal of Asian Economics*, Vol. 6 No 1, (Spring 1995), pp. 53-70. Bergsten, C. Fred, 'The Case for APEC: An Asian Push for World-Wide Free Trade,' *The Economist*, January 6, 1996, pp. 62-63; Paul Aarts, 'The Middle East: A region without Regionalism or the End of Exceptionalism,' *Third World Quarterly* 20 (1999), 911-925.

¹²⁰ Member states are India, Pakistan, Bangladesh, Sri Lanka, Nepal, Maldives, Bhutan and Afghanistan.

¹²¹ Kishore C. Dash, 'The Political Economy of Regional Cooperation in South Asia, Pacific Affairs, Vol. 69, (1996); Adiseshiah, Malcolm. 'The Economic Rationale of SAARC.' *South Asia Journal* Vol. 1, Number 1 (1987): 29-42; Bahadur, Kalim. 'The Politics of SAARC,' *World Focus* Vol. 25, Number 6 (2004), pp. 3-8; Das, Debendra K. *SAARC: Regional Cooperation and Development*, (New Delhi, India: Deep and Deep Publications, 1998); Gopal, Krishan. *Geopolitical Relations and Regional Cooperation: A Study of South Asia*, (New Delhi, India: Trans Asia Publications, 1996); Harshe, Rajen. 'South Asian Regional Cooperation: Problems and Prospects,' *Economic and Political Weekly*. Vol. 34, Number 19 (1999): 1100-1005 and Nahar, Emanuel. *SAARC, Problems and Prospects*, (New Delhi, India: Sehgal Publishers, 1991).
Services, 1991.

Finally, the Middle East region offers a unique insight into the complexities which may arise out of social-cultural differences within a region.¹²² The disagreements that divide its constituent states are as a result of the presence of radically Islamic regimes and the threat posed by western political ideology. Indeed, the ongoing crisis has led the Middle East to be referred to as 'a region without regionalism.'¹²³ However, rather than a lacking of regionalism, it has been argued that the expanse consists of a multiplicity of regionalisms, which consists of the Middle East, the Arab, the Mediterranean and the Islamic paradigms.¹²⁴

Nevertheless, the Arab League, which was created in 1945,¹²⁵ is the principle regional organisation and has been preoccupied with the ongoing Arab-Israel confrontation.¹²⁶ In contrast to the regional organisations described above, the membership of the Arab League is founded on culture,¹²⁷ rather than geographical location, and has hardly achieved any significant degree of regional integration. However, as shown in the chapter four, though not initially perceived as a regional arrangement for the purposes of the UN Charter, it now qualifies with that regard in similar fashion to the OAS and the AU.¹²⁸

It also deserves to be mentioned that all Arab League members are also members of the Organisation of the Islamic Conference whose aim is to 'promote Islamic solidarity among Member States.'¹²⁹ However, despite the shared history, language and culture, there exist deep ideological differences amongst these states.¹³⁰ Hence in

¹²² Paul Aarts, 'The Middle East: A region without Regionalism or the End of Exceptionalism,' *supra* note 119; Bilgin, Pilar. 'Inventing Middle East?' Pp. 10-37 in Utvik and Vikor *The Middle East in a Globalized World*, (Bergen/London, 2000).

¹²³ Paul Aarts, 'The Middle East: a region without regionalism or the end of exceptionalism?', *supra* note 119.

¹²⁴ See Saad Eddin Ibrahim, 'Future Visions of the Arab Middle East,' *Security Dialogue* 27:4 (1996) pp. 428-430.

¹²⁵ See the Pact of Arab League of States, 1945, U.N. doc. A/C. 6/L.111 (also in U.N. Treaty Series, vol. LXX, pp. 237-263).

¹²⁶ H. McCoubrey, J. Morris, *Regional Peacekeeping in the Post-Cold War Era*, (Kluwer Academic Publishers, 2000), p. 189; Charles Tripp, 'Regional organizations in the Arab Middle East', in Louise Fawcett and Andrew Hurrell, eds, *Regionalism in world politics: regional organization and international order* (Oxford: Oxford University Press, 1995), pp. 283-308. On the Israeli-Palestinian issue, see Charles L. Geddes, *A Documentary History of the Arab-Israeli Conflict*, (Greenwood Press, 1991).

¹²⁷ See article 1 of the Arab League Cultural Treaty 1946.

¹²⁸ On this point, see Christine Gray, *International Law and the Use of Force*, (Oxford University Press, 2nd Edition, 2004), p. 287.

¹²⁹ Article 1 of the Charter of Islamic Conference 1969.

¹³⁰ Michael N. Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States System', *International Organization*, Vol. 49, No. 3, 1995, pp. 479-510.

this context, despite the noted advantages of regionalism in the provision of regional solutions to disputes, 'the case of [the] middle east clearly demonstrates that regional organisations are occasionally ill suited in solving crisis within their very own borders.'¹³¹

3.1 The New Regionalism and its Developing Mechanisms for Human Rights Enforcement

Having traced the historical function of regionalism in the development of the international legal system, what follows is an introduction of the contemporary function of this phenomenon and its relationship with universalism in the protection of community values. As will be demonstrated throughout the thesis, the role of regional organisations in the protection of human rights has worked in a manner that was unforeseen by the drafters of the UN Charter, which was designed to regulate their activities and ensure their actions were consistent with the principles and purposes of the UN.¹³² And although the major regional organisations were originally economically aligned or designed to deal with external threats to their peace and security, they have since transformed themselves to halt the gross violation of human rights in their territories.¹³³

Indeed, as shown in the coming chapters, the areas of peace and security and human rights are intractably linked. This is primarily because, for the most part, the latter incorporates peremptory norms that seek to protect populations from severe political, legal, and social abuses that are conflict related. At this juncture, it is worth mentioning that the Vienna Declaration of the 1993 UN World Conference on Human Rights, which gave a modern interpretation of the earlier Declaration of Human Rights,¹³⁴ authenticated the important role of regional organisations in reinforcing universal human rights.¹³⁵

Moreover, the Declaration called for the establishment of regional arrangements to promote the interests of the international community. Indeed, for the purposes of

¹³¹ H. McCoubrey, J. Morris, *Regional Peacekeeping in the Post-Cold War Era*, *supra* note 126, p 59.

¹³² See chapter four.

¹³³ *Ibid* and chapter seven.

¹³⁴ See the Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

¹³⁵ United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, 25 June 1993, I para. 37, 32 ILM (1993) 1661 at 1672.

furthering these objectives, there exists a broad range of regional agreements which promote and protect human rights, including the European Court of Human Rights, the African Commission on Human and People's Rights, the Inter-American Court of Human Rights and the Cairo Declaration on Human Rights in Islam. Significantly, the complimentary function of regional human rights regimes across the major regions has been welcomed by the UN.¹³⁶ However, an evaluation of these regional agreements demonstrates the limited enforcement capability available in their treaties.¹³⁷

Therefore, this thesis uses the peace and security model and measures its application in the human rights context. Such an approach is based on the practice of recent actions of regional organisations which have highlighted the challenges brought about by potential threats to universal and regional peace and security against the increasing emphasis on the promotion of human rights, particularly those amounting to peremptory norms.¹³⁸ Indeed, as shown in the coming chapters, certain organisations have acted upon the challenge presented by the UN Secretary General, on whether the doctrine of non-intervention and sovereignty should allow coalitions of states to stand aside and watch as horror unfolds on a future Rwanda or Srebrenica.¹³⁹

However, as shown in chapter three and seven, some of their actions have often been perceived as posing a potential challenge to the UN legal system,¹⁴⁰ including the rules on the use of force contained in article 2(4) and chapter VIII of the UN Charter. It is in this context that this thesis aims to identify and develop a workable framework, within the permissible legal rules, in order to demonstrate that the new regionalism is indispensable, particularly in the areas of human rights where the potential future role of regional organisations was ignored and where the much favoured universalism had failed.

¹³⁶ E.g. see G.A. Res. 47/125, 47 U.N. GAOR Supp. (No. 49) at 198, U.N. Doc.A/47/49 (1992).

¹³⁷ See generally Rhona K.M. Smith, *Textbook on International Human Rights*, (Oxford University Press, 3Rev Ed edition, 2007).

¹³⁸ See chapters three, four and seven.

¹³⁹ Kofi Annan's speech on 20 September 1999 before the UN General Assembly: *Balance State Sovereignty with Individual Sovereignty!* http://users.lmi.net/wfanca/pp_annan_on_sov.html; Report of the Secretary General on the Work of the Organisation, A/54/1, 1999, p.48; Kofi Annan, *We the Peoples; The Role of the United Nations in the 21st Century*, UN Doc. A/54/2000, Chapter IV, p. 7. see also Kofi Annan, 'Two Concepts of Sovereignty,' *Economist*, September 18, 1999.

¹⁴⁰ See chapters three, four and seven.

3.2 Devising a Complimentary Function for Regionalism within Universalism: An Overview of the Key Issues addressed in the Study

A major theme of this thesis addresses the similarities and differences, as well as evolving relationship between regionalism and universalism, with respect to collective security. This broad enquiry is useful in answering specific questions informing the study such as Africa's understanding, interpretation and application of the rules governing the use of force in international law and how they measure against the prohibition against the rules prohibiting the use of force contained in article 2(4) and Chapter VIII of the UN Charter. As argued in chapter seven, the recent actions of regional organisations, though controversial, are rooted in the deficiency of the UN system,¹⁴¹ which is based on the Westphalian interstate system and which hardly emphasised the significance of the need to protect human rights.¹⁴²

The study identifies and builds on the developing regional approach that is founded on the dilemma brought about by the strict interpretation of the provisions of the UN Charter against the wider peremptory rules of law, as was highlighted by the inaction of the UN and the international community during the 1994 Rwandan genocide.¹⁴³ In this instance, despite the fact that a clear peremptory norm of international law required them to 'prevent and punish'¹⁴⁴ genocide, the UN and regional agencies failed to act in order to prevent the massacre of up to one million people.¹⁴⁵ Instead, reliance was placed on the principles of sovereignty, non-intervention,¹⁴⁶ and the prohibition of the use of force,¹⁴⁷ above the duty to protect the higher laws enshrined in the *jus cogens*, which obligated them to act.¹⁴⁸ Whereas few would doubt the UN's primacy in the maintenance of international peace and security, the question that still persists is with

¹⁴¹ See chapters three, seven and eight.

¹⁴² N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin & Robert Mccorquodale, (eds.) *Economic, Social and Cultural Rights in Action*, (Oxford University Press, 2007); Mashood Baderin.A. and A. Abass, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union,' *Netherlands International Law Review*, 49. (2002), pp. 1-38.

¹⁴³ See chapter five and eight.

¹⁴⁴ See article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

¹⁴⁵ See chapter five.

¹⁴⁶ Article 2(7) of the UN Charter. See chapters three, five and nine.

¹⁴⁷ Article 2(4) of the UN Charter. See chapter three.

¹⁴⁸ See chapter one.

regard to which body possesses the subsidiary or complementary function when the latter organisation is slow, unwilling or unable to exercise its competence.¹⁴⁹

This question has partially been answered and the lessons from Rwanda continue to make a strong case for the reassessment of past practice.¹⁵⁰ Indeed, the ECOWAS intervention in Liberia (1991) and Sierra Leone (1997) brought about an African tradition that raised fundamental issues with regard to whether there was a right, or an emerging one for that matter, where regional organisations could intervene in order to halt systematic violations of human rights without the Security Council's prior approval, particularly where the latter had failed to act.¹⁵¹ And as scholars grappled with this question, the ECOWAS action was closely followed by the NATO's regional intervention to halt the slaughter of Kosovo Albanians (1999).¹⁵²

However, Africa went further. Not only did it dismantle its previous continental organisation (OAU),¹⁵³ subsequently the established a new African Union and awarded itself the right to intervene, which portrayed Africa's willingness to play a more formidable role in the prevention of key international crimes such as war crimes, genocide and crimes against humanity.¹⁵⁴ In doing so, the emerging development led to fundamental questions of what was left of the UN's peace and security system, which vests the primary responsibility for the maintenance of peace and security in its Security Council.¹⁵⁵ The issues raised were highly significant given that the UN organisation forms an almost complete system and arguably takes primacy over all other international agreements.¹⁵⁶

Unfortunately, as shown below, the relationship between regionalism and universalism with regard to peace and security has often been seen as one of contest.¹⁵⁷ Therefore a major aim of this thesis is to present a rounded picture of the

¹⁴⁹ See chapter three, seven and eight.

¹⁵⁰ See chapter seven.

¹⁵¹ See e.g. Richard B. Lillich, & Hurst Hannum, *International human rights: Problems of law, policy, and practice*, (Little, Brown, Boston, 1995), p. 614.

¹⁵² See chapter three.

¹⁵³ See chapter five.

¹⁵⁴ Article 4 (h) of the Constitutive Act of African Union.

¹⁵⁵ See chapter three.

¹⁵⁶ See chapter four.

¹⁵⁷ *Ibid.* See also chapters four, seven, eight and nine.

manner through which the UN and regional organisations can better their relationship in the promotion and maintenance of regional and international peace and security using the AU's model of regional security. In doing so, the study analyses the different questions raised by the AU's right to forcefully intervene as part of its mechanism of regional security and how this right sits alongside established rules of international law.

3.3 Establishing the Case for Regionalism and addressing Key Concerns

A serious problem with universalism is that it often leaves gaps amidst its struggles to catch up with the increasing pace of international affairs.¹⁵⁸ This flaw has meant that its functions have been picked up by regional organisations.¹⁵⁹ These include the EU, the OAS and the AU. Furthermore, there are other regional organisations in existence such as the Economic Community of West African States (ECOWAS) and defence-pacts, such as the North Atlantic Treaty Organization (NATO), as well as security arrangements such as the Organization on Security and Cooperation in Europe (OSCE). As shown elsewhere in this study, these have all modified their constitutive instruments to include peace and security roles.¹⁶⁰

Indeed, the deficiency the UN and the usefulness of regional organisations challenge the notion as to whether every international problem requires universal collective action. However, to some, the growth of regional organisations and increased multilateralism has become a matter of concern as these entities have been perceived as possessing the potential to undermine the rule of international law embodied in the international legal system. In this context, a deeply divisive debate has since emerged between the 'regionalists' and 'regiosceptics' schools of thought.¹⁶¹

According to its detractors, regionalism poses as a threat to the international system in terms of its relationship with universalism under the auspices of the UN, whose legitimacy in terms of numbers in membership remains largely unchallenged.¹⁶² However, the weakness of this argument is that it seems to ignore the role of

¹⁵⁸ See chapters three six and eight.

¹⁵⁹ For detailed illustration of this point, see chapter four and part two of thesis.

¹⁶⁰ See chapter four.

¹⁶¹ Terms used by Benedikt in Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *The Journal of Humanitarian Assistance*, 2006.

¹⁶² See article 4 (1) of the UN Charter.

regionalism in its contribution to 'a deeper sense of participation, consensus and democratization in international affairs.'¹⁶³ However, in reality, due to the fact that 'few regional organisations have the capability or international legitimacy,'¹⁶⁴ Higgins observes that 'the involvement of regional arrangements has not had the effect of enlargement in the sense of a broader participation.'¹⁶⁵

On one hand, the proponents of regional organisations argue that the emergence of regionalism has brought an urgently needed approach and offers an unprecedented opportunity for an effective partnership with universal organisations.¹⁶⁶ In this regard, Louise Fawcett observes that 'robust regionalisation goes hand in hand with robust internationalism'¹⁶⁷ However, the critics of regionalism favour universalism over regionalism and argue that the mere usurpation of the universal role given to a universal body by the international community without the latter's authorisation, is itself a violation of international law.¹⁶⁸ However, the problem with this assertion is that it fails to recognise valuable opportunities that the cooperation and coordination between the UN and regional organisations provide for the international community. Hence, a theme of this study sets out at identifying clear purposes of promoting and deepening co-operation in peace and security within permissible legal grounds.

Such an approach is important given that warning has been made to the effect that 'the current trend in regional collective security portends dire consequences for Chapter VIII in particular and for the cohesion of the UN collective security in general.'¹⁶⁹ However, despite this assertion, it will be shown that the function of regionalism, itself acknowledged by Chapter VIII of the UN Charter, is apt to adapt to meet the changing security demands of the international community.¹⁷⁰ Having said

¹⁶³ See former UN Secretary General Boutros Boutros, *Agenda for Peace*, UN Doc. A/47/277 - S/24111, (1992), para 64.

¹⁶⁴ Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers*, (Oxford University Press, USA; New Ed edition, 2000), p. 282.

¹⁶⁵ R. Higgins, 'The United Nations' Role in Maintaining International Peace: the Lessons of the First Fifty Years', *New York Law School Journal of International and Comparative Law*, 16 (1996), p.135 at p. 143.

¹⁶⁶ See chapters three, six, seven and eight.

¹⁶⁷ Louise Fawcett, 'The Evolving Architecture of Regionalization', Presentation at the SWP/IPA workshop on *Regionalization of Peace Operations*, 11-12, January 2002, Potsdam.

¹⁶⁸ See chapter eight.

¹⁶⁹ A. Abass, *Regional Organisations and the Development of Collective Security*, *supra* note 5, p.xx.

¹⁷⁰ See chapter four.

so, highlight is made of the apparent difficulty surrounding the ability to structure formal relationships that outlines a clear division of responsibilities between the UN and regional organisations.¹⁷¹

In doing so, it has to be bore in mind that any relationship between the UN and regional organisations has to exist within the key parameters of the UN, including ensuring the compatibility with traditional concepts, such as the key principles in article 2(4) and Chapter VIII of the UN Charter. Moreover, particular reference is made to an important universalistic feature which affirms the prevalence of Charter obligations over those contained in 'any other international agreement'¹⁷² provided for under article 103 of the UN Charter.¹⁷³ Therefore, in order to envisage a proper relationship of cooperation between the UN and the AU, it must be shown that its right to intervene interpreted narrowly or permissively, is in harmony with key principles of the UN.

However, mention must be made of wider rules of international law, which go beyond those envisaged by the UN Charter, such as those prohibiting war crimes, genocide and crimes against humanity, to which the AU subscribes. Importantly, it is also crucial to take into account the tension and often the clash of *jus cogens* norms existing within and beyond the Charter.¹⁷⁴ In this context, it will be recalled from chapter one that the lack of a hierarchy of peremptory norms occasionally creates a legal void in the event of a conflict between rules of *jus cogens*. Therefore, a major question this thesis poses is whether regional organisations ought to be ready to seemingly act in flagrant violation of the prohibition against the use of force contained in article 2(4) of the UN Charter,¹⁷⁵ in order to comply with an equally compelling obligation, such as that embodied in article 1 of the Genocide Convention.¹⁷⁶

¹⁷¹ See chapter four, six and eight.

¹⁷² See article 103 of the UN Charter.

¹⁷³ On the application of article 103, see discussion in chapters three, four and seven.

¹⁷⁴ Joseph H.H. Weiler and Andreas L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?' *EJIL*, Vol. 8 (1997) No. 4, Martti Koskenniemi, 'Hierarchy in International Law: A Sketch,' *EJIL*, Vol. 8 (1997) No. 4, Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' *EJIL*, Vol. 8 (1997) No. 4.

¹⁷⁵ Confirmed as a peremptory norm in the *Nicaragua Case*, ICJ Reports (1986) 14, para. 190. See also the *Palestinian Wall Advisory Opinion*, ICJ Rep (2004), para. 87. See chapters three, four and seven.

¹⁷⁶ Article I of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 mandates states to 'prevent and punish' the crime of genocide. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and*

Alternatively, should regional organisations use the UN rules on the use of force as their justification for their failure to halt the core crime of genocide which they are obligated to ‘prevent and punish.’?¹⁷⁷ As shown in chapter seven, the consideration of the appropriate response to situations of conflict between peremptory norms within the UN charter and general norms of *jus cogens* is ‘complicated by the fact that there is little scope for ‘balancing’ the interests of international peace and security against the humanitarian values recognized in the clearly accepted norms of *jus cogens*.’¹⁷⁸

Finally, the actions of ECOWAS operations in Liberia (1991) and Sierra Leone (1997), NATO in Kosovo (1999) as well as the formation of the AU and its right to intervene raised further concerns. In particular, one issue that has emerged is with regard to whether there exists a legal rule, or an emerging one for that matter, authorising or tolerating a regional organisation to forcefully intervene after the Security Council has determined that a situation is a threat to international peace and security and thereby remains seized of the matter but fails to take further action due to a deadlock in the Council.¹⁷⁹ However, the specific answers to the questions raised in this section are better answered through an analysis within the broader framework in which they have traditionally been understood. With this regard, the discussion of the peace and security system under the UN is introduced and explored in the next chapter. Such an analysis is useful in setting the background for demonstrating the similarities, differences as well as relationship between African regional security and its compatibility with UN and general international law, which is the object and purpose of the thesis.

C: Conclusion

The historic synopsis provided by this chapter demonstrated that the current international legal framework is not only based on foundations of European origin but is also largely dominated by western values advocated for and attained during hegemonic struggles amongst powerful states. However, the current system also provides a podium where the fundamental rights of mankind can be protected. It

Herzegovina v. Serbia and Montenegro), ICJ 26 Feb. 2007 at paras. 161-7, where the Court examined the obligation to prevent and punish as an express duty imposed upon states in the Convention.

¹⁷⁷ See chapter seven.

¹⁷⁸ Steven Wheatley, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’, *EJIL*, 2006 17(3):531-551

¹⁷⁹ See chapters three and seven.

therefore serves as a pragmatic platform whereby old and new, as well as just and unjust, rules operate.

The second section showed that the turn of the 20th Century saw the crystallisation of the major subjects within the international legal system. The proliferation of institutions further witnessed the entrenchment of international law in the world system as vehicle through which these entities could co-exist and cooperate in spite of the diversity in cultures. Indeed, the formation of the League of Nations(1919) and the UN (1945) furthered the Kantian thesis that international law requires the development of institutions which express the general will of sovereign states to ensure world peace and to solve international conflict.¹⁸⁰

Therefore, in this context, section three affirmed the theme that the increasing role of regionalism does not necessarily contradict universalism embodied in the UN system. In fact, many of the functions of the traditionally more acceptable norms of universalism are also carried out by regionalism, which often possesses the capability to act towards their own self-interest including the primary objective of ensuring their own peace and security. In this context, the current forces of compulsion for regional solutions coupled with both traditional and new opportunities provided by regional organisations have come to reflect what Walt Rostow termed as the 'coming age of regionalism.'¹⁸¹

However, against this background, regional organisations have often shown tremendous reluctance to rely on the rule contained in article 2(4) of the UN Charter, in order to prevent the core crimes of international concern such as those of genocide, war crimes and crimes against humanity. As shall be demonstrated in the coming chapters, African regional organisations have displayed their willingness and often, preparedness to act in what may appear to be in violation of the prohibition against the use of force, in order to comply with their obligations in the protection of fundamental human rights. This innovative thinking represents the changing focus from a state oriented interpretation of international law to the responsibility of the

¹⁸⁰ See Brian Orend, *War and International Justice: A Kantian Perspective*, (Wilfrid Laurier University Press, 2000).

¹⁸¹ W.W. Rostow, 'The Coming Age of Regionalism,' *supra* note 8.

international community as expressed in key UN documents,¹⁸² which affirm the role of regionalism.¹⁸³ Nevertheless, the key theme of this study however, remains of cooperation and how the international community can ensure that any action is legal, proportionate, effective and sustainable.

Up to this point, it becomes obvious that the universalism versus regionalism debate is misplaced and ultimately amounts to an artificial creation of states and commentators who are in support of international cooperation, to the extent that it does not infringe on their sovereignty and national interests. This dispute has essentially been one between the proponents of international organisations and institutions and the 'realists' who often underestimate the compelling need of states to operate within an institutional framework, particularly through regionalism. It is in this context that the thesis aims to add to the debate, which has been wrongly phrased as one that determines, or seeks to determine, which of the two i.e. regionalism and universalism, provides a better system. Instead, the study explores the relevant law and practice, in order to identify and develop the possibility of an effective relationship of cooperation between the AU and the UN in the promotion and maintenance of regional and international peace and security.

¹⁸² E.g see the Report of the United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, U.N. Doc. A/59/5652, December 2004; Kofi Annan, *In Larger Freedom. Towards Development, Security and Human Rights for All*, UN doc. A/59/2005, 21 March 2005; 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, para 138, U.N. Doc A/60/L.1 (Sept.20, 2005).

¹⁸³ See chapters four, six, seven and eight.

Chapter Three

The International Legal Framework under the Charter of the United Nations

A: Introduction

The UN Charter is a universally accepted multilateral treaty whose application transcends across all regions and possesses a special status in international law. Indeed, the very adoption of the Charter and creation of the UN marked an unprecedented evolution of the pre-1945 international legal system.¹ Inspired and committed to prevent the suffering caused by the scourge of war,² the drafting of the UN Charter formed a spirited attempt at creating a universal organisation with the primary purpose of maintaining international peace and security through a collective security system.³ However, in spite of the initial optimism, the rivalry amongst the major powers during the aftermath of World War II brought with it the Cold War era, which severely impaired the proper functioning of the UN system.⁴

As it turned out, the fall of the Berlin Wall in 1989 ushered in a new age that dramatically increased UN membership and its peace and security role. However, this period also brought with it a surge of conflict, particularly in Africa.⁵ The catastrophic events that followed thereafter led to disturbing realities, which in turn led to the dramatic increase in the activities of other organisations, in order to fill the perforations of a deficient UN system.⁶ As shown throughout the thesis, this development raised the question that must now be asked: should the UN Charter, a 1945 document, realistically be expected to meet the international challenges of the 21st century and beyond? The UN was established on the basis of Westphalian sovereign equality between states as stipulated in article 2 (1) of its Charter. It thereby failed to adapt to issues and problems which did not conform to this paradigm.

¹ For a detailed history of the evolution of the UN, see Ruth B. Russell & Jeanette E. Muther, *A History of the United Nations Charter: The Role of the United States 1940-1945*, (Washington DC: The Brookings Institution, 1958).

² See Preamble to the UN Charter.

³ Article 1 of the UN Charter.

⁴ See below and chapter four.

⁵ See below, introduction and chapters four & five.

⁶ See chapter four.

Indeed, as shown in the coming chapters, the rise in the activity of regional organisations in peace and security functions sought to rectify the shortcomings of the UN. Broadly speaking, despite its undisputed contemporary relevance, its flaws are hardly surprising given that the formation of the UN was a direct response to the horrors of World War II. However, it is abundantly clear that today the world stands in stark contrast to the challenges which the organisation was created to confront.⁷ There exist new and real threats. Amongst many others, human rights violations, terrorism, rogues states and non-state actors have become the new threats to peace and security.⁸

The purpose of this chapter is therefore to address the fundamental questions facing the international community at this juncture in the broad context. Does the international community need, and want, the UN to centrally manage regional peace and security and can it meet the evolving peace and security demands of intra and trans-state challenges, which are increasingly apparent? Or does its current situation risk it being deemed 'irrelevant and fall into the dustbin of history as did the League of Nations as the world descended into the darkness in the aftermath of World War 1'⁹?

While it remains true that the League could not halt the aggression by states in the 1930s, the UN is designed to be more effective and survive much longer than its predecessor.¹⁰ In light of the foregoing, this chapter turns to the current regulatory institutional framework contained in the UN collective security system and assesses the envisaged possibilities and limitations faced by the organisation in carrying out its function. In doing so, the discussion herein takes into account the changes in the international character of conflict from the inter-state conflicts against the background of the enlarged definitions of security in the post-Cold War era, including the broadening of the multilateral agenda to cover numerous aspects of regional conflict and internal wars.

⁷ See chapter eight.

⁸ See the Report of the United Nations High Level on Threats Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, 12, December 2004.

⁹ See 'Testimony of U.S. Secretary of Defense Donald Rumsfeld Before the Senate Armed Forces Committee Regarding Iraq' (transcript), 19 September, 2002. Available at www.dod.gov/speeches/2002/s20020919-secdef2.html

¹⁰ See Alexandru Grigorescu, 'Mapping the UN-League of Nations Analogy: Are There Still Lessons to Be Learned from the League?', *Global Governance*, Volume 11,(1), (February 2005).

B: Aims, Purpose and Structure

The present chapter provides the thesis with an analytical framework for a critique of the current peace and security mechanisms. It also aims to demonstrate the evolutionary manner of the international legal system and highlight some of the contemporary justifications for its alteration and amendment to meet the challenges of the prevailing international community.¹¹ In order to achieve its objective, the chapter is organised in three main sections. The first section elaborates on the tremendous development of the peace and security system. Therefore, it starts with an examination of the early European doctrines on the use of force and the diplomatic restrictions in the League of Nations Covenant (1919) to the restraint on war in the Kellogg- Briand Pact of 1928.

The second section will begin by demonstrating the magnitude of the UN's establishment in 1945 and discuss the special status of its Charter within the international system. This part will also focus on the distinct role vested in the UN Security Council, as well as the obligations bestowed on member states, in adhering to the dictates of the UN Charter. Having examined its collective security set up, this section will then narrow in on the particular significance of the prohibition against the use of force by states and quite possibly, regional organisations.¹²

Furthermore, the section will also address the legal exceptions to the use of force including the doctrine of self defence contained in article 51 of the UN Charter and collective measures permissible under Chapter VII of the UN Charter. Here, it will be argued that the current rules prohibiting the use of force are often unsuitable for contemporary regional conflicts, particularly those stemming from internal wars, such as those in Rwanda (1994) and Darfur (2003). Thereafter, the discussion paves way for the third section which addresses the use of force by states and regional organisations beyond the permissible exceptions under the UN Charter, in an attempt to rectify its shortcomings.

¹¹ On UN reform, see chapter eight.

¹² For a discussion on the specific obligations of regional organisations, see chapter four.

In investigating the challenges posed to the UN system, this discussion necessitates an analysis of not only what states do but what they say, being the ultimate creators of international law through state practice and *opinio juris*. For this reason, this section will explore the legality, as well as the legitimacy, of humanitarian intervention, as well as its significance in international law. What will become clear from this discussion is the connection between humanitarian intervention and the justification of the AU's right to intervene,¹³ as well as the UN's responsibility to protect.¹⁴ It is against this background that the chapter concludes with an assessment of the lessons that can be drawn from the past success and failure of the UN collective system. Having introduced the theme of reform, the final part demonstrates the manner in which the shortcomings of the UN calls for more cooperation with regional organisations, which as demonstrated in the coming chapters can greatly contribute in the development of the UN's collective system of peace and security.

I.1 The Pre-1945 International Legal System: The Development from the Just War Doctrine to the Second World War

The principles governing peace and security form the basic apparatus of any community and usually emanate from the early rules found in primitive societies.¹⁵ However, it will be recalled from chapter two that during the early years of international law, Western Europe formed the 'world theatre'¹⁶ and it is where the current rules on the use of force originate. During this time, the tenets regarding the resort to war as a method of enforcement action were largely dominated by the teachings of ancient Jewish, Christian, Greek and Roman traditions for 'just war' theory.¹⁷

¹³ See chapter seven.

¹⁴ See chapter eight.

¹⁵ See H.L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1994), p. 91; Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), p.2. See generally, M. Barkun, *Law without Sanctions: Order in Primitive Societies as the World Community*, (Yale University Press, 1968).

¹⁶ See chapter one.

¹⁷ See Aquinas, Saint Thomas Timothy McDermott (Editor), *Summa Theologiae: A Concise Translation*, (Christian Classics, 1991). Other traditional just war theorists include Cicero (106 BC-43 BC), Augustine of Hippo (354-430) Francisco de Vitoria (1492-1546), Francisco Suarez (1548-1617, Hugo Grotius (1583-1645) Immanuel Kant (1724-1804). Modern 'just war' theorists include Michael Walzer and Brian Orend. For contemporary relevance of the just war theory, see Brian Orend, *War and International Justice: A Kantian Perspective*, (Wilfrid Laurier Univ Pr, 2000); M. Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, (New York: Basic Books, 3. rd. Edition, 2000).

In his exposition regarding the use of force, St Augustine (AD 354-430) authoritatively wrote that the purpose of a just war is to 'avenge injuries, when the nations or city against which warlike action is to be directed has been neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which 'God Himself ordains.'¹⁸ However, towards the end of his life, the renowned Saint also inserted one of the first documented restrictions to the resort to war. In his words, 'it is a higher glory still to slay war itself with the word, than men with the sword, and to procure or maintain peace by peace, not war.'¹⁹

The just war doctrine is also vaguely manifest in the biblical historical teachings and has been presented most notably by Saint Thomas Aquinas, who developed St Augustine's conception of war in his *Summa Theologicae*.²⁰ More recently, the modern interpretation of the just cause was articulated in 1993 at a US Catholic Conference. Here, it was explained that in support of a just war, 'force may be used only to correct a grave, public evil, i.e., aggression or massive violation of the basic rights of whole populations.'²¹ Hence, in the human rights context, a just war is legitimate in order to put halt violations 'that shock the moral conscience of mankind.'²²

As demonstrated further below, the just war era stood in sharp contrast to the current international regulatory framework. Indeed, a key problem with the just war theory was that states enjoyed the right to resort to war without any real legal limitation. It was therefore not surprising that the difficulty in making a distinction between just and unjust wars was manifest most notably in the Russo-Turkish wars, which were a series of wars fought in the European region during the 17th, 18th, and 19th and 20th centuries.²³ Other conflicts included the French intervention of Syria in 1860-61; the

¹⁸ John Eppstein, *The Catholic Tradition of the Law of Nations*, (Washington D.C: 1935), p. 70.

¹⁹ *Ibid.* p. 74.

²⁰ St Thomas Aquinas, *Summa Theologica*, *supra* note 17.

²¹ See 'The Harvest of Justice Is Sown in Peace: A Reflection of the National Conference of Catholic Bishops on the Tenth Anniversary of 'The Challenge of Peace,' Nov. 17, 1993.

²² See Michael Walzer, *Just and Unjust Wars*, *supra* note 17, p. 107

²³ For more on these wars, see Aksan, Virginia H. 'Ottoman Military Matters,' *Journal of Early Modern History* 6 (1) (2002), 52 – 62; Frederick W.Kagan, and Robin Higham (eds.), *The Military History of Tsarist Russia*, (New York: Palgrave, 2002); Bruce W. Menning, 'Russian Military Innovation in the Second Half of the Eighteenth Century.' *War & Society* 2 (1) (1984), 23 - 41.

threat of intervention in Crete from 1866 to 1868; the Russian intervention in Bosnia, Herzegovina and Bulgaria from 1877 to 1878, the United States Intervention in Cuba of 1898 and the Greece, Bulgaria, and Serbia intervention in Macedonia from 1903-1908.

Although steps had been taken towards limiting the freedom of states to use force, such as during the Hague Peace Conferences of 1899 and 1907,²⁴ it was not until the unprecedented, and previously unimagined, suffering brought about by the First World War that states were compelled to change their attitudes towards recourse to war. Indeed, the millions of lost lives and the sheer destruction that took place between 1914 and 1918 made a strong case for Grotius'²⁵ plea for the rule of international law and the Kantian²⁶ concept of peace amongst the community of nations.²⁷

It was for primarily due to this reason that, barely a year later, the League of Nations was established in 1919, under Treaty of Versailles, with the aim 'to promote international cooperation and to achieve peace and security.'²⁸ However, a major problem with the League was that it remained largely a regional organisation.²⁹ Furthermore, despite designating wars as 'a matter of concern to the whole League'³⁰ and imposing some limitations on resort to the phenomenon, it did not contain a prohibition of war. Instead, article 12 (1) provided that the members of the League would submit their disputes 'either to arbitration or judicial settlement or to enquiry by the Council' after which the lapse of three months would give a discretion go to war if a settlement was not forthcoming.

²⁴ See Convention for the Pacific Settlement of International Disputes, 18 October, 1907, art. 2, 36 Stat.2199, 205 Consol. T.S.233.

²⁵ See H. Grotius, *De jure belli ac pacis: libri tres* (1965), book 1, chapter II, para.II(2), translated in F.W.Kelsey, *The Classics of International Law* (Oxford: Clarendon Press, 1925)

²⁶ See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, (Hackett Publishing Company, 2003). On Kant, see James Bohman&Matthias Lutz-Bachmann, *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, (the MIT Press, 1997); Immanuel Kant & H. S. Reiss, *Kant: Political Writings*, (Cambridge University Press; 2 edition, 1991); Patrick Capps, 'The Kantian Project in International Legal theory', *EJIL*, Volume 12, Number 5, 2001.

²⁷ Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 15, p. 5.

²⁸ Preamble to the Covenant of the League of Nations found before Article 1 of the Versailles Treaty, June 28, 1919.

²⁹ See chapters two and four.

³⁰ Article 11 (1) of the League of Nations Covenant.

A further weakness with this arrangement was that, unlike the present UN framework, the League's collective security system did not lie within the Council or Assembly, but largely lay in the hands of individual member states.³¹ In this respect, 'the League of Nations [...] failed to keep world peace primarily because the idea of collective security was far weaker than each individual State's interests to protect its national interests.'³² Therefore, it was not until the signature to the 1928 Kellogg-Briand Treaty³³ (Pact of Paris) that the gaps left in the Covenant were partially filled and which saw an almost universal accession of states to its provisions.³⁴ Most significantly, the state parties to the Pact of Paris finally considered it opportune for a 'frank renunciation of war as an instrument of national policy'³⁵ and 'condemne[d] the recourse to war for the solution of international controversies.'³⁶

Disagreement remains over whether the ban on the recourse to war was the same as the prohibition on the use of force contained in article 2(4) of the UN Charter,³⁷ described below. Meanwhile, despite its considerable strength, a key setback of the Pact of Paris was that, just like its predecessor, it did not contain a provision referring to the doctrine of self-defence. However, what became clear is the general trend by the international community to view war as evil. Nevertheless, the league's failure to 'safe-guard the peace of nations'³⁸ and act on Japan's intervention in Manchuria (1931), Italy's invasion of Ethiopia (1935) and Germany's occupation of parts of Czechoslovakia (1939), rendered it to near irrelevance. However, it was the failure to prevent the Second World War that ultimately marked the League's ultimate disappointment and subsequent demise, as it was unable to meet its primary purpose which was to avoid any future world war.

³¹ Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 15, p. 5.

³² N.D. White, *Keeping the Peace. The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1993), p. 3.

³³ General Treaty for the Renunciation of War as an Instrument of National Policy opened for signature 27 August, 1928, TS No. 796.

³⁴ D.J. Harris, *Cases and Materials on International Law*, (Sweet & Maxwell; 6 ed., 2004), p. 888.

³⁵ Preamble to the League Covenant.

³⁶ See article 1 of Kellogg-Briand Pact 1928.

³⁷ D.J. Harris, *Cases and Materials on International Law*, *supra* note 34, p.888.

³⁸ Article 11 (1) of the League Covenant.

2.1 The Emergence of the United Nations and the Special Status of its Charter

The establishment of the UN³⁹ was a defining moment in world history that brought much optimism for the future generations. Created in 1945 by representatives of 51 states,⁴⁰ the formation of the organisation, which was initially a wartime alliance,⁴¹ was a direct response to the horrors of the Second World War.⁴² Unsurprisingly, the institutional set up of the UN was based on the proposals worked out by the victorious powers that included China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August-October 1944.⁴³ In pursuit of a 'better world'⁴⁴ amongst its members, the Charter of the United Nations was subsequently signed on 26 June 1945.⁴⁵

Back then, the UN Charter was agreed upon by the triumphant world powers with the hope that it would act to prevent conflicts between states and make future wars impossible.⁴⁶ This objective was to be carried out through the collective security system, which awarded the power of veto⁴⁷ to the victorious alliance as 'an implicit guarantee to all members that they will not be asked to wage a war, in the name of the United Nations, against any of the big powers.'⁴⁸ Therefore, in fostering the idea of collective security, major powers would act as trustees of peace on behalf of the international community.⁴⁹ In sharp contrast to the League of Nations, the UN displayed a clear preponderance of universalist features and it is through its creation that an international legal system based on universalism was achieved.⁵⁰

³⁹ See UN *Basic Facts About the United Nations* (UN publication 2000), Sales No. E.00.I.21. Also available at <http://www.un.org/aboutun/history.htm>.

⁴⁰ *Ibid.*

⁴¹ See I.L. Claude, Jr., *Power and International relations*, (Random House, 1962) p.161. See also Dore Gold, *The Tower of Babel: How the United Nations has Fueled Global Chaos*, (Three Rivers Press, 2005); Richard Crockatt, *The Fifty Years War: The United States and the Soviet Union in World Politics, 1941-1991*, Routledge; 1 edition, 1994).

⁴² See preamble to the UN Charter 1945.

⁴³ See UN, 'History of the Charter of the United Nations', available at <http://www.un.org/aboutun/charter/history/dumbarton.shtml>.

⁴⁴ See President Truman's Address to Opening Session of United Nations Conference on International Organization at San Francisco. April 25, 1945 United States Department of State *Bulletin*. Available at <http://www.ibiblio.org/pha/policy/1945/450425a.html>

⁴⁵ See UN *Basic Facts About the United Nations*, *supra* note 39.

⁴⁶ See I.L. Claude, Jr., *Power and International relations*, *supra* note 41, p.161.

⁴⁷ On the veto, see below and chapter eight.

⁴⁸ See the statement of the Indian delegate to the San Francisco Conference as quoted in Hilaire McCoubrey and Justin Morris, *Regional peacekeeping in the post-Cold War era*, (The Hague ; London : Kluwer Law International, 2000). p. 25

⁴⁹ *Ibid.*

⁵⁰ See chapter four.

In doing so, the UN Charter immediately gained a unique legal standing in international relations. Most importantly, the UN Charter has been observed as 'not just an inter-state compact'⁵¹ but a 'kind of public law transcending in kind and not merely in degree the ordinary agreement between states.'⁵² For some, it went even further. According to the first UN Secretary General, Dag Hammarskjöld,⁵³ the Charter clearly implied the existence of 'an international community, for which the Organization is an instrument and an expression.'⁵⁴ And although the document does not 'entail all principles of paramount importance for the international community,'⁵⁵ it was said that the Charter acts as a 'venture in progress towards an international community living in peace under the laws of justice.'⁵⁶

Indeed the UN Charter has been described as a 'constitution of the world community.'⁵⁷ This is bearing in mind that a typical constitution sets out 'the fundamental rules of political order and establishes the basic political institutions'⁵⁸ as well as regulates the relations between the subjects of that order.'⁵⁹ Therefore, according to Koskenniemi, the UN Charter represents 'the fulfilment of the modernist wish to find a single, comprehensive, and consistent point of view on the political

⁵¹ N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin, Robert Mccorquodale (eds.), *Economic, Social and Cultural Rights in Action*, (Oxford University Press, 2007), p. 93.

⁵² AD McNair, 'The Functions and Different legal Character of Treaties,' (1930) *XI British Yearbook of International Law* 100 at 112.

⁵³ Dag Hammarskjöld served as United Nations Secretary-General from 10 April 1953 until 18 September 1961.

⁵⁴ See Kofi Annan, 'Dag Hammarskjöld and the 21st century', *The Fourth Dag Hammarskjöld Lecture* 6th September 2001, Uppsala University, SG/SM/794. See also UN Press Release/SC/7756 of 13/05/2003.

⁵⁵ Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', in 1 *Max Planck YB United Nations L I*, 2 (1997).

⁵⁶ See Noeleen Heyzer, UNIFEM Executive Director, 'Women, War and Peace: Mobilizing for Security and Justice in the 21st Century', *The Dag Hammarskjöld Lecture 2004*, Uppsala, Sweden, 22 September 2004.

⁵⁷ See the section by Reisman in B. Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford Univ Pr, 2nd ed. 2002). See also section by Fassbender and Bleckmann on article 2(1) of the UN Charter. See also J. A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 247 *RdC* (1994, IV) 345, at 355; Macdonald, 'Fundamental Norms in Contemporary International Law', 25 *Canadian Yearbook of International Law* (1987) 115, at 119, 120, 128; *idem*, 'The Charter of the United Nations and the Development of Fundamental Principles of International Law', in B. Cheng and E. D. Brown (eds), *Contemporary Problems of International Law. Essays in Honour of Georg Schwarzenberger*, London : Stevens, 1988), p. 196

⁵⁸ H Abromeit and T Hitzel- Cassagnes, 'Constitutional Change and Contractual Revision: Principles and Procedures', 8 *EJIL* 1 (1999) at 9.

⁵⁹ ND White, *The Law of International Organisations* (Manchester University Press, 2nd ed., 2005), p. 15.

organisation of humankind.’⁶⁰ Furthermore, Tomuschat suggests that it ‘has become obvious in recent years that the Charter is nothing else than the constitution of the international community.’ ‘Now that universality has been reached, it stands out as the paramount instrument of the international community, not to be compared to any other international agreement.’⁶¹

On the other hand, although ‘the present-day order rests entirely on the Charter,’⁶² it has been argued that none of the above makes the UN document the constitution for the international community. Indeed, it has been put forward that the word ‘constitution’ has no particular meaning in international law.⁶³ In fact, even Tomuschat himself acknowledges that the Charter ‘may not be fully satisfactory as a world constitution, not having been conceived of that function in 1945.’⁶⁴ Furthermore ‘the membership of the international community extends beyond the state membership provided in the UN Charter.’⁶⁵ With this regard, it is perhaps better to say the Charter formed an amendment of the existing legal system and subsequently gained a special status within the international framework.⁶⁶

Indeed just like in the United Kingdom, whereby the components of the constitution are not to be found in one document, the relevant rules and obligations detailing the governance of international community are set out not only in the provisions of the Charter but also beyond it.⁶⁷ Certainly the rules governing the community may also be contained in other treaties as well as other customs which are supported by state practice and *opinio juris*. Indeed, as illustrated earlier,⁶⁸ there are laws within the international

⁶⁰ See M. Koskenniemi, ‘Review of Bruno Simma (ed), *The Charter of the United Nations: A Commentary*’, *Australian Yearbook of International Law* (1996) 227.

⁶¹ C. Tomuschat (ed.), *The United Nations at age fifty: a legal perspective*, (Hague; Boston, MA: Kluwer Law International, 1995). P. xvii, and 327.

⁶² *Ibid.*

⁶³ Michael Wood, ‘The Security Council and the ‘Constitutionalization’ of International Law’, *Paper*, University of Leeds, 14 March 2007. Available at <http://www.law.leeds.ac.uk/leedslaw/webdocs/leedslaw/uploadeddocuments/cfig-wood.doc>.

⁶⁴ C. Tomuschat, *The United Nations at age fifty*, *supra* note 61. See also Tomuschat, ‘Obligations Arising For States Without or Against their Will’, *RdC* 241 (1993), 199, et seq.,(217).

⁶⁵ See, Erika de Wet, ‘The International Constitutional Order,’ *International and Comparative Law Quarterly*, (2006) 55: 51-76.

⁶⁶ See Nigel D White, ‘The Will and Authority of the Security Council After Iraq’, *Leiden Journal of International Law*, 17 (2004), p. 649.

⁶⁷ C. Tomuschat, *The United Nations at age fifty: a legal perspective*, *supra* note 61.

⁶⁸ See chapter one and two.

legal system that are considered so fundamental that they override and bind all others, including those contained in the UN Charter.⁶⁹

Nevertheless, the UN Charter normalises the world's most powerful organisation consisting of 192 states, with its operations including the fields of international law, international security and economic development. Significantly, as demonstrated in the next chapter, the activities of regional organisations such as NATO, the Arab League, the OAS and the AU are regulated under Chapter VIII of the UN Charter.⁷⁰ Furthermore, some of the major provisions in the Charter have also been held to reflect customary international law and hence bind non-state parties.⁷¹ Most notably, in the *Nicaragua Case*,⁷² the International Court of Justice (ICJ) reaffirmed the customary character of the prohibition against the use of force.⁷³ As shall be shown below, the Court also held that this rule amounts to a peremptory norm or *jus cogens* meaning that it is part of a 'higher law' considered by the international community as so fundamental that derogation by states is strictly forbidden.⁷⁴

The duty to adhere to the dictates of the Charter is similarly manifest in that the UN treaty supersedes any states' interests which may be in conflict with its mechanism for collective security. In particular, article 103 of the UN Charter, which possesses a constitutional function,⁷⁵ provides that in the event of a conflict between the obligations of member states under any other international agreement, the obligations under the Charter shall prevail.⁷⁶ As shown in the next chapter, this provision was reaffirmed by the ICJ in the *Lockerbie Case*.⁷⁷ Notably, its ruling has recently been followed by the other judgments of the Court of First Instance of the European Communities in Luxembourg in the *Yusuf*⁷⁸ and *Kadi*⁷⁹ cases of 2005. Furthermore,

⁶⁹ See chapter seven.

⁷⁰ See articles 53 and 103 of the UN Charter. See also chapter four and seven.

⁷¹ E.g. article 51 on the right to self defence, see in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. Reports p. 14.

⁷² *Ibid*

⁷³ Article 2 (4) of the UN Charter

⁷⁴ See article 53 of the Vienna Convention on the Law of Treaties 1969. See also chapter one.

⁷⁵ Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law,' *supra* note 63.

⁷⁶ However, see chapter seven.

⁷⁷ See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Provisional Measures, ICJ Reports, pp.15 and 126 respectively.

⁷⁸ *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, T-306/01, unreported case, 21 September 2005.

the status and strength of the principle in article 103 of the UN Charter was similarly affirmed by the UK House of Lords in the *Al-Jedda Case*⁸⁰ in December 2007.

Although its application to regional agencies is subject to debate,⁸¹ article 103 is clearly addressed to states.⁸² Indeed, the obligations arising from this provision have been said to be part of the higher law with respect to other international agreements.⁸³ Moreover, it is argued that article 103 is connected to member state obligations under article 25 of the UN Charter,⁸⁴ which confirms the Charter's status as an integral part of the constitution of the international community.⁸⁵ As a matter of practice, the special nature of article 103 is evidenced by the General Assembly's approval of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.⁸⁶ This Declaration included a paragraph reaffirming priority of member state obligations under the UN Charter over any other international obligations in accordance with article 103 of the UN Charter. Clearly, this provision applies with regard to the rules relating to the collective security set up under the UN, which contains specific obligations imposed on member states, starting with those concerning the maintenance of international peace and security.

2.2 The United Nations System of Collective Peace and Security

As mentioned above, the purpose of the UN treaty is outlined in article 1 of the Charter which in 1945 was, 'to save succeeding generations from the scourge of war, which [...] brought untold sorrow to mankind.' Therefore, the Charter sets up a collective security system. In doing so, it provides that its purpose is to maintain

⁷⁹ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, T-315/01, unreported, 21 September, 2005.

⁸⁰ *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* [2007] UKHL 58, para 3.

⁸¹ See chapter four.

⁸² N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin & Robert Mccorquodale, *Economic, Social and Cultural Rights in Action*, *supra* note 51.

⁸³ See Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community,' *Columbia Journal of Transnational Law*, vol. 36 (1998), p. 590; Lord A.D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 217; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law*, Vol. 10 (1999) No. 1.

⁸⁴ Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law', *supra* note 63.

⁸⁵ R Bernhardt, 'Article 103', in Simma (ed), *The Charter of The United Nations. A Commentary*, *supra* note 57.

⁸⁶ G.A Res. 42/22 of 18 November 1987, annex.

international peace and security for the prevention and removal of 'threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.'⁸⁷ It was mentioned earlier that during the creation of the UN in 1945, it was envisaged that the Security Council would play a central role in fulfilling the purposes of the organisation.⁸⁸ Hence, member states conferred 'on the Security Council primary responsibility for the maintenance of international peace and security, and agree[d] that in carrying out its duties under this responsibility, the Security Council acts on their behalf.'⁸⁹ Therefore member states are obligated under article 25 to 'accept and carry out' decisions of the Council in the exercise of its responsibilities, which are set out in Chapters VI, VII, VIII and XII of the Charter.

But in the real sense, the Council was, from the onset, structured to be 'a universal instrument of geopolitics'⁹⁰ whose composition 'is nothing more than the victory coalition of 1945.'⁹¹ Thus at any one time, the Council is comprised of the victorious powers of World War II, namely; the United States, France, Britain, China and Russia and ten non-permanent members, who are elected for two-year terms on a regional geographical rotation.⁹² The current criticisms and calls for reform with regard to the current system, which contradicts the 'principle of the sovereign equality of all UN member states,'⁹³ are discussed in chapter eight.

Meanwhile, in spite of its limitations, which are considered further below,⁹⁴ the Council was intended, through consensus, to exercise both executive and diplomatic functions in its primary duty of maintaining peace and security.⁹⁵ At this stage, it is important to mention that questions have often arisen as to what body possesses the subsidiary responsibility *in lieu* of the Council's inability or unwillingness to act on

⁸⁷ Article 1 (1) of the UN Charter.

⁸⁸ Dan Sarooshi, *The United Nations and the Development of Collective Security : The Delegation by the UN Security Council of Its Chapter VII Powers*, (Oxford University Press, USA; New Ed edition, 2000) p.3.

⁸⁹ Article 24 of the UN Charter. For further on article 24, see B. Simma, *The Charter of the United Nations*, *supra* note 57, p. 397.

⁹⁰ R. Falk, 'The United Nations and the Rule of Law', 4 *TLCP* (1994) 625. See also Eagleton, 'International Law and the Charter of the United Nations', 39 *AJIL* (1945) 751-752; Kunz, 'The United Nations and the Rule of Law', 46 *AJIL* (1952) 505.

⁹¹ Charles Krauthammer, 'Don't Go Back to the UN,' *Washington Post*, 21 March 2003, p. A-37

⁹² See article 23 (1), (2) and (3) of the UN Charter.

⁹³ Article 2(1) of the UN Charter.

⁹⁴ See also chapter eight.

⁹⁵ N.D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 66 .See also, Inis Claude, 'The Security Council', in E.Luard (ed), *The Evolution of International Organizations*, (London: Thames and Hudson, 1966),p. 68.

its duty, which in turn has led to much controversy over the legality of certain actions of the existing regional organisations.⁹⁶

While the latter point is developed in coming chapters, it deserves mention that the UN General Assembly arguably possesses subsidiary responsibility in this area. Indeed, the Assembly may invoke the 'Uniting for Peace' Resolution (377) that was originally put forward in 1950 to overcome situations when the Security Council is unable to act.⁹⁷ The difficulty with this instrument is the fear that it would undermine the Council, which is given exclusive authority on the resort to enforcement measures.⁹⁸ Furthermore, as demonstrated in chapter eight, any attempt to curtail the Council's powers in this area are not only fiercely resisted by states, such a possibility is also mooted in the intended reforms of the Council, which seek to further entrench its powers and in the process, alienate any intended use of Res. 377. In further demonstration of the powers vested in the Security Council under the Charter, UN member states are forbidden from recourse to the use of force without authorisation of the Council, as shown below.

2.3 The United Nations and the Prohibition on the Use of Force

While institutionalising the international collective security system within the UN, the drafters of the Charter further centralised the use of force. This was achieved by prohibiting the unilateral use of force by states in international relations with limited exceptions. The legality of the ban on the recourse to force is of 'universal validity,'⁹⁹ and is specifically spelt out in article 2(4) of the UN Charter.

All 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 United Nations.

⁹⁶ See chapter four.

⁹⁷ See ND White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, (Manchester University Press, 2nd ed, 1997), pp. 169-182; N.D. White, 'The Legality of Bombing in the Name of Humanity', 5 *Journal of Conflict and Security Law* (2000), 27.

⁹⁸ See below. See also article 2(4) and 42 of the UN Charter.

⁹⁹ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (Routledge, 7th rev. ed., 1997), p. 309.

Article 2(4) lies at the heart of international law and instils a fundamental obligation by prohibiting the unilateral use of force. Famously affirmed by the ICJ in the *Nicaragua Case* (1986),¹⁰⁰ the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (1996)¹⁰¹ and the *Oil Platforms Case*¹⁰² (2003), the rules on the threat and use of force had also been asserted in the much earlier *Nuremberg*¹⁰³ (1946) and *Corfu Channel*¹⁰⁴ (1949) cases. Most recently, the ban was similarly reiterated in the two recent African cases concerning the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda and Democratic Republic of the Congo v Rwanda)* in 2005.¹⁰⁵ However, although all these cases commonly restate the prohibition on the use of force, 'some of these decisions are, at least in part, controversial.'¹⁰⁶

Nonetheless, one of the major strengths of article 2(4) of the UN Charter lies in so far as it talks of the broader 'threat or use of force' rather than the more narrower concept of 'war,' which featured in the League of Nations system.¹⁰⁷ However, despite the claim that 'all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law,'¹⁰⁸ it is clear that economic coercion and political pressure are not considered to amount to a threat or use of force under the Charter.¹⁰⁹ This view was confirmed in the *Nicaragua* judgment, where the World Court held that the economic sanctions imposed on Nicaragua by the United States were not in breach of the principle of non-intervention.¹¹⁰

¹⁰⁰ *Nicaragua v United States of America*, *supra* note 71, p. 14.

¹⁰¹ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, ICJ Reports 1996, p. 226.

¹⁰² *Oil Platforms (Islamic Republic of Iran v United States of America)*, *Judgement*, ICJ Reports 2003, p. 161.

¹⁰³ *International Military Tribunal (Nuremberg)*, *Judgement and Sentence*, 1 October, 1946. Available at 41 *American Journal of International Law* 172, (1947).

¹⁰⁴ *Corfu Channel case (UK v. Albania)*, 1949, ICJ Rep. 4, April, 9, 1949.

¹⁰⁵ Posted on the ICJ website.

¹⁰⁶ Michael C. Wood, 'Towards New Circumstances in Which the Use of Force May be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 15, p. 79.

¹⁰⁷ On this point, see D.J. Harris, *Cases and Materials on International Law*, *supra* note 34, p.890; W.M. Reisman/J.E. Baker, *Regulating Cover Action: Practices, Contexts and Policies of Coercion Abroad in International and American Law*, (New Haven :Yale University Press ,1992).

¹⁰⁸ See the 1970 Declaration on Principles of International Law's section on the Principle of Non-Intervention.

¹⁰⁹ A proposal by Brazil, during the drafting of article 2(4) UN charter, which required states to refrain from 'economic measures', was rejected. See 6. U.N.C.I.O., Documents 335.

¹¹⁰ ICJ Reports (1986). On the legality of US economic sanctions on Nicaragua, see also Curtis J. Henderson, 'The Legality of Economic Sanctions Under International Law: The Case of Nicaragua,' 43

All the same, the general prohibition against the unilateral use of force has been accepted and reaffirmed on many occasions.¹¹¹ Most significantly, the rule has gained the status of *jus cogens*,¹¹² reference to which was made by the ICJ in *Nicaragua*,¹¹³ as described earlier. The prohibition is therefore part of a 'higher law', deemed necessary for the benefit of the international community in which derogation by states is not allowed.¹¹⁴ And although clearly addressed to states, the prohibition also features in the constitutive instruments of key regional organisations, such as the NATO treaty,¹¹⁵ the former Warsaw Pact,¹¹⁶ the OAS Charter¹¹⁷ and the Constitutive Act of the AU.¹¹⁸

However, in spite of the fact that the prohibition has served as a very effective restraint against the use of force, an intense debate has ensued with respect to the precise parameters of the ban. In particular, the question that needs to be asked is, does article 2(4) represent a total ban of the use of force, except in self-defence and collective enforcement measures under Chapter VII, or is it limited when it prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'?'¹¹⁹

Wash. Lee L.R. (1983), 167. See also Acevedo, 'The U.S. measures against Argentina resulting from the Malvinas conflict,' 78, *AJIL*, 323 (1984).

¹¹¹ The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States; GA Res. 2131(XX) UN Doc, A/6014; the 1970 Declaration of the Principles of International Law, GA Res.2625 (XXV); the 1974 the Definition of Aggression GA Res. 3314 (XXIX), UN Doc. A/9632; Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), UN Doc. A/4684 (1961); the 1987 Declaration on the Enhancing the Effectiveness of the Prohibition of the Use of Force in International Relations, GA Res. 42/22, UN Doc. A/Res/42/22.

¹¹² JI Charney, 'Anticipatory Humanitarian Intervention in Kosovo,' 32 *Vanderbilt Journal of Transnational Law* (1999), 1231; A. Abass and M. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union', (2002) 49 *Netherlands International Law Review* 1 16.

¹¹³ ICJ Reports (1986) 14, para 190. See also the *See the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004, para. 87. See also Christenson, 'The World Court and Jus Cogens', 81 *American Journal of International Law* (1987) 93; Ronzitti, 'Use of Force, Jus Cogens and State Consent', in A. Cassese (ed.), *Developments in International Law, the Current Regulation of the Use of Force*, (Brill Academic Publishers, 1986) p. 147; Weisburd, 'The Emptiness of the Concept of Ius Cogens, as Illustrated by the law Bosnia-Herzegovina', *Michigan Journal of International Law* (1995-6) 591.

¹¹⁴ Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making.,' *EJIL* Vol 1 (2) (1991).

¹¹⁵ Article 1 North Atlantic Treaty, 1949, UNTS 243.

¹¹⁶ Art 1 Treaty of Friendship, Co-operation and Mutual Assistance 1955, 219 UNTS 3.

¹¹⁷ Article 19 of the Charter of the Organization of American States 1967.

¹¹⁸ Article 4(f) of the Constitutive Act of the African Union 2000.

¹¹⁹ On this issue, see *Corfu Channel* Case, Pleadings, Vol III, p 296. See Bowett, *Self-Defence in International Law*, (Manchester University Press, 1958) p. 152; Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford; New York: Oxford University Press, 1994) 106; Waldock, 'The

While this issue features in the discussion in chapter seven concerning the African Unions' right to intervene, it is worth mentioning here that the diverse views on this question taken lie in the interpretation advocated by the 'permissive' and 'restrictive' schools of thought.¹²⁰ Meanwhile, a key problem with the ban is that it prohibits the use of force by states in 'international relations' and therefore does not specifically address regional conflicts which emanate from intra-states wars, such as the Darfur conflict.¹²¹ Nonetheless, the Charter provides two related exceptions to the prohibition on the use of force which include 1) the right to self defence under article 51 of the UN Charter and 2), forcible measures taken by or authorised by the Security Council under Chapter VII of the UN Charter.

2.4: Self defence

While prohibiting the use of force, the UN Charter provides for 'the inherent right of individual or collective self-defence if an armed attack' occurs against a state. The temporary nature of this right provided by article 51 is evidenced by the condition that it is only exercisable 'until the Security Council has taken measures necessary.' The supremacy of the Council is also demonstrated in the requirement that the measures taken by states in the exercise of self-defence are to be immediately reported to the UN organ. Furthermore, any measures taken 'shall not in any way affect the authority and responsibility' of the Council 'to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

Although the concept of self defence is universally accepted, both as a treaty and customary right,¹²² its precise limits are subject to much controversy and continue to raise fundamental questions relevant to international law. Precisely, can a state invoke the right to self-defence only after an armed attack has occurred, or may it strike first in the face of an imminent attack?¹²³ International legal commentators have largely been preoccupied with the debate centring on the scope of what constitutes an 'armed attack' under article 51 of the UN Charter and whether, given the threat of terrorism, the

Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des Cours* (1952)415.

¹²⁰ C. Gray 'International Law and the Use of Force', (Oxford University Press, USA; 2 edition, 2004) See also I. Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963).

¹²¹ See chapter nine.

¹²² *Nicaragua v. United States of America*, *supra* note 71, p. 14.

¹²³ *Ibid.* See also Gray, *International law and the use of force*, *supra* note 120, pp. 86-87.

concept of self defence allows anticipatory, preventive or pre-emptive action.¹²⁴ However, this debate has ignored the fact that the concept of self defence as an exception to article 2(4) of the UN charter hardly meets the challenges posed by modern regional conflicts, particularly those raging in Africa.

Indeed, taking into account that the UN Charter was formulated with aggression between states in mind, its provisions appear to be inadequate to address conflicts internal in nature, particularly where rebel factions challenge the authority of the government as highlighted by the Darfur conflict.¹²⁵ This is because article 51 has not been interpreted to cover internal armed attacks, as they do not amount to a breach of article 2(4) and hence are considered to be within the domestic jurisdiction of individual states.¹²⁶ Therefore, it was anomalous that the UN High Level Panel (2004) took an abstract approach and claimed that article 51 need not be 're-written nor reinterpreted.'¹²⁷

Meanwhile, the Court in the *Wall Case*¹²⁸ also restricted the use of force in self-defence to cases of an armed attack by one state against another state. However, this view has been criticised by Judge Higgins in her separate Opinion where she argues that 'nothing in the text of Article 51 [...] stipulates that self defence is available only when an armed attack is made by a state.'¹²⁹ This observation by Higgins is of particular significance in evaluating the rationale of regional intervention based on self-defence of peoples in the context of regional wars in response to the changed nature of conflicts, from inter-state to intrastate. It is for this reason that the concept of regional self-defence is considered in more detail in the next chapter. Perhaps a more relevant discussion here is with respect to the second permissible exception to the prohibition against the use of force, which rests in the residual role of the Security Council under Chapter VII of the UN Charter.

¹²⁴ See A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', 12 *European Journal of International Law*, (2001) 993. See also C. Gray, *International law and the use of force*, *supra* note 120; M. Shaw, *International Law*, (Cambridge University Press; 5 edition, 2003).

¹²⁵ See chapter nine.

¹²⁶ See article 2 (7) of the UN Charter.

¹²⁷ UN, High Level Report, *A More Secure World*, *supra* note 8.

¹²⁸ See *the Palestinian Wall Case*, *supra* note 113, para. 138-141.

¹²⁹ Separate Opinion by Judge R. Higgins, *ibidem*, para 33.

2.5 The Collective Security System under Chapter VII of the UN Charter: The Powers and Discretion of the UN Security Council

Under the current set up, the Security Council is vested with a broad discretion under article 39 in determining 'the existence of any threat to the peace, breach of the peace, or act of aggression' and may make recommendations that are binding. In practice, the Council rarely makes express reference to article 39 of the UN Charter¹³⁰ in its resolutions, although it did so when passing resolution 598 (1987),¹³¹ relating to the Iran-Iraq conflict and resolution 660 (1990)¹³² concerning the illegal invasion of Kuwait by Iraq. However, it has been observed by some that the 'Security Council members no longer pay much attention to the presence or absence of a reference to such a threat.'¹³³ Therefore, although it is generally agreed that that the Council must first determine the existence of a threat to peace before a passing decree under Chapter VII,¹³⁴ it has voted for certain resolutions, such as the much controversial resolution 1422 (2002),¹³⁵ without making a determination under article 39 of the Charter.¹³⁶

Nevertheless, article 39 normally constitutes the preliminary steps to taking enforcement actions which include measures short of the use of force by way of sanctions under article 41. In recent years, the Council has imposed some form of sanctions on, amongst others, Angola,¹³⁷ Haiti,¹³⁸ Iraq,¹³⁹ Liberia,¹⁴⁰ Libya,¹⁴¹

¹³⁰ On this point, see Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, (Manchester University Press, 2006), pp. 7-10.

¹³¹ SC Res. 598 (1987) of 20 July 1987.

¹³² SC Res 660 (1990) of 2 August 1990.

¹³³ See H. Freudenschub, 'Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council', 46 *AJIL* (1993) 1.

¹³⁴ See R. Higgins, *The New United Nations: Appearance and Reality*, (Hull: University of Hull Press, 1993), p 10; V. Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) 55, p, 61; F.L. Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL*, (1995), p.512; J.A. Frowein and N. Krisch, 'Article 39', in B. Simma (ed), *The Charter of the United Nations*, (Oxford: Oxford University Press, 2nd ed, 2002) p. 717. See also Michael C. Wood, 'Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 15, pp.75-90.

¹³⁵ See SC Res. 1422 (2002) of 12 July 2002, UN. Doc. S/RES/1422 (2002),

¹³⁶ See Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', *EJIL*, Vol. 14, (2003), No. 1.

¹³⁷ See SC. Res. 864 (1993) of 15 September (1993) and SC Res. 1127 (1997) of 29 October 1997.

¹³⁸ See SC Res. 841 (1993) of 16 June 1993.

¹³⁹ See SC Res. 661 (1990) of 6 August 1990.

¹⁴⁰ See SC Res. 788 (1992) of 19 November 1992. See also SC Res. 1343 (2001) of 7 March 2001.

¹⁴¹ See SC Res. 748 (1992) of 31st March 1992 and SC Res. 883 (1993) of 11th November 1993.

Rwanda,¹⁴² Somalia¹⁴³ and the states of the former Yugoslavia.¹⁴⁴ However, this practice has extended to other legal subjects such as individuals,¹⁴⁵ liberation and guerrilla movements,¹⁴⁶ as well as outlaws, such as the Al Qaeda network.¹⁴⁷ Having said so, it deserves mention that some of the sanctions, particularly those previously imposed on Iraq, have not been free from criticism.¹⁴⁸

Meanwhile, the Security Council is also empowered to take enforcement measures under article 42 which provides that should initial measures prove 'to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'¹⁴⁹ As will be shown below in regard to the UN's initial action in Iraq, rather than making references to the use of force, it has been the practice of the Council to authorise the use of 'all necessary measures' or 'all necessary means' when conferring a military enforcement mandate.¹⁵⁰

However, a fundamental flaw of the UN is its lack of a standing army to carry out some of its functions. Indeed, regional agencies such as NATO and the AU have since capitalised on the lessons learnt from the shortcomings encountered by the lack of an UN army, and thereby established standby forces.¹⁵¹ In the meantime, due to the obsolete nature of article 43 of the Charter, which had envisioned an UN armed force

¹⁴² See SC Res. 918 (1994) of 17th May 1994.

¹⁴³ See SC Res. 733 (1992) of 23 January 1992.

¹⁴⁴ See SC Res. 713 (1991) of 25th September 1991 and SC Res. 757 (1992) of 30 May 1992.

¹⁴⁵ See SC Res. 1532 (2004) on the former Liberian President Charles Taylor.

¹⁴⁶ See also SC Res. 942 (1994) of September 23 1994.

¹⁴⁷ See SC 1267 (1999) of October 15 1999.

¹⁴⁸ See the Symposium on: 'The Impact on International Law of a Decade of Sanctions against Iraq', with contributions by different authors, published at 13 *EJIL* (2002) 1. See also Jean Dupraz, 'UNICEF and the Sanctions Committee - Lessons Learned from Iraq', in Vera Gowlland-Debbas, *United Nations Sanctions and International Law*, (Martinus Nijhoff Publishers, 2001).

¹⁴⁹ On the UN's use of force, see N.D. White, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press, 2005), p. 235; M. Golding, 'The Use of Force by the United Nations', (1996) 3 *International Peacekeeping* 1; G. Gaja, 'Use of Force Made or Authorized by the United Nations', in C. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective supra* note 61.

¹⁵⁰ On interpretation of the Council's mandate, see M.C. Wood, 'The Interpretation of Security Council Resolutions', (1998) 2 *Max Planck Yearbook of United Nations* 73. R. Cryer, 'The Security Council and Article 39: A Threat to Coherence?', (1996) 1 *Journal of Armed Conflict Law*. See also See E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', 56 *ICLQ* (2007) p. 83; C. Gray, 'Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations', in *ASIL Insights* (Nov. 2002); P. McLain, 'Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force', 13 *Duke JCIL* (2003) p. 233.

¹⁵¹ See chapter six.

managed by a Military Staff Committee, it has been the tradition of the Council to request 'coalition of the willing' states to provide armed forces on an *ad hoc* basis.¹⁵² This practice was initially subject to controversy. For example, during the Korean crisis, the United Kingdom maintained that the Security Council could not resort to article 42 without concluding an article 43 agreement¹⁵³ while the former U.S.S.R. argued quite the opposite.¹⁵⁴ In the end, with the latter position favoured by notable scholars,¹⁵⁵ the legality of this practice was confirmed in the flexible approach taken in the *Expenses Cases*. Here, the ICJ ruled that 'nothing in the text of Art. 43 would limit the discretion of the Security Council negotiating such agreements.'¹⁵⁶

Meanwhile, in spite of the wide powers available to the Security Council, the persistence of the Cold War rivalry ensured that it was not until November 1990 that the Security Council authorised a 'coalition of willing states' to take enforcement action against Iraq, subsequent to the latter's infamous invasion of Kuwait.¹⁵⁷ During this time, Security Council resolution 678 called on these states to use 'all necessary means' to liberate Kuwait from Iraq.¹⁵⁸ However, controversy persists as to whether the intervention in Iraq amounted to an exercise of collective self defence or whether it is better perceived as collective security measures authorised by the Security Council under Chapter VII of the Charter.¹⁵⁹

¹⁵² See Gary Wilson, 'The Legal, Military and Political Consequences of the 'Coalition of the Willing' Approach to UN Military Enforcement Action', *Journal of Conflict and Security Law*, Volume 12, Number 2, 2007, Pp. 295-330; N.D White, *Keeping the Peace*, *supra* note 32, p. 30. See also L.Sohn, 'The authority of the United Nations to Establish and Maintain a Permanent Force', 52 *AJIL* (1958) 229, P.230; G. Schwarzenberger, 'Problems of a United Nations Force', 12 *CLP* (1959) 247, p. 254; D. Sarooshi, 'The United Nations and the Development of Collective Security *supra* note 88.

¹⁵³ S/PV.476,p.3, 7 July 1950.

¹⁵⁴ Memorandum of the U.S.S.R. A/AC.121/2, 10 July 1964.

¹⁵⁵ See, e.g. D. Sarooshi, *The United Nations and the Development of Collective Security*, *ibid*, pp.143-53; H. McCoubrey and N. D. White, *International Law and Armed Conflict* (Ashgate Publishing, 1992) at 133 and 144-5; R. Higgins, *Problems and Process: International Law and how we use it* (New York: Oxford University Press, 1994) at 263-6; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7th ed., 1997) at 389-90; N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing,' (2000) 11 *EJIL* 541 at 547-55; F. L. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 *AJIL* 506 at 521. However, for an alternative view, see J. Quigley, 'The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism', 17 *Michigan Journal Of International Law* (1996), 249.

¹⁵⁶ See *Certain Expenses of the United Nations Case* I.C.J. Rep.1962, pp. 166-167.

¹⁵⁷ However, see SC Re. 83 (1950), June 27, 1950. On the Council's increased role after the Cold War, see generally, N.D White, 'The Will and Authority of the Security Council After Iraq,' *supra* note 66.

¹⁵⁸ See SC Res. 678 (1990), 29 November 1990.

¹⁵⁹ Some have argued that article 51 UN Charter seemed to be the one most relevant in passing resolution 678. See Oscar Schachter, 'United Nations Law in the Gulf Conflict,' 85 *American Journal*

This uncertainty is largely borne out of the Council's ambiguity in the sense that it did not specify the provision it relied on but merely stated that it was acting under Chapter VII of the Charter.¹⁶⁰ More controversial was the reliance on resolution 678, more than a decade after Operation Desert Storm in 1990, as justification for the US/UK invasion of Iraq (2003).¹⁶¹ Also contentious was the use of Council resolution 688 as a legal basis for military action in Iraq to protect the Kurdish population, which aroused deep disagreements on the whether the Council's could impliedly authorise the use of force.¹⁶²

Nevertheless, the fall of the Berlin Wall brought with it a new optimism which manifest itself in fundamental agreements between the permanent members.¹⁶³ In particular, resolution 678 'gave rise to hopes of a new era for the UN and of a New World Order.'¹⁶⁴ In turn, the aftermath of the Kuwaiti liberation saw the famous publication of the Secretary General's *Agenda for Peace*¹⁶⁵ and a vision exemplified in President Bush's words that; 'the rule of law would supplant the rule of the jungle.'¹⁶⁶ In the aftermath of the Gulf War, the Group 7 (G7) leaders also announced the emergence of the requisite 'conditions for the United Nations to fulfil completely the promise and the vision of its founders.'¹⁶⁷ Meanwhile some writers argued that the

of International Law. 452, 459 (1991); Mary Ellen O'Connell, 'The UN, NATO, and International Law After Kosovo', *Human Rights Quarterly* 22.1 (2000), 57-89.

¹⁶⁰ On the use of SC Res. 688 (1990), 5 April 1991, see D.J. Harris, *Cases and Materials on International Law*, *supra* note 34.

¹⁶¹ See N.D. White and E.P.J. Myjer, 'The Use of Force against Iraq', 8 *JCSL* (2003) 1; N.D White, 'The Will and Authority of the Security Council After Iraq' *supra* note 66. On the legality of the Iraq War, see, generally, T.M. Franck, 'What Happens Now? The United Nations After Iraq', 97, *American Journal of International Law*, (2003), 607; W.H.Taft and T.F. Buchwald, 'Pre-emption, Iraq and International Law', 97, *American Journal of International Law* (2003), p. 557.

¹⁶² C. Antonopoulos, 'The Unilateral Use of Force by States after the end of the Cold War', 4 *Journal of Armed Conflict Law* 117, (1999) at 152-3; P. Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War', (1991) 2 *EJIL* 11; N.D. White, 'Commentary on the Protection of the Kurdish Safe-Havens: Operation Desert Strike', 1 *Journal of Armed Conflict Law* (1996), 197.

¹⁶³ See introduction by Niels Blokker, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force* *supra* note 15, p.1.

¹⁶⁴ Christine Gray, *International Law and the Use of Force*, (Oxford University Press: New York, 2000), p. 153, citing UN Blue Book Series, Vol IX *The UN and the Iraq/ Kuwait Conflict 1990-1996*; G Bush Senior, Speech to Congress, 'New World Order,' Washington D.C, 11 September, 1990; Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', (2004) 8 *Max Planck Yearbook of United Nations Law* 237.

¹⁶⁵ See B. Boutros- Ghali *An Agenda for Peace* (United Nations, New York, 1992).

¹⁶⁶ Simon Chesterman and Michael Byers, 'Has US power destroyed the UN?', *Royal United Services Institute for Defense Studies Journal* (August) 1999.

¹⁶⁷ See Osman Mohamed Awad, *The United Nations and Peace Enforcement : Wars*,

'waning of the Cold War seems to have brought with it a rebirth of collective security system advocated and designed in 1945 by the victors in World War II,'¹⁶⁸ a view shared by many others.¹⁶⁹

However, in their article, Simon Chesterman and Michael Byers rightly observe that the post-Cold War 'rhetoric was euphoric, utopian and short-lived.'¹⁷⁰ It soon became clear that this 'new world order' was beset by the same problems as the old one. Indeed the pursuit of national interests by the permanent members and the domination of geopolitics brought the real possibility of the Security Council being paralysed 'in a way that may render it more ineffective than at any time during the Cold War.'¹⁷¹ As it turned out, the discretion of the permanent members to use the Council powers to further and protect their individual interests raised fundamental questions in regard to whether they are bound by the principles of the Charter and importantly, whether the Council could be held accountable in cases of breach.

2.6 The Question of the Legal Limits to the Political Powers of the Security Council

From the discussion above, it is clear that the Security Council retains a key role both under self-defence and under Chapter VII of the UN Charter. However the failure of the Charter to define the meaning of the terms under article 39 has led to the discretionary use of the Council powers.¹⁷² Indeed, the Council has been reluctant to use the expressions 'breach of the peace' and 'act of aggression' and has preferred to use the phrase 'threat to peace,' which allows a wide margin of discretion.¹⁷³ However, the Council has found aggression, for example in resolution 573 (1985),¹⁷⁴

Terrorism and Democracy, (Aldershot, Ashgate, 2002), p. 25. Osman quotes the Financial Times, 17 July 1991, p.4.

¹⁶⁸ See E.B. Haas (1994), 'Collective Conflict Management', in F. Kratochwil and E.D. Mansfield, *International Organisations: A Reader*, (Mansfield Harper College Publishers), p. 237.

¹⁶⁹ For example, in 1991, Oscar Schachter agreed that 'UN enforcement action against an aggressor is presently the centre of world attention'. See O. Schachter, (1991) 'Authorised Uses of Force by the United Nations and Regional Organisations', in L.F. Damrosch and D.J. Scheffer (eds), *Law and Force in the New International Order*, (Westview Press, Boulder and Oxford), p. 66. See E.B. Haas (1994), 'Collective Conflict Management', in F. Kratochwil and E.D. Mansfield, *International Organisations*, *ibid.* p. 237.

¹⁷⁰ Simon Chesterman and Michael Byers, 'Has US power destroyed the UN?', *Royal United Services Institute for Defense Studies Journal* (1999).

¹⁷¹ *Ibid.*

¹⁷² Jean Allain 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 164.

¹⁷³ See Tarcisio Gazzini, *The changing rules on the use of force in international law*, *supra* note 130, p.

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¹⁷⁴ See SC Res. 573 (1985), 4 October, 1985.

which condemned the Israeli military action on the PLO headquarters in Tunisia. Compounded by the use of veto,¹⁷⁵ the Council's often unwillingness and inability to act in times of grave peril has meant that what constitutes to 'a threat to peace, breach of the peace or acts of aggression' has not evolved in a uniform manner. Instead, the Council continues to fully exploit its discretion and 'in some cases even beyond any reasonable limits or in a rather suspicious selective manner.'¹⁷⁶

Furthermore, serious problems arise due to the blur between the legality of the Council's practice and politics.¹⁷⁷ White observes that 'the making of a determination that there is a threat to, or breach of the peace or an act of aggression will depend in practice at least as much upon political factors as upon strictly legal criteria, especially where the interests of permanent members may be involved [or otherwise].'¹⁷⁸ This discretion raises the question as to whether the UN is itself bound by any legal limits 'or whether it is omnipotent and *legibus solutus*.'¹⁷⁹ In this context, it has been argued that the Council has unfettered discretion and with no real legal limits in its exercise of Chapter VII measures.¹⁸⁰ However, this argument is fiercely contested.¹⁸¹ For example, in his dissent during the *Lockerbie Case*, Judge

¹⁷⁵ See article 27 (2) and (3) of the UN Charter. See also chapter eight.

¹⁷⁶ Tarcisio Gazzini, The changing rules on the use of force in international law, *supra* note 130. See also I. Brownlie, 'The Decisions of the Political Organs of the United Nations and the Rule of Law', in S.St Macdonald (ed.), *Essays in Honour of Wang Tieya*, (Dordrecht: Nijhoff, 1993), p.91; and *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, (The Hague;Nijhoff, 1998), p. 217.

¹⁷⁷ Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 15, p. 11.

¹⁷⁸ ND White, *Keeping the Peace*, *supra* note 32.

¹⁷⁹ Aristotle Constantinides, 'An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq', *Paper* presented at the Inaugural Conference of the European Society of International Law, Florence, May 2004), at www.esil-sedi.org/english/papers.html. See also T.D.Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Power Under Chapter VII of the Charter,' 26 *NYIL* (1995) 33.

¹⁸⁰ See G. Oosthuizen, 'Playing Devil's Advocate: The United Nations Security Council is Unbound by Law', *LJIL* 12, (1999), 549.

¹⁸¹ See generally Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 1; J. Gardam, 'Legal Restraints on Security Council Military Enforcement Action', 17 *Michigan Journal of International Law* 285, p. 318. N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin, Robert Mccorquodale, *Economic, Social and Cultural Rights in Action*, *supra* note 51, p. 93. See further R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, (Oxford University Press, 1963); S.R. Ratner, 'The Security Council and International Law', in Malone, *The UN Security Council: From the Cold War to the 21st Century*, (Lynne Rienner Publishers, 2004), pp. 591-605; See, also ,D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Springer; 1 edition, 2001); Lamb, 'Legal Limits to United Nations Security Council Powers', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), at 361; Nolte,

Weeramantry expressed the view that the Council's powers 'must be exercised in accordance with well-established principles of international law.'¹⁸² White concurs and asserts that the Council discretion must exist within the law since it is granted by the UN Charter which being a treaty, is thereby a legal document.¹⁸³ Indeed, such a premise had also been stated by the ICJ in the *Admissions* Opinion where it was held that the 'political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement.'¹⁸⁴ Still on the same point, reference is also made of the statement made by first president of the Security Council, Mr Makin, on 17 January 1946 during its first meeting: 'Our work must be based on the Charter. We are not permitted to go beyond it.'¹⁸⁵ However, he was to add 'but we shall not fail to exercise to the full the great powers which have been given to this Council.'¹⁸⁶

However, despite its 'great powers,' it is agreed that the Council is bound by the peremptory norms of international law.¹⁸⁷ Recently, this has been confirmed by the Court of First Instance of the EC, which, in the cases of *Yassin Abdullah Kadi* and *Ahmed Ali Yusuf and Al Barakaat International Foundation*, held that the Council 'must observe the fundamental peremptory provisions of *jus cogens*.'¹⁸⁸ Furthermore,

'The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections', in M. Byers (ed.), *The Role of Law in International Politics: Essays in international relations and international law* (Oxford University Press, USA, 2000), at 315.

¹⁸² *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK: Libya v. US) Provisional Measures*, 1992 ICJ Rep. 114, 14 April, 1992, 175 (Judge Weeramantry dissenting).

¹⁸³ N.D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 66. For a similar assertion, see also Gary Wilson, 'The Legal, Military and Political Consequences of the 'Coalition of the Willing' Approach to UN Military Enforcement Action', *Journal of Conflict and Security Law*, Volume 12, Number 2, (2007), pp. 295-330.

¹⁸⁴ *Conditions of Admission of a State to Membership of the United Nations*, Advisory Opinion, [1948], ICJ, Rep.57, at 64. See also the *Case Concerning Certain Expenses of the United Nations* (Article 17, paragraph 2 of the Charter), Advisory Opinion, ICJ Reports, 1962, p. 168.

¹⁸⁵ See UN SCOR No. 1 (1946).

¹⁸⁶ *Ibid.*

¹⁸⁷ N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin & Robert McCorquodale, *Economic, Social and Cultural Rights in Action*, *supra* note 51. See also, P Sands & P Klein, *Bowett's Law of International Institutions* (5th ed, Sweet & Maxwell, 2001), pp.458-459; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*. (Oxford: Hart Publishing, 2004), pp. 187-191; Gowlland-Debbas, 'UN Sanctions and International Law: an Overview', in V. Gowlland-Debbas (Ed.), *United Nations Sanctions and International Law*, (Kluwer Law International,) 2001, p.14.

¹⁸⁸ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, at para. 281; Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, at para. 230.

as argued in chapter eight, the UN Security Council, is also arguably bound by the concept of 'good faith.'¹⁸⁹ However, the Security Council's has rarely felt compelled to decisively act during circumstances requiring urgent action, particularly in Africa. Indeed, its record in the continent stands in apparent contradiction to the broad powers and extensive discretion vested to it by the UN Charter, in order to discharge its peace and security responsibilities.

Instead, of invoking its wide powers available under Chapter VII, the Council, although often declaring the existence of a threat to peace and security in Africa, hardly ever takes the decisive action necessary to halt conflicts and alleviate much suffering, as shown in Darfur.¹⁹⁰ This last point is of particular significance as the Council's inability or unwillingness to act with regard to the commission of genocide, war crimes and crimes against humanity has not only led to catastrophe but also increased the activity of regional organisations which, to some, challenges the UN's collective security system.¹⁹¹

2.7 The Practice of the Security Council in Africa: The Ambivalence towards African Regional Conflicts

Although the turn of the 21st century saw a fully decolonised Africa,¹⁹² 'liberation from the yoke of colonialism did not automatically bring about peace and prosperity for Africa.'¹⁹³ Instead, the post-colonial system, which was based on the Westphalian state system,¹⁹⁴ paved the way for systematic *coup d'états* and gross violations of human rights that reached their watershed in the 1990s.¹⁹⁵ And in spite of its primary responsibility for peace and security, the UN was unable to effectively deal with the post-Cold War conflicts in Liberia, Sierra Leone, Ethiopia, Eritrea, DR Congo,

¹⁸⁹ On this point, see Franck, T.M., *Fairness in International Law and Institutions*, (Clarendon Press, Oxford, 1995), p.51-3& 219-220. See also R. Cryer, 'The Security Council and Article 39,' *supra* note 150.

¹⁹⁰ See chapter nine.

¹⁹¹ See chapter seven. See also Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 164. See also Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, *supra* note 130, p. 114.

¹⁹² See chapter five.

¹⁹³ Nsongurua J. Udombana, 'Critical Essay: Can the Leopard Change Its Spots? The African Union Treaty and Human Rights', Vol.17, No.6, *American University Law Review*, (2002).

¹⁹⁴ See chapters two and five.

¹⁹⁵ See chapter five and six.

Uganda, Sudan, Somalia, Burundi, and Cote d'Ivoire.¹⁹⁶ As it turned out, the escalation of the violence confirmed Africa's status as holding 'the record of [...] wars and conflicts.'¹⁹⁷ This picture ensured that violent conflicts killed and displaced more people in Africa than in any other continent.¹⁹⁸

Although the UN later acknowledged its own failure in post-Cold War Africa,¹⁹⁹ the international community's ambivalence towards the continent can be sketched out from as early as the UN's inception in 1945. Indeed, despite the presence of wars in the continent, the controversial operation played by the ONUC Forces in Congo between 1960 and 1964²⁰⁰ remained the UN's sole peace operation in Africa in the first four and a half decades of the organisation's existence.²⁰¹ Until the early 1990s,

¹⁹⁶ For a historic account of some of these conflicts, see Adekeye Adebajo & Chris Landsberg, 'Back to the Future: UN Peacekeeping in Africa', in Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century*, (Frank Cass Publishers, 2001),

¹⁹⁷ Yaounde Declaration (Africa: Preparing for the 21st Century), *adopted* 8–10 Jul. 1996, ¶ 6, O.A.U. Doc. AHG/Decl.3 (XXXII).

¹⁹⁸ See Kofi Annan, 'The Cause of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa', (General Assembly, Security Council Fifty-Second Session, Fifty-third year. See UN Press Release, SG/SM/6524 of 16 April 1998; Report of the Secretary-General on the Work of the Organization of African Unity); reproduced in 10 *African Journal of International & Comparative Law* (1998), pp.549-550. See also Jeffrey Herbst, 'Economic incentives, natural resources and conflicts in Africa' *Journal of African Economies* 9, 3 (2000), pp. 270–88, 292 and 294; and the World Bank, *Can Africa Claim the 21 Century?* (The World Bank, Washington, DC, 2001), p. 59; The Commission for Africa, *Our Common Interest: Report of the Commission for Africa* (The Commission for Africa, London and Addis Ababa, 2005), p. 200.

¹⁹⁹ UN Secretariat, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, Doc. S/1999/1257(1999) December 16 (1999), 3.

²⁰⁰ Deployed by SC Res. 161 (1961), 21 February 1961. See Osman Mohamed Awad, *The United Nations and Peace Enforcement: Wars, Terrorism and Democracy*, (Aldershot, Ashgate, 2002).p. 153-165. See also Abi-Saab, Georges, *The United Nations operations in the Congo 1960-1964*, (Oxford: Oxford University Press; 1978); Amirie, Abbas, *The United Nations intervention in the Congo crisis, 1960-1961: with special emphasis on the political role of the late Secretary-General, Dag Hammarskjold*, (Ann Arbor, MI: University Microfilms, 1967); Burns, Arthur Lee and Nina Heathcote. *Peacekeeping by UN forces, from Suez to the Congo*, (New York: Praeger; 1963); Dayal, Rajeshwar, *Mission for Hammarskjold: the Congo crises*, (London: Oxford University Press; 1976), p.335; p. Lefever, Ernest Warren, *Crisis in the Congo: a United Nations force in action* (Washington, D.C.: Brookings Institution; 1965); Anthony Parsons, *From cold war to hot war: UN interventions, 1947-1995*, (London; Penguin Books); Adekeye Adebajo & Chris Landsberg, 'Back to the Future: UN Peacekeeping in Africa', in Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century*, *supra* note 196; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 15, p.94; Christine Gray, *International Law and the Use of Force*, *supra* note 120, pp. 202-204.

²⁰¹ Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf: Essays on Africa and the United Nations* (Johannesburg: Jacana, 2006). On African perspectives on UN peacekeeping, see Adekeye Adebajo, 'From Congo to Congo: United Nations Peacekeeping After the Cold War' in Ian Taylor and Paul Williams (eds.) *Africa in International Politics: External Involvement on the Continent* (London: Routledge, 2004); Ibrahim Gambari, 'The United Nations' in Mwesiga Beregu and Christopher Landberg (eds.), *From Cape to Congo: Southern Africa's Evolving Security Challenges*, (Boulder and London: Lynne Rienner, 2003); James Jonah, 'The United Nations', in Adekeye Adebajo and Ismail

the UN practice had been dominated by the Cold War and the power enmity that characterised it.²⁰² For this reason, its disastrous record in the African continent was often excused on the grounds that the UN Security Council was divided on Cold War lines,²⁰³ coupled with the threat and use of the veto.²⁰⁴ This separation, however, had not stopped the Council from functioning during the duration of this period, which lasted until 1989.²⁰⁵

As suggested earlier, these conflicts pointed towards the reality that the formulation of the UN Charter, with aggression between states primarily in mind, meant that its provisions appeared to be inadequate for regional conflicts and failed to address the threats that emanate from intra-state wars. However, as will be shown below, the provision in article 2(7) of the UN Charter did not prevent the Security Council from determining the existence of a threat to peace under Chapter VII despite their internal character.²⁰⁶ It can therefore be deduced that the Security Council's practice took note of the changing nature of what amounts to threat to peace from being strictly interstate to include intra state conflicts.²⁰⁷

Therefore, its resolutions with regard to the situations in the African conflicts of Somalia (1992)²⁰⁸ Rwanda (1994),²⁰⁹ Central African Republic (1997),²¹⁰ Liberia (1991),²¹¹ Sierra Leone,²¹² (1997), Sudan²¹³ (2005) and the DRC (2000),²¹⁴ the

Rashid (eds.) *West Africa's Security Challenges: Building Peace in a Troubled Region* (Boulder and London: Lynne Rienner, 2004) and Agostinho Zacarias, *The United Nations and International Peacekeeping*, (London: I.B. Tauris and Co., 1996).

²⁰² See chapter two.

²⁰³ N.D. White, *The United Nations and the maintenance of international peace and security*, (Manchester, England; New York: Manchester University Press, 1990), p.10. See also Christine Gray, *International Law and the Use of Force* *supra* note 120, p. 195.

²⁰⁴ See chapter eight. See also Article 27 (3); N.D. White, 'The United Nations and the maintenance of international peace and security', *ibid*, p.10.

²⁰⁵ N.D White, 'The Will and Authority of the Security Council After Iraq,' *supra* note 66.

²⁰⁶ On this point, see N.D. White, *Keeping the Peace*, *supra* note 32, p. 56.

²⁰⁷ *Ibid*, p. 26. About this changing notion of threats to peace, see J. E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, USA, 2005), 195–196; see also K. C. Wellens, 'The UN Security Council and new threats to the peace: back to the future', (2003) 15 *JCSL* 15.

²⁰⁸ See SC Res. 794 (1992) adopted 3 December 1992. See also SC Res 746 (1992) of 17 March 1992.

²⁰⁹ See SC Res. 918 (1994) of May 1994. See also SC Res. 1955 (1994) of 8 November 1994.

²¹⁰ See SC Res. 1125 (1997) of 6 August 1997.

²¹¹ See SC Res. 788 (1992) of November 19 1992.

²¹² See SC Res. 1132 (1997) of October 08 1997.

²¹³ See SC Res. 1591 (2005) of 29 March 2005.

²¹⁴ See SC Res. 1304 (2000) of 16 June 2000.

Council made a link between threats to peace and gross human rights violations.²¹⁵ The justification for this practice was supported in *Prosecutor v Tadic*, whereby the ICTY observed that there 'there is a common understanding manifested by the subsequent practice of the members of the United Nations at large, that the threat to peace under Art. 39 may include, as one of its species, internal armed conflicts.'²¹⁶ However, the Council went further and determined that non-state actors could also pose a threat to international peace and security.²¹⁷

Nevertheless, while the Council's practice with this regard shows a clear development of international law, the permanent members continue to reinforce their seemingly unfettered discretion in pursuit of their national interests. Occasionally, this behaviour has in itself triggered threats to international peace and security, including during grave circumstances.²¹⁸ A clear illustration of this point lay in its approach to the Rwandan genocide.²¹⁹ Indeed a Panel of Eminent Personalities from the Organisation of African Unity accused certain members of the Security Council, specifically France and the United States that they 'consciously chose to abdicate their responsibility for Rwanda.'²²⁰ And according to Boutros Boutros -Ghali, '[t]he behaviour of the Security Council was shocking; it meekly followed the US' lead in denying the reality of the genocide. Although it was a clear case of genocide, US spokesmen were obviously under instructions to avoid the term in order to avoid having to fulfil their treaty obligations under the 1949 Genocide Convention.'²²¹

In the words of the UN Secretary General, the ambivalent attitude towards the Rwandan genocide brought about the 'perception of near indifference' on the part of the international community which left a 'poisonous legacy' that undermined confidence in

²¹⁵ The Security Council has also authorised action in Yugoslavia (1992), Haiti (1994), Rwanda, the Great Albania (1997), the), Kosovo (1999) and East Timor (2000) which were largely internal conflicts

²¹⁶ See *Prosecutor v Dusko Tadic Case No. IT-94-1-AR72 (1995)*, para. 30.

²¹⁷ See SC Res. 1532 (2004) of 12 March 2004 on the former Liberian President Charles Taylor. See also SC Res. 864 (1993) concerning UNITA. See also SC Res. 942 (1994) concerning the self-proclaimed Serb Republic in Bosnia- Herzegovina.

²¹⁸ See chapter eight.

²¹⁹ For a more analysis, see chapter five and eight.

²²⁰ See Organisation of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*, 2000 para. 13.1.

²²¹ See Boutros Boutros-Ghali, *Unvanquished: A US-UN Saga*, (I.B.Tauris Publishers, London-New York, 1999), pp. 135-136. See chapters five, eight and nine.

the UN.²²² Significantly, the Council's response to Rwanda clearly violated a norm of law which obligated states 'to prevent and punish' the international crime of genocide.²²³ As it turned out, the 1994 massacre 'ultimately triggered a conflict in the heart of Africa that [...] directly or indirectly touched at least one-third of all the nations on the continent.'²²⁴ What was equally shocking was that as the remnants of the Rwandan genocide spilled over to the Democratic Republic of Congo, the UN displayed its ambivalent attitude towards African conflicts when it sent a mere 5000 troops to a country the size of Western Europe.²²⁵

The culmination of these events sent a strong message to African leaders: the UN could not be solely relied upon to prevent and halt the conflicts raging in the continent. Fortunately by this time, the actions of ECOWAS in West Africa had provided African states with valuable lessons from which they could exercise new ways of thinking and contemplate issues with respect to intervention to halt gross human rights abuse within the continent.²²⁶ Meanwhile, the entry of regional organisations, such as NATO, as an attempt to correct the deficiency of the collective security system raised the fears of an attempted dismantling of the UN collective system of security.²²⁷ Their actions aroused questions with regard to the legitimacy of regional organisations in the area of peace and security, particularly given that article 2 (4) and Chapter VIII²²⁸ of the Charter prohibited the use of force by such organisations except in self-defence or under Security Council mandate.

²²² Report of the Secretary General, *The causes of conflict and the promotion of durable peace and sustainable development in Africa*, S/1998/318/37/ILM (1998) 913 para 11.

²²³ See article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

²²⁴ Organisation of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, *supra* note 220, Introductory Chapter, para.3.

²²⁵ Ademola Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII Of The UN Charter*, (Hart Publishing Ltd., 2004), p. vii; Phoebe Okowa, 'Congo's Rebels and the Responsibility of Non-State Groups in Situations of Armed Conflict', *Paper*, International Law Association, A More Secure World: Our Shared Responsibility – What is the Role for International Law? University of Sussex, April 20 & 21, 2007.

²²⁶ See chapter seven.

²²⁷ Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, *supra* note 130; Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 164.

²²⁸ See chapter four.

3.1 The Use of Force beyond the United Nations: The Legality of the so-called Right to Humanitarian Intervention

The concept of humanitarian intervention has remained an elusive subject.²²⁹ Most recently, it has aroused an intense debate pertaining to its legality in international law, which gained rigour with respect to the Darfur conflict.²³⁰ Humanitarian intervention denotes the use of coercive action by one or more states involving the use of armed force in another state without its consent, and with the purpose of preventing widespread suffering or death.²³¹ The response of regional organisations to the violation of peremptory norms, particularly those that breached fundamental rights raised the question as to whether humanitarian intervention now sat alongside self-defence and Chapter VII measures as exceptions to the prohibition of force under article 2(4) of the UN Charter.²³²

²²⁹ For a study on humanitarian intervention, see Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility*, (Cameron May, 2005). See also see Francis Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1999); Mario Bettati and Bernard Kouchner, *Le devoir d'ingérence: Peut-on les laisser mourir?* (Paris: Denoël, 1987); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Richard Lillich, *Humanitarian Intervention and the UN* (Charlottesville: University Press of Virginia, 1973); Sean D. Murphy, *Humanitarian Intervention: The UN in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996); Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); R.J. Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974); and Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985). See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963); and Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (Irvington-on-Hudson: Transnational Publishers, 1997). For a review of the legal and international-relations literatures, see Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1996). See also Richard A. Falk, 'The Complexities of Humanitarian Intervention: A New World Order Challenge,' *Michigan Journal of International Law* 17, No. 2 (1996), pp. 491—513; and Tom J. Farer, 'Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife,' *Harvard Law Review* 82 (1969), pp. 511—514.

²³⁰ See 'Sudan Cant Wait' *the Economist*, 31 July-6 August, 2004, pp. 32-33.

²³¹ See definitions of humanitarian intervention in Ian Brownlie, 'Humanitarian Intervention', in John Moore ed., 1974, *Law and Civil War in the Modern World*, (Baltimore: Johns Hopkins University Press), p. 217; Oliver Ramsbotham & Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict*, (Polity Press, Cambridge, 1996), pp.103-13; Terry D. Gill, 'Humanitarian Intervention: Legality, Justice and Legitimacy', *supra* note 229; Fairley, H. Scott, 'State Actors, Humanitarian intervention and international Law: Reopening Pandora's Box', 10:1 *GA. J. Intl. & Comp. L.* (1980) at p.32; Vevrey, Wil, 'Legality of Humanitarian Intervention After the Cold War' in Ferris, E., (ed.), *The Challenge to Intervention: A New Role for the United Nations*, (1992) at p.114; Adam Roberts, 'The So-Called Right of Humanitarian Intervention.' *Yearbook of International Humanitarian Law*, vol. 3, Summer 2001. See also J.L. Holzgrefe & R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, (Cambridge University Press, 2003); Netherlands Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, *Humanitarian Intervention*, Report no. 13.

²³² Susan Breau, *Humanitarian Intervention* *supra* note 229.

Although the doctrine has been topical in recent years, the historical practice of intervention to halt gross human rights violations in another state had been acknowledged much earlier by writers such as Suarez, Grotius and Vattel.²³³ However, their assertions were based on the 'just war' theories described above.²³⁴ As demonstrated earlier, their justifications were severely eroded by the legal framework established by UN, which prohibited the use of force, and led the legality of humanitarian intervention to be questioned. This is because Chapter VII of the UN Charter provided a mechanism to halt humanitarian catastrophe after the Council having determined that they constitute a threat to peace and security.²³⁵ However, such arguments were at the risk of making the presumption that a humanitarian tragedy will always amount to a threat to peace and security and failed to take into account of the flaws brought about by the Council's discretion in making such a determination, as shown above.

Although the rules contained in the UN Charter and the doctrine of non-intervention were supported by post-1945-state practice, some legal scholars vociferously argued for the right of intervention²³⁶ with the significant reason that the UN had not met the original expectations of collective actions in response to 'threats to the peace.'²³⁷ Meanwhile, other proponents²³⁸ of the doctrine stated that the concept of humanitarian intervention was supported by state practice in spite of the UN Charter's prohibition against the use of force.²³⁹ Amongst the interventions embarked during the Cold War period,²⁴⁰ the two most cited examples to illustrate this point are India's invasion of

²³³ Terry D. Gill, 'Humanitarian Intervention: Legality, Justice and Legitimacy' *supra* note 234; Danish Institute of International Affairs. *Humanitarian Intervention: Legal and Political Aspects*, (Copenhagen: Danish Institute of International Affairs, 1999), p.11; Susan Breau, *Humanitarian Intervention*, *ibid.*

²³⁴ Susan Breau, *Humanitarian Intervention*, *ibid.*, p.22

²³⁵ See section two above.

²³⁶ For definition of the term intervention, see chapter seven.

²³⁷ See J.P.L. Fonteyne *The Customary International Law Doctrine of Humanitarian Intervention* (1974) 4 *California WILJ* 203 at 257.

²³⁸ Lillich, 'Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for a Constructive Alternatives' Chapter 11 in Moore, J.N. *Law and Civil War in the Modern World*, (Baltimore and London: The Johns Hopkins University Press, 1974), Lillich, 'Forcible Self-Help under International Law' in 22 *Naval War College Review* 61 (1970), and McDougal and Reisman 'Rhodesia and the United Nations; The Lawfulness of International Concern,' 62 *AJIL* 1 (1968) McDougal and Reisman,, 'Response' 3 *International Lawyer* 438 (1969).

²³⁹ Susan Breau, *Humanitarian Intervention supra* note 229, p.24.

²⁴⁰ For a review of the interventions in the Cold War period, see Susan Breau, *Humanitarian Intervention*, *supra* note 232; Simon Chesterman, *Just War or Just Peace?*, *supra* note 229; Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford

East Pakistan in 1971²⁴¹ in response to the human rights violations by the West Pakistan Army and Tanzania's invasion of Uganda in 1979, in order to overthrow Idi Amin's oppressive regime.²⁴²

However, the key problem with these illustrations is that neither state put forward humanitarian intervention as their legal justification for intervention.²⁴³ Instead, the two states defended their military intervention on 'self-defence' and even though the outcome was held to be 'humanitarian,' this trend showed states do not always undertake humanitarian intervention for humanitarian reasons. Furthermore, Chesterman conducted an extensive study of instances of 'humanitarian intervention' in the Cold War era and how states justified their actions and concluded that the writers who claim that 'state practice provides evidence of customary international right of humanitarian intervention grossly overstate their case.'²⁴⁴ However, after the lessons from Rwanda, and in the face of the 'ethnic cleansing' of Kosovo Albanians in the republic of Yugoslavia, both scholars and more importantly, states, were forced to re-assess their positions with respect to humanitarian intervention.²⁴⁵

University Press, 2000); Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1999); Fernando Tesón, *Humanitarian Intervention. An Inquiry into Law and Morality*, 2nd ed. (Irvington-on-Hudson: Transnational Publishers, 1997); and Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996).

²⁴¹ On details of this intervention, see Susan Breau, *Humanitarian Intervention*, *supra* note 229, pp. 35-42.

²⁴² On details of this intervention, see *ibid*, pp. 54-61.

²⁴³ Terry D. Gill, 'Humanitarian Intervention,' *supra* note 229.

²⁴⁴ S. Chesterman, 'Just War or Peace?,' *supra* note 229, p. 84. See also F.K. Abiew, 'The evolution of the Doctrine and Practice of Humanitarian Intervention,' *supra* note 229.

²⁴⁵ E.g. C. Greenwood, 'Humanitarian Intervention: The Case of Kosovo,' *10 Finnish Year Book of International Law* (1999), 141; R. Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention', *42 Virginia Journal of International Law* (2001), 923. Susan Breau, *Humanitarian Intervention*, *supra* note 232, p. 26.

3.2 Kosovo and Relationship between Legality and Legitimacy of Intervention

The conflict in Kosovo²⁴⁶ raised serious questions relevant to the UN system and the use of force, which were articulated by the Secretary General with regard to the ‘consequences of action without international consensus and clear legal authority.’ ‘On the one hand is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?’²⁴⁷ After decades of reluctance by states to use humanitarian intervention as a legal justification, even for actions that have been regarded as such on an *ex post facto* basis,²⁴⁸ NATO member states attempted to expand the exceptions to the prohibition on the use of force.²⁴⁹

This is evidenced by the attempts of the United Kingdom’s forceful argument that past practice, including its very own, had led to the re-emergence of the doctrine of humanitarian intervention.²⁵⁰ This was despite its earlier assertion that ‘the best case that can be made in support of humanitarian intervention is that it cannot be said to be

²⁴⁶ For some literature on the conflict, see Amnesty International, *Kosovo: The Evidence* (London: Amnesty International, 1998); Alex J. Bellamy, *Kosovo and International Society* (Houndmills; New York: Palgrave, 2002); Ken Booth, *The Kosovo Tragedy: The Human Rights Dimensions* (London, Portland, Or.: Frank Cass, 2001); Noam Chomsky, *The New Military Humanism* (Monroe, Me: Common Courage Press, 1999); Richard A. Falk, ‘Kosovo, World Order, and the Future of International Law’, 93 *American Journal of International Law* 847 (October 1999); Franck, Thomas M., ‘Lessons of Kosovo’, 93 *American Journal of International Law* 857 (October 1999); Hahn, Michael, ‘The Conflict in Kosovo: A Constitutional War?’, 89(7) *The Georgetown Law Journal* 2351 (July 2001); Henkin, Louis, ‘Kosovo and the Law of Humanitarian Intervention’, 93 *American Journal of International Law* 824 (October 1999); Koskenniemi, Martti, ‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law’, 65(2) *The Modern Law Review* 159 (March 2002).

²⁴⁷ UN 1999, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. No. S/1999/957, 8 September.

²⁴⁸ On *ex post facto* authorisation, see chapter seven.

²⁴⁹ See the UN position in *Legality of the Use of Force Case* (Yugoslavia v United States), Verbatim Record, 11 May 1999, CR 99/24, para 1.7. See also the humanitarian grounds put forward in the Chairman’s Summary of the Deliberations on Kosovo of the Informal Meeting of EU Heads of States, 14 April 1999, S/1999/429, Annex; See also the reference by U.S. and Canada to the humanitarian emergency (S/PV.3988, 23 March 1999, p. 5); B. Simma, ‘NATO, the UN and the Use of Force: Legal aspects,’ *European Journal of International Law*, Vol.10, (1999).

²⁵⁰ See the argument by the UK representative Sir Jeremy Greenstock at the Security Council debate on the NATO intervention of Kosovo (1999). UN Doc/PV.3988. March, 24 1999. See also the United Kingdom Guidelines on Humanitarian Intervention contained in the speech by Mr Robin Cook, Secretary of State for Foreign and Commonwealth Affairs, 19 July 2002, U.K.M.I.L. 2000 (2000) 71 B.Y.I.L. 646. See also Michael C. Wood, ‘Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 15, p.75-90.

unambiguously illegal.’²⁵¹ Thereafter, the Conservative government through its Foreign Secretary Douglas Hurd, invoked humanitarian intervention by name in the case of northern Iraq during the ‘Operation Provide Comfort’ to protect the Kurds. (1991).²⁵²

This resulting trend was illustrative of the tension between law and morals, as well as the uneasy relationship between legality and legitimacy.²⁵³ The question that arose was whether there might be instances where legality should give way to legitimacy. On this point, leading scholars, while maintaining that the NATO intervention in Kosovo remained illegal as it was not authorised by the Security Council, held the view that there remained a thin line between NATO action and international legality,²⁵⁴ that in some cases there existed a moral imperative to act,²⁵⁵ and that the ‘military intervention was illegal but legitimate.’²⁵⁶

In his contribution to the ongoing debate, Simma argued that whilst humanitarian intervention involving the threat or use of armed force and undertaken without the mandate of the authorisation of the Security Council will be unlawful, such a general statement cannot be the last word. He stresses that ‘in any instance of humanitarian intervention, a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get ‘as close to the law’ as possible. ‘Such analyses’ he concludes ‘will influence not only the moral but also the legal judgement in such cases.’²⁵⁷

Indeed, the divergent views have led some commentators to talk of ‘an emerging right to humanitarian intervention’²⁵⁸ provided that a certain criterion of legitimacy is

²⁵¹ See the 1984 Foreign and Commonwealth Office Paper, Foreign Policy Document No. 148 contained in *B. Y. B. IL. Vol. 57* (1986), beginning at page 614.

²⁵² See *BYB IL* (1992) 824.

²⁵³ See chapter one.

²⁵⁴ See Simma ‘NATO, the UN and the Use of Force,’ *supra* note 249.

²⁵⁵ A Cassese, ‘*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community’, *EJIL*, Vol.10, (1999). See also Foreign Affairs Committee (UK), *Fourth Report: Kosovo*, (HC 28-I), 2000.

²⁵⁶ Independent International Commission on Kosovo, *Kosovo: Conflict, International response, Lessons Learnt*, (Oxford: Oxford University Press, 2000).

²⁵⁷ See B. Simma ‘NATO, the UN and the Use of Force,’ *supra* note 249.

²⁵⁸ *Ibid.*

followed. However, this line of argument fails to take into account the differing views put forward by states in justifying their actions as well as the different arguments put across by scholars in the assessment of state actions and their legality. Firstly, apart from the UK and Belgium, states were reluctant to openly use humanitarian justifications as a legal basis of their actions or relied on it on an *ex post facto* basis.²⁵⁹

Furthermore, it is important to emphasise on not only what states do but also what they say, being the ultimate creators of international law by way of state practice and *opinio juris*.²⁶⁰ For example, in April 2000, the 114 states comprising the Non-Aligned Movement, along with China, declared that they reject the 'so called right' of humanitarian intervention. The 'so-called right,' they argued, 'had no legal basis in the [UN] Charter or in the general principles of international law.'²⁶¹ This pronouncement was reaffirmed in February 2003 where the Heads of State and Government reiterated their dismissal of the concept of humanitarian intervention.²⁶² As shown in chapter eight, some of these states were to later reject yet another emerging concept known as the responsibility to protect,²⁶³ which in their denunciation, termed it a reincarnation of humanitarian intervention in another name.

The justifications behind the refusal to accept this concept is that in reality, weaker states remain weary of becoming the target of a humanitarian intervention action while some perceive it as bearing too much resemblance to the colonialism of the 19th Century, which while advancing western concepts, threatened local cultures.²⁶⁴ Furthermore, as Louis Henkin argues, 'the law against unilateral intervention may reflect, above all, the moral-political conclusion that no individual state can be trusted

²⁵⁹ Belgium also argued in the *Legality of Use of Force Case* was that the Security Council's lack of condemnation for the NATO action meant that it was legal. *Legality of Use of Force Case* (Provisional Measures) (International Court of Justice, 1999), pleadings of Belgium, May 10, 1999, CR 99/15

²⁶⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Reports 4 .

²⁶¹ 'Declaration of the Group of 77 South Summit', 10-14 April 2000, para. 54.

²⁶² Non-Aligned Movement, 'Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur', 24-25 February 2003, para. 16.

²⁶³ On the responsibility to protect, see chapter eight.

²⁶⁴ David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto, 2002), p. 135. For similar reasoning see Statement by Hugo Chavez, President of Venezuela, at the General Debate of the 60th Session of the United Nations General Assembly, September 15, 2005; available at www.embavenez-us.org/news.php?nid=1745.; Mohammed Ayoob, Third World Perspectives on Humanitarian Intervention and International Administration, 10 *Global Governance* 99, 115 (2004).

with authority to judge and determine wisely.’²⁶⁵ However, the problem with this explanation is that it fails to take into account that ‘unilateral intervention’ is now increasingly been utilised by organisations such as NATO and ECOWAS collectively rather than by individual states. However, although there hardly exists any distinction, in law, between a state and a regional organisation with respect to intervention, NATO states have argued the fact that there was multilateral support within the organisation, in which all 19 member states have in theory the power of veto, confirms that this military action did represent an international-community interest, and not just the interests of one single state and hence was legitimate.²⁶⁶

Nevertheless there is currently is no legal right of states or regional organisations to forcefully intervene in another state for humanitarian reasons without the authorisation of the Security Council, notwithstanding there may be a moral right to intervene in such circumstances.²⁶⁷ However, the failure of the right to humanitarian intervention as a legal doctrine posed further questions eloquently articulated by the Secretary General in explaining the dilemma facing the international community due to an impotent Council:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask...in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?²⁶⁸

This statement is of single particular significance for two reasons that are interrelated. Firstly, it provides the partial justification of the AU’s right to intervene²⁶⁹ and the UN’s responsibility to protect.²⁷⁰ Indeed, African states and world leaders while overwhelmingly rejecting the doctrine of humanitarian intervention, went ahead to

²⁶⁵ L. Henkin, ‘Editorial Comments: NATO’s Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention,’ *American Journal of International Law*, Vol. 1999, 824

²⁶⁶ Biljana Vankovska, ‘NATO War Over Yugoslavia: Civilian Control in Focus’ July (2000) *Copenhagen Peace Research Institute*.

²⁶⁷ See chapter seven.

²⁶⁸ Kofi Annan’s speech on 20 September 1999 before the UN General Assembly: *Balance State Sovereignty with Individual Sovereignty!* http://users.lmi.net/wfanca/pp_annan_on_sov.html.

²⁶⁹ See chapter seven.

²⁷⁰ See chapter eight.

promote the application of new doctrines, particularly in situations that involved war crimes, genocide, crimes against humanity.

Secondly, the emergence of the new norms raised fundamental questions with regard to the potential conflict between rules of *jus cogens*. This will become clear in part two of the thesis. However, for the purpose of illustration, it will be recalled that despite the fact that a clear norm of *jus cogens* obligated states to 'prevent and punish' genocide,²⁷¹ the UN and regional agencies failed to act in order to prevent the massacre of up to one million people in Rwanda.²⁷² Instead, reliance was placed on the peremptory norm contained in the prohibition of the use of force,²⁷³ above the duty to protect the higher laws enshrined in the *jus cogens*, which obligated them to act.²⁷⁴ As shown in the coming chapters, partial answers to the underlying questions are to be found in the constituent instruments and recent practice of some major regional organisations, whose legal background is considered in the next chapter.

C: Conclusion

This chapter has demonstrated the manner in which the emergence of the United Nations fundamentally altered the pre 1945 international legal order. Before the establishment of the UN, the previous system was based on the just war doctrine whereby states enjoyed the right to resort to war without any real legal limitation. However, although the collective security system of the UN has played a central role in preventing a third world war, the Cold War period and its aftermath has nevertheless been marked by numerous, national and regional conflicts. The reality remains that the UN was designed in 1945 to confront challenges facing the world during that era and not the one facing the international community of the 21st century. Taking into account that the UN Charter was formulated with aggression between states in mind, its provisions appear to be inadequate to address internal conflicts, particularly where rebel factions challenge the authority of the government as highlighted by the Darfur conflict. Unfortunately for Africa, the failure by the UN to adapt to new threats and challenges has had especially profound consequences in the continent.

²⁷¹ See article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

²⁷² See chapter five.

²⁷³ Article 2(4) of the UN Charter. See chapter three.

²⁷⁴ See chapter one.

As shown in this thesis, the predicament facing Africa is not helped by the fact that it remains the only continent in the world that has been without a permanent seat in the Security Council since the UN's inception, despite the latter being the body responsible for conflict in the region.²⁷⁵ And although terrorism, rogues states and non-state actors are acknowledged as the new threats to international peace and security, this does not necessarily reflect the case for Africa.²⁷⁶ Instead, it is the typical characteristics of modern conflicts in Africa involving internal wars with the potential to destabilise entire regions that forms the greatest threat to the continent's peace and security and the survival of millions of its citizens as the DRC, Rwanda²⁷⁷ and Darfur²⁷⁸ show.

As shown in chapter five, it is the images brought by specific failures, both by the UN and African leaders, which formed the rationale and inspiration for the continental journey from the OAU to the new AU, including its right to intervene in grave circumstances as part of its system of regional security.²⁷⁹ As aforementioned,²⁸⁰ this being the first international treaty to contain such a right raises fundamental questions, particularly in regard to the prohibition against the use of force and article 53 of the UN Charter, which states that no enforcement action shall be taken by regional agencies without the authorization of the Security Council.²⁸¹ With the former having been discussed above, the next chapter looks at the regional legal principles under the UN Charter, in order to ultimately determine the legality of the AU's right to intervene and its relationship with the UN Charter and general international law.

²⁷⁵ See chapter eight.

²⁷⁶ *Ibid.*

²⁷⁷ See introduction, chapters five and eight.

²⁷⁸ See chapter nine.

²⁷⁹ See article 4(h) of the Constitutive Act of the African Union.

²⁸⁰ See introduction.

²⁸¹ See chapter four.

Chapter Four

Regional Legal Principles

A: Introduction

It will be recalled that the 16th and 17th century European law that crystallised into international law had little to say on the future role of regional agencies.¹ And although regionalism was envisaged under the League of Nations, the demise of the organisation was partly attributed to the poor drafting of its article 21 concerning the function of regional organisations.² Nevertheless, the system established by the UN in 1945 devised a key role for regional arrangements, which did not achieve its full potential due to the Cold War.³ However, the peace and security challenges facing the international community after the fall of the Berlin Wall have led regionalism to work in a manner unforeseen by the drafters of the UN Charter.⁴

The recent actions of some regional organisations have raised fundamental questions with respect to their compatibility with traditional concepts such as the key provisions in article 2(4) and article 103, as well as Chapter VIII of the UN Charter. In particular, the enforcement actions of ECOWAS in Liberia (1990) and Sierra Leone (1997), the NATO invasion of Kosovo (1999) and the establishment of the AU's right to

¹ See chapter two.

² *Anthoni van Nieuwkerk*, 'Regionalism into Globalism? War into Peace? SADC and ECOWAS Compared' *African Security Review* Vol 10 No 2, 2001. See Covenant (Part I of the Treaty of Versailles).

³ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations, in Particular the African Union, in the Maintenance of International Peace and Security*, UN Doc. S/2008/186, 24 March, 2008.

⁴ For extensive literature regarding the increased activity of regional organisations in peace and security, see Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security of its Chapter VII Powers*, (Oxford University Press, 1999), p. 247-228; Gray, C., 'Regional Arrangements and the United Nations Collective Security System', in Fox, H, *The Changing Constitution of the United Nations* (London: British Institute of International and Comparative Law, 1997), p. 91; Wolfrum, R., 'The Protection of Regional or Other Interests as Structural Element of Decision-Making Process of International Organizations', *Max Plank Yearbook of International Law*, 1, (1997), p. 259; Walter, C., 'Security Council Control over Regional Action', *Max Plank Yearbook of International Law*, 1, 1997, p. 129; Norton Moore, J., 'The Role of Regional Arrangements in the Maintenance of World Order', in *The Future of the International Legal Order*, vol 3, (Falk, R., Black, C., eds, 1971), p.122; Nolte, G., 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict', *ZaöRVtt*, 53, (1993), p.603; Christoph Schreuer, 'Regionalism v. Universalism', *European Journal of International Law*, Vol. 6 (1995) No. 3; Rivlin, B., 'Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?', *Foreign Relations*, 11, (1992), p. 5; Akehurst, M., 'Enforcement Action by Regional Agencies with Special Reference to the Organization of American States', *British Yearbook of International Law*, 42 (1967) p. 175. See also chapters on regional organisations in Simma, Bruno, ed. *Charter of the United Nations : a commentary*, (Oxford; New York: Oxford University Press, 1994).

intervene (2001) have been subject to much controversy. This is because the general understanding has been that regional organisations' right to take enforcement measures has been subsidiary and ultimately under the express authorisation from the United Nations.⁵ In light of the foregoing, the object of the present chapter is order to demonstrate the evolving function of regionalism within the UN system.

B: Aim Purpose and Structure

For the purpose of proper analysis, the chapter restricts itself to analysing the remarkable changes brought about by the dramatic realignment of geo-political interests that emerged at the turn of the post Cold War era. Using the existing framework, it introduces the central argument of the thesis; despite the assertions to the contrary, regional organisations may engage in enforcement action and at the same time play a complementary role of strengthening the universal system. In support of this argument, which is reinforced in chapter seven, this chapter calls for a defined and structured formal division of labour between the UN and regional organisations.

In order to meet its objectives, the discussion herein is divided into three main sections. In order to uncover the present form of the ongoing debate, section one begins by re-introducing the perennial question of regionalism v universalism that prominently featured at the 1945 San Francisco Conference. Having done so, it will examine in detail, the UN's legal framework as spelt out in the relevant provisions of its Charter. Given the lack of definition of what entails a regional organisation, it discusses the term as understood in practice and calls for more clarity.

This analysis will pave way for the second section which analyses the practice of regional organisations in the post-Cold War era. This part will highlight the transformation of the major regional organisations, which were initially defence pacts, to meet the challenges brought about by the collapse of the Berlin Wall in 1989. This discussion will pave way for the third section which looks at the evolving relationship between the UN and regional organisations, as well as assess the obstacles and

⁵ Christine Gray, *International Law and the Use of Force*, (Oxford University Press, USA; 2 edition, 2004); Danesh Sarooshi, *The United Nations and the Development of Collective Security*, *ibid*, p. 247-228; Gray, C., 'Regional Arrangements and the United Nations Collective Security System', in *The Changing Constitution of the United Nations* *ibid*, p. 91; Akhurst, M., 'The Enforcement Action by Regional Agencies with Special Reference to the Organization of American States,' *ibid*.

prospects of decentralisation. Although the study herein is premised on their cooperation, this section ends by looking at the possibility of conflict between the UN and regional organisations and assesses the applicability of article 103 of the UN Charter.

1.1 The Deliberations Touching on Regionalism at the San Francisco Conference and the Final Outcome of the UN Charter

It will be recalled that although article 21 of the Covenant of the League of Nations noted the validity of regional arrangements for securing the maintenance of peace and security, it was the lack of proper attention given to regionalism that ultimately led to its failure and subsequent demise.⁶ Against this background, an intense debate immediately ensued amongst delegates during the negotiating and drafting of the UN Charter on the merits of regionalism.⁷ As will be demonstrated below, Chapter VIII of the UN Charter, which regulates the functioning of regional arrangements, was only achieved as a result of a compromise between the proponents of universalism led by US President Franklin D. Roosevelt and regionalism favoured by Winston Churchill.⁸

The regionalist front, represented by the Latin American and Asian states, made a 'decisive and ultimately successful push for modification of the universalist principle.'⁹ However, as it turned out, the final draft of the UN Charter reflected 'the premise that the UN should be supreme, and accepted regionalism conditionally.'¹⁰ In the end, the lobbying by Latin American states to have regional organisations exempt from the Security Council with regard to the use of force failed at the San Francisco

⁶ See chapter two. See also Anthoni van Nieuwkerk, 'Regionalism into Globalism?' *supra* note 2.

⁷ Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional Peace Operations', *Journal of Conflict and Security Law*, Vol 11, No. 3, 2006, pp. 483-508.

⁸ See Hull, *The Memoirs of Cordell Hull*, (New York: Macmillan, vol. 2, 1948), p. 1640. See also W.G. Grewe, 'The History of the United Nations' in Bruno Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford: Oxford University Press, 1995) p. 7. Hilaire McCoubrey & N.D. White, 'International Organizations and Civil Wars', (Brookfield: Dartmouth, 1995), p. 45; Bruno Simma, *The Charter of the United Nations*, *supra* note 4, p 685; Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, *supra* note 4; Mary Ellen O'Connell, 'The UN, NATO, and International Law After Kosovo', *Human Rights Quarterly* 22.1 (2000) 57-89.

⁹ Bruno Simma, *The Charter of the United Nations*, *supra* note 4, p. 686. See also H. McCoubrey, *Regional Peacekeeping in the Post-Cold War Era*, (Kluwer Academic Publishers, 2000), p. 189. See also W. Hummer & M. Schweitzer, 'Article 52', in B. Simma (ed.), *The United Nations Charter: A Commentary* (Oxford University Press, USA; 2 edition, 2002) 679 at 685-687. On regionalism v. universalism, see C. Schreuer, 'Regionalism v. Universalism', *supra* note 4.

¹⁰ I. Claude, *Swords into Plowshares: The Problems of International organizations*, (Hodder & Stoughton Ltd, 1965), p. 106.

Conference as the 'majority of the delegations considered prior authorization by the [Council] to be necessary.'¹¹

As shown throughout this study, with the above position having been incorporated in Chapter VIII of the UN Charter, it is in this context that some recent actions of certain regional organisations have been controversial. This is because until now, the general understanding has been that regional organisations' right to take action has been secondary and ultimately under the express authority of the UN.¹² Surprisingly however, the UN Charter gives no definition of what constitutes a 'regional arrangement or agency' under Chapter VIII.¹³ A flexible approach in determining their status was taken by the Secretary General. In his *Agenda for Peace*,¹⁴ which was the first official document to encourage regionalism, Boutros-Ghali explained that the Charter 'deliberately provides no precise definition of regional arrangements and agencies.'¹⁵ Hence, having put the debate with regard to the constitutive elements of regional organisations to rest, the efforts to find a definition have remained largely abandoned.¹⁶

The interpretation taken in *Agenda for Peace* offers a 'useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action [and] which also could contribute to the maintenance of international peace and security.'¹⁷ However, this approach did not prevent the Secretary General from explaining what may constitutes a 'regional arrangement or agency' under Chapter VIII. Thus, the *Agenda for Peace* articulates that such 'associations or entities could include treaty-based organizations,' such as 'regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.'¹⁸ However,

¹¹ G. Ress, 'Article 53', in Simma, *The Charter of the United Nations*, *supra* note 9.

¹² See article 53 (1) of the UN Charter.

¹³ B. Simma, *The Charter of the United Nations*, *supra* note 9, pp. 820- 828. See also Cot and Pellet, *La Charte des Nations Unies* (Economica, 1991) pp 801 and 810.

¹⁴ Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111. 17 June 1992.

¹⁵ *Ibid.*

¹⁶ However, see B. Simma, *The Charter of the United Nations*, *supra* note 9, pp. 820-828.

¹⁷ See *Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping*, UN Doc. A/47/277 - S/24111 Available at www.un.org/Docs/SG/agpeace.html - 69k

¹⁸ *Ibid.*

although the interpretation above may act as a useful guide, its lack of properly defined legal criteria for what constitutes a regional agency means that reliance is placed upon political recognition from key states and international organisations, as shown below.

1.2 The Wide and Narrow Definitions of Regional Organisations

In spite of the lack of definition of regionalism, key organisations such as the Organisation of American States (OAS),¹⁹ the Commonwealth of Independent States (CIS)²⁰ and the Organisation for Security and Cooperation in Europe (OSCE)²¹ have explicitly proclaimed their status as regional arrangements under Chapter VIII of the UN Charter.²² However, the positions of key regional bodies, such as NATO²³ and the former Warsaw Pact have not been so clear cut. On this point, White writes that 'organisations such as [...] NATO and the former Warsaw pact are not, prima facie regional arrangements under Chapter VIII. Indeed the treaties establishing these bodies seem to be clear that they are based on Article 51.'²⁴ However, given the flexibility regarding the constitutive elements of regional organisations, the latter view is a matter of 'a technicality rather than a point of substance.'²⁵ Indeed, it has largely been accepted that a regional arrangement did not have to make express reference to Chapter VIII, or even to the UN Charter, in its constituent instrument to qualify as a regional organisation.²⁶

In support of this point, it is worth noting that the Security Council and the Secretary General implicitly referred to NATO²⁷ and WEU as regional organisations even though none of these had been originally designated as regional organisations under Chapter VIII.²⁸ Similarly, this was also the case with regard to the Arab League which

¹⁹ See Article 1 of the Charter of the Organization of American States of 1948, 119 UNTS 4.

²⁰ See the 'Concept for the Prevention and Settlement of Conflicts on the Territories of the Member-States of the Commonwealth of Independent States,' adopted by the Council of the Heads of States of the CIS in Moscow, Russia, January 19, 1996.

²¹ See the Declaration and Decisions from Helsinki Summit, 10 July 1992, 31 ILM (1992) 1385 at 1403; Schlotter, 'Universalismus, Regionalismus, Kapitel VIII: Die KSZE und die Vereinten Nationen', 41 *Vereinte Nationen* (1993) 137.

²² Christoph Schreuer, *Regionalism v. Universalism*, *supra* note 4.

²³ See for example, Kelsen, H., 'Is the North Atlantic Treaty a Regional Arrangement?' *American Journal of International Law*, 45 (1951), pp. 162-6.

²⁴ See N.D. White, *Keeping the Peace*, (Manchester: Manchester University Press, 2nd ed, 1997), p. 21.

²⁵ H. McCoubrey, *Regional Peacekeeping in the Post-Cold War Era*, *supra* note 9, p. 73.

²⁶ Christine Gray, *International Law*, *supra* note 5, p. 287.

²⁷ See Simma, Bruno, *Charter of the United Nations*, *supra* note 4, p. 730.

²⁸ Christine Gray *International Law and the Use of Force*, *supra* note 5, p. 289.

had not expressly claimed to be a regional organisation but was still accepted as a regional arrangement.²⁹ Furthermore, the AU's status as a regional organisation is undisputed despite its vague references with regard to its status, as well as its obligations under the UN Charter.³⁰ However, having said so, the flexible approach with regard to what constitutes a regional organisation appears to be contradicted by the ICJ.

In the *Nicaragua Case*,³¹ the World Court seemed to require a link between regional agency activities and the purposes of the UN in order to qualify under Chapter VIII of the Charter. In its *obiter dictum* it observed that '[t]he Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a 'regional arrangement' for the purposes of Chapter VIII of the Charter of the United Nations.'³² From this reasoning, it is argued that whether an organisation qualifies under Chapter VIII of the UN Charter ought to be determined by whether its activities are undertaken in a manner that is clearly consistent with the purposes and principles of the Charter.

In spite of the above view, as practice demonstrates, it is often the case that it is the Security Council, a political body, that acts as the arbiter in determining the compatibility of the activities of a regional organisation and the purposes of the UN Charter.³³ This means that a regional organisation's status in international law is determined neither by its own constitutive instruments nor by the nature of the organisation but by the relationship and position taken by the Council.³⁴ As shown in chapter seven, this practice extends to the legality of activities taken by regional bodies, as was evident in the actions of ECOWAS in West Africa in the 1990s, which found favour with the Council despite their lack of UN authorisation.³⁵

For the above reasons, legal scholars have not concerned themselves with the internal mechanisms of regional arrangements but rather determined an organisation's status

²⁹ *Ibid.*, p. 287.

³⁰ See chapter six and seven.

³¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. Reports.

³² *Ibid.* at para. 440.

³³ See chapter seven.

³⁴ Christine Gray, *International Law and the Use of Force*, *supra* note 5, p. 287.

³⁵ See SC/Res/788 (1992), 19 November 1992 and SC Res 1162 (1998) of 17 April 1998 respectively. See also Aoife O'Donoghue, 'Humanitarian Intervention Revisited', 1 *HanseLR* (2005), 165-175.

by assessing the practice between the UN and the said organisations.³⁶ However, the Secretary General has recently called on the Security Council to consider defining the specific role of regional organisations, to make a distinction between regional agencies for Chapter VIII purposes and other regional activities, in considering issues, such as membership, focal area and mandate.³⁷

1.3 Regional Organisations under Article 51 of the UN Charter

The majority of the literature takes Chapter VIII of the UN Charter as the starting point in the discussion relating to the function of regionalism within the UN system. However, there remains a close link between article 51 of the UN Charter³⁸ and regionalism. In essence, it was article 51 that prepared the legal ground for defence pacts such as NATO (1949) and the Warsaw Pact (1955).³⁹ Indeed, it will be recalled that important modifications in favour of regionalism were inserted at the insistence of the Latin American and Arab States, including the right to individual and collective self-defence as enshrined in article 51 of the UN Charter. In demonstrating the connection between regionalism and the doctrine of self-defence, it is worth noting that throughout the deliberation on article 51, emphasis was placed on the doctrine of 'collective self-defence' as opposed to 'individual self-defence.'⁴⁰

Therefore, in line with article 51, regional organisations were granted the right to collective self-defence 'until the Security Council has taken measures necessary to maintain international peace and security.'⁴¹ The justification for this approach was based on the fact that due to the inherent nature and most often, the unexpected invocation of the concept of self-defence, the exercise of this right would not require the explicit authorisation from the Security Council.⁴² Nevertheless, that the passage

³⁶ Christine Gray, *International Law and the Use of Force*, *supra* note 5, p 287.

³⁷ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3, para. 71.

³⁸ On article 51 of the UN Charter, see chapter three.

³⁹ Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, *EJIL*, Vol. 10 (1999) No. 1.

⁴⁰ See Osman Mohamed Awad, *The United Nations and Peace Enforcement : Wars, Terrorism and Democracy*, (Aldershot: Ashgate, 2002), p. 88.

⁴¹ Article 51 of the UN Charter.

⁴² N.D. White, *The United Nations and the Maintenance of International Peace and Security*, (Manchester, England; New York: Manchester University Press, 1990), p. 23.

in article 51 refers to the authority of the Council no less than three times emphasises that the use of force is very much subject to the control of the Council.⁴³

However, as mentioned in the previous chapter, the drafting process at the San Francisco was formulated with inter-states conflicts in mind and its provisions failed or at best were inadequate to address the changing nature of conflicts that were to take prominence in the post-Cold War era, such as Rwanda⁴⁴ and Darfur.⁴⁵ Therefore, in recent years, some of the proponents of regionalism favour inclusion of a right of regional organisations to use force in defence of values, such as fundamental freedoms from genocide, crimes against humanity and war crimes, within a region. During such instances, the regional agencies would take action until the intervention of the Security Council, in a similar manner as that within article 51 of the UN Charter.

Therefore according to a NATO document, a new interpretation would recognise 'that the inherent right of individual or collective self-defence, also enshrined in Article 51 of the UN Charter, must include defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes.'⁴⁶ Regional action is favoured due to the proximity of regional organisations to local conflicts. In this context, regional arrangements are perceived as able to compliment the collective security system at the regional level.⁴⁷ The AU position is most clear on this matter;

Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard.⁴⁸

Thus, the AU, while acknowledging the need 'to comply scrupulously with the provisions of Article 51 of the UN Charter, which authorise the use of force only in

⁴³ See chapter three.

⁴⁴ See chapter five.

⁴⁵ See chapter nine.

⁴⁶ NATO Doc. AR 295 SA (1998) as reprinted in Bruno Simma, *NATO, the UN and the Use of Force*, *supra* note 39.

⁴⁷ See chapters six, seven, eight and nine.

⁴⁸ See the *Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus*, Executive Council, 7th Extraordinary Session, Ext/EX.CL/2 (VII) 7- 8 March 2005, Addis Ababa, Ethiopia.

cases of legitimate self-defence' offers its own interpretation on the issue and asserts that it is 'important to define the notion of 'collective danger' which would justify collective action.⁴⁹ However, the problem with this view is that although article 51 would be broadened to include the defence of community values and not just states, it will be recalled⁵⁰ that the ICJ in the *Wall Case* restricted the use of force in self-defence to cases of an armed attack by one state against another state.⁵¹

Nevertheless, although speaking in the context of the terrorism threat posed by non-state actors, the ruling by the ICJ was criticised by Judge Higgins in her separate Opinion where she observes that 'nothing in the text of Article 51 [...] stipulates that self defence is available only when an armed attack is made by a state.'⁵² Indeed, the ICJ decision ignored the changing nature of conflicts from being purely inter-state to internal wars with the potential to destabilise whole regions, such as was the case in Rwanda and Darfur.⁵³ However, even though there currently is no right for the invocation of the right to self-defence in the absence of an armed attack, the provisions in Chapter VIII offer alternatives for regional action to protect community principles and values enshrined in the UN Charter.

1.4 The Acknowledgement of Regional Organisations under Article 52 of the UN Charter

The first provision in Chapter VIII relating to regionalism within the UN system is article 52 of the Charter. However, this provision merely acknowledges the existence of regional agencies 'provided that such arrangements or agencies and their activities are consistent with the purposes and principles' of the UN.⁵⁴ In such terms, it seems to favour the restrictive approach taken in the *Nicaragua Case*, described earlier, in regard to what constitutes a regional organisation and thereby makes it clear that not all organisations qualify as regional organisations for the purposes of the UN.⁵⁵

⁴⁹ *Ibid.*

⁵⁰ See chapter three.

⁵¹ See *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004, para. 138-141.

⁵² Separate Opinion by Judge R. Higgins, *ibidem*, para 33.

⁵³ See introduction, chapter five and nine.

⁵⁴ See article 52 of the UN Charter.

⁵⁵ U. Beyerlin, 'Regional Arrangements', *EPIL* 1040.

Although article 52 recognises the existence of regional agreements, the same article does not define the concept of region nor does it provide whether there are any geographical or social political economic conditions that must be met by states in order to enter into regional arrangements. Nevertheless, given that it contains the word 'regional,' a narrow interpretation of article 52 would suggest that it would require geographical vicinity between the member states of a regional organisation.⁵⁶ Furthermore, it has been observed that a degree of vicinity is suggested by the term 'local disputes' in article 52.⁵⁷ However, although Joseph Nye defines a region as a group of states linked by way of geographical relationship and mutual interdependence,⁵⁸ the term regional has been interpreted broadly and is not limited by territorial contiguity.⁵⁹

Indeed, Louse Fawcett observes that regions do not need to conform to state boundaries and 'may comprise of substate as well as suprastate and trans-state units, offering different modalities of organisation and collaboration.'⁶⁰ In this regard, Fawcett proposes a multipurpose definition, which is interpreted to include an economic criterion such as the Organisation for Economic Cooperation and Development (OECD), cultural and historic links such as the Commonwealth of Nations, or religion such as the Organization of the Islamic Conference. Furthermore, this definition interprets the 'South' as a region and includes non-state actors that operate regionally.⁶¹ However, for the purposes of this study, the term regionalism is used to refer to the economic, political, social and cultural cooperation or integration of states and is largely based on geographical identity.⁶² Having said so, in order to ensure further clarity, the use regionalism is restricted to the areas where it is

⁵⁶ See Yepes, 'Les Accords Régionaux', (1947 II) 71 *Recueil des Cours* 227 at 249.

⁵⁷ Marten Zwanenburg, 'Regional Organisations and the Maintenance of International peace and Security, *supra* note 7.

⁵⁸ Joseph Nye, *International Regionalism*, (Boston; Little, Brown, 1968), p. vii. See also J.Baylis and Smith, S., *The Globalization of World Politics: An Introduction to International Relations* (New York: Oxford Press, 1997), pp.409-425.

⁵⁹ M. Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States', *supra* note 4, at 177.

⁶⁰ Louise Fawcett 'Exploring Regional Domains: A Comparative History of Regionalism' *International Affairs*, Volume 80, Issue 3, (2004), p. 429

⁶¹ *Ibid.*

⁶² See J.Baylis and Smith, S., *The Globalization of World Politics: An Introduction to International Relations* (New York: Oxford Press, 1997), pp.40. However, the geographical location of states may expand beyond a specific region e.g. the Organisation of Security and Cooperation in Europe (OCSE) includes the USA and Canada.

connected to the principles and purposes of the UN Charter in peace and security functions.

In spite of the usefulness of the above definition, a key problem that arises is the fact that article 52 of the UN Charter offers no further explanation as to the framework within which regional agencies must operate. Significantly, it hardly requires regional agencies to adopt a position on questions of foreign policy by following the Security Council's decisions concerning the maintenance of international peace and security. Although article 52 calls on regional arrangements to deal with such matters which are appropriate for regional action, it does not require them to designate any organ to make an appropriate judgement on a particular matter or specify what needs to be done if there exist parallel and different judgements. Furthermore, the same article, whilst giving priority to regional arrangements in the pacific settlement of local disputes does not contain criteria which the relevant decision makers should take into account in making the distinction between national and regional disputes. However, as will be made clear throughout this thesis, the activities embarked on by regional agencies under Chapter VIII of the UN Charter may only be taken within the membership of the regional organisation.⁶³

1.5 Regional Enforcement Measures under Article 53 of the UN Charter

The general function of regional agencies in the international collective security framework of the UN is provided in article 53 which provides that the 'Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.' However, despite envisioning a key role for regional agencies, article 53 restricts their capability and actual functioning by outlining that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.' Although this article does not broaden the enforcement powers of the Council, they certainly widen the ways in which enforcement measures may be implemented.⁶⁴

⁶³ W. Hummer & M. Schweitzer, 'Article 52', in B. Simma (ed.), *The United Nations Charter*, supra note 9, pp. 685–687; Marten Zwanenburg, 'Regional Organisations and the Maintenance of International peace and Security,' supra note 7; Villani, Ugo, 'The Security Council's Authorization of Enforcement Action by Regional Organizations', *Max Planck Yearbook of United Nations Law*, Vol.6, No. 1 (2002), pp. 535-555(21).

⁶⁴ Villani Ugo, 'The Security Council's Authorization of Enforcement Action by Regional Organizations', *ibid.*

In spite of the above, specific issues arise as to the definition of 'enforcement action' and in particular, whether it is similar to 'enforcement measures' as used in article 2 (7) and 50 of the UN Charter.⁶⁵ Although military action would clearly amount to enforcement, questions arise with regard to sanctions, in which case it is argued that the majority of states do not consider them as enforcement action.⁶⁶ This is because if enforcement action 'in article 53 were interpreted as including economic sanctions, a group of states would not be entitled to do what each of the states singly would.'⁶⁷ Nonetheless it is also argued that 'Article 53 UN Charter seemed to provide that any non-forcible measure taken by regional organizations that amounted to 'enforcement action' would require the authorization of the Security Council.'⁶⁸ However, as shown in chapter seven, the OAS, the AU and other African regional mechanisms have, as a matter of practice, recently imposed sanctions on their members without Council approval.

Meanwhile, other issues that have arisen with regard to article 53 relate the nature of authorisation by the Council that may be required in order to undertake enforcement measures. For the most part, the questions that have come up are with respect to whether the authorisation must be explicit or if it may be merely implicit. Furthermore, does the failure to condemn an otherwise illegal enforcement action amount to an approval? As shown later in the thesis, these issues have gained enormous interest in the context of the NATO and ECOWAS actions.⁶⁹ Moreover, a huge debate has emerged as to whether there is a legal rule, or an emerging one for that matter, authorising intervention whereby the Council commends or seems to condone an otherwise illegal intervention. While these issues are discussed in chapters seven and eight, what is clear is the general understanding that a regional organisations' right to intervene remains secondary and ultimately under the express authority of the

⁶⁵ See Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security,' *supra* note 7.

⁶⁶ *Ibid.* See also G.Ress, 'Article 53', in Simma, *The Charter of the United Nations* *supra* note 9, p. 733.

⁶⁷ See Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security,' *supra* note 7. See also M. Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States,' *supra* note 4, p. 177; Christoph Schreuer, *Regionalism v. Universalism*, *supra* note 4.

⁶⁸ N.D. White & A. Abass, 'Countermeasures and Sanctions' in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2006), p. 511.

⁶⁹ See chapter seven.

Council.⁷⁰ Indeed, as mentioned above, in similar fashion to the debates at the San Francisco Conference, the attempts to provide regional organisations with the right to take enforcement action without the need for Council approval has recently been met with resistance.⁷¹ Nevertheless, it is argued that recent African practice does not show the requirement of Council authorisation where there is an urgent need to prevent or halt the gross violations of human rights.⁷²

1.6 The Duty to Report to the Security Council under Article 54 of the UN Charter

Article 54 of the UN Charter mandates regional organisations to ensure that the 'Security Council shall at all times be kept fully informed of activities' taken for the maintenance of peace and security. This duty applies to activities under both articles 52 and 53 of the Charter.⁷³ The main function of article 54 is to emphasise that the Council has primary responsibility for the maintenance of peace and security and to guarantee its control of regional organisations' activities.⁷⁴

While the Council hardly makes explicit references to article 54 UN Charter,⁷⁵ there is evidence demonstrating that the organ has been kept informed of activities of regional organisations, such as the OAU⁷⁶ and OAS.⁷⁷ However, it has also been noted that regional organisations' compliance with the obligation in article 54 in practice is

⁷⁰ See chapters seven and eight.

⁷¹ See chapter seven.

⁷² *Ibid.*

⁷³ See Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security,' *supra* note 7.

⁷⁴ See W. Hummer & M. Schwitzer, 'Article 52' in B. Simma (ed), *The United Nations Charter*, *supra* note 63, p. 893.

⁷⁵ However, see SC Res. 530 (1983) of 19 May, 1983.

⁷⁶ See e.g. Letter Dated 9 October, 1970 From the Executive Secretary of the Organisation of African Unity Addressed to the President of the Security Council, S/9962, 14 October, 1970. See also Letter dated 14 December 1966: transmitting the text of a resolution adopted by the Assembly of Heads of State and Government of the OAU, concerning the policies of *apartheid* of the Government of the Republic of South Africa; Letter dated 14 December 1966: transmitting the text of a resolution adopted by the Assembly of Heads of State and Government concerning South West Africa.

⁷⁷ See e.g. Telegram dated 20 September 1966: transmitting a report of the *Ad Hoc* Committee to the President of the Tenth Meeting of Consultation concerning the implementation of a resolution regarding the withdrawal of the Inter-American Peace Force from the Dominican Republic; letter dated 29 November 1966: transmitting the text of a report entitled 'The First Solidarity Conference of the Peoples of Africa, Asia and Latin America and its Projections' (volume 1) prepared by the OAS Special Committee. Telegram dated 1 December 1966: transmitting pursuant to the resolution adopted on 28 November 1966 by the OAS Council, the text of a report entitled 'The First Solidarity Conference of the Peoples of Africa, Asia and Latin America and its Projections' (volume II).

weak.⁷⁸ This appears to contravene the emphasis placed on the primacy of the Security Council required under article 54, which covers all areas and continues to apply even during activities undertaken or in contemplation by regional agencies.⁷⁹ In this regard, in its resolution 1631 of October 2005,⁸⁰ the Council explicitly reminded the relevant regional organisations of their obligations under article 54 of the Charter to keep the Council fully informed of relevant activities.

The recent efforts by the Security Council to engage in a more collaborative relationship with regional organisations is highly significant, particularly given developments that demonstrate new approaches to regional peace and security. However, before examining the move towards robust regionalisation of peace and security, it is important to first look at the root causes of the emerging practice that led the key regional organisations to adjust their constituent instruments, which initially did not make reference to enforcement action, but which were amended to meet challenges of the post-Cold War era.

2.1 The Impact of the Post-Cold War Era and the Evolution of Regional Peace and Security

Although similar assertions have been made of the powerful effects of the events of September 11, 2001,⁸¹ the fall of the Berlin Wall challenged the manner in which governments and commentators understand, interpret and apply international law. Broadly speaking, the impact of the new era is summarised in the expositions by Charles Krauthammer, Francis Fukuyuma and Samuel Huntington, three of the most influential commentators in America. Krauthammer observes that the beginning of the 1990s 'was the end of everything--the end of communism, of socialism, of the Cold War, of the European wars. But the end of everything was also a beginning. On December 26, 1991, the Soviet Union died and something new was born, something

⁷⁸ See Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security,' *supra* note 7.

⁷⁹ See W. Hummer & M. Schwitzer, 'Article 52' in B. Simma (ed), *The United Nations Charter*, *supra* note 63, p. 892.

⁸⁰ SC Res. 1631 (2005) of 17 October 2005.

⁸¹ See generally Paul Eden & Thérèse O'Donnell, *September 11, 2001: A turning Point in International Law?*, (Transnational Publishers, inc. 2005); N.J. Schrijver, 'September 11th and Challenges to International Law', in Boulden Weiss (eds), *Terrorism and the UN: Before and After September 11* (2004), pp. 55-73.; A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law,' 12 *EJIL* (2001), 993.

utterly new--a unipolar world dominated by a single superpower unchecked by any rival and with decisive reach in every corner of the globe.'⁸²

His critic, Francis Fukuyuma, agreed that this period marked 'not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.'⁸³ However, in his most influential and controversial work, Huntington disagrees with both Krauthammer and Fukuyuma and theorised that the post-Cold War order would witness a clash of civilizations as the source of conflict in the world.⁸⁴ Irrespective of the similarities and differences of these schools of thought, the effects and subsequent realignments of the end of the Cold War forced the modification of regional organisations as the UN struggled to adapt itself to the changing realities.

It will be recalled from chapter two that despite providing a role for regional organisations, the Charter lacked a precise explanation as to the relationship between regionalism and universalism.⁸⁵ Instead, it restricted the role of regional organisations to that of assisting the UN in the maintenance of peace and security even within their respective regions. However, the threats that emerged in the post-Cold War era compelled regional organisations to amend their constituent treaties and engage in

⁸² See C. Krauthammer, *Democratic Realism: An American Foreign Policy for a Unipolar World*, (The AEI Press., the Publisher for American Enterprise Institute, Washington D.C, 2004), p. 5.

⁸³ See Francis Fukuyama, 'The End of History?' in *The National Interest*, 16, (1989). See also Francis Fukuyama, *The End of History and the Last Man*, (New York: The Free Press, 1992).

⁸⁴ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York:Simon & Schuster; 1 edition) See also Samuel Huntington, (ed.), *The Clash of Civilizations?: The Debate*, (New York, Foreign Affairs, 1996) ; Samuel Huntington, 'The Clash of Civilizations?', *Foreign Affairs*, vol. 72, no. 3, 1993, pp. 22-49. On reaction to the clash of civilisation theory, see Tony Blankley, *The West's Last Chance: Will We Win the Clash of Civilizations?*, (Washington, D.C., Regnery Publishing, Inc., 2005); Lee Harris, *Civilization and Its Enemies: The Next Stage of History*, (New York, The Free Press, 2004); Hans Köchler, (ed.), *Civilizations: Conflict or Dialogue?*, (Vienna, International Progress Organization, 1999); Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations*, (London, Continuum, 2002); Andrej Tuscisny, 'Civilizational Conflicts: More Frequent, Longer, and Bloodier?', *Journal of Peace Research*, vol. 41, no. 4, (2004), pp. 485-498.

⁸⁵ Ademola Abass, 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organizations?' In N. D. Lewis (ed) *Global Governance and the Quest for Justice* (Oxford; Hart Publishing, 2006), p. 91.

practice that sought to legitimise enforcement action to deal with 'crimes of international concern,'⁸⁶ including genocide, war crimes and crimes against humanity.

This changeover is evident in the constitutive instruments of organisations such as NATO, which had originally been designated as a defence pact designed to deal with the Soviet Union and the Warsaw Pact.⁸⁷ The dissolution of the former and the demise of the latter led NATO to undergo a dramatic transformation to meet the more diversified threats brought about by disputes over ethnicity, religion and territory.⁸⁸ This modification was based on the rationale that these threats could trigger armed conflict, leading to political instability, refugee flows and humanitarian catastrophe and potentially endanger European regional security.⁸⁹

Similarly, the Organization for Security and Co-operation in Europe (OSCE) was established in 1973 for the purposes of security in its region during the Cold War period. The OSCE is unique in the sense that its membership is not limited to Europe and includes the United States and Canada.⁹⁰ While the OSCE was not originally recognised by its members as a Chapter VIII organisation, its status was confirmed during 1992 Helsinki Summit whereby the Heads of State and Government of the OSCE declared the organization to be a regional organisation under Chapter VIII of the UN Charter.⁹¹ Subsequently, this resulted in the 1993 Framework for Cooperation and Coordination between the UN Secretariat and the OSCE with the latter remaining a primary instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation in its region.⁹² The fall of the Berlin Wall also led to an appraisal of regional security issues for the OAS which, even in the absence of a communist threat, transformed itself by broadening its concept of security 'to include

⁸⁶ See article 1 of Rome Statute of the International Criminal Court.

⁸⁷ See article 5 of the NATO treaty.

⁸⁸ Bruno Simma, 'NATO, the UN and the Use of Force', *supra* note 39.

⁸⁹ UK Foreign Office Policy Document No. 148, reprinted in 57 *BYbIL* (1986) 614; Bruno Simma, 'NATO, the UN and the Use of Force,' *ibid.*

⁹⁰ *Final Recommendations of the Helsinki Consultations on the Conference on Security and Co-operation in Europe*, Helsinki, 3 July 1973, para. 54.

⁹¹ 31 *ILM* (1992) 1385; Bothe, Ronzitti and Rosas (eds), *The OSCE in the Maintenance of Peace and Security*, (The Hague, London, Boston: Kluwer Law International, 1997).

⁹² See CSCE, *Budapest Document 1994: Towards A Genuine Partnership In A New Era*, 'Budapest Summit Declaration,' par. 8, 5 December 1994.

inter alia, the protection of democracy regimes, human rights, and economic and social development.⁹³

However, contrary to certain assertions,⁹⁴ these organisations have not denied but instead affirmed their submission to the principles and purposes of the UN. In this context, the primacy of the Security Council over regional arrangements is evidenced by the practice of organisations such as NATO and the OAS. In particular, the latter proclaims itself to be a regional organisation in article I of its Charter,⁹⁵ and undertakes ‘not to resort to the threat or use of force in any manner inconsistent with the provisions of [...] the Charter of the United Nations.’ Similarly, NATO states continue to agree to ‘refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations’ and further acknowledge that the treaty does not affect in any way ‘the primary responsibility of the Security Council for the maintenance of international peace and security.’⁹⁶

In short, these constitutive instruments ‘demonstrate the manner in which [these] regional organisations clearly subordinate themselves to the dictates of the United Nations system.’⁹⁷ However, in sharp contrast to the Charters of NATO and OAS, the amendment of African constitutive instruments in the aftermath of the Rwanda genocide⁹⁸ in order to allow for African regional mechanisms to engage in robust peace and security roles, were not so clear on the issue and to some seemed to do quite the opposite.⁹⁹ While an in-depth analysis of the AU is given in later chapters, this section restricts itself to the dramatic evolution of ECOWAS, its practice, as well as the manner in which it differs from the organisations mentioned above.

Briefly, the Economic Community of West African States (ECOWAS)¹⁰⁰ is an African sub-regional organisation established in May 1975. Its foundational purpose

⁹³ Hilaire McCoubrey, Justin Morris, *Regional Peacekeeping in the Post-Cold War Era*, *supra* note 9, pp. 50 and 54.

⁹⁴ See chapter seven.

⁹⁵ 119 UNTS 48; 33 (1994) 981.

⁹⁶ See Article 1 and 7 of the NATO Treaty.

⁹⁷ Jean Allain ‘The True Challenge to the United Nations System of the Use of Force: The failures of Kosovo and Iraq and the Emergence of the African Union,’ *Max Planck Yearbook of United Nations Law*, Vol.8, (2004), pp 237-289.

⁹⁸ See chapter five.

⁹⁹ Jean Allain ‘The True Challenge to the United Nations System of the Use of Force,’ *supra* note 97.

¹⁰⁰ ECOWAS member states are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

had initially been to 'to promote cooperation and development in all fields of economic activity, the purpose of which is to increase the standard of living of its people, to enhance and maintain economic stability, to strengthen relations between its members and to contribute to progress and development on the African continent.'¹⁰¹

However, a serious problem with ECOWAS was that it did not provide for a regional peace security function. Indeed, it was not until the escalation of conflicts in the West African region that it soon became clear that peace and stability was a prerequisite for economic development. Therefore, in contrast to NATO and OAS, which emphasise their obligations under Chapter VIII of the UN Charter, ECOWAS takes an interventionist approach. In this regard, article 4 of the 1981 Protocol on Mutual Assistance on Defence authorises the organisation to intervene in 'internal armed conflict within any Member State engineered and supported actively from outside likely to endanger the security and peace in the entire Community.' The protocol, by allowing for intervention in the internal affairs of member states, appears to stand in contradiction with the principles on non-intervention embodied in the Charters of the now defunct OAU,¹⁰² the AU,¹⁰³ and the UN.¹⁰⁴

Indeed, in its much later Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security (1999), while paying lip service to the UN, mandates itself to 'authorise all forms of intervention and decide particularly on the deployment of political and military missions.'¹⁰⁵ In practice, ECOWAS has involved itself in operations in Liberia (1991), Sierra Leone (1997), Guinea –Bissau (1999) and Côte d'Ivoire (2003).¹⁰⁶ At this stage, it deserves to be mentioned that ECOWAS is currently designated one of the five regional pillars of the AU.¹⁰⁷ Most significantly, some of its recent activities continue to demonstrate the potential that the regionalisation of peace and security holds in strengthening the Security Council's role of maintaining international peace and security.

¹⁰¹ Article 2 ECOWAS Treaty.

¹⁰² See article 3(2) Organisation of African Unity Charter 1963. See chapter five.

¹⁰³ See article 4(g) of the Constitutive Act of the AU

¹⁰⁴ See article 2 (7) UN Charter. See also chapters three and nine.

¹⁰⁵ Article 10 (c) ECOWAS, Protocol concerning the Mechanism for Conflict Prevention, Management Resolution, Peace-keeping and Security 10 December (1999).

¹⁰⁶ See chapter seven and eight.

¹⁰⁷ See chapter six. This is together with COMESA, ECCAS, IGAD and SADC, ECOWAS signed the Protocol on Relations between the AEC and RECs in February 1998.

Furthermore, in the process, ECOWAS made a strong case for the decentralisation of the UN security system.¹⁰⁸ Indeed, as will be shown in the chapter seven, the ECOWAS interventions in the West African region created a precedent in Africa that inspired the AU to build a robust regional security system that is unparalleled in the South American, Asian and Middle East regions¹⁰⁹ Meanwhile, as the overall function of regionalism in the area of peace and security increases, so have fears of regional hegemonism.¹¹⁰ Hence despite their key role, accusations of supremacy have been labelled against the US within the OAS,¹¹¹ Russia in CIS,¹¹² and Indonesia in ASEAN,¹¹³ as well as Nigeria in ECOWAS¹¹⁴ and South Africa in SADC,¹¹⁵ who have all utilised the underlined regional arrangements in pursuit of their own national interests.¹¹⁶

3.1 Cooperation of Regionalism and Universalism in the UN: Theory and Practice

In sharp contrast to the Cold War period, where there were no references in Security Council resolutions to regional organisations, the past decade has seen a strengthened relationship between the UN and regional organisations.¹¹⁷ Therefore, in April 2008, the Security Council expressed 'its determination to take effective steps to further

¹⁰⁸ See discussion below and chapters seven and eight.

¹⁰⁹ See chapter six.

¹¹⁰ For a display of African hegemony, see chapters five-eight.

¹¹¹ Hilaire McCoubrey, Justin Morris, *Regional Peacekeeping in the Post-Cold War Era*, supra note 9, p. 54. See generally, Rosemary Foot, S. Neil MacFarlane & Michael Mastanduno, *US Hegemony and International Organizations*, (Oxford University Press, USA, 2003).

¹¹² Hilaire McCoubrey, Justin Morris, *Regional Peacekeeping in the Post-Cold War Era*, *ibid.* See also Roy Allison, 'Regionalism, Regional Structures and Security Management in Central Asia,' *International Affairs*, Vol. 80, No. 3, (May 2004), pp. 463-483,; Annette Bohr, 'Regionalism in Central Asia: New Geopolitics, Old Regional Order', *International Affairs*, Volume 80, Issue 3, (May 2004), pp. 485-502,; Roy Allison, 'Strategic Reassertion in Russia's Central Asia Policy', *International Affairs*, Volume 80, Issue 2, (March 2004), pp. 277-293.

¹¹³ Ralf Emmers, 'Regional Hegemonies and the Exercise of Power in Southeast Asia: A Study of Indonesia and Vietnam', *Asian Survey*, (2005), Vol. 45, No. 4, pp. 645-665.

¹¹⁴ Hilaire McCoubrey, Justin Morris, *Regional Peacekeeping in the Post-Cold War Era*, supra note 9, p.56.

¹¹⁵ *Ibid.* p.56.

¹¹⁶ On hegemony and regionalism, see James Mittelman and Richard Falk, 'Global hegemony and regionalism', in Stephen Calleya, ed., *Regionalism in the post-Cold War world* (Aldershot: Ashgate, 2000); Thomas Pedersen, 'Cooperative hegemony: power, ideas and institutions in regional integration,' *Review of International Studies* (2002), 28, 677-696. See also William D. Coleman and Geoffrey R. D. Underhill (eds.), *Regionalism and Global Economic Integration* (London: Routledge, 1998); See e.g. Richard Falk & Saul Mendlowitz (eds.), *Regional Politics and World Order* (San Francisco:Freeman, 1973); Joseph S. Nye, *International Regionalism. Readings* (Boston: Little & Brown 1968).

¹¹⁷ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, supra note 3.

enhance the relationship between the United Nations and regional organisations, in particular the African Union, in accordance with Chapter VIII of the United Nations Charter.’¹¹⁸ This interest came after having passed resolution 1769 in July 2007, which affirmed ‘that co-operation between the UN and the regional arrangements in matters relating to the maintenance of peace and security is an integral part of collective security as provided for in the Charter of the United Nations.’¹¹⁹

However, it was in 2005 that, for the first time, the Council passed a resolution that outlined a coherent guideline for enhancing cooperation between the UN and regional organisations. Unanimously passed on 17 October 2005, resolution 1631,¹²⁰ expressed its ‘determination to take appropriate steps to further the development of cooperation’ between the UN and regional organisations ‘in maintaining international peace and security, consistent with Chapter VIII’ of the UN Charter.¹²¹ Similarly, there is an array of Security Council Presidential Statements which have reiterated that the provisions in Chapter VIII of the UN Charter, discussed above, set forth the relationship between the UN and regional organisations.¹²²

However, in spite of the topical enthusiasm expressed by the Council, the calls for a more collaborative effort between the UN and regional agencies had been made much earlier, particularly in the immediate aftermath of the fall of the Berlin Wall.¹²³ With this regard, successive UN Secretaries, including General Javier Perez de Cueller,¹²⁴ Boutros Boutros-Ghali,¹²⁵ Kofi Annan¹²⁶ and Ban-Ki Moon,¹²⁷ all put forward

¹¹⁸ See SC Res. 1809 (2008) of 16 April 2008.

¹¹⁹ See preamble to SC Res. 1769 (2007), 31 July 2007.

¹²⁰ SC Res. 1631 (2005) of 17 October, 2005.

¹²¹ SC Res. 1631 (2005), 17 October 2005.

¹²² E.g. S/PRST/2004/27, 20 July 2004; S/PRST/1994/22 of 3 May 1994; SC Res. 1170 (1998) of 28 May 1998; S/PRST/1998/28 of 16 September 1998; SC Res. 1197 (1998) of 18 September 1998; S/PRST/1998/35 of 30 November 1998; S/PRST/2004/27 of 20 July 2004; S/PRST/2004/44 of 19 November 2004; S/PRST/2006/39 of 20 September 2006; S/PRST/2007/7 of 28 March 2007; S/PRST/2007/42 of 6 November 2007.

¹²³ Benjamin Rivlin, ‘Regional Arrangements and the UN System for Collective Security and Conflict Resolution: A New Road Ahead?’, *International Relations* 1992; 11;95.

¹²⁴ See Javier Perez de Cueller, ‘*Report of the Secretary General on the Work of the Organisation* (United Nations. Department of Public Information 1990).

¹²⁵ Boutros-Ghali, *An Agenda for Peace*, *supra* note 17, paras 60-65; Boutros-Ghali, *Supplement to the Agenda for Peace: Position Paper of the Secretary General on the Occasion of the 50th Anniversary of the United Nations*, Doc A/50/ 60-S/1995/1, paras 79-96, January 3 1995;

¹²⁶ K. Annan, *Renewing the United Nations: A Programme for Reform: Report of the Secretary General* UN Doc A/51/950, 14, July 1997; the *Report of the UN High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN Doc. A/59/2005, 2 December 2004; the *Secretary General’s report, ‘In Larger Freedom: Towards Development, Security and Human Rights for All* UN Doc. A/59/2005, 21 March 2005.

proposals calling for a greater contribution by and with regional organisation in the promotion and maintenance of international peace and security.

In his penultimate *Report on the Work of the Organization* (1990) written at the turn of the post-Cold War era, the former Secretary-General Javier Perez de Cuellar, stated that 'for dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value.'¹²⁸ Consequently, it was during this period that the Council began to pass resolutions which expressly recalled Chapter VIII and supported cooperation between the UN and regional organisations.¹²⁹ And for the first time, in 1992, the Security Council authorised the use of force by a regional organisation (NATO).¹³⁰

However, this was a rarity and the inadequacy of the UN Charter in addressing the relationship with regional agencies called for more reinforcement. Therefore, the General Assembly passed significant agreements, such as the 1994 Declaration on the strengthening of cooperation between the United Nations and regional organizations in the maintenance of international peace and security.¹³¹ The renewed interest in a revived Chapter VIII was also manifested in the earlier General Assembly Resolution 46/58, of 20 December 1991, which requested the Special Committee on the Charter of the United Nations on Strengthening the Role of the Organization 'to consider the proposal on the enhancement of cooperation between the United Nations and regional organizations [...] relating to the maintenance of international peace and security.' Since then, the General Assembly has perfunctorily adopted resolutions commending cooperation between the UN and regional organisations that are not necessarily restricted to Chapter VIII but spread to all areas.

¹²⁷ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3.

¹²⁸ See 'Envisioning the United Nations in the Twenty-first Century', Proceedings of the Inaugural Symposium on the United Nations System in the Twenty-first Century 21-22 November 1995, UNU Headquarters, Tokyo, Japan.

¹²⁹ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3.

¹³⁰ See SC Res 770 (1992) of August 13, 1992, regarding the former Yugoslavia.

¹³¹ UNGA/Res/49/57 of December, 1994.

Meanwhile, the issue of cooperation between the UN and regional cooperation was also discussed in the *Brahimi Report* (2000),¹³² the 2005 UN High Level Panel Report,¹³³ the 2005 Secretary General's Report *In Larger Freedom*,¹³⁴ and the 2005 *Summit Outcome Document*.¹³⁵ Most recently, the Secretary General also issued a report on the relationship between the UN and regional organisations, in particular the AU, in the maintenance of international peace and security.¹³⁶ Published in 2008, this report called for more 'dialogues on conflict prevention between the United Nations and regional organizations on cross-cutting issues of mutual interest.'¹³⁷ As shown in chapter eight, the High Level Panel report favoured a much more integrated approach between the UN and regional organisations while the Secretary General's Report *In Larger Freedom* called for the 'establishment of an interlocking system' that would enable the UN to work with regional organisations in 'predictable and reliable partnerships.'¹³⁸ For its part, the 2005 *World Summit Document* urged for 'further development of proposals for enhanced rapidly deployable capacities' between the UN and regional organisations.¹³⁹

Overall, these proposals are based on the realisation that cooperation based on a formalised division of labour would enable the AU and the UN to respond in a more comprehensive manner by building strengths and compensating for the weaknesses of both types of organisation.¹⁴⁰ The key areas of cooperation include brokering of peace agreements in conflict situations and taking steps to promote closer and more

¹³² UN General Assembly and Security Council, *Report on the Panel on United Nations Peace Operations*, UN Doc. A/55/505-S/2000/809, 21 August 2000.

¹³³ UN High-Level Panel, *A More Secure World*, *supra* note 126.

¹³⁴ Kofi Annan, *In Larger Freedom*, *supra* note 126.

¹³⁵ *World Summit Outcome Document*, 16 September 2005, A/RES/60/1.

¹³⁶ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3.

¹³⁷ *Ibid*, paras 72-74.

¹³⁸ Kofi Annan, *In Larger Freedom*, *supra* note 126, para. 112.

¹³⁹ *2005 World Summit Outcome* *supra* note 126, paras. 92-93.

¹⁴⁰ Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *The Journal of Humanitarian Assistance*, (2006); Theo Neethling, 'Realising the African Standby Force as a Pan-African Deal: Progress, Prospects and Challenges,' *Journal of Military and Strategic Studies*, Vol. 8, Issue 1, (2005), pp. 1-25, pg. 15; C. De Coning, 'Refining the African Standby Force Concept,' *Conflict Trends*. 2 (2004): 22; A. Adebayo & C. Landsberg, 'Back to the Future: UN Peacekeeping in Africa,' in A. Adebayo & C.L. Sriram (eds.), *Managing Armed Conflicts in the 21st Century*, (Frank Cass, London, 2001).

operational cooperation between UN and regional agencies in conflict prevention,¹⁴¹ intervention,¹⁴² peace operations¹⁴³ and peacebuilding.¹⁴⁴

In practice, cooperation between regionalism and universalism has taken a variety of shapes, including formal and informal relationships and partnerships. A key formal relationship is that of observer status given to regional organisations by the General Assembly, which has been granted to the major regional arrangements. These include the AU in 2002,¹⁴⁵ the OAS in 1948,¹⁴⁶ the Arab League in 1950,¹⁴⁷ the EU in 1974,¹⁴⁸ the CSCE in 1993,¹⁴⁹ and the ASEAN in 2006.¹⁵⁰ Others include the ECOWAS in 2004¹⁵¹ and the OIC in 1975.¹⁵² Specific cooperation agreements between the UN and regional organisations also include Cooperation between the United Nations and the Organization of American States(1994),¹⁵³ Cooperation between the United Nations and the Organization of the Islamic Conference(1994),¹⁵⁴ Cooperation between the United Nations and the League of Arab States (1994),¹⁵⁵ Cooperation between the United Nations and the Association of South-East Asian Nations (2003)¹⁵⁶ and Cooperation between the United Nations and the now defunct Organisation of African Unity, in 1993.¹⁵⁷ Most recently, the AU and UN signed a Declaration on 'Enhancing UN-AU Cooperation' in November 2006.¹⁵⁸ And although

¹⁴¹ See chapter six.

¹⁴² See chapter seven.

¹⁴³ See chapter eight and nine.

¹⁴⁴ See chapter eight.

¹⁴⁵ See UNGA Res. 56/475 of 15 August 2002. Note that the former Organisation of African Unity had been given observer status in 1965. See UNGA. Res. 48/25 of 11 October 1965.

¹⁴⁶ See UNGA Res. 253(III) of 16 October, 1948.

¹⁴⁷ See UNGA Res. 477(V) of 1 November, 1950.

¹⁴⁸ See UNGA Res. 3208 (XXIX) of 11 October, 1974

¹⁴⁹ See UNGA Res. 48/5 of 13 October, 1993.

¹⁵⁰ See UNGA Res.61/44 of 4 December 2006.

¹⁵¹ See UNGA Res. 59/51 of 2 December 2004.

¹⁵² See UNGA Res. 3369 (XXX) of 10 October 1975.

¹⁵³ See GA/Res/49/5, 41st plenary meeting, 21 October (1994). See also Cooperation between the United Nations and the Organization of American States, G.A. res. 47/11, 47 U.N. GAOR Supp. (No. 49) at 16, U.N. Doc. A/47/49 (1992).

¹⁵⁴ See G.A. Res. 49/15, 49 U.N. GAOR Supp. (No. 49) at 14, U.N. Doc. A/49/49 (1994).

¹⁵⁵ G.A. Res. 49/14, 49 U.N. GAOR Supp. (No. 49) at 13, U.N. Doc. A/49/49 (1994).

¹⁵⁶ See G.A/ 57/35, 57th Session, 10 January 2003. See also Memorandum of Understanding between the Secretariat of the Association of Southeast Asian Nations (ASEAN Secretariat) and the Secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP Secretariat) GA/Res/ 53/435, 25 September 1998.

¹⁵⁷ G.A. Res. 47/148 and 48/25.

¹⁵⁸ 'Declaration, Enhancing UN-AU Cooperation Framework: for the Ten-Year Capacity Building Programme for the African Union', 16 November 2006. See *Report of the Secretary-General on the Work of the Organization, GA, 62nd Session, Supplement No.1 (A/62/1)*, New York, 31 August, 2007. See also the AU Assembly of the AU Assembly Decision on Enhancing UN-AU Cooperation:

the relationship between the AU and UN is specifically dealt with in chapter six, this Declaration is significant as it contained ‘an expression of the common commitment of both institutions to work together,’¹⁵⁹ which may potentially create lessons for other regional organisations and their relationship with the UN with regard to peace and security.

Meanwhile, informal cooperation and consultation between the UN and regional organisations is also visible in the UN Office in Geneva (UNOG), which ‘represents the UN in the ‘Tripartite Process,’ a framework of informal consultations with the Council of Europe and the Organization for Security and Cooperation in Europe.’¹⁶⁰ The ‘Tripartite’ consultations are indicative of the manner in which the United Nations and regional organisations can cooperate and coordinate more effectively in the maintenance of international peace and security and solve wider international problems of an economic, social, cultural or humanitarian character. Other diverse forms of relationships are not exhaustive but include memorandums of understanding, sharing of information, mutual attendance of meetings, seminars and conferences, informal contacts and the exchange of documents.¹⁶¹

However, the key problem with these agreements is the scarcity of clearly defined mechanisms of cooperation and lack of a legal framework to govern the same. Furthermore, these agreements tend to be reactive, rather than proactive, meaning that it is usually too late to halt the catastrophes, such Rwanda¹⁶² and Darfur,¹⁶³ and protect the principles that they purport to uphold. Nevertheless, the failure of the current system and the overlap and duplication of mandates with regard to peace and

Framework for the Ten-Year Capacity-Building Programme for the African Union, Assembly/AU/Dec.140 (VIII), adopted at the Eighth Ordinary Session, 29-30, January 2007, Addis Ababa, Ethiopia.

¹⁵⁹ Statement by Mr. Abdoulie Janneh, UN Under-Secretary-General and Executive Secretary of ECA, Tenth Ordinary Session of the Executive Council of the African Union, Addis Ababa, Ethiopia, 25 January 2007.

¹⁶⁰ See the United Nations Office in Geneva Website available at [http://www.unog.ch/80256EE600583A0B/\(httpPages\)/2BE770FCC31A50F980256EF700769637?OpenDocument](http://www.unog.ch/80256EE600583A0B/(httpPages)/2BE770FCC31A50F980256EF700769637?OpenDocument).

¹⁶¹ Christoph Schreuer, ‘Regionalism v. Universalism,’ *supra* note 4.

¹⁶² See chapter five.

¹⁶³ See chapter nine.

security described above, has led to calls for better clarity of the division of labour between the principal organs of the UN and regional organisations.¹⁶⁴

3.2 The Prospects of Decentralisation and Division of Labour between Regionalism and Universalism within the UN System

Boutros Boutros-Ghali, during his tenure as Secretary General of the UN, was in favour of a division of labour between the UN and regional organisations, which he viewed as being in conformity with Chapter VIII of the Charter. For instance, he cited the case of Nagorno-Karabakh where the UN had supported the work of the CSCE 'as just one example of a new division of labour with regional organizations.'¹⁶⁵ However, in spite of the strong case for a formal structure between the UN and regional organisations, the apparent hesitation to decentralise the UN system and recognise regional agencies with robust roles lies in the fear of usurpation of the function of the Security Council, particularly in any enforcement action entailing the use of force.¹⁶⁶

With this regard, it has been observed that any abandonment by the Security Council of its asserted monopoly on determining the lawful use of force 'could put the world community on a slippery slope of competing claims of 'rights' to intervene - with the potential consequence of escalating hostilities rather than resolving them.'¹⁶⁷ This fear was also shared by the UN High Level Panel, which concluded that, '[a]llowing one to so act is to allow all.'¹⁶⁸ However, the problem with this concern is that it is preoccupied with the unilateral activities such as those manifest in the United States policy of unilateralism.¹⁶⁹ Furthermore, this fear ignores the potential usefulness that

¹⁶⁴ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3.

¹⁶⁵ Boutros Boutros-Ghali, 'UN Peacekeeping in a New Era: a New Chance for Peace', *The World Today*, April 1993, p. 168. See also Boutros Boutros-Ghali, *Report on UN Activities* (Sept. 1992-Sept. 1993), (New York, United Nations), para. 323.

¹⁶⁶ See chapter seven.

¹⁶⁷ Background Paper for the present Roundtables, prepared by Jeffrey Laurenti for the United Nations Association of the U.S.A quoted in Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *EJIL*, Vol. 10 (1999) No. 1.

¹⁶⁸ UN High Level Panel, *A More Secure World*, *supra* note 126.

¹⁶⁹ See chapter one. For detailed discussion on US unilateralism, see Christian Tomuschat, 'Multilateralism in the Age of US Hegemony', in MacDonald, St John Johnston, D. M., *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, (Martinus Nijhoff Publishers 2005), p.31-75; Robert F. Turner, 'American Unilateralism and the Rule of Law', in MacDonald, St John Johnston, D. M., *Towards World Constitutionalism*, *ibid*, p. 77-101; Feffer, John, *Power Trip: U.S. Unilateralism and Global Strategy After September 11*, (Seven Stories Press 2003); John Lewis Gaddis, 'A Grand Strategy,' *Foreign Policy* (November/December 2002); The White House, *The National Security Strategy of the United States of America*, (The White House, September

regional arrangements hold, particularly in the enforcement of peremptory norms and their capability to prevent a future Rwanda or Srebrenica.¹⁷⁰

Indeed, as shown in chapters seven and eight, there is an emerging African norm where, in the event of a failure to act by the Security Council, the AU possesses the requisite legitimacy to intervene with the purpose of protecting and preventing gross violations of human rights.¹⁷¹ In such circumstances, the AU would act upon the UN's failure during circumstances requiring urgent action, and subsequently request *ex post facto* authorisation.¹⁷² While the legality of the African regional norm on intervention is discussed in chapter seven, suffice to say here that such a possibility was envisaged by the International Commission on Intervention and State Sovereignty¹⁷³ (ICISS), and the UN High Level Panel.¹⁷⁴ These Commissions pointed out that that in some urgent situations, Security Council authorisation maybe sought after such operations have commenced.¹⁷⁵ As shown in chapter eight, this proposal 'goes to the heart of the legal basis of military operations by regional organisations in the maintenance of international peace and security.'¹⁷⁶

What is important to emphasise at this point is that despite the danger of fragmentation to the international system by regionalism, recent practice shows that decentralisation of the UN system may offer viable prospects. Therefore, the majority of the prevailing regional approaches do not seek to challenge the UN system but have instead been necessitated by the failure of the current collective security framework.¹⁷⁷ However, in spite of the calls for a decentralised system and formalised division of labour between the UN and regional organisations, little has been achieved in terms of working out such an agreement.¹⁷⁸ Nevertheless, the practical benefits for

2002). See also J.R. Bolton, 'Is There Really 'Law' in International Affairs?' *Transnational Law and Contemporary Problems* 10 (2000).

¹⁷⁰ See chapters seven and eight.

¹⁷¹ See article 4 (h) of the Constitutive Act of the African Union.

¹⁷² See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 48.

¹⁷³ See the *International Commission on Intervention and State Sovereignty, The responsibility to protect*, (International Development Research Centre, Canada), at 53.

¹⁷⁴ UN High Level Panel, *A More Secure World*, *supra* note 126, p. 71 para 272.

¹⁷⁵ See chapter seven and eight.

¹⁷⁶ Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security,' *supra* note 7.

¹⁷⁷ See the Secretary General's Statement at opening of the Second Meeting between the United Nations and Regional Organizations. Press Release, SG/SM/5895, 14 February 1996.

¹⁷⁸ See chapters six and eight.

closer involvement of regional organizations in peace and security were well summarized by the Secretary-General himself.

Firstly, although finding the right division of labour between the UN and regional organizations is not easy, 'such cooperation brings greater legitimacy and support to international efforts.'¹⁷⁹ Secondly, 'it eases the material and financial burden' on the UN and 'allows for comparative advantage.'¹⁸⁰ And finally, the division of labour also 'brings more actors to the world stage, helping to democratize the international system.'¹⁸¹ It is after making these observations that Boutros Ghali asserted that the 'founders of the United Nations proposed regionalism and universalism working not at odds, but together.'¹⁸² His successor, Kofi Annan, similarly agreed and further developed the idea of a division of labour, which for him, could potentially provide a platform within which common responsibilities may be shared while at the same time ensure more effectiveness in the maintenance of peace and security. In this regard, Annan provided important insights.

We must be willing to seek out and establish our comparative advantages in the various areas of tomorrow's challenges -- where the OAU [now AU] may be better suited for a mediation role; where the Organization for Security and Cooperation in Europe (OSCE) may be better suited for an election monitoring role; where NATO may be better suited for a peacekeeping role; where the United Nations may be better suited to negotiate the resolution of a conflict and provide a peacebuilding mission.¹⁸³

Most recently, the current Secretary General has also recommended the clarification of the specific roles of the UN and regional bodies, particularly the AU in order to enhance predictability and sustainability of concerted action.¹⁸⁴ Understandably, the nature and extent of cooperation between the UN and regional organisations will vary in each case, as shown in chapter six. Meanwhile, although the discussion herein argues for a strengthened complementary role for regional organisations in the area of peace and security, there are further potential restrictions that may hinder the functioning of regionalism, which are worth considering. In particular, despite the

¹⁷⁹ UN Press Release, SG/SM/5804, 1 November 1995.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ UN Press Release, SG/SM/6653, 27 July 1998.

¹⁸⁴ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations*, *supra* note 3.

optimism that increased cooperation may bring, there has been a worry as to the legal position in case of conflict between regional organisations and the UN. On this issue, it has generally been perceived that the constitutive instruments of regional organisations take the back seat when they conflict with the UN Charter as outlined in article 103 of the UN; at least as far as the obligations of member states are concerned. However, the matter is not so clear cut as the following section shows.

3.3 The Relationship between Regionalism and Article 103 of the UN Charter

As mentioned in chapter seven and shown above, the activities of regional organisations such as NATO, the OAS and the AU are regulated under Chapter VIII of the UN Charter. Furthermore, article 103 of the UN Charter provides that the obligations of UN member states prevail over their obligations under any other international agreement. Article 103 of the UN Charter is often perceived as having a constitutional function¹⁸⁵ as it is connected to member states' obligations under the article 25 of the UN Charter.¹⁸⁶ Alongside other articles, the latter provisions arguably confirm the Charter's status as an integral part of the constitution of the international community.¹⁸⁷

Significantly, the legal effect of article 103 of the UN Charter provision was confirmed in the *Lockerbie Case*.¹⁸⁸ However, it should be noted that the ruling on the status of article 103 was contained in the preliminary ruling in the *Lockerbie* proceedings and not in the merits phase of the dispute. Therefore, the latter position leaves room for the argument that the status of article 103 is not as settled as it is often thought. Nevertheless, as mentioned in the previous chapter, the reasoning by the ICJ has recently been followed by the other key judgments, such as that of the Court of First Instance of the European Communities in Luxembourg in the *Yusuf*¹⁸⁹ and *Kadi*¹⁹⁰ cases of 2005. Importantly, the principle was also recently affirmed by the

¹⁸⁵ Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law', *Paper*, University of Leeds, 14 March 2007. Available at <http://www.law.leeds.ac.uk/leedslaw/webdocs/leedslaw/uploadeddocuments/cfig-wood.doc>.

¹⁸⁶ *Ibid.*

¹⁸⁷ See chapter three. See also R Bernhardt, 'Article 103', in Simma (ed), *The Charter of The United Nations. A Commentary*, (OUP, 2002),

¹⁸⁸ *Aerial Incident at Lockerbie Case* (1992), 31 I.L.M. 662.

¹⁸⁹ *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, T-306/01, unreported case, 21 September 2005.

¹⁹⁰ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European communities*, T-315/01, unreported, 21 September, 2005.

House of Lords the *Al-Jedda Case*¹⁹¹ in December 2007. Nevertheless, in spite of their considerable weight, it deserves to be mentioned that these are European and English cases, which thereby lack the veracity of an ICJ decision.

However, what is important to mention here is that, as opposed to being directed at regional organisations, article 103 is addressed to states.¹⁹² This observation is of particular significance given that regional organisations possess an international legal personality that is independent from their member states.¹⁹³ Therefore, state parties confer upon regional organisations obligations that are different from those of its members under the UN system and thereby create 'an entity possessing objective international personality and not merely personality recognized by them alone.'¹⁹⁴

Although not all international agreements establish a distinct international legal personality, as was held by the ICJ,¹⁹⁵ such personality, according to Seyersted,¹⁹⁶ can be inferred from the powers, purposes and practice of the organisation.¹⁹⁷ Nonetheless, having said so, since it is composed of constituent states, it is difficult to see how an organisation created by signatory parties could be independent of the will of its

¹⁹¹ *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* [2007] UKHL 58, para 3.

¹⁹² Nigel D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin & Robert McCorquodale, (eds.), *Economic, Social and Cultural Rights in Action*, (Oxford University Press, 2007).

¹⁹³ *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174. See also F Seyersted, 'International Personality of International Organizations: Do Their Capabilities Really depend upon Their Constitutions?', 4 *Indian Journal of International Law*, 1 (1964); Schermers and Bokker, *International Institutional Law: Unity Within Diversity* (Brill Academic Publishers, 4th ed 2003), p. 34. See also Jan Klabbbers, 'The Changing Image of International Organizations' Published in edited form in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001); N.D White, 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17 (2004), pp.645-672. See also T Frank, *Fairness in International Law and Institutions*, (New York: Oxford University Press, 1995), at 218-220; Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *American Journal of International Law* (2001) 858.

¹⁹⁴ *Reparations for Injuries Suffered in the Service of the United Nations*, *supra* note 193.

¹⁹⁵ *Nauru v Australia* ICJ Reports, 1992, pp. 240&258.

¹⁹⁶ See F Seyersted, 'International Personality of International Organizations,' *supra* note 193.

¹⁹⁷ See also the ruling in the *Reparations for Injuries Suffered in the Service of the United Nations*, *supra* note 193 at 174. On the certain elements that constitute an international organisation, see C.F. Amerasinghe *Principles of the International Law of International Organizations*, (Cambridge University Press, 1996), pp.89-90; J.Klabbbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.) *International Legal Aspects of the European Union*, (Kluwer, The Hague, 1998) pp.243-9; I. Brownlie, *Principles of Public International Law*, (Oxford University Press, USA; 6 edition) , p. 649; R. Higgins, *Problems and Process: International Law and How Use it*, (Clarendon Press, Oxford, 1994), p.47; R.A. Wessel, 'Revisiting the International Legal Status of the EU', 5 *European Foreign Affairs Review* 507,(2000) at 517.

members.¹⁹⁸ Yet, the prevailing view is further evidenced by the presence of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.¹⁹⁹ Though not in force, the treaty was intended to regulate the legal relationships between states and international organisations.²⁰⁰ Furthermore, even assuming that article 103 of the UN Charter applied to regional organisations, the effect of the article is not to invalidate the conflicting obligation, but rather to set it aside to the extent of the conflict.²⁰¹

The application of article 103 UN Charter is further limited in that that it applies *only* to treaties and not custom.²⁰² However, it has been noted that there was no need for article 103 to refer to customary international law since a treaty obligation overrides a customary one in any event.²⁰³ In spite of this assertion, according to Rudolf Bernhardt, during the drafting of article 103 of the UN Charter, a ‘formula according to which all other commitments, including those arising under customary law, were superseded by the Charter, was ultimately not included.’²⁰⁴ This ‘[a]pparently

¹⁹⁸ D.J. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartle’, 36 *Virginia Journal of International Law* (1996), 275, at 357.

¹⁹⁹ See The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, UN Doc. A/Conf. 129/15 (1986).

²⁰⁰ Article 85 of the Convention provides that it enters into force after the ratification by 35 states.

²⁰¹ Karl Zemanek, ‘General Course on Public International Law’, *Recueil des Cours*, vol. 266 (1977), 230; Michael Wood, ‘The Security Council and the ‘Constitutionalization’ of International Law’, *supra* note 185; Jeremy L. Levitt, ‘The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), pp. 213-251; N.D. White, ‘The Applicability of Economic and Social Rights to the UN Security Council’, in Mashood A. Baderin & Robert Mccorquodale, *Economic, Social and Cultural Rights in Action*, *supra* note 192.

²⁰² See El Erian, ‘The Legal Organization of the International Society’, in M. Sørensen, ed., *Manual of Public International Law*. (London, Macmillan 1968), pp. 79-80; Gardam, ‘Legal Restraints on Security Council Military Enforcement Action’, 17 *Michigan JIL* (1996) 302; Zemanek, ‘The Legal Foundations of the International System. General Course on Public International Law’ 266 *RCADI* (1997), 230; R Bernhardt, ‘Article 103’, in Simma (ed), *The Charter of The United Nations*, *supra* note 187, p. 1293; Jeremy L. Levitt, ‘The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *ibid*; N.D. White, ‘The Applicability of Economic and Social Rights to the UN Security Council’, in Mashood A. Baderin & Robert Mccorquodale, ‘*Economic, Social and Cultural Rights in Action*’, *ibid*.

²⁰³ On this point, see Michael Wood, ‘The Security Council and the ‘Constitutionalization’ of International Law’, *Paper*, *supra* note 185. See also Alina Kaczorowska, *Public International Law* (London: Old Bailey Press, 2002), p. 21.

²⁰⁴ R. Bernhardt, ‘Article 103’, in Simma, *The Charter of the United Nations*, *supra* note 187.

showed the framers of article 103 were not comfortable with it superseding conflicting customary law developments.²⁰⁵

As shown in chapter seven, in signing up to the respective constitutive instruments, member states of regional organisations 'create new subjects of law endowed with certain autonomy, to which the parties entrust the task of realizing common goals.'²⁰⁶ Indeed, regional organisations such as the AU seek to enforce certain community values that have developed independently of the UN Charter, including peremptory norms.²⁰⁷ Significantly, it should be pointed out here that article 103, a mere procedural provision, cannot be interpreted as able to override the norms against genocide, war crimes and crimes against humanity, which the AU seeks to protect.²⁰⁸ Indeed, the 'concept of *jus cogens* operates as a concept superior to both customary international law and treaty.'²⁰⁹ Not even the immense powers accorded to the Security Council excuses the organ from observing the fundamental provisions of peremptory norms in passing resolutions under Chapter VII of the Charter. Indeed, any action by the Council that violated *jus cogens* would not bind the international community as stated in the *Kadi* case referred to above. Meanwhile, although there exists no defined hierarchy of the peremptory norms of international law,²¹⁰ the last point is highly significant as it strengthens the case for regional organisations, including the AU to act, in order to preserve and enforce peremptory norms of international law where the UN fails or is slow to act.²¹¹

²⁰⁵ Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 201.

²⁰⁶ ICJ Reports 1996, at 75, para.19.

²⁰⁷ Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', in 1 *Max Planck YB United Nations L I*, 2 (1997)

²⁰⁸ On article 103 and peremptory norms, see Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law*, Vol. 16 (2005) No. 1. See also Alexander Orakhelashvili, *Peremptory Norms in International Law*, (Oxford University Press, 2008).

²⁰⁹ See Judge Lauterpacht, Separate Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro))*, ICJ Reports (1993) 440, at para. 105.

²¹⁰ Joseph H.H. Weiler and Andreas L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', *European Journal of International Law*, Vol. 8 (1997) No. 4, Martti Koskenniemi, 'Hierarchy in International Law: A Sketch', *European Journal of International Law*, Vol. 8 (1997) No. 4, Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law', *EJIL*, Vol. 8 (1997) No. 4.

²¹¹ See chapters seven and eight.

C: Conclusion

This chapter showed that the architects of the UN Charter recognised the significant function of regionalism within the UN by granting regional organisations the right to collective defence under article 51 by recognising their important role under Chapter VIII, which was deemed necessary for the maintenance of international peace and security. However, regionalism was accepted conditionally in so far as it was subordinate to universalism.²¹² Even so, acknowledgement was also made that ‘not every possible situation was foreseen at San Francisco and that it is for the members of the United Nations to fill the gaps.’²¹³ It was in this context that regional organisations began to take on more functions in order to repair a deficient UN collective security system.²¹⁴

In particular, the end of the Cold War compelled the international community to reassess its positions in regard to regional peace and security issues. The change of attitude and practice is manifest in the modification of constitutive instruments and recent practice by some of the key regional organisations.²¹⁵ Furthermore, the weaknesses of both the UN and regional arrangements called for more collaboration in order to meet the threats and challenges of the new century. It goes without saying that by acting together, the UN and regional agencies would be stronger than when acting alone. Nevertheless, in spite of the references to regionalism discussed above, the clear lack of due attention given to the relationship between regionalism and universalism under the UN system remains a matter of concern.²¹⁶

It is in this context that the relationship between the UN and African regional organisations requires careful examination and analysis.²¹⁷ Therefore, using the African model and post-Cold War practice, this thesis aims to show that regional organisations may be complimentary to the UN and arguably possess subsidiary responsibility where the Council struggles or fails, so long as they act when

²¹² I.Claude, *Swords into Plowshares*, *supra* note 10, p.106.

²¹³ Repertory of Practice of United Nations Organs, *Supplement No. 3* (1959–1966), Vol. II, 219.

²¹⁴ See chapters three and eight.

²¹⁵ See chapter seven.

²¹⁶ Abass, Ademola, ‘The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organizations?’ In N. D. Lewis (ed) *Global Governance and the Quest for Justice* (Oxford: Hart Publishing, 2006), p. 91.

²¹⁷ Jane Boulden, *Dealing With Conflict in Africa: The United Nations and Regional Organizations*, (Palgrave Macmillan; 1st edition, 2003).

authorised, explicitly or otherwise, by the Council.²¹⁸ Indeed, notwithstanding the constituent instrument establishing major regional organisations, the relationship in practice between regional arrangements and the UN seems to indicate an emerging trend of support and co-operation and in particular one where the Council is occasionally willing to allow the some regional agencies to take the leading role.²¹⁹

However, the lack of formal institutional framework to regulate their collaboration has meant that these organisations are free to cooperate at their discretion or not to cooperate at all.²²⁰ Furthermore, by entrusting regional organisations with responsibility for regional conflict, the international community alongside the Security Council are at the risk of abrogating the duty to protect and maintain peace and security. It is within this context that a formalised division of labour is both necessary and indispensable.²²¹ As argued in part two of the thesis, this is particularly important given that its regional agencies have demonstrated that they are part of the broader collective security system with key complimentary functions.²²²

And although a formalised relationship between the UN and regional organisations may bring along with it rigidity, building on past practices with individual regional arrangements may provide viable prospects. In this context, the codification of practices would partly eliminate the problems caused by uncertainty and inconsistency, as witnessed in Darfur.²²³ Therefore, a central theme of the thesis is that of cooperation with regard to peace and security between the AU, the UN and other regional organisations under Chapter VIII of the UN Charter. Finally, it is argued that a formalised division of labour would not only reduce reliance on *ad hoc* reactive mechanisms but would also entrench fully fledged practices that would guarantee more efficiency, legitimacy and most of all, would save lives by promoting and maintaining peace and security.

²¹⁸ See chapter seven.

²¹⁹ See chapter nine.

²²⁰ Christoph Schreuer, Regionalism v. Universalism, *supra* note 4.

²²¹ See chapters six, seven, eight and nine.

²²² Ademola Abass, 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organizations?' In N. D. Lewis (ed) *Global Governance and the Quest for Justice*, *supra* note 216, p. 94.

²²³ See chapter nine.

Part Two: The Evolution of African Regional Security

Chapter Five

The Journey from the Organisation of African Unity to the New African Union

A: Introduction

On 9 September, 1999, the Heads of State and Government of the Organisation of African Unity (OAU) issued the Sirte Declaration which called for the establishment of an African Union (AU). This was subsequent to a call by the Panel of Eminent Personalities to establish appropriate regional structures that was enacted upon by African leaders in the coastal city of Sirte, Libya. The OAU Secretariat subsequently drafted the legal text of the Union contained in the Constitutive Act of the AU. At an extraordinary speed, the Act was later adopted by the OAU Assembly of Heads of State and Government meeting in Lomé, Togo in July 2000 and entered into force on 26 May 2001, after Nigeria became the 36th member state to deposit its instrument of ratification.¹

The new AU was established in 'conformity with the ultimate objectives of the Charter' of the 'Continental Organisation and the provisions of the Treaty establishing the African Economic Community.'² Importantly, it was designed to assist in 'accelerating the process of integration in the continent to enable it play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they are by certain negative aspects of globalisation.'³

However, the quest for African unity had begun much earlier through various initiatives whose evolution culminated in the establishment of the AU. Notably, this included the Legal Plan of Action and the Final Act of Lagos (1980),⁴ the African

¹ In line with article 36 of the Constitutive Act of the AU.

² 4th Extraordinary Session of the Assembly of Heads of State and Government. 8-9 September 1999, Sirte, Libya, EAHG/Draft/Decl. (IV) Rev.1.

³ See 'The African Union in a Nutshell', available at http://www.african-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm.

⁴ See Organisation of African Unity, 'Legal Plan of Action For the Development of Africa, 1980-2000', 1981, published by the International Institute for Labour Studies, Geneva. See also Rose M. D'Sa', 'The Lagos Plan of Action--Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations Economic Commission for Africa', *Journal of African Law*, Vol. 27, No. 1. (Spring, 1983), pp. 4-21; Adedeji, A. (2002), 'From the Lagos plan of action to the new partnership for African development and from the final act of Lagos to the constitutive act: whither

Charter on Human and People's Rights (1981),⁵ the Treaty establishing the African Economic Community (AEC): commonly known as the Abuja Treaty (1991),⁶ the Mechanism for Conflict Prevention, Management and Resolution (1993),⁷ and the Lome Declaration on the framework for an OAU Response to Unconstitutional Changes (2000).⁸

In spite of its ambition, the new Union fell short of Libya's rather 'unrealistic'⁹ idea of Marcus Garvey's¹⁰ vision of a 'United States of Africa.'¹¹ Nonetheless, some termed it as part of an 'African renaissance'¹² and a major triumph for 21st century Pan Africanism.¹³ Although the evolution of the Pan African movement largely

Africa?', keynote address prepared for presentation at the African Forum for Envisioning Africa, Nairobi, 26-29 April, available at:

<http://64.233.179.104/search?q=cache:AEoDAGQW7l0J:www.worldsummit2002.org/texts/AdebayoAdedeji2.pdf+Lagos+plan+of+Action&hl=en>, .

⁵ See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986:

⁶ 4th Extraordinary Session of the Assembly of Heads of State and Government. 8-9 September 1999, Sirte, Libya, EAHG/Draft/Decl. (IV) Rev.1.

⁷ See OAU Assembly of Heads of State and Government, Cairo Declaration, Doc. AHG/Decl.3 (XXIX), Cairo, Egypt, 30 June 1993.

⁸ See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Governments, OAU Doc. AHG/ Decl. 5 (XXXVI) (2000). For a discussion on other initiatives see African Union'. 'The African Union in Nutshell,' *supra* note 3.

⁹ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene: A Shift From Human Security to Regime Security,' *African Security Review* 12, no. 2 (2003), p. 42.

¹⁰ For literature on Garvey's ideas on Africanism, see Amy Jacques Garvey, *The Philosophy and Opinions of Marcus Garvey*, (Majority Press; Centennial edition, 1986); Tony Martin, *Message to the People: The Course of African Philosophy by Marcus Garvey*, (Majority Press, 1986); Hill, Robert A., editor. *The Marcus Garvey and Universal Negro Improvement Association Papers: Africa for the Africans 1921-1922*, (University of California Press, 1996); John Henrik Clarke, *Marcus Garvey and the Vision of Africa*, (New York: Vintage Books, 1974); Manoedi, M. Korete. *Garvey and Africa*, (New York: New York Age Press, 1922); Tony Martin, *The Pan-African Connection: From Slavery to Garvey and Beyond*, (Dover, Mass.: Majority Press, 1983).

¹¹ The phrase 'United States of Africa,' was coined by Marcus Garvey, a Jamaican civil rights activist in his poem 'Hail, United States of Africa' in 1924. See Tony Martin's compilation of Marcus Garvey's poems in *The Poetical Works of Marcus Garvey*, (Majority Press, 1983).

¹² See Thabo Mbeki, 'Africa: The Time Has Come: Selected Speeches' (Cape Town: Tafelberg Publishers, 1998), pp. 224-31, 239-51. See also Statement of Deputy President TM, Mbeki, On Behalf of the African National Congress, On the Occasion of the Adoption by the Constitutional Assembly of the 'Republic of South African Constitution Bill 1996', Cape Town, 8 May 1996. Available at <http://www.anc.org.za/ancdocs/history/mbeki/1996/sp960508.html>.

¹³ Tim Murithi, 'Institutionalising Pan-Africanism: Transforming African Values and Principles into Policy and Practice', *ISS Paper* 143, 2007; Eddy Maloka (ed.) *A United States of Africa*, (African Institute of South Africa, Pretoria, 2001), K. M. Mathews, 'Renaissance of Pan-Africanism: The African Union and the New Pan Africanists', *Paper* presented at the Centre for Conflict Resolution (CRR) policy seminar, *Building an African Union (AU) for the 21st Century: Relations with Regional Economic Communities (RECs) The New Partnership for Africa's Development (NEPAD) and Civil Society*, Cape-Town, South Africa, 20-22, August 2005.; Abdalla Bujra, 'Africa: Transition from the OAU to the AU', *Lecture* delivered at ACARTSOD Tripoli, Libya on 23 September 2002. Available at <http://dpmf.org/meetings/From-OAU-AU.html>; Magliveras K.D and Naldi G.J, 'The African Union:

shaped the current tide of African unity, the present chapter reflects on the immediate rationale and motivating factors that led to the dismantling of the 38 year old Organisation of African Unity and the establishment of the AU.

B: Aims Purpose and Structure

The present chapter examines the justification for the establishment of the African Union in order to ultimately answer the wider question posed by this thesis on the relationship between the AU, the UN and international law. In this regard, a significant aim of this chapter will therefore be to demonstrate the move away from the regional principles contained in the treaty of the OAU. In order to do so, it will analyse the events leading up to the key constitutional moment which saw the launch of the new AU in Durban, South Africa in 2002. In doing so, this discussion will set the foundation for a proper scrutiny of the key differences and similarities between the previous regime under the OAU and the AU in the coming chapters.

In order to achieve its objectives, this chapter looks at the celebrated journey of African unity, which is better understood through a historical perspective and is divided in three main sections. Therefore, the first section starts by demonstrating the manner through which the Pan-Africanist movement that vigorously emerged at the beginning of the 19th Century led to the founding of the OAU.¹⁴ Having done so, the second part offers a historical, political and legal synopsis of the OAU which will allow a clearer understanding of the Pan African evolution leading to the establishment of the AU. Here, illustration is made of the impact of the Westphalian state system on the fierce debate surrounding Africa's concept of 'unity' where highlight is also made of Africa's transformation of the regional principle of non-interference to that of non-indifference, as exhibited in the AU's right to intervene.¹⁵

The third part demonstrates the actual changeover from the OAU to the new AU which entailed not only a change in policy but also a literal journey that began in North Africa (Sirte, Libya 1999), through Central Africa (Lusaka, Zambia) and culminated in Southern Africa (Durban, South Africa (2002)). Finally, it sets the

A New Dawn for Africa', *International and Comparative Law Quarterly*, Volume 51, Number 2, (April 2002), pp. 415-425(11).

¹⁴ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

¹⁵ See chapter seven.

background for a discussion of the ongoing implementation process of the AU's institutions that were not part of the OAU organisational structure, but which are necessary in order to further peace and security in Africa.¹⁶ It then concludes by highlighting the role of hegemony as well as the disagreements behind the pomp and vigour of the new developments and concludes that despite commendable advances, the AU faces considerable challenges.

1.1 The Pan-African Quest for Unity: A Historical, Political and Legal Synopsis

The quest for African unity was manifest in the formation of the Organisation of African Unity (OAU) on 25 May 1963¹⁷ in Addis Ababa, on signature of the OAU Charter by representatives of 32 states.¹⁸ The foundational objectives of the now defunct OAU had been to eradicate all forms of colonialism from Africa and apartheid as well as 'to promote unity and solidarity among African States', to coordinate and intensify 'co-operation and efforts to achieve a better life for the peoples of Africa;' as well as 'to safeguard the sovereignty and territorial integrity of Member States' within the framework of the UN.¹⁹

However, the OAU was not the first attempt at unification and economic development of the African continent. Indeed, long before its establishment, African leaders had recognised the significance of the political and social economic integration of the continent and the importance of unity and solidarity between African states and the peoples of Africa. In this context, it has been said that '[t]he first recorded Pan-African Struggle occurred in 3200 B.C. where the Pharaoh Aha [...] united upper and lower Egypt into one nations [...] This was an act of Pan-African nationalism of the first order.'²⁰ Nevertheless, the quest for African Unity, in its current manifestation, is

¹⁶ See chapter six.

¹⁷ The 25th May is designated as Africa Day. See Assembly of States Decision on the Implementation of the Sirte Summit Decision on the African Union, AHG/DEC.1 (XXXVII), Lusaka 9-11 July, 2001.

¹⁸ Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Léopoldville), Dahomey, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast (Côte d'Ivoire), Liberia, Libya, Madagascar, Mali, Mauritania, Morocco (withdrew in 1984), Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, The Sudan, Tanganyika, Togo, Tunisia, Uganda, Upper Volta and Zanzibar.

¹⁹ See article 2 of the OAU Charter.

²⁰ See Kwame Nantambu, 'Pan-Africanism Versus Pan-African Nationalism,' *Journal of Black Studies*, 28, 5 (1998), 568.

traced to the Pan-Africanist movement that emerged at the beginning of the 18th century and accelerated through the 19th and 20th century.²¹

But what exactly is this phenomenon? There exists no single definition of Pan Africanism.²² Nonetheless, Murithi argues that, '[r]ather than a unified school of thought, Pan-Africanism is a movement with as its common underlying theme the struggle for social and political equality and freedom from economic exploitation and racial discrimination.'²³ However, it is clear that such a struggle would be based on a unity of all continental African cultures and states which make up a universal African community. This view is supported by African intellectuals who stress that the 'original Pan Africanism was meant to be a global project in the sense that the Pan-Africanist demand encompassed all aspects of Africa and the black world that needed to be established or rehabilitated.'²⁴

In light of the foregoing, it has often been the view that Pan-Africanism arose as a result of slavery and colonialism.²⁵ However this view is flawed as it fails to look deeper into the past, which documents African resistance in the initial contact of foreign exploitation.²⁶ Nevertheless, it was the great effort against slavery, such as that evidenced in the slave revolts in Americas, that is mostly identified with early Pan Africanism. This struggle was led by the likes of Nat Turner, Henri Christophe and Prince Hall, whose ideology was strengthened and put forthright by amongst others, Henry McNeal Turner, David Walker and Edward Wilmont Blyden.²⁷

²¹ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union', *Netherlands International Law Review*, Volume 51, Issue 02, (2004), p 196.

²² On the different interpretation of Pan-Africanism, see Giselle D. Aris, 'Pan-Africanism: Competing Interpretations,' *Gaines Junction*, (Spring 2005), Volume 3, Number 1.

²³ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

²⁴ Marika Sherwood &, Hakim Adi, *Pan-African History: Political Figures from Africa and the Diaspora Since 1787*, (Routledge, 2003). This view is also displayed in Rupert Emerson, 'Pan Africanism', *International Organization*, 16, 2, (1962), p. 280. See also African Union, 'First Meeting of Intellectuals of Africa and the Diaspora Organised by the African Union', *Draft Concept Paper*, Dakar, Egypt 6-9 October 2004.

²⁵ Rupert Emerson, 'Pan-Africanism' *ibid*, p. 280.

²⁶ See Giselle D. Aris, 'Pan-Africanism,' *supra* note 22. See also Kwame Nantambu, *Pan-Africanism Versus Pan-African Nationalism*, *supra* note 20.

²⁷ See Paul D. Williams, 'From Non-Intervention to Non-Indifference; The Origins and Development of the African Union's Security Culture', *African Affairs*, 106/423,(2007), pp. 253-279; Giselle D. Aris, 'Pan-Africanism,' *supra* note 22.

As suggested above, a key feature of Pan Africanism is that its evolution has taken 'different forms at different historical moments and geographical locations.'²⁸ For a start, it began as a global project before it reached its renowned pinnacle in the African continent.²⁹ Indeed, it was not until the proliferation of conflicting European claims to African territory and the subsequent 'Scramble for Africa,' which was settled at the 1884 Berlin Conferences,³⁰ that a reinforced urgency for a more robust Pan Africanism, based in Africa itself was called. During this period the pioneers of the Pan-African movement included the likes of W.E.B. DuBois, Marcus Garvey, Henry Sylvester Williams, Kwame Nkrumah, George Padmore, Jomo Kenyatta, Franz Fanon, Malcolm X, Stokely Carmichael, Leopold Senghor and Langston Hughes. In the Conferences mentioned below, these Pan-Africanists shared the 'same ultimate goals: to challenge and destroy the European power structure, and serve as a potent liberating tool for all African people.'³¹

1.2 The Pan African Conferences: From London (1900) to Addis Ababa (1963)

The first ever Pan African Conference was held on the 23rd, 24th, and 25th July, 1900 at the Westminster Central Hall, in London, United Kingdom.³² The Conference was convened by Henry Sylvester William and attended by approximately 37 people, mostly from the Caribbean, American and European Diaspora rather than from the African continent itself. Despite the scarcity in terms of numbers, the notion of African unity was to later become a powerful mobilising ideology as was manifest in the Pan-African Congress in Paris in 1919. Incidentally, this Conference was to coincide with the much more publicised Versailles Peace Conference which led to the formation of the League of Nations.³³ Nevertheless, the Pan-African Congress was

²⁸ Marika Sherwood &, Hakim Adi, *Pan-African History*, *supra* note 24. p.vii.

²⁹ K. Nkrumah, 'The Spectre of Black Power', in *The Struggle Continues*, (Londres, Panaf, 1980), p.34; Ali Mazrui, 'Celebrating six decades of pan-Africanism: Alternative routes for continent's heritage', *The Sunday Standard*, 24 September 2006. Available at http://www.eastandard.net/hm_news/news_s.php?articleid=1143958648; see also Abdalla Bujra, 'Africa: Transition from the OAU to the AU', *supra* note 13.

³⁰ On the scramble for Africa and Berlin conferences, see M.E. Chamberlain, *Scramble for Africa*, (Longman; 2 edition, 1999); Thomas Pakenham, *The Scramble for Africa: White Man's Conquest of the Dark Continent from 1876-1912*, (Avon Books, 1992).

³¹ See Giselle D. Aris, 'Pan-Africanism,' *supra* note 22.

³² See African Union, 'First Meeting of Intellectuals of Africa and the Diaspora Organised by the African Union', *supra* note 24.

³³ See chapters two and three.

organised by W.E.D. Dubois in the hope of persuading the world leaders that the principle of self-determination³⁴ should be applied to Africa.³⁵

Similarly, in the aftermath of World War II, the Pan-African Congress of 1945 took place in the shadow of the momentous San Francisco Conference that led to the establishment of the United Nations.³⁶ This relatively obscure Pan-African Conference in Manchester, UK included participants destined to become global figures, including Kwame Nkrumah of the Ghana, Jomo Kenyatta of Kenya, W E B Dubois of the United States and George Padmore of the Caribbean. Most notably, this Congress was unprecedented in the sense that, unlike other previous Congresses, it was dominated by Africans in the Diaspora.³⁷

However, it was not until the 1950s and 1960s that Pan-Africanism truly moved from a universal movement to an Afro-centric continental movement. Now as president of the first black African country to gain independence, Nkrumah hosted the All-African People's Conference in 1958.³⁸ Dubbed as the First Conference of Independent African States (CIAS), it was the first real attempt to create an African continental organisation.³⁹ Borrowing from previous conferences, this meeting brought together representatives of the people of Africa to Accra where Nkrumah articulated his vision of a united Africa.⁴⁰ He later affirmed this aspiration at the second conference held in Tunis, Tunisia in January 1960 and finally, the third in Cairo, Egypt in March 1961.⁴¹

³⁴ On the principle of self-determination, see chapter two.

³⁵ Tim Murithi, 'Institutionalising Pan-Africanism' *supra* note 13.

³⁶ See chapters three and eight.

³⁷ Abdalla Bujra, *From the OAU to the AU: From the Lagos Plan of Action (LPA) to the New Partnership on African Development (NEPAD) Occasional Paper, No. 13, Development Policy Management Forum, (DPMF), 2004*; Abdalla Bujra, 'Africa: Transition from the OAU to the AU', *supra* note 13.

³⁸ Thomas M. Leonard, *Encyclopedia of the Developing World*, (Routledge 2006), p. 1147.

³⁹ *Ibid.* See also Walraven, Klaas van, *Dreams of Power – The Role of the Organisation of African Unity in the Politics of Africa 1963-1993*, (Ashgate, Aldershot, 1999), p. 95.

⁴⁰ Kwame Nkrumah, *African Must Unite*, (New York: International Publishers 1970) and C.O.C Amate, *Inside the OAU: Pan Africanism in Practice*, (London, McMillan Press 1986), pp. 52-58.

⁴¹ *Ibid.*

Throughout these deliberations, a serious debate ensued in regard to the most desirable strategy for African unity.⁴² This was primarily due to ideological differences between differing schools of thought, whose disagreements remain visible till the present day, as shown further below. The prevailing divisions centred on the relentless debate with regard to whether the Pan African vision of continental unity should: be realised immediately, or be a long term objective to be achieved first through the creation and consolidation of independent states and then built up upon sub-regional building blocks.⁴³ Here, states strategically realigned themselves into three groups that pitted the Casablanca bloc,⁴⁴ which considered itself as 'progressive,' against the Monrovia⁴⁵ and Brazzaville blocs,⁴⁶ themselves more 'conservative' and 'gradualist'⁴⁷ respectively.

Predictably, the Casablanca block was led by Nkrumah himself and advocated an immediate unification of the African continent. However, this position stood in contrast to the position of the Brazzaville faction, which later merged with the larger Monrovia group under the leadership of President Mwalimu Nyerere of Tanzania. This bloc stood for a gradualist approach to the concept of African unity, starting with regional economic and cultural co-operation.⁴⁸ In other words, it favoured a union *not* based on 'political integration of sovereign states, but unity of aspirations and of

⁴² Colin Legun, *Pan Africanism: A Short Political Guide*, (New York: Frederick a Praeger 1962), pp.45-47.

⁴³ See Abdalla Bujra, 'Pan-African Political and Economic Visions of Development From the OAU to the AU: From the Lagos Plan of Action (LPA) to the New Partnership for African Development (NEPAD)' *DPMF Occasional Paper*, No 13 (2004). Available at <http://www.dpmf.org/Occasionalpapers/occasional-paper-no-13.htm>.

⁴⁴ The Casablanca Group consisted of Ghana, Mali, Guinea, the United Arab Republic, and the Algerian Provisional Government. This group was led by the then President of Ghana, Kwame Nkrumah, and was formally launched on 7 January 1961. On the failure of the Casablanca Group, see Gallagher, Charles, *The Death of a Group* (American Universities Field Staff Reports, North Africa Series, IX, 4, 1963), pp. 5-8.

⁴⁵ The Monrovia Group consisted of Nigeria, Sierra Leone, Liberia, Togo, Ivory Coast, Cameroon, Senegal, Dahomey, Malagasy Republic, Chad, Upper Volta, Niger, People's Republic of Congo, Gabon, Central African Republic, Ethiopia, Somalia, and Tunisia.

⁴⁶ The Brazzaville Group mainly comprised former French colonies: Central African Republic, Cameroon, Ivory Coast, People's Republic of Congo, Dahomey, Mauritania, Gabon, Upper Volta (the present-day Burkina Faso), Senegal, Niger, Chad and Madagascar.

⁴⁷ Benedikt F. Franke, 'Competing Regionalisms in Africa and the Continent's Emerging Security Architecture', *African Studies Quarterly*, Volume 9, Issue 3, (Spring 2007).

⁴⁸ Abdullah Bujra, Pan-African Political and Economic Visions of Development,' *supra* note 43.

action considered from the point of view of African social solidarity and political identity.’⁴⁹

The extreme positions taken by opposing sides led to a stalemate based on the question as to whether the envisaged continental organisation should be centred on a ‘Federation of African States’ or a ‘United States of Africa.’⁵⁰ However, Emperor Haile Selassie of Ethiopia succeeded in striking a compromise between the groups, which later met in May 1963 in Addis Ababa to establish the OAU. In his words, the idea was to ‘create a single institution to which we will all belong, based on principles to which we all subscribe.’⁵¹ As it turned out, the ideals and deliberations held during these conferences culminated in the drawing up of the OAU Charter in which the earlier aspirations for unity and solidarity of the African found expression. Thus, ‘[i]n 1963 Pan-Africanism went truly continental with the formation of the Organisation of African Unity (OAU) in Addis Ababa.’⁵²

Nevertheless, it soon emerged that the compromise that led to the formation of the OAU was more of ‘a historic necessity and a welter of conflicting political ideas and interests’⁵³ as opposed to reflecting a true unity that called for a continent-wide unification of the whole of Africa in all its cultural ethnic and linguistic diversity. Instead, its configuration was founded on the distinct units drawn up by the colonial masters and thereby further entrenching the Westphalian state system, discussed in chapter two. Indeed, the newly acquired unity represented victory for the Monrovia group over the weakened Casablanca bloc, which had also been accused of being communist inspired.⁵⁴ While the ongoing debate between proponents of the Westphalian inter-states system and those that called for a Federalist/Political Union

⁴⁹ Chimelu, Chime, *Integration and Politics among African States*, (Scandinavian Institute of African Studies, Uppsala, 1977), p. 164.

⁵⁰ Armstrong Matiu Adejo, ‘From the OAU to AU: New Wine in Old Bottle?’, *Paper* prepared for presentation at the 10th CODESRIA General Assembly, Nile International Conference Centre, Kampala, December 8-12, 2002. Available at http://www.codesria.org/Archives/ga10/Abstracts%20Ga%206-11/Regionalism_Adejo.htm.

⁵¹ Haile I. Selassie, ‘Towards African Unity’, *Journal of Modern African Studies*, 1, 3 (1963), p. 285.

⁵² Ali Mazrui, ‘Celebrating six decades of pan-Africanism,’ *supra* note 29; Emperor Haile Selassie, ‘Welcome Address,’ Addis Ababa Summit, 1963 in *Journal of Modern African Studies*, No. 1 (September 1963), 281-91.

⁵³ Colin Legum, ‘The Organisation of African unity: Success or Failure?’, *International Affairs*, 51, 2 (1975), p.208.

⁵⁴ Armstrong Matiu Adejo, ‘From the OAU to AU: New Wine in Old Bottle?’, *supra* note 50. See also Abdalla Bujra, From the OAU to the AU,’ *supra* note 37.

is considered further below, what follows is a discussion of the significant consequences that arose as a result of the adoption, by Africa, of the Westphalian state system.

2.1 The OAU and the Importation of the Westphalian State System into Africa

It will be recalled that the modern international legal system of sovereign states is traceable to the Treaty of Westphalia of 1648, which established the equality and independence of states.⁵⁵ Thereafter, the importation of the Westphalian system in Africa had serious ramifications for its citizens in various spheres of influence, particularly with regard to the concept of African identity and unity, as well as peace and security, social, economic and cultural development.⁵⁶ Indeed, the confusion over the form of unity that emerged was evident from the OAU's early years where some states simultaneously maintained two foreign policy positions in relation to the federalist versus independent states issue.⁵⁷ This was despite the fact that the incorporation of the differing ideological doctrines was untenable.

Nevertheless, this matter was finally laid to rest when the OAU Assembly passed the Cairo Declaration of 1964 on the inviolability of boundaries⁵⁸ containing the key principle of *uti possidetis*.⁵⁹ In spite of its wide support, this position seemed to contradict the essence of Pan Africanism and went against the decision of the African People's Conference in Accra in December 1958 which had:

denounce[d] artificial frontiers drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide people of the same stock; call[ed] for the abolition or adjustment of such frontiers at an early date; [and] call[ed] upon the independent states of Africa to support a permanent solution to this problem founded upon the wishes of the people.⁶⁰

⁵⁵ See chapter two.

⁵⁶ Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' *EJIL*, Vol. 1, No. 3, 2007. On the imposition of the Westphalian system in Africa, see See Basil Davidson, *The Black Man's Burden: Africa and the curse of the nation state*, (James Currey, Oxford, 1992); Thandika Mkandawire, 'Rethinking Pan Africanism', First Conference of Intellectuals of Africa and its Diaspora, Dakar, 6-9 October, 2004. Available at http://africa-union.org/CIAD_NEW/Documents/Mkandawire_EN.doc

⁵⁷ Armstrong Matiu Adejo, 'From the OAU to AU: New Wine in Old Bottle?', *supra* note 50.

⁵⁸ OAU Assembly of States and Government, First ordinary session, AHG/Res. 16 (I): Resolution on Boarder Disputes Among African states adopted on 21, July, 1964, Cairo, Egypt.

⁵⁹ See chapter two.

⁶⁰ Cited in Rupert Emerson, 'Pan-Africanism', *supra* note 24, p. 278.

However, the prospects of altering state boundaries aroused the possibility of conflicts and hence strengthened the case for the 'nearly untrammelled state sovereignty, in which heads of states sought sedulously to safeguard the independence so recently won.'⁶¹ In this context, there remained a real 'fear that if these borders were dissolved, all hell might let loose.'⁶² As shown in chapter two, this position was also justified by the ICJ which perceived it as necessary in order to prevent the independence and stability of new states from the risks of struggles that may be waged in disputing frontiers.⁶³

However, as mentioned in chapter two, the ICJ Chamber also cautioned that '*uti possidetis juris* is essentially 'a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.'⁶⁴ Meanwhile, some argued that the 'African borders fail to follow any pre-colonial logic.'⁶⁵ These assertions were based on the fact that the imperial powers disturbed a pre-existing order in their conquests, which in turn resulted in 'a process of destruction of the native social and political systems and of the imposition of artificial constructs, concerning boundaries, population, and governmental institutions.'⁶⁶ The adoption of this system led the Nobel Literature Laureate Wole Soyinka to accuse the OAU of having 'consecrated this act of arrogant aggression, reinforced by civil wars on varied scales of mutual destruction in the defence of imperial mandate.'⁶⁷

⁶¹ Claude Welch, Jr., 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment,' 14 *HUM. RTS Q.* 43, 43 (1992).

⁶² Chris Berazier, 'African United: Not Hopeless not Helpless', *New Internationalist*, No.326:9-12 (August 2000).

⁶³ *Frontier Disputes (Burkina Faso v Mali)*, 1986 I.C.J. 554, 566-67 (Dec.22). See also Steven R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 *AM.J. INT'L L.* 590 (1996).

⁶⁴ *The Land island and Maritime Dispute* CJ Reports (1992) 351, at 386.

⁶⁵ Bronwen Manby, 'The African Union, NEPAD and Human Rights: The Missing Agenda' *Human Rights Quarterly* 26 (2004), p. 983-1027.

⁶⁶ Leopoldo Lovelace Jr 'Has International Law Failed Africa?', *International Studies Association Annual Convention*, Chicago, Illinois, February 21-24, 2001. See also Basil Davidson, *The Black Man's Burden*, *supra* note 56.

⁶⁷ See Wole Soyinka, *The Burden of Memory, The Muse of Forgiveness*, (Oxford: New York, 1999), p 40-41. See also O. Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa', 41 *Harvard International Law Journal*, (2000), 503. For a different view, see A. Mbembe, 'At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa', *Public Culture* 12: (2000), 259-284.

As will be shown below, similar accusations have also been levelled on the AU whose Constitutive Act restated the OAU's commitment to the legal principle of *uti possidetis juris*.⁶⁸ Meanwhile, the links between the artificial African state and the wars that have raged the continent, such as Rwanda and Darfur, have led to strong propositions:

[We] should sit down with square-rule and compass and redesign the boundaries of African nations. If we thought we could get away without this redefinition of boundaries back when the Organization of African Unity was formed, surely the instance of Rwanda lets us know in a very brutal way that we cannot evade this historical challenge any longer.⁶⁹

However as it turned out, the Westphalian system became further entrenched as African states respected the administrative boundaries and frontiers established by the colonial powers. The strong affirmation of the principle of respect for the sovereignty and territorial integrity of every state left little room for the OAU to attach any conditions on these norms, let alone mention human rights. Instead, African regional principles seemed to reject the earlier ideals of Pan Africanism and were more concerned with the protection of the state and not the individual.

With this regard, Mathews notes that the OAU Charter initially 'spoke for the African peoples still under colonialism or racial domination, but once the countries emerged to nationhood, the Charter stood for the protection of their heads of state which protected them. In other words, the OAU appears to be an institution for the heads of state, by the heads of state and for the heads of state.'⁷⁰ While the horror that unfolded due to the principles of non-interference is considered further below, what follows is a brief analysis of the Africa's interpretation of the Westphalian doctrine of sovereignty, which stood as a stumbling block to the realisation and protection of fundamental human rights.

⁶⁸ Article 4 (b) of the Constitutive Act of African Union.

⁶⁹ Quoted in 'Africa's Outdated Colonial Boundaries Must Be Redrawn', *University of Pennsylvania-African Studies Center, The Plain Dealer*, Monday September 26, 1994.

⁷⁰ K Mathews, 'The Organisation of African Unity', in D Mazzeo (ed), *African Regional Organizations*, (London: Cambridge University Press, 1984), p. 79.

2.2 The OAU's 'Articles of Faith' and the Sovereignty Principle

The OAU's 'articles of faith'⁷¹ were set out in article 3 of its Charter with the principle of non-interference in the internal affairs that lie within the domestic jurisdiction of states as one of the cardinal principles of the OAU Charter.⁷² This was in line with traditional practice whereby the state was considered as the anchor to sovereignty within the international legal system.⁷³ In particular, article 3 of the OAU Charter obligated member states to 'solemnly affirm and declare their adherence'⁷⁴ to the 'sovereign equality of all Member States,'⁷⁵ the '[n]on in-interference in the internal affairs of States'⁷⁶ and respect 'the sovereignty and territorial integrity of each State.'⁷⁷

Furthermore, African nations were required to hold in the highest regard the 'inalienable right to independent existence'⁷⁸ of member states and refrain from engaging in subversive activities against other countries.⁷⁹ The veracity of these norms was later reaffirmed when African states institutionalised the colonial borders and reiterated these sovereignty-related provisions in the 1964 Cairo Declaration, as mentioned above. On this occasion, member states pledged to respect the borders existing on their achievement of national independence.⁸⁰

In doing so, African rulers created a paradox. The resulting irony was clear from the fact that the apparent entrenchment of the artificial borders created by colonial powers 'stood in sharp contrast to the rhetorical statements by African leaders of a pan-African ideal of continental unity.'⁸¹ Furthermore, the actuality that the OAU was

⁷¹ Described as such by the then Nigerian Attorney General. See T.O. Elias, 'The Charter of the Organization of African Unity', *American Journal of International Law*, 59, 2, (1965), p. 248.

⁷² See Paul D. Williams, 'From the Norm of Non-Intervention to Non-Indifference,' *supra* note 27. See also T.O. Elias, 'The Charter of the Organization of African Unity', *ibid*, p. 248.

⁷³ See chapter two.

⁷⁴ Article 3 of the OAU Charter.

⁷⁵ Article 3(1).

⁷⁶ Article 3 (2).

⁷⁷ Article 3 (3).

⁷⁸ *Ibid*.

⁷⁹ Art 3 (5) of the OAU Charter.

⁸⁰ Para 2 'Resolution on border disputes among African states' OAU Doc AHG/ Res 16(I). See S. Touval, 'The Organization of African Unity and African Borders', (1967) 21 *Int. Org* p.102 and A.O. Cukwurah, 'The Organization of African Unity and African Territorial and Boundary Problems 1963-1973', 13 *Ind.J.Int.L.* p.176.

⁸¹ Emmanuel Kwesi Aning, 'Towards the new Millennium: ECOWAS' evolving Conflict Management System', *African Security Review*, Vol 9. No 5/6, (2000).

formed as a united reaction to western imperial and colonial domination which at the same time embraced the Westphalian system was not only contradictory in terms but brought to the continent further predicaments.⁸² In this context, a key problem with the principles contained in article 3 of OAU is articulated by Cillers and Sturman who observe that:

The concept of sovereignty, on which the international system and the OAU were founded, presumes that each state has the power, authority and competence to govern its territory. For many African States, however, sovereignty is a legal fiction that is not matched by governance and administrative capacity.⁸³

However, as stated earlier, although perceived as an obstacle to African unity, the emphasis on the sovereignty centred norms was primarily to protect the recently won independence from neo-colonial intervention and imperialism.⁸⁴ Indeed, these principles were justified by Haile Selassie as being necessary in order that African disputes are 'quarantined from the contamination of non-African interference.'⁸⁵ The fear of drawing imperialism, particularly from the super powers and other strong states, was evident in the Africa's practice which showed immense reluctance to even submit disputes to the UN Security Council.⁸⁶

Meanwhile, doubts were cast as to how possible it was for 'the collective of a group of non-cohesive and unstable nation states [to] form a cohesive, stable and dynamic region.'⁸⁷ This is particularly because the African state, as invented by the Europeans, had neither been deconstructed nor reconstituted.⁸⁸ Nevertheless, the OAU Charter and subsequent state practice by the member states were largely in conformity with the UN Charter, and in particular article 2(7) which provided for non-interference in matters within the domestic jurisdiction of member states.⁸⁹ The rigid view of these

⁸² Basil Davidson, *The Black Man's Burden*, *supra* note 56.

⁸³ J. Cillers and K. Sturman, 'The Right of Intervention: Enforcement Challenges for the African Union', *African Security Review*, Vol 11, No. 3, (2002), p .3.

⁸⁴ Paul D. Williams, 'From Non-Intervention to Non-Indifference,' *supra* note 27.

⁸⁵ Haile L. Selassie, 'Towards African Unity', *supra* note 51, p. 287.

⁸⁶ David B. Meyers, 'Intraregional Conflict Management by the Organization of African Unity,' *International organization*, 28, 3 (1974), p. 372.

⁸⁷ See Rotimi Oyekanmi, 'Adedeji Cautions Against Hasty Emergence of African Union', *the Guardian*, March 6, 2002..

⁸⁸ *Ibid.*

⁸⁹ See chapter three and nine.

provisions ensured that African countries perceived international concern for human rights and democratic governance as pretexts for undermining their sovereignty.⁹⁰ As will be shown below, the strict interpretation of article 3 of OAU Charter barred the regional organisation from interfering in the internal affairs of a member state even during situations where it would have been logically necessary in order for the organisation to carry out its mandate.

For example, even 'when a few African leaders tried to get the long, very highly intense Sudanese civil war [1955-1972] onto the OAU agenda, they found little support following a Sudanese announcement that it did not wish such discussion.'⁹¹ As shown elsewhere in this study, this stood in sharp contrast to the practice of the UN whereby it is agreed that article 2(7) of the UN Charter in no way bars the Security Council from taking action in situations that would otherwise violate the domestic jurisdiction of member states.⁹² As will be demonstrated in chapter nine, this point is of particular significance as it played a key part in the recent conflict in Sudan, which is reviewed at the end of the thesis.

Meanwhile, while the OAU showed its willingness and preparedness to condemn the apartheid regimes perpetrated by the European minority, it chose to remain silent in the face of abuses committed by African governments.⁹³ The deafening silence and inaction of the OAU had tragic consequences for individuals and groups whose fundamental human rights were grossly violated. This behaviour not only partly led to the genocide in Rwanda but its deficiency made the case for the establishment of the AU and the right to intervene, which is considered further below. Meanwhile, as shown in the next section, the African regional norm of non-intervention ensured that impunity and gross violations of human rights raged across the continent despite the numerous treaties, resolutions and declarations affirmed by the OAU in support of fundamental rights.

⁹⁰ G. Naldi, *The Organization of African Unity. An Analysis of its Role*, 2nd edition. (London: Mansell, 1999).

⁹¹ David B. Meyers, 'Intraregional conflict management by the Organization of African Unity,' *supra* note 86, p. 364. See generally, U. O. Umzurike, 'The Domestic Jurisdiction Clause in the OAU Charter', *African Affairs*, Vol. 78, No. 311. (Apr., 1979), pp. 197-209.

⁹² See chapter three, seven and nine.

⁹³ A. Glenn Mower Jr., 'Human Rights in Black Africa: A Double Standard?' *Revue des droits de l'homme*, (1976) Vol., IX-I, 39-70.

2.3 The OAU Charter and the Issue of Human Rights

Although the formation of the OAU set the stage for further unification of African peoples, a key problem with its Charter was that no mention was made on the need to protect human rights. Instead, the concept of protecting sovereignty, territorial integrity and independence of member states was the overriding consideration in the treaty.⁹⁴ Therefore, for decades, articles 2 and 3 of the OAU Charter were held as a justification for permitting the perpetration of all forms of atrocities against the people of Africa.⁹⁵ In demonstrating this point, a former Chairman of the African Commission was to write that 'with regard to breaches of human rights, even of a grave nature such as genocide, the OAU ha[d] been bogged down by the jurisdictional clause.'⁹⁶ 'With the exception of only a few states, African states refrained from commenting on, let alone intervening, to stop grave violations of human rights in other countries.'⁹⁷

As it turned out, this policy ensured that the massacres of thousands, such as those of Hutus in Burundi in 1972 and 1973, 'were neither discussed nor condemned by the OAU.'⁹⁸ In this context, a disturbing episode is given where Ethiopian Colonel Mengistu Haile Mariam, who on welcoming OAU delegates to its headquarters in Addis Ababa on 6 June 1983, was in turn thanked for his 'warm and generous hospitality, despite having overthrown and murdered [amongst thousands] one of the OAU founding fathers and first Chairman, Emperor Haile Selassie, in 1974.'⁹⁹ Meanwhile, key African figures such as Salim Ahmed Salim, who would later become the Secretary General of OAU, while expressing concern for human life, told the General Assembly that 'we have no desire to intervene in the domestic affairs of that brother state.'¹⁰⁰ Indeed, the African policy of non-interference was so powerful

⁹⁴ Article 2 (1) (c) OAU Charter.

⁹⁵ Emmanuel Kwesi Aning, 'Towards the new Millennium,' *supra* note 81.

⁹⁶ See U.O Umzurike. 'The Domestic Jurisdictional Clause in the OAU Charter', *supra* note 91.

⁹⁷ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 9, p. 42.

⁹⁸ N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', Vol. 17 *American University International Law Review*, (2002), p.1177. See generally, U. O. Umzurike, 'The Domestic Jurisdiction Clause in the OAU Charter,' *supra* note 91.

⁹⁹ Amani Daima, 'The Biggest Show' in Africa: the Launching of the African Union' *The Perspective*, Atlanta, Georgia, July 11, 2002. Available at <http://www.theperspective.org/biggestshow.html>. See

¹⁰⁰ N.J. Udombana, 'Can the Leopard Change its Spots?' *supra* note 98. See also U.N. Doc. A/PV.2301. See generally, U. O. Umzurike, 'The Domestic Jurisdiction Clause in the OAU Charter,' *supra* note 91.

that the OAU organisation did nothing when its first and two-term Secretary General, Diallo Telli was murdered by Sekou Toure's regime in Guinea.¹⁰¹

Predictably, the OAU degenerated into what a Kenyan Statesman Oginga Odinga termed as a 'Trade Union of African Heads of States'¹⁰² and effectively a 'dictators club.'¹⁰³ The massive human rights violations in several African States, particularly in the 1970s by African dictators including, Idi Amin of Uganda, Jean-Bedel Bokassa of Central African Republic and Macias Nguema of Equatorial Guinea, highlighted the dangers of strict adherence to the sovereignty principle.¹⁰⁴ Nevertheless, it was hardly surprising that when Mwalimu Julius Nyerere of Tanzania took the decision to pursue invading Ugandan troops all the way back to Kampala and put a halt to Idi Amin's bloodbath in 1978, there was little support across the African continent.¹⁰⁵ However, the Tanzanian intervention¹⁰⁶ in Uganda, though of questionable legality,¹⁰⁷ led some member states to question the rigid interpretation of the concept of sovereignty. Indeed, the frustrations brought about by the OAU's inaction due to its strict adherence to the notion of sovereignty in the face of catastrophe resonated in President Museveni's maiden speech at an OAU Summit in 1986:

Over a period of 20 years three quarters of a million Ugandan's perished at the hands of governments that should have protected their lives (...) I must state that Ugandans felt a deep sense of betrayal that most of Africa kept silent (...) the reason for not condemning such massive crimes had supposedly been a desire not to interfere with the internal affairs of a Member State, in accordance with the Charters of the OAU and the United Nations. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and the inviolability of human life.¹⁰⁸

¹⁰¹ See Edward Kannyo, 'The OAU and Human Rights,' in Yassin El-Ayouty & I. William Zartman ed, *The OAU After Twenty Years*, (Praeger Publishers, 1984), p. 156.

¹⁰² Adams Oshiomhole, 'Popular Participation and the African Union' in Adagbo Onoja (ed), *Plying the Foreign Pitch* vol, 2 (2000-20001) (Abuja: Ministry of Foreign Affairs, 2001), pp.119-120.

¹⁰³ Paul Reynolds, 'African Union replaces dictators' club, *BBC, World Version*, Monday 8 July, 2002.

¹⁰⁴ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 9, p. 42.

¹⁰⁵ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Interventions in International Affairs*, (Oxford University Press, USA, 2001), p. 111-138.

¹⁰⁶ On the Tanzanian perspective of the intervention, see The Government of the United Republic of Tanzania, *Tanzania and the War Against Amin's Uganda*, (Official Publication, 1979).

¹⁰⁷ See chapter three. On the legality of Tanzania's invasion, see Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility*, Cameron May, 2005, pp.54-62

¹⁰⁸ President Yoweri Museveni of Uganda, 22 Ordinary Session of the OAU Assembly of Heads of State and government. Addis Ababa, Ethiopia July 1986.

It must be said that even when the OAU decided to take interest in conflict situations, human rights concerns lay at the periphery as was evident in its involvement during the Congo Crisis (1964-65), the Nigerian Civil War (1967-70), the Angolan Civil War (1975-76) and the Chad Civil War (1965-78).¹⁰⁹ Indeed, Tanzania's invasion of Uganda in 1979 to halt Idi Amin's brutal regime remained a significant exception to the norm with its President, Julius Nyerere having similarly realised that the OAU was a 'trade union of the current Heads of State and Government, with solidarity reflected in silence if not in open support for each other.'¹¹⁰ This tone however, stood in sharp contrast to Nyerere's earlier assertion that African leaders 'must avoid judging each other's internal policies, recognizing that each country has special problems.'¹¹¹

Indeed, according to the President Sekou Toure of Guinea, the OAU was not 'a tribunal which could sit in judgement on any member states' internal affairs.'¹¹² This position was clearly evident in 1975, when the organisation 'defied all logic and common sense and ordained Field Marshall Idi Amin as its Chairman at the Kampala Summit, despite his woeful human rights record and opposition by few African countries who cited Amin's disregard for the sanctity of life.'¹¹³

However, as shown in chapter nine, the new AU seemed to partially shed the continent's past image when it declined to hand the AU Assembly Chair to Sudan in 2006. On this occasion, there was the fear that, given the tragedy in the Darfur region, allowing Sudan to 'lead the AU would damage the AU's credibility, especially its commitment to respect human rights, democracy and good governance.'¹¹⁴ Nevertheless, the remnants of old practice were evident in Africa's decision to

¹⁰⁹ N.J. Udombana, 'Can the Leopard Change its Spots?', *supra* note 98.

¹¹⁰ Nasila S. Rembe, 'The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects', *Lesotho: Inst. of S. Afr. Stud* 105 (1991). See also Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

¹¹¹ Julius K. Nyerere, 'A United States of Africa', *Journal of Modern African Studies*, 1, 1 (1963), p. 5.

¹¹² See U.O. Umozurike, 'The African Charter on Human and Peoples' Rights', 77 *AM.J.INT'L L*, 902,903 (1983).

¹¹³ Claude Welch Jr., 'The OAU and human rights: toward a new definition', *Journal of Modern African Studies*, 19, 3 (1981), p. 405. See also Nsongurua J. Udombana, 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan', *Human Rights Quarterly* 27.4 (2005) 1149-1199.

¹¹⁴ Patrick Runkhumise, 'Civilian (in) Security in the Darfur Region of Sudan', *ISS paper* 123, March 2006.

appoint Mugabe's Zimbabwe to chair the UN's commission on Sustainable Development, a major UN body, in May 2007 despite its poor human rights record.¹¹⁵

Meanwhile, gross human rights violations, particularly in the 1970s, soon prompted the OAU Head of States and Government to adopt the African Charter on Human and Peoples' Rights in June 1981.¹¹⁶ However, the problem was that the treaty did not come into force until 1986 and even though it made a significant contribution in eroding African states' strict adherence to sovereignty, it was inadequate to match the challenges brought by the end of the Cold War which brought with it a surge of increased internal and region conflicts in the late 1980s.¹¹⁷

As shown in the previous chapter, the new era witnessed the 'breakdown of the ideological mind set and structures of the Cold War global alliances', which in turn 'exposed conflicts, which were formally overshadowed by strong nationalist governments and superpower rivalries.'¹¹⁸ Therefore, in order to meet this new challenge, the OAU's adopted what it envisaged as a permanent Mechanism for Conflict Prevention, Management and Resolution in 1993.¹¹⁹ However, in spite of the initial optimism, it was during this period that the infamous collapse of the state of Somalia occurred 'while violence in Sierra Leone, Liberia, Angola, the Democratic Republic of Congo (DRC) and Sudan led to the death of millions of Africans.'¹²⁰

Most significantly, the genocidal massacre in Rwanda (1994) took place when the Mechanism was in operation, and subsequently failed to bring any meaningful

¹¹⁵ See BBC News, 'Zimbabwe to chair major UN body', *International Version*, Saturday, 12 May 2007.

¹¹⁶ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),

¹¹⁷ On some of the criticism and general literature on the African Charter on Human and Peoples' Rights, see Claude E. Welch, Jr., 'The African Commission on Human and Peoples' Rights,' *supra* note 61; Rose M. D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter', *Journal of African Law*, Vol. 29, No. 1. (Spring, 1985), pp. 72-81.

¹¹⁸ <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN011836.pdf>.

¹¹⁹ See Declaration of the OAU Assembly of Heads of State and Government on the Establishment, within the OAU, of a mechanism for Conflict Mechanism for Conflict Prevention, Management and Resolution, adopted by the twenty-ninth ordinary session of the Assembly in Cairo, Egypt, on 30 June 1993: AHG/DECL.3 (XXIX).

¹²⁰ Tim Murithi, 'Transforming African Union Values and Principles into Policy and Practice', *ISS Paper* 143, (June 2007).

hope.¹²¹ Sam Ibok who was then the Director of the OAU's Political Affairs Department conceded in 1999 that in spite of the Continental Mechanism for Conflict, Prevention, and Resolution, Africa had been unable to craft comprehensive security architecture to drive the peace and security agenda of the Continent.¹²² This meant that reliance had to be made of sub-regional organisations, notably ECOWAS, to provide a 'framework for collective intervention by states' in order to halt massive violations of human rights.¹²³ Although the actions of ECOWAS were inspired by the OAU's failures, it was the world's inaction during the genocide in Rwanda that was to form a turning point in the history of post-colonial Africa and compel states to reassess their positions on non-intervention.

2.4 The Lessons from Rwanda: A Rude Awakening for the OAU

The Rwandan genocidal massacre marked a catastrophic period that not only unearthed the utter failure of humanity,¹²⁴ but also left a scar on the conscience of the international community.¹²⁵ Therefore, although the factors considered above led African states to question their own system and that of the UN as a whole, it was the unparalleled cataclysm brought about by the Rwandan genocide that is mainly credited with fundamental change of outlook with respect to Africa's position in

¹²¹ For an assessment of the OAU's conflict response capacities, see Monde Muyangwa and Margaret A Vogt, *An Assessment of the OAU Mechanism for Conflict Prevention Management and Resolution, 1993-2000*, (New York: International Peace Academy, 2002); A. Abass & M Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the African Union', 49 *Netherlands International Law Review* (2002), 1 12; Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

¹²² Sam Ibok, *The OAU Mechanism for Conflict Prevention, Management and Resolution of Disputes*, (Addis Abba, 1999), p. 4.

¹²³ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to intervene,' *supra* note 9.

¹²⁴ See Romeo A. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, (Carroll & Graf, 2004). See also 'Rwanda Genocide 'Failure' Berated', *BBC*, April 5, 2004.

¹²⁵ On the Rwandan genocide, see generally, Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch; Paris: International Federation of Human Rights, 1999); Astri Suhrke and Bruce Jones, 'Dilemmas of Protection: The Log of the Kigali Battalion,' in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick: Transaction Publishers, 1999); Gerard Prunier, *The Rwanda Crisis, 1959—1994: History of a Genocide* (London: Hurst & Co., 1995); Scott Feil, *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda: A Report to the Carnegie Commission on Preventing Deadly Conflict* (Washington, DC: Carnegie Commission on Preventing Deadly Conflict, 1998); Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict — Final Report; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Document S/1999/1257, December 15, 1999, p. 1; and Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience* (Copenhagen: Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 1996).

conflict resolution. In this regard, a revelation of brief facts of the conflict that led to the deaths of between 500,000 and 1 million people within 100 days deserves mention.¹²⁶ As stated earlier, this approach is useful in ultimately understanding the rationale behind the formation of the AU mechanisms, in order to test the mantra of 'Never Again,' who's first key trial manifested itself in the Darfur conflict.¹²⁷

Due to its operational failures in Yugoslavia¹²⁸ and Somalia¹²⁹ in the early 1990s, the UN approached the conflict in Rwanda with marked caution.¹³⁰ Its striking hesitance was as 'a consequence of America's shambolic intervention in Somalia the previous year.'¹³¹ Nevertheless, in October 1993, at the joint request of the government of Rwanda and the Rwandan Patriotic Front, the Council established the United Nations Assistance Mission for Rwanda (UNAMIR),¹³² with amongst others, the mandate of monitoring the cease-fire and overseeing the demilitarization and demobilization and

¹²⁶ Estimated deaths range from 500,000 to 1,000,000 persons. See *Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, CM 12048 (LXVII), 29 May 2000. See also *Question of the Violation of Human Rights and Fundamental Freedoms, In Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, ¶ 24, U.N. Doc. E/CN.4/1994/7 (1994). See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, U.N. Doc. S/1994/1405 (1994); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1996/68 (1996); *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1995/7 (1995).

¹²⁷ See chapter nine.

¹²⁸ Mats Berdal, 'Lessons Not Learnt: The Use of Force in 'Peace Operations' in the 1990s, in Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century*, (Frank Cass Publishers, 2001); Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), pp. 91-106.

¹²⁹ Jarat Chopra, Å. Eknes, and T. Nordbø, 'Fighting for Hope in Somalia,' *Peacekeeping and Multinational Operations* 6 (Oslo: Norwegian Institute for International Affairs, 1995); Mohamed Sahnoun, *Somalia: Missed Opportunities* (Washington, DC: US Institute of Peace, 1994); Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *ibid*, pp.91-106.

¹³⁰ See chapter eight. UN Publication, *The Blue Helmets: A Review of United Nations Peace Keeping*, (3rd Edition 1996); United Nations Department of Peace Keeping, *Comprehensive Report on Lessons Learnt from UNAMIR*; United Nations Blue Books Series, Vol X, *The United Nations and Rwanda 1993-1996*; Christine Gray, *International Law and the Use of Force*, (Oxford University Press; Second Edition, 2004) pp.227-230; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *ibid*. 91-106.

¹³¹ Lessons of genocide: Rwanda, Remembered, *Economist*, 27 March. 2004.

¹³² See SC Res. 872 (1993) of 5 October, 1993.

assist with mine clearing. The force comprised of a mere 2,500 lightly armed military personnel.¹³³

However, the country drifted to further conflict when the Presidents of Rwanda and Burundi were killed in a plane crash in April 1994. The mass slaughter and gross violations of human rights of Tutsis and moderate Hutus that ensued completely overwhelmed UNAMIR, which could no longer carry out its mandate to implement the peace agreement. Furthermore, Belgium announced its unilateral withdrawal from UNAMIR leaving the force level at 1500 troops.¹³⁴ These factors ensured that UNAMIR did not have the resources and logistics to prevent the looming genocide as the 'force level was too small for the military action to protect the victims of the slaughter and the force's capabilities had not been put together with a conflict situation in mind: With an extremely weak logistics base, UNAMIR was also rapidly running out of food and medical supplies[...]It had no ambulances and mainly used soft-skin vehicles for the transportation of troops.'¹³⁵ In spite of this, in May 1994, the Security Council, by way of resolution 918,¹³⁶ imposed an arms embargo on Rwanda and expanded UNAMIR's mandate by authorising it to contribute to the security of refugees and civilians through the establishment of secure humanitarian areas and the provision of security for humanitarian operations. However, by this time UNAMIR had only 500 troops in Rwanda and states were reluctant to provide more forces.

As it turned out, the UN's ambivalence towards conflicts in the continent reached its low point during the world's 'sin of omission'¹³⁷ in the genocide. In a mere 100 days, up one million Tutsis and moderate Hutus were slaughtered.¹³⁸ And more so, this tragedy

¹³³ UN Publication, *The Blue Helmets: A Review of United Nations Peace Keeping*, *ibid*; United Nations Department of Peace Keeping, *Comprehensive Report on Lessons Learnt from UNAMIR*, *ibid*; United Nations Blue Books Series, Vol X, *The United Nations and Rwanda 1993-1996*, *ibid*.

¹³⁴ See *Report of the Secretary-General on UNAMIR*, UN Doc. S/1994/470, 20 April, 1994.

¹³⁵ UN Publication, *The Blue Helmets: A Review of United Nations Peace Keeping*, *supra* note 130; United Nations Department of Peace Keeping, *Comprehensive Report on Lessons Learnt from UNAMIR*, *supra* note 130; United Nations Blue Books Series, Vol X, *The United Nations and Rwanda 1993-1996*, *supra* note 130.

¹³⁶ See SC Res. 918 (1994) of 17 May 1994.

¹³⁷ Term used by the Secretary General to describe the world's failure to prevent and halt the Rwandan genocide. See 'UN Chief's Rwanda Genocide Regret' *BBC News*, World Edition, March 26, 2004.

¹³⁸ See *Report of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, CM 12048 (LXVII), 29 May 2000. See *Question of the Violation of Human Rights and Fundamental Freedoms, In Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 12, ¶ 24, U.N. Doc. E/CN.4/1994/7 (1994). See generally, *Final Report of the Commission of Experts*

occurred as 'the majority of the international community, impassive and apparently unperturbed, sat back and watched the unfolding apocalypse or simply changed (TV) channels.'¹³⁹ The 'lack of political will'¹⁴⁰ to intervene during those dark days leading to the catastrophic period not only unearthed the utter failure of humanity,¹⁴¹ but also clearly rode roughshod over a clear legal obligation under international law.¹⁴²

Most importantly, as mentioned in chapter three, the failure by the international community to intervene in this instance led to the commission of genocide, which in itself is violation of a peremptory norm of law.¹⁴³ Meanwhile, the impact of the tragedy in Rwanda was to be felt across many of the countries within the African continent.¹⁴⁴ And as the remnants of the genocide spilled over to the Democratic Republic of Congo, the UN failed to intervene and instead sent a weakly mandated peace operation force which failed to stop the systematic slaughter of millions of innocent civilians.¹⁴⁵

Established Pursuant to Security Council Resolution 935 (1994), U.N. SCOR, U.N. Doc. S/1994/1405 (1994); Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1996/68 (1996); Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Sèqui, Special Rapporteur, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 10, U.N. Doc. E/CN.4/1995/7 (1995).

¹³⁹ Romeo Dallaire, *Shake hands with the Devil*, *supra* note 124, p. xvii.

¹⁴⁰ Kofi Annan, speech, 'Secretary-General Observes International Day of Reflection on 1994 Genocide,' Geneva, April 7, 2004. <http://www.unog.ch/news2/documents/newsen/sg04003e.htm>. See also Alison Des Forges, *Leave None to Tell the Story*, *supra* note 125; Astri Suhrke and Bruce Jones, 'Dilemmas of Protection: The Log of the Kigali Battalion,' in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick: Transaction Publishers, 1999); Gerard Prunier, *The Rwanda Crisis, 1959—1994: History of a Genocide* (London: Hurst & Co., 1995); Scott Feil, *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda: A Report to the Carnegie Commission on Preventing Deadly Conflict* (Washington, DC: Carnegie Commission on Preventing Deadly Conflict, 1998); Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict — Final Report; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Document S/1999/1257, December 15, 1999, p. 1; and Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience* (Copenhagen: Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 1996).

¹⁴¹ See Romeo A. Dallaire, *Shake Hands with the Devil*, *supra* note 124.

¹⁴² Article I of the Convention on the Prevention and Punishment of the Crime of Genocide provides that: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. For discussion of the obligation to prevent and punish as an express duty imposed upon states in the Convention, see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ 26 Feb. 2007 at paras. 161-7.

¹⁴³ See *Reservations to the Convention on Genocide*, 1951 I.C.J. Rep. 15, 23; see also *Case Concerning Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J., Rep. 3, 32).

¹⁴⁴ Organisation of African Unity, 'The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events', 2000, Introductory Chapter, para.3.

¹⁴⁵ Abass, Ademola, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Hart Publishing Ltd., 2004), p.vii; Phoebe Okowa, 'Congo's Rebels and the Responsibility of Non-State Groups in Situations of Armed Conflict', *Paper*, International Law

Nevertheless, the UN Security Council later authorised *Operation Turquoise*, a French peace operation that was mandated to put a halt to the genocidal massacre.¹⁴⁶ However, the same mission provided assistance to the *genocidaires* and helped them to escape into the east of the DR Congo thereby creating a 'rump genocidal state on the very border of Rwanda.'¹⁴⁷ And the Council, adopted resolution 955 (1994),¹⁴⁸ providing for the establishment of the International Criminal Tribunal for Rwanda (ICTR), in order to prosecute persons 'responsible for genocide and other serious violations of international humanitarian law.'¹⁴⁹ As shown in chapter nine, the Council's referral of the Darfur conflict to the International Criminal Court, as an alternative to the decisive enforcement action necessary to halt the devastating catastrophe in the region, led to accusations that it had 'all but plagiarized the resolutions on Rwanda.'¹⁵⁰

Meanwhile, the world's failure in Rwanda 'had especially profound consequences in Africa. Throughout the continent, the perception of near indifference on the part of the international community [...] left a poisonous legacy that continues to undermine confidence in the [UN] organisation.'¹⁵¹ Similarly, the OAU Panel of Eminent Personalities accused certain members of the Security Council members, specifically France and the United States that they 'consciously chose to abdicate their responsibility for Rwanda.'¹⁵² The Panel also blamed African states for their inaction and soon strongly

Association, *A More Secure World: Our Shared Responsibility – What is the Role for International Law?* University of Sussex, April 20 & 21, 2007.

¹⁴⁶ SC Res. 929, 22 June 1994 .See Helmut Freudenschuss, 'Between Unilateralism and Collective Security: Authorisations of the Use of Force by the UN Security Council,' *EJIL*, 46, no. 1 (1994).

¹⁴⁷ Organization of African unity, *International Panel of Eminent Personalities to investigate the 1994 Genocide in Rwanda and the Surrounding Events*, *supra* note 145, para.19.28; B. Jones 'Intervention Without Borders: Humanitarian Intervention in Rwanda, 1990-1994' in Millenium, in N. Al-Naumi & R. Meese (eds) *International Legal Issues Arising under the United Nations Decade of International Law*, (Martinus Nijhoff Publishers, 1995), vol.24, No.2, p.225; BBC, 'France accused on Rwanda killings', *BBC News*, Tuesday, 24 October 2006.

¹⁴⁸ SC Res. 955 (1994) of 8 November 1994.

¹⁴⁹ *Ibid.*

¹⁵⁰ Roméo Dallaire, 'Looking at Darfur, Seeing Rwanda', *New York Times*, 4 October, 2004.

¹⁵¹ Report of the Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, S/1998/318, 37 ILM (1998) 913 at para 11. See also *Report of the Independent Inquiry into the Actions of the United Nations during the Genocide in Rwanda*, UN Doc. S/1999/1257 (1999).

¹⁵² Organisation of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*, *supra* note 145, para. 13.1.

recommended that the OAU 'establish appropriate structures to enable it to respond effectively to enforce peace in conflict situations.'¹⁵³

It was at this point that the Pan African journey from the OAU to the new AU regained its momentum. However, before embarking on a discussion on the AU, despite its failures, it has to be said that the OAU is credited with the successful efforts for the total decolonisation of Africa and the struggle against apartheid.¹⁵⁴ Furthermore, by affirming the principle of inviolability of borders inherited from colonialism, it arguably limited the number of conflicts that could have potentially broken out, particularly in the 1960s and 1970s, which formed the period subsequent to the achievement of independence by the majority of African states.¹⁵⁵ In addition, through its mediation role, the OAU made significant efforts in solving several disputes, including the ones involving Algeria and Morocco and also amongst Kenya, Sudan and Ethiopia.¹⁵⁶ Moreover, as stated above, the OAU also often engaged in cooperation with the United Nations that included agreements to deal with African disputes which had been referred to the UN Security Council and which were on occasion reverted back to the OAU, such as the Chad/Libya dispute.¹⁵⁷

In this regard, as will be shown below, leaders at the launch of the AU, paid tribute to the organisation and praised it 'for the total decolonisation of Africa, the struggle against apartheid [and] the exaltation of the virtues of unity, solidarity and dignity on the continent.'¹⁵⁸ Nevertheless, the failure to prevent and manage conflicts, particularly in Rwanda marked the demise of the organisation which 'in this context, [the OAU], like the prehistoric dinosaurs, was facing the threat of extinction for failing to adapt itself to changed global and regional political, social and economic settings and rising up to the new challenges faced by the continent in the post Cold

¹⁵³ *ibid.*

¹⁵⁴ See Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

¹⁵⁵ See Mr Amara Essy, Secretary-General of the OAU, 'Opening Statement', 38th Assembly of Heads of State and Government of the OAU, 8 July 2002. See also MacFarlane, S. N, 'Intervention and Security in Africa', *International Affairs*, Vol 60, Issue 1 (1983-84) p. 56.

¹⁵⁶ Fredric S. Pearson and Robert A Baumann, 'International Military Intervention in Sub-Saharan African Subsystem,' *Journal of Political and Military Sociology*, Vol 17 1989, p.118. On peaceful dispute resolution in Africa, see B.D. Meyers, 'Interregional Conflict Management by the Organization of African Unity,' 28 *Int.Org.*, (1974) p. 345 at pp.359-60; M. Shaw, 'Dispute Settlement in Africa', 37 *Yearbook of WA* (1983), p. 149 at pp.156-7; and M. Wolfers, 'The Organization of African Unity as Mediator', in Touval and Zartman, *International Mediation in Theory and Practice*, (Westview, 1985) p. 175.

¹⁵⁷ See AHG/Res. 106 (XIX).of 1983.

¹⁵⁸ Opening Statement by Mr Amara Essy, Secretary-General of the OAU, *supra* note 156.

War era.’¹⁵⁹ Subsequently, in apparent continuation of the earlier Conferences on Pan Africanism, an array of OAU summits culminated in the formal launch of a new African Union, as described in the following section.

3.1 The Transition from the OAU to the New AU: From Sirte (1999) to Durban (2002)

The call by the OAU Panel of Eminent Personalities to ‘establish appropriate structures to enable it to respond effectively to enforce peace in conflict situations,’¹⁶⁰ was heeded by the Assembly of Heads of State and Government in July 1999 in Algiers, Algeria.¹⁶¹ This occurred after African leaders assembled in Sirte, Libya following an invitation from Colonel Muammar Ghaddafi of Libya to the 4th Extraordinary Summit in 9 September, 1999. Incidentally, this date coincided with time during which Colonel Ghaddafi celebrated the 1969 coup that brought him to power. As will be shown further below, this point is of particular significance given that certain quarters have interpreted this misnomer as expressive of ‘his desire for recognition as the continental leader.’¹⁶²

Nevertheless, the purpose of the Extraordinary Summit was to amend the OAU Charter to increase the efficiency and effectiveness of the continental organisation. However, although the theme of the Summit was dubbed ‘Strengthening OAU capacity to enable it to meet the challenges of the new millennium,’ African leaders, instead, decided to issue the *Sirte Declaration*.¹⁶³ This Declaration, having taken note of the need to ‘effectively address the new social, political and economic realities in Africa and in the world,’¹⁶⁴ unanimously decided to ‘establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organisation and the provisions of the Treaty establishing the African Economic Community.’¹⁶⁵

¹⁵⁹ E Baimu, K Sturman, ‘Amendment to the African Union’s Right to Intervene,’ *supra* note 9.

¹⁶⁰ Organisation of African Unity, ‘*The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*’, *supra* note 145, para. 13.1.

¹⁶¹ See Decision AHG/ Dec.140 (XXXV) adopted at the thirty-fifth ordinary session of the OAU Assembly of Heads of State and Government in Algiers, Algeria, on 14 July 1999.

¹⁶² See J.Cillers, ‘From Durban to Maputo: A review of 2003 Summit of the African Union’, *ISS Paper* 76, (August 2003), p. 8.

¹⁶³ See the Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya, EAHG/Draft/Decl. (IV) Rev 1.

¹⁶⁴ Paragraph 6 of the preamble to the *Sirte Declaration*, *ibid.*

¹⁶⁵ See the *Sirte Declaration*, *ibid.*

Amongst others, the Declaration also decided to accelerate the process of implementing the Treaty establishing the African Economic Community,¹⁶⁶ including shortening the implementation periods of the Abuja Treaty.¹⁶⁷ Finally, the Declaration '[m]andate[d] the Council of Ministers to take the necessary measures to ensure the implementation of the above decisions and in particular, to prepare the constitutive legal text of the Union, taking into account the Charter of the OAU and the Treaty establishing the African Economic Community' and thereby submit its report at Thirty-sixth Ordinary Session of [the] Assembly¹⁶⁸ in Lomé, Togo. Following the Sirte Declaration, the OAU legal department drew up a draft Constitutive Act of the Africa Union which was then debated in a meeting of legal experts and parliamentarians and later at a ministerial conference in Tripoli, Libya in June 2000.¹⁶⁹

The next summit was held in Lomé, a mere month later, in July 2000, whereby the Assembly approved and adopted the Draft Constitutive Act on the establishment of the AU¹⁷⁰ in terms of the *Sirte Declaration* which became open for signature.¹⁷¹ The Summit in Lomé also saw the adoption by the OAU of the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).¹⁷² This initiative, which is loosely based on the Organisation for Security

¹⁶⁶ The Treaty Establishing the African Economic Community 1991. See also the 'Final Communiqué of the First extra Ordinary Summit', The First Extra-Ordinary Summit of the COMESA Authority of Heads of State and Government for the launching of the COMESA Free Trade Area, Lusaka, Republic of Zambia, 31 October, 2000; Asante, SKB, 'Towards an African economic community', *Africa Institute of South Africa*, 2001; Olufemi A. Babarinde, 'Analyzing the Proposed African Economic Community: Lessons from the Experience of the European Union', *Paper*, Third ECSA-World Conference on The European Union in a Changing World, Brussels, Belgium, 19-20 September, 1996. Available at <http://www.ecsanet.org/conferences/ecsaworld3/babarinde.htm>.

¹⁶⁷ Article ii(a) the *Sirte Declaration*.

¹⁶⁸ Article iii.

¹⁶⁹ See chapter seven. See also Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 21.

¹⁷⁰ See Assembly of Heads of State and Government Thirty-sixth Ordinary Session/Fourth Ordinary Session of the AEC, 10 – 12 July, 2000, Lomé, Togo, AHG/Dec.143-159 (XXXVI), AHG/Dec.144 (XXXVI).

¹⁷¹ During the Summit, 27 African states signed the Constitutive Act of the AU during a formal signing ceremony in Lomé on July 2000. These include: Algeria, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea Bissau, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Niger, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Sudan, Togo and Zambia.

¹⁷² In its Declaration, the OAU Assembly 'acknowledged the CSSDCA process as creating a synergy between the various activities undertaken by the OAU/AEC, which therefore must help to consolidate the work of the OAU/AEC in the areas of peace, security, stability, development and cooperation'. See Assembly of Heads of State and Government Thirty-sixth Ordinary Session/Fourth Ordinary Session of the AEC, 10 – 12 July, 2000, Lomé, Togo, AHG/Dec.143-159 (XXXVI), AHG/Dec.144 (XXXVI).

and Cooperation in Europe (OSCE), was advocated by Nigeria's Olusegun Obasanjo.¹⁷³

In March 2001, African leaders were back in Sirte, Libya where the Assembly, meeting in its Fifth Extraordinary Session noted that all member states had signed the Constitutive Act of the African Union and unanimously declared the establishment of the AU.¹⁷⁴ This paved way for the Lusaka, Zambia summit (2001), which concerned itself with the implementation of the Union and mandated the OAU Secretary General to formulise modalities and guidelines for the launching of the organs of the Union.¹⁷⁵ As will be shown in detail in chapter six, the Constitutive Act of the AU envisioned the creation of new institutions at the continental level. In this regard, the Assembly, the Executive Council, the Commission and the Permanent Representative Committee were considered to be of priority.¹⁷⁶ Furthermore, the Assembly called for the preparation of the Draft Rules of Procedure of the primary organs and requested member states to submit proposals regarding the structure, functions and powers of the Commission.¹⁷⁷ Finally, the New Partnership for Africa's Development (NEPAD) was adopted as a Programme of the AU at the Lusaka Summit (2001).¹⁷⁸ As shown in chapter seven, this organ is associated with the quest to promote the respect for democracy, good governance and human rights.¹⁷⁹

The culmination of Summits symbolised an African a journey from North Africa (Sirte and Lome) making its way through Central Africa (Lusaka) and finally reached its high point in South Africa (Durban), which saw the formal inauguration of the new AU. Coincidentally, the AU's ceremonial launch marked the first ordinary session of the Assembly of the Union that adopted the Protocol on the establishment of the

¹⁷³ Bronwen Manby, 'The African Union, NEPAD and Human Rights,' *supra* note 65; Lloyd and Rachel Murray, 'Institutions with Responsibility for Human Rights Protection under the African Union', *Journal of African Law*, 48, 2 (2004), p.165-186.

¹⁷⁴ See the Decisions adopted by the Fifth Extraordinary Session of the Assembly of Heads of State and Government of the OAU/AEC, 1-2 March 2001, Sirte, Great Jamahiriya EAHG/Dec.1(V).

¹⁷⁵ See Assembly of States Decision on the Implementation of the Sirte Summit Decision on the African Union, AHG/DEC.1 (XXXVII), Lusaka 9-11 July, 2001.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ New Partnership for Africa's Development (NEPAD), 71, African Union, A/57/304 (8-10) July 2002. See also Bronwen Manby, 'The African Union, NEPAD, and Human Rights,' *supra* note 65.

Peace and Security Council of the African Union,'¹⁸⁰ the Rules of Procedure of the Assembly and the Statutes of the Commission.'¹⁸¹ Significantly, the AU Assembly encouraged all member states of the AU to support the NEPAD initiative and adopt the Declaration on Democracy, Political, Economic and Corporate Governance and accede to the African Peer Review Mechanism.¹⁸²

The formal launch also set the stage for the preparation to bid farewell to the OAU and the platform from which African states ushered in a new era of an AU embodied in the spirit of the Constitutive Act. The new era that was to 'dawn on Africa and for Africa'¹⁸³ bound the continent to democratic principles and further called for the adherence to 'principles of good governance, transparency and human rights [which] are essential elements for building representative and stable governments and can contribute to conflict prevention'¹⁸⁴ in Africa. As mentioned earlier, the adoption of the Sirte Declaration 'unleashed a new momentum in the quest for Continental integration and unity.'¹⁸⁵ Indeed, the rapidity of signing and ratifying the Constitutive Act, expressed the remarkable enthusiasm and dedication towards the transition from the OAU to the new AU.

It was during the moment of the formal launching of the AU in Durban that the Yaoundé Declaration,¹⁸⁶ issued by the OAU Summit meeting in July 1996 in Cameroon, resonated.

¹⁸⁰ Assembly of the African Union, First Ordinary Session: Decision on the Establishment of the Peace and Security Council of the African Union. ASS/AU/Dec. 3 (I). 9 - 10 July, 2002, Durban, South Africa.

¹⁸¹ See Assembly of States Decision on the Draft Rules of Procedure, ASS/AU/Dec. 1 (I), 1st Ord.Sess., Durban, South Africa, July 9-10, 2002.

¹⁸² See Assembly of the African Union, First Ordinary Session: Declaration on the Implementation of the New Partnership for Africa Development (NEPAD) - ASS/AU/Decl. 1 (I), 2002 (Durban). On the APRM, see Jakkie Cillers, 'NEPAD's Peer Review Mechanism', *ISS Paper* 64, November 2002; Jakkie Cillers, 'Peace and Security Through Good Governance? A Guide to NEPAD Peer Review Mechanisms', *ISS, Paper* 70, April 2003.

¹⁸³ Opening Statement by Mr Amara Essy, Secretary-General of the OAU at the 38th Assembly of Heads of State and Government of the OAU, *supra* note 158.

¹⁸⁴ See Declaration on the Framework for an OAU response to Unconstitutional Changes of Government, OAU Doc. AHG/Decl. 5 (XXXVI) (2000).

¹⁸⁵ Statement by Mr Amara Essy, Secretary-General of the OAU, Special session of the AU Council of Ministers, Durban, 1 July 2002.

¹⁸⁶ See introduction.

the total political liberation of the continent has just been achieved. This has been followed today by a transitional period characterised by the end of one-party rule, the inception of democratisation, the emergence of the state of law and the restructuring of our economies.¹⁸⁷

As stated earlier, despite its shortcomings, African leaders paid tribute to the OAU during the formal launch of the AU where they issued the Durban Summit Declaration.¹⁸⁸ Here, the now defunct OAU was described as a 'pioneer, a liberator, a unifier, an organizer and the soul of the continent.'¹⁸⁹ Further homage was also given to its founding leaders for 'their tenacity, resilience and commitment to African Unity' and for standing 'firm in the face of the decisive manipulation of the detractors of Africa and [fighting] for the integrity of Africa and the human dignity of all the peoples of the continent.'¹⁹⁰ Finally, acknowledgment was also made of 'all the Secretaries General and all the women and men who served the OAU with dedication and commitment.'¹⁹¹

3.2 The Aftermath of the New AU: The Prospects and Challenges of a New Regional Organisation

As mentioned earlier, the African Union's Constitutive Act entered into force on the 26th of May 2001 after Nigeria became the 36th member state to deposit its instrument of ratification.¹⁹² However, as described below, the persistent debates that featured behind the scenes in the run up to the inauguration, and which were reminiscent of those prior to the formation of the OAU, made it abundantly clear that the launch of the new Union was not an end but a road map for the further integration of Africa. As it turned out, the pace of signature and ratification of the Constitutive Act of the AU was a 'record-setting event considering the continent's history of a general lack of enthusiasm in ratifying multilateral treaties.'¹⁹³

¹⁸⁷ Organisation of African Unity (OAU), Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaounde Declaration (Africa: Preparing for the 21st Century), AHG Decl. 3, pmb. para. 2, OAU AHG/Res. 247-257 (XXXII) (8-10 July 1996).

¹⁸⁸ The Durban Declaration in Tribute to the Organization of African unity and the Launching of the African Union, AU Doc. ASS/AU/Decl.2 (1), Assembly of the AU, 1st Ord.Sess., Durban, South Africa, July 9-10, 2002..

¹⁸⁹ *Ibid.* para . 14.

¹⁹⁰ *Ibid.* para. 13

¹⁹¹ *Ibid.* para. 14.

¹⁹² Article 36 of the Constitutive Act of the African Union.

¹⁹³ N.J. Udombana, 'Can the Leopard Change its Spots?', *supra* note 98.

Indeed, by March 2001, all the 53 member states to the AU had signed¹⁹⁴ a ‘freshly baked cake’¹⁹⁵ presented by African leaders to their citizens. Though ‘teasing and tempting, [...] it was difficult to determine if it [was] nutritious.’¹⁹⁶ Whatever the case, for reasons discussed here and the next chapter, the rapid creation of the AU was described as ‘one of the most puzzling events in inter-state cooperation in contemporary Africa.’¹⁹⁷ Given the haste in the preparation, signature and adoption of the Constitutive Act of the AU, it was hardly surprisingly that the new African Charter was sent back to the draftsmen for a series of amendments. Predictably, Libya led the pressure for the immediate modification to the Constitutive Act.¹⁹⁸ However, although these proposals were not discussed at the AU launch in Durban due to procedural huddles,¹⁹⁹ concern was expressed by some states that embarking on the amendment of the Constitutive Act soon after its adoption would ‘cast a shadow on the historic significance of the moment.’²⁰⁰

In spite of the above, what was clear was that ‘the speedy negotiation and elaboration of the Constitutive Act seems to have led to the adoption of a sketchy instrument which faile[d] to cover certain issues that merited inclusion.’²⁰¹ Hence, subsequent to the adoption of the treaty, it was hardly seven months that African leaders passed the first amendments to the Constitutive Act of the AU.²⁰² This was through the approval of the 2002 Protocol Relating to the Establishment of the Peace and Council of the African Union that established the AU Peace and Security Council, which is standing decision-making body within the Union.²⁰³ The other key amendments were

¹⁹⁴ See the OAU Assembly Decision, OAU Doc. EAHG/ Dec.1 (V) (2001)

¹⁹⁵ See N.J. Udombana, ‘Can the Leopard Change its Spots?’, *supra* note 98.

¹⁹⁶ *Ibid.*

¹⁹⁷ Thomas Kwasi Tiekou, ‘Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union’, *African Affairs* (2004), 103, 249-267.

¹⁹⁸ See Proposed Amendments to Articles of the Constitutive Act of the African Union (Proposed by the Great Socialist peoples’ Libyan Jamahiriya); Assembly of the African Union, First Ordinary Session, 9-11 July 2002, Durban, South Africa: Doc. AHG/238(XXXVIII). See also Maluwa, T, ‘Fast-tracking African Unity or Making Haste Slowly?’, *supra* note 21.

¹⁹⁹ Libya failed to abide by article 32 of the Constitutive Act which reads: Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof, and that Assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member States. See T., Maluwa, ‘Fast-tracking African Unity or Making Haste Slowly?’, *ibid.*

²⁰⁰ Maluwa, T, Maluwa, ‘Fast-tracking African Unity or Making Haste Slowly?’, *ibid.*

²⁰¹ *Ibid.*

²⁰² Evarist Baimu and Kathryn Sturman, Amendment to the African Union’s Right to Intervene, *supra* note 9.

²⁰³ See chapter six.

contained in the Protocol on the Amendments to Constitutive Act which was adopted in 2003.²⁰⁴

3.3 A United States of Africa versus a Confederation of Independent States

Inevitably, it soon became clear that behind the pomp and vigour in the run up to the establishment of the Union, there ensued an intense debate amongst African leaders surrounding the very meaning of the 'union' that they sought.²⁰⁵ Furthermore, these debates unearthed the influence of key African states,²⁰⁶ such as Libya, in pushing the AU agenda. It will be recalled that disagreements which were grappled with by the earlier Pan Africanists of the earlier part of the 20th century revolved around the relentless dispute that centres on whether the pan African vision of continental unity should either be realised immediately or be a long term objective to be achieved first through the creation and consolidation of independent states and then built up using sub-regional building blocks.²⁰⁷

As it turned out, the contemporary intensity of this debate compelled African leaders, during a summit in January 2007, to dedicate the July AU Assembly Summit in Accra, to the theme of the 'Grand Debate on the Union Government.'²⁰⁸ Reminiscent of the deep divisions in the 1950s between the 'progressive' and 'gradualists' blocks, discussed above, Africa was 'once again at the crossroads.'²⁰⁹ This is because the debate that had previously ensued between the Monrovia and Casablanca groups had come back to haunt African leaders in their quest for African unity.

Having being recognised for his efforts as 'the son of Africa',²¹⁰ the vision contained in the proposal by Libya's Colonel Muammar Ghaddafi deserves mention.

²⁰⁴ For a critical analysis of the amendments to the Constitutive act, see Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?' *supra* note 21.

²⁰⁵ Tiyanjana Maluwa, 'The Constitutive Act of the African union and Postcolonial institutional-building in Africa', 16 *Leiden Journal of International Law*, (2003) p. 157 at 159.

²⁰⁶ Thomas Kwasi Tiekou, 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union' *supra* note 198.

²⁰⁷ See Abdalla Bujra, 'Pan-African Political and Economic Visions of Development From the OAU to the AU: From the Lagos Plan of Action (LPA) to the New Partnership for African Development (NEPAD)' *supra* note 43.

²⁰⁸ Assembly/AU/Dec. 156 (VIII) adopted in Addis Ababa, Ethiopia, 29-30 January, 2007.

²⁰⁹ Statement by Executive Council of the African Union (ECA) Executive Secretary, 14th Ordinary Session of the Permanent Representatives Committee (PRC), 25-26 June, 2007. Accra, Ghana.

²¹⁰ See Special Motion of Thanks to the Leader of the Great Socialist Libyan Arab Jamahiriya Brother Muammar Al Ghaddafi, preamble para 1-2, OAU, EAHG/ Decl. 4. (V) (2001).

Controversially, during the 2000 summit in Lomé, Togo²¹¹ he proposed the formation of unity based upon Ghana's president Kwame Nkrumah's dream of a 'United States of Africa' in the 1960s.²¹² During this period, the Libyan leader also challenged the existing colonial borders that had been institutionalised by the OAU Charter and subsequent African instruments, including the Constitutive Act. Not only did Ghaddafi ask for the borders to be dismantled, he further urged for a single African identity, army and common economy within the region. Furthermore, in a live broadcast, he declared that:

[I]n the coming years, there will be changes towards further African integration. Boundaries between African states will be scrapped. Armies, with their heavy burden on the national state, will be made redundant and replaced by one African defence force. Even passports and national identities will inevitably disappear. From now on, national differences will give way to a single African identity, with a single currency, one central bank, a single passport and a joint defence force.²¹³

Reminiscent of the aftermath of the creation of the OAU in the 1960s, confusion as to the union that was achieved in 2002 was manifest in the speech by President Gnassingbe Eyadema of Togo, who was then the OAU Chairman. Eyadema's statement was riddled with referrals to the birth of the 'United States of Africa' during the launch of the African Union in Durban, South Africa, on 9 July 2002.²¹⁴ Other references, to a 'United States of Africa' were also recently made by the Chairperson of the African Commission²¹⁵ on the occasion of the commemoration of the Africa Day, on May 25, 2006.²¹⁶

With this regard, the role of Libya's Colonel Muammar al-Qaddafi as a prime mover of the African agenda with regard to the unification of the continent created both doubt and interests as to his intentions within the organisation.²¹⁷ It will be recalled

²¹¹ Barnaby Phillips 'A United States of Africa?', *BBC News*, Tuesday, 11 July, 2000.

²¹² See Kwame Nkrumah, *Africa Must Unite*, *supra* note 40.

²¹³ The Libyan leader speaking at the General Peoples Congress on 18 March 2001 in an address also carried on Libyan television, quoted by *Jakkie Cilliers*, 'Commentary: Towards the African Union', *African Security Review* Vol 10 No 2, (2001).

²¹⁴ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 21.

²¹⁵ On the function and powers of the AU Chairperson, see chapter six.

²¹⁶ Statement of the Chairperson of the AU Commission On the Occasion of the Commemoration of Africa Day, 25 May 2006: Working Together for Integration and Development, 25 May 2006. Available at http://www.africa-union.org/root/au/Conferences/Past/2006/May/BC/CP_statement.htm

²¹⁷ For more discussion on Ghaddafi's influence on the AU agenda, see Thomas Kwasi Tieku, 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African

that the *Sirte Declaration*, which called for the establishment of the AU, had been at the request by Libya to 'discuss ways and means of making the OAU more effective' in the context of globalisation.²¹⁸ Further, amongst Libya's contributions to the Sirte process was included a grant of one million dollars towards the AU,²¹⁹ and the North African state also paid \$4.5 million to the Council of Ministers as imbursement of seven members of the OAU who were in arrears.²²⁰

These enormous efforts of the Libyan President were in return acknowledged by the AU Heads of State and Government who paid 'tribute to Brother Leader Muammar Al-Qaddafi for his vision and commitment to a strong and a united continent within the framework of the African Union and for his continuing commitment to the consolidation of peace, security, development and integration in Africa.'²²¹ In addition to what it termed as 'deserving tribute to Brother Leader Muammar Al Ghaddafi [...] for his role and efforts as the son of Africa,' the AU further praised 'the initiatives [he has] taken [...] to strengthen the unity, cohesion and solidarity of our peoples and the continent [...] [b]earing in mind, the intense contributions made by the Libyan people and leadership, to the advancement of the objectives of the continent in the area of peace, security, stability and development.'²²²

However, in spite of this development, there is evidence of Libya's strong influence among African states which is visibly clear from the much earlier position taken by the OAU in its support of Ghaddafi. Subsequent to its adoption of the Ouagadougou decision defying the UN Security Council sanctions imposed on Libya in connection

Union', *African Affairs* (2004), 103, 249-267; T. Maluwa, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union', (2001), 9 *African Yearbook of International Law* 3 and 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *Leiden Journal of International Law*, 16 (2003), pp.157-170.

²¹⁸ The OAU Assembly of Heads of State and Government, 35 Ord Sess., AHG/ Dec.140 (XXXV). This coincided with Ghaddafi's 30 years of rule. See Donna Abu- Nasr, 'Ghaddafi Marks 30 Years in Power with a Massive Display of Force', *Sun-Sentinel*, 8 September, 1999. See also Libya- Quaddafi Underlines His Conversion from Pan-Arabism to Pan-Africanism by Hosting an Extraordinary AU Summit', 609 *Middle East Int'l* 7 (October 1999).

²¹⁹ Jakke Cillers, 'Commentary: Towards the African Union,' *supra* note 214.

²²⁰ See 'Libya Pays OAU Contributions for Seven States', *Pan African News Agency*, 7 September, 1999.

²²¹ Assembly of the Union, '2nd Extraordinary Session, Ext/ Assembly/ AU/ Decl. 1-2 (II), 27-28 February 2004.

²²² Special Motion of Thanks to the Leader of the Great Socialist Libyan Arab Jamahiriya Brother Muammar Al Ghaddafi, *supra* note 211.

to the Lockerbie bombings,²²³ the OAU passed resolutions, from 1997 onwards, at every Heads of State and Government Summit demanding that sanctions against Libya be lifted and/or flouted by African states.²²⁴ Conveniently, during the AU's inauguration in Durban in July 2002, delegates took note of the settlement of the Lockerbie case and 'urgently request[ed] the Security Council to immediately and definitively lift these sanctions and embargo imposed on Libya which no longer have legal or moral justification.'²²⁵

The Libyan leader was later described as the 'accelerator of the engine for the transformation and reconstruction of Africa unity' and anointed as the 'spiritual leader of the African Union.'²²⁶ However, although Ghaddafi remained the most prominent advocate for real continental unity at extraordinary summits, his vision on the AU initiative has somewhat been exaggerated. This is because his outspoken views were also shared by other African scholars, particularly those who were of the view that the transition from the OAU to AU 'should ensure that this semantic and institutional evolution creates new realities marked by the gradual eradication of all borders between African countries.'²²⁷

More significantly, as Maluwa strongly argues, Ghaddafi was not alone in his pronouncements as they are riddled with Pan Africanist antecedents in regard to African unity, which are reiterations of previous calls by leaders such as Nkrumah. In this regard, the AU 'project is, therefore, not one individual country's sole initiative or one particular leader's obsession with personal aggrandizement.'²²⁸ Indeed, quite to

²²³ T. Maluwa, 'Reimagining African Unity,' *supra* note 218.

²²⁴ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 9; E.de Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing 2004), p. 382.

²²⁵ AHG/Dec.174 (XXXVIII); See also Assembly of the Heads of State and Governments, Thirty-Third Ordinary Session, AHG/Decl.2 (XXXIII), Harare, Zimbabwe, 2 to 4 June 1997; the OAU Council of Ministers at its Sixty-Fourth Ordinary Session, Yaoundé, Cameroon, 1 - 6 July, 1996 ;Sixty-Fifth Ordinary Session , Tripoli, Libya, 24 - 28 February, 1997.

²²⁶ Quoted in Tiyanjana Maluwa, 'The Constitutive Act of the African union and Postcolonial institutional-building in Africa', *supra* note 206, p. 160.

²²⁷ See African Union, 'First Meeting of Intellectuals of Africa and the Diaspora Organised by the African Union', *supra* note 24. See also Wole Soyinka, *The Burden of Memory*, *supra* note 67, pp. 40-41. See also O. Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa', *supra* note 67. For a different view, see A. Mbembe, 'At the Edge of the World,' *supra* note 67.

²²⁸ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 206.

the contrary, all the member states, through the adoption and ratification of AU agreements have endorsed the Union's programme of continental unity. Furthermore, states such as Nigeria and South Africa have also not shied from strongly influencing the AU's agenda.²²⁹

Moreover, the majority of African leaders, while appreciating the views of the Libyan leader, were not willing to go so far as agreeing to an absolute African integration. For example, some states, such as Kenya, argued that Africa was not ready for unification.²³⁰ In its place the AU Assembly agreed that the Union be established in conformity with the OAU Charter and the Abuja treaty.²³¹ In the end, the uncertainty in regard to the union that was sought and ultimately achieved, led Maluwa to observe that 'as it stands, the Constitutive Act is hardly the charter for the politically integrated Africa that some commentators may have made it out to be, or some Africa leaders may have wished for; and that it is not the programme of action in the sense that the Treaty Establishing the African Community (commonly) known as the Abuja Treaty is, but simply an organizational framework for the future political integration of the Africa continent.'²³²

As mentioned earlier, the ferocity of this debate was recently awoken leading to the AU Assembly's decision to dedicate the AU Summit in Accra, Ghana from 1-3 July 2007, to the theme of the 'Grand Debate on the Union Government'. Unsurprisingly, the leading voice for an immediate unification of Africa was the Libyan leader, Gaddafi. Although he found favour in leaders such as the Senegalese President, Abdoulaye, others, such as Robert Mugabe and Thabo Mbeki of Zimbabwe and South Africa respectively, preferred the gradualist approach to integration.²³³ Meanwhile, some leaders such as Yoweri Museveni, of Uganda, would rather have had more economic integration as opposed to political union, as he felt Africa was too diverse

²²⁹ Thomas Kwasi Tiekou, 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union', *supra* note 198.

²³⁰ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 21; Jakkie Cilliers, 'Commentary: Towards the African Union', *supra* note 214.

²³¹ Kioko, Ben, 'The Right of Intervention Under the African Union's Constitutive Act; Non-Interference to Non-Intervention,' *International Review of the Red Cross*, no. 85, (2003), pp. 807-825.

²³² Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 98.

²³³ See BBC News, 'No timetable for uniting Africa', *UK Version*, Wednesday, 4 July 2007. Available at <http://news.bbc.co.uk/1/hi/world/africa/6268468.stm>.

to be under one government. However, he remained a strong advocate of a politically united East African Federation.²³⁴

In the end, the Chairperson of the AU Assembly ruled that due to the lack of political will by states, the regional groupings had 'not performed to the degree of efficiency and purposefulness which would assure an objective observer of hastening the day of the attainment of the Continental Government.'²³⁵ What is clear is that the outcome represented the willingness by African leaders to support continental integration to the extent that it did not considerably erode the jealously guarded concept of sovereignty. Nevertheless, the Abuja treaty remains the road map for the continental quest for a United States of Africa through a coordinated development approach modelled around Regional Economic Communities (RECs).²³⁶ As it stands, the on-going debate with regard to the most appropriate form of unity in similar fashion to earlier years rages on, and is in no where near conclusion.

C: Conclusion

The creation of the AU through the adoption of the Constitutive Act marked the 'turning of a significant page in the modern history of Africa.'²³⁷ Leaders in modern Africa were inspired by the ideals which guided the Founding Fathers of [the continental] Organization and Generations of Pan-Africanists in their resolve to forge unity, solidarity and cohesion, as well as co-operation between African peoples and among African States.'²³⁸ In this sense, its establishment, 100 years after the first Conference in London was the embodiment of Pan-Africanism in its latest guise.²³⁹

²³⁴ On Museveni's vision of a politically united East Africa, see Phillip Apuuli, Kasaija, 'Regional Integration: A political Federation of the East African Countries,' *African journal of International Affairs*, Vol.7, Nos. 1&2, (2004), pp.21-34.

²³⁵ Address by the Chairperson of the African Union, H.E. President J.A. Kofuor at the Opening of the Ninth Ordinary Session of the Assembly of the African Union, Accra, Ghana, 28-29 June : 11th Ordinary Session of the Executive Council.

²³⁶ See chapter seven.

²³⁷ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 206.

²³⁸ See the Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya. EAHG/Draft/Decl. (IV) Rev.1

²³⁹ See generally, Timothy Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development*, (Ashgate Publishing, 2005).

Indeed the turn of the 21st Century, saw the 'fully decolonised Africa,' with apartheid having 'been consigned to the ignominy of history.'²⁴⁰ However, the 'the liberation of the yoke of colonialism did not automatically bring about peace and prosperity for Africa.'²⁴¹ Instead, as shown in chapter seven, the post colonial system paved way the systematic *coup d'états* and gross violations of human rights which reached their watershed in the 1990s.²⁴² In the wider context, the increase in the marginalisation of the continent brought about the geopolitical changes resulting from the Cold War, and the frustrations of the post-1945 universal system compelled African leaders to replace the OAU.²⁴³ This organisation 'effectively died of a cancer of inefficiency because it had not lived up to its ideals of promoting peace security and development.'²⁴⁴ In its place, the launch of the new AU formed a 'critical moment in the quest of African peoples for a politically united and economically integrated continent.'²⁴⁵

As demonstrated in the coming chapters, the regional principles contained in the Constitutive Act of the AU represented the dramatic shift from the previous concept of non-interference to that of non-indifference.²⁴⁶ Significantly, it also brought with it the right to intervene and deal with conflicts such as that in Darfur against the background of Rwanda which had formed 'a deplorable example of the international community's disinterest in the African continent.'²⁴⁷ Indeed, some have compared the emergence of the AU on the world stage as akin to that of the transformation of the League of Nations into the UN.²⁴⁸ However, as the rest of this thesis will show, some of the key features of the AU, such as the practice of some of its major organs,

²⁴⁰ Assembly of the African Union, First Ordinary Session: Decisions and Declarations, 9 - 10 July, 2002, Durban, South Africa, ASS/AU/Dec. 1-8 (I), ASS/AU/Decl. 1-2 (I).

²⁴¹ Nsongurua J. Udombana, 'Critical Essay: Can the Leopard Change Its Spots?,' *supra* note 98.

²⁴² See chapter seven.

²⁴³ See B Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 232.

²⁴⁴ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

²⁴⁵ T. Maluwa, 'The Constitutive Act of the African Union and Postcolonial Institution-building in Africa,' *supra* note 206.

²⁴⁶ Ambassador Said Djinnit, Commissioner of the Peace and Security Council (PSC) of the African Union (AU), Addis Ababa June 28, 2004

²⁴⁷ Daniela Krosiak, Book Review of Arthur Jay Klinghoffer, 'The International Dimension of Genocide in Rwanda (1998), 75 *INT'L AFF.* 877 (1999).

²⁴⁸ See 'U.S. Ambassador to the African Union, Cindy L. Courville, Presents Copy of Her Credentials to African Union Chairperson Alpha O. Konare', *U.S Embassy News*, Addis Ababa, December 22, 2006, No. 50/06. Available at No. 50/06.

continue to raise serious questions as to whether the AU treaty is indeed an old wine in new wineskin with the AU amounting to a reincarnation of the OAU.²⁴⁹

In the broader context, the quest to reduce the significance of imposed and artificial state borders have been welcomed as a prelude towards economic integration, which goes hand in hand with peace and stability.²⁵⁰ On the other hand, concerns about regional hegemonies have been made with reference to Nigeria and South Africa in their quest to dominate key initiatives in order to pursue their own parochial foreign policy interests.²⁵¹ Most notably, the continued fear and mistrust by African states, of the intentions of Libya in pushing the AU agenda will be demonstrated in chapter seven. Furthermore, the issue of funding and availability of resources for the AU and its new organs remains a challenge.²⁵²

In conclusion, the establishment of the new AU was not an event but an ongoing project. Rather than amounting to fully established regime, its formation represents a gradual process whose 'organisational framework [is] aimed at providing the parameters for the future political integration the continent.'²⁵³ Driven by two contrasting paths in the form of immediate federalists and gradualists, 'the Union serves as guide map of where Africa wants to go.'²⁵⁴ It therefore 'forms part of a progression and is unlikely to be the final phase.'²⁵⁵ While the two opposing visions and interpretation of integration continue to be contested, the ongoing dialogue between the two remains part of the continent's historic steps towards achieving full political and economic unity.²⁵⁶

²⁴⁹ N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', *supra* note 98. See also Adekeye Adebajo, 'The Curse of Berlin: Africa's Security Dilemmas', *IPG* 4/2005.p 85; Adejo, Dr. Armstrong Matiu 'From OAU to AU: New Wine in Old Bottle?', *supra* note 50; Cameron Duodu, 'Give Unity a Chance', *News Africa Magazine*, July 29, 2002, pp.20-21; Jakke Cilliers, 'Towards the African Union', *supra* note 214; Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

²⁵⁰ Timothy Murithi, 'The African Union: Pan-Africanism, Peacebuilding and Development', (Ashgate Publishing, 2005), p. 45.

²⁵¹ Chris Landberg, 'SA Should Take Heed of the Harsh Criticisms against NEPAD' *City Press*, 12 March 2006, p.28.

²⁵² See chapter six, seven and nine.

²⁵³ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 206.

²⁵⁴ C. Packer and D. Rukare, 'The New African Union and its Constitutive Act', 96, *AJIL*, (2002) p. 379.

²⁵⁵ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 13.

²⁵⁶ T. Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 21.

Chapter Six

The African Union's Institutional Security

Framework: A Critical Analysis

A: Introduction

The formal inauguration of the African Union (AU) in Durban, South Africa on 9 July 2002, marked 'a new era in institution-building in postcolonial Africa.'¹ Bearing in mind that violent conflicts had constituted a major impediment to African unity and economic prosperity, African leaders finally placed the concept of peace and security into its proper perspective. In linking wars to economic development, the establishment of the AU institutional architecture of peace and security reflected a motivation to 'create propitious conditions for socio-economic development and integration of the Continent.'² This was evident from the fact that the AU's constitutional framework was based on the Treaty establishing the African Economic Community (Abuja Treaty),³ which envisaged the formation of an African Economic Community by the year 2025.⁴

In its set up, the constitutive Act (CA) of the AU amounted to an institutionalisation of the ideals of Pan-Africanism.⁵ As it stands, it represents a radical departure from the political, legal and institutional set up of the former Organisation of African Unity (OAU).⁶ In sharp contrast to the OAU, which had only three organs, the AU possesses no less than 17 institutions. These include the Assembly of the Heads of State, the Peace and Security Council, the AU Commission, the Executive Council, the Pan

¹ T Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *Leiden Journal of International Law*, 16, (2003), pp. 157-170.

² See preamble to the African Union Non-Aggression and Common Defence Pact Adopted by the 4th Ordinary Session, Abuja, Nigeria, 31 January, 2005.

³ 4th Extraordinary Session of the Assembly of Heads of State and Government. 8-9 September 1999, Sirte, Libya, EAHG/Draft/Decl. (IV) Rev.1. See chapter five.

⁴ The Treaty Establishing the African Economic Community 1991. See also the 'Final Communiqué of the First Extra Ordinary Summit', The First Extra-Ordinary Summit of the COMESA Authority of Heads of State and Government for the launching of the COMESA Free Trade Area, Lusaka, Republic of Zambia, 31 October, 2000; Asante, SKB, 'Towards an African economic community', Africa Institute of South Africa, 2001; Olufemi A. Babarinde, 'Analyzing the Proposed African Economic Community: Lessons from the Experience of the European Union', Third ECSA-World Conference on The European Union in a Changing World, Brussels, Belgium, 19-20 September, 1996. Available at <http://www.ecsanet.org/conferences/ecsaworld3/babarinde.htm>.

⁵ Tim Murithi, 'Institutionalising Pan-Africanism: Transforming African Union Values and Principles into Policy and Practice', *ISS Paper* 143, (June 2007).

⁶ T Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 1.

African Parliament, the Court of Justice, the Permanent Representatives Committee, seven Specialised Technical Committees, the Economic, Social and Cultural Council and three financial institutions i.e. the African Central Bank, the Monetary Fund and the Investment Bank.⁷

Having elaborated the historical processes, as well as the political and legal discourses underpinning the new AU framework in chapter five, the present chapter analyses the powers and responsibilities of the institutions that were created through the Constitutive Act as amended by several Protocols. A close examination of the main component of the AU's evolving mechanism for peace and security demonstrates that the current system is grounded upon a robust security system comprised of the organs listed above and the continent's sub-regional organisations. As shall be shown below, the AU's institutional framework also constructs relationships with the UN and the wider international community.

What will become clear is the extent to which the current system departs from the previous practice under the OAU regime. The chapter shall also highlight the increased roles of African regional and sub-regional organisations, as well as elaborate on the evolving relationship with the UN, and other international organisations. Finally, it also aims to assess the longer term prospects that the emerging AU's relationship will have with the UN, including the prospects of a formalised division of labour.

B: Aims, Purpose and Structure

To some, 'the speedy negotiation and elaboration of the Constitutive Act seems to have led to the adoption of a sketchy instrument which faile[d] to cover certain issues that merited inclusion'.⁸ In particular, the Act was severely criticised as wanting in respect to the functional attributes, institutional powers and interrelationships between the different organs of the Union.⁹ In order to reveal its true picture with regard to peace and security, the intended scope of this chapter does not allow a detailed examination of all the bodies within the AU. Suffice to say here that while all the institutions remain

⁷ Article 5(1) of the Constitutive Act of the African Union.

⁸ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union', *Netherlands International Law Review*, Volume 51, Issue 02, p. 195 at 198.

⁹ See C.Parker and D. Rukare, 'The new African Union and its Constitutive Act', *96 American Journal of International Law* (2002) p. 365 at 374.

central to the running of the Union, priority is given to the key organs of the Union that form the basic apparatus of Africa's regional system for peace and security. After identifying the institutions that are most relevant to the area of regional peace and security, the chapter then engages in a comparative analysis of the similarities of roles and functions, as well as the differences in the AU's internal composition, working and organisation. In doing so, it also assesses the linkages between the AU's internal mechanisms and their relationship with the UN and other international and regional organisations.

The chapter is organised in five main sections. The first part begins with a broad examination of the architectural design of the AU. What will emerge from this section will be the ongoing doctrinal debate on the appropriate model of the Union discussed in chapter five. Ultimately, some of the key similarities and differences between the AU and other regional organisations are also highlighted. The second section identifies and examines the key institutions of the AU. Precedence is given to the AU Assembly, the Peace and Security Council, the Commission, the African Standby Force, Early Warning System, Panel of the Wise and the Special Fund. The selection of these organs is based on their connection to the subject of African regional peace and security, particularly given their designated functions during grave circumstances.¹⁰

As stated above, the AU's institutional framework creates formal linkages with the traditionally recognised Regional Economic Communities (RECs). This arrangement is discussed in the third section which elaborates on the role of RECs in the promotion and maintenance of regional peace and security. Given the background of weak linkages in the past between the OAU and sub-regional organisations, this section not only assists in measuring the extent to which the AU has set right previous deficiencies but also highlights the direction that such cooperation must take in order to meet contemporary peace and security demands. The issue of funding of the Union deserves special mention as it touches on the working of the old and new institutions within the AU. This in turn impacts on the viability, accountability and credibility of the Union. Thus, the fourth section will assess the resource requirements for the AU and its institutions.

¹⁰ Article 2 (2) of the 2002 Protocol Establishing the Peace and Security Council.

In particular, it addresses the serious questions that have emerged in regard to the AU's budget requirements particularly given the dramatic increase in the AU's institutions and mandate. This section also highlights how the current system differs from the practice of the OAU, whose over-reliance on membership dues meant that it was hampered by chronic funding problems. Fortunately, what becomes clear from this discussion is that the shortcoming brought about by Africa's resource requirements opens the way for a deeper relationship with the UN.

Indeed, a central theme that runs through this study is that of an evolving relationship of cooperation and coordination between the AU and the UN. On this point, Abass notes that, at present, the developing relationship of cooperation between the AU and the UN 'has been largely shaped by chances and opportunism rather than by a carefully considered *modus operandi*.'¹¹ Therefore, the fifth section dedicates itself to an analysis of the harmonisation between the two institutions and suggests the structural institution linkages that should be put in place between the two organisations in order to meet the demands of regional peace and security. Finally, the chapter concludes by arguing that, at present, despite notable improvement from past practice, the AU's security institutional framework of peace and security still has shortcomings because many of its programmes are not supported by clear and coherent operational strategies.¹²

1.1 The Debate on the Model and Ultimate Design of the African Union

The adoption of the Constitutive Act immediately raised serious issues amongst states in regard to the basis of institutional set up of the AU.¹³ Indeed, specific questions revolved around the very meaning of the 'union' as well as its political, economic and legal implications for the continent.¹⁴ Also, matters arose as to whether the AU

¹¹ Ademola Abass, 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organizations?' In N. D. Lewis (ed) *Global Governance and the Quest for Justice* (Oxford: Hart Publishing, 2006), p. 93.

¹² Wafula Okumu, Tseppe Motumi, Funmi Olonisakin and Firmino Mucavele, 'Dynamics of The African Union (AU), the new Common African and Defence and Security Policy (CADSP) and the New Partnership for the Development of Africa (NEPAD)', in *Networking the Networks: Supporting Regional Peace and Security Agendas in Africa*, Ann Fitz-Gerald and Anicia Lala (GFN-SSR, UK) 2004. Available at http://www.ssr-online.org/ebooks_pages.cfm?b=3&id=15&p=15.

¹³ See chapter five.

¹⁴ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 1

amounted to a supranational organisation or whether it was better defined as an intergovernmental institution.¹⁵

These disagreements were reminiscent of the theoretical debates in regard to European integration.¹⁶ Since the 1950s, these debates centred on 'neofunctionalism' and 'intergovernmentalism.'¹⁷ Similarly, in the African context, intense discussions ensued in regard to whether the AU structure should borrow from other models of integration such as the EU, the US and ASEAN. Other deliberations centred on whether the new continental unity should be something new and based on Africa's own experience and identity. While some favoured the EU structure due to its notable success as a model of regional integration,¹⁸ some perceived it as being tantamount to 'recolonization.'¹⁹

But the debate on the appropriate model for African integration had begun much earlier than the formation of notable regional integration such as that made possible by the EU and ASEAN. It will be recalled²⁰ that Nkrumah, in the early 1960s had called for an African high command, a common Market for Africa, an African Currency, an African Monetary Zone, an African Central Bank, a continental communication system, a common Foreign Policy and Diplomacy, a Common Defence and Common African Citizenship.²¹

At the turn of the twenty first century, these principles later found an advocate in Libya's Muammar Ghaddafi. However, his proposals for a unified African Government were met with stiff opposition from other Heads of State.²² Nevertheless,

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ For more on these debates, see Ben Rosamond, *Theories of European Integration*, (Basingstoke, 2000)

¹⁸ See chapter two.

¹⁹ See John Bart Agami 'Colonization and Recolonization Part III', interview held on 30/04/2006, *Escaping old ideas of Debt, Aid and Development*. Available at <http://asp.african-institute.org/articles.asp?indeks=184>.

²⁰ See chapter five.

²¹ Steven Maja, 'Distilling the vision of an African Union', *Southern African Political & Economic Monthly* (SAPEM), Vol.14, No. 6, (2001), pp. 5-6; T.A. Imobighe, 'An African High Command: The Search for Feasible Strategy of Continental Defence', *Afr Aff* (Lond) (1980) 79: 241-254 ; See C. O. C. Amate, *Inside the OAU: Pan-Africanism in practice* (Macmillan, London, 1986), pp. 37-8; T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 1.

²² Jakkie Cilliers, 'Commentary: Towards the African Union', *African Security Review* Vol 10 No 2, (2001); Siegmund Schmidt/Keith Gottschalk, 'The African Union and the New Partnership for Africa's Development: Strong Institutions for Weak States?', *IPG/2004*.

as it continues to be shown throughout this study, the enduring influence of Libya during the discussions on the future of the AU led to a series of concessions. Subsequently, the visible struggles by legal experts in an attempt to keep divergent views on board resulted in compromise riddled with paradoxes. As it turned out, the final AU model resembled the EU model in that it aspired to establish a common market and a single currency. However, it was at the same time based on the ASEAN model of states whose immediate priority was to preserve their national sovereignty.²³

The overall institutional structure of the AU embodied in the Constitutive Act of the AU was then left for the adoption and ratification by member states. Notably, there was no requirement of submission for democratic referenda to approve countries' accession to the Union. This was despite the latter's purported inclusion of civil participation in its framework and commitment to democratic principles.²⁴ With the framework of the new Union finally set up, the established organs in turn required institutional capacity and considerable skill in order to operate effectively. However, as will be shown in the next section some of the specific functions, powers and duties of the institutions have not been properly determined, specified and prioritised. What follows is a discussion of the specific powers and duties of some of the key institutions, their operations in practice, as well as their strengths and limitations.

2.1 The AU Assembly

The AU Assembly is designated as the chief decision making body of the Union. However, although it is listed by the Constitutive Act as the 'supreme organ'²⁵ of the AU, the powers and practice of the AU Peace and Security, which is discussed below, suggests otherwise.²⁶ The Assembly organ is headed by the Chairperson²⁷ and consists of all the Heads of State and Government of member states or their duly elected representatives.²⁸ In similar fashion to the former OAU, the Assembly meets once in a year with two-thirds of the total membership of the Union forming a quorum at any

²³ See, 'The Architecture and Capacity of the African Union', *Issues Paper for African Union Symposium, 2007*. Available at www.justiceafrica.org/wp-content/uploads/2006/07/AU_IssuesPaper_ArchitectureandCapacity.pdf. See also chapter two.

²⁴ *Ibid.*

²⁵ Article 6(2) of the Constitutive Act of the AU.

²⁶ See chapter nine.

²⁷ See article 6 (5) of the Constitutive Act of the AU.

²⁸ See article 6 (1).

meeting.²⁹ However, the Assembly may meet at the request of a member state and on the approval of a two-thirds majority of the member states. The decisions of the Assembly are made by 'consensus, or failing which, by a two-thirds majority of member states.'³⁰

A key problem with the Constitutive Act is that it fails to articulate the legal status of AU decisions. Nevertheless, the Assembly's Rules of Procedure provide that regulations and directives are legally binding while its declarations and recommendations remain merely persuasive.³¹ However, the latter may acquire a status in international law and thereby become binding if their provisions amount to custom by way of state practices and *opinio juris*.³² The AU Assembly decisions are particularly significant as they include the power to make a ruling in regard to the Union's right to intervene. On this point, Wafula Okumu observes that:

If a decision [to intervene] is issued as a regulation or directive, then it will be binding to the Member States and all measures will be taken to ensure that it is implemented within 30 days. However, if a decision is taken as a 'recommendation, resolution or opinion,' then it will not be binding.³³

In addition to possessing the authority to decide on intervention, the Assembly possesses a wide array of powers which are spelt out in article 9 of the AU's Constitutive Act.³⁴ Chief amongst them is the power to determine the common policies of the Union; to receive, consider and take decisions on reports and recommendations from the other Union bodies, including the Peace and Security Council which, as will be shown below, may recommend the use of sanctions and military intervention by the Union against member states.³⁵

²⁹ Article 6(3) and 7(2).

³⁰ Article 7 (1).

³¹ See Rule 33 of the Rules of Procedure of the Assembly of the African Union, adopted during the First Ordinary Session, 9-10 July 2002, Durban, South Africa. See also Viljoen, Frans and Louw, Lirette, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation', *Journal of African Law*, 2004, 48 (1), p. 9.

³² See ICJ decision in the *North Sea Continental Shelf Cases* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), para. 77. See also Shabtai Rosenne, *Practice and Methods of International Law*, (Oceana Pubns, 1984).

³³ Quoted by Kristiana Powell in 'The African Union's Emerging Peace and Security Regime Opportunities and Challenges for Delivering on the Responsibility to protect', Monograph series no. 119, *Institute for Security Studies*, (2005).

³⁴ See article 9 (g)- (i).

³⁵ See article 4, protocol on the Amendments to the Constitutive Act of the African union, 3 February and 11 July 2003. See also the AU Assembly Rules of Procedure Rule 4 (e).

Significantly, the Assembly may delegate any of its powers and functions to any organ of the Union.³⁶ Magliveras and Naldi observe that this ‘could potentially give rise to significant problems, since it was clearly not the intention of the Act’s drafters to have lesser organs to decide on such fundamental issues as, for example, the admission of new Member States or the establishment of new organs.’³⁷ However, as stated earlier, the Assembly meets only once a year and takes decisions on the basis of consensus or, failing that, a two-thirds majority. Therefore to require the organ to deal with the vast array of matters concerning the Union would be time-consuming and ultimately impracticable.

However, what would undoubtedly attract criticisms of the working of the Assembly is the role of regional politics particularly in the area of peace and security. This is particularly so given past practice reveals the traditional reluctance by African Heads of States and governments to endorse interventionism amidst fractious subregional alignments even in the face of grave circumstances.³⁸ As will be shown in chapter nine, the two AU peace operations, in Burundi³⁹ and Darfur,⁴⁰ were only conducted with host state consent despite the magnitude of the crimes committed in the respective territories. Clearly in this regard, the possibility of securing a two-thirds majority in the face of a hostile host must be thought unlikely at best.⁴¹

Indeed there remains the fear that the politicisation of interpretation of the Assembly’s power to determine the existence of the grounds for intervention may also be ‘hijacked’ by the more powerful states within the AU.⁴² However, the absence of veto rights and the requirement of consensus, as well as the occasional requirement of the assent of a two-thirds majority of member states, ensures that the decision making process is not

³⁶ Article 9 (2) of the Constitutive Act of the AU.

³⁷ Magliveras K.D and Naldi G.J, ‘The African Union: A New Dawn for Africa?’, *International and Comparative Law Quarterly*, Volume 51, Number 2, (April 2002), pp. 415-425.

³⁸ See chapter five.

³⁹ See Alex J. Bellamy and Paul D. Williams, ‘Who’s Keeping the Peace? Regionalization and Contemporary Peace Operations,’ *International Security* 29, no. 4 (2005), pp. 157-95.

⁴⁰ See Paul D. Williams, ‘Military Responses to Mass Killing: The African Union Mission in Sudan,’ *International Peacekeeping* 13, no. 2 (2006).

⁴¹ Alex J. Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’, *Ethics & International Affairs* 20 (2), 143-169.

⁴² K. 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’, 3 (1) *African Human Rights Law Review Journal* (2003).

controlled by a single state.⁴³ In addition, as stated in the next chapter, the establishment of the African Court of Justice,⁴⁴ which is the 'principal judicial organ of the Union,'⁴⁵ will be instrumental in solving disputes by ensuring that the interpretation of situations amounting to war crimes, genocide and crimes against humanity accord with the definitions contained in texts such as the 1998 Rome Statute.⁴⁶

2.2 The AU Peace and Security Council

It will be recalled that the AU's Constitutive Act was hastily passed leading to calls for amendment.⁴⁷ During this time, it was discovered that the new institutional framework lacked 'the political mechanism to implement the Union's ambitious objectives.'⁴⁸ Subsequently, the adoption of the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the AU,⁴⁹ which established the AU Peace and Security Council, was a major amendment of the AU Act. This is because of the fact that not only did it replace the Central Organ of the OAU mechanism, it also confirmed the AU Peace and Security Council (now hereby AU PSC) as the 'standing decision-making organ for the prevention, management and resolution of conflicts.'⁵⁰ In apparent reference to the horrors of Rwanda, the AU PSC is also designated as a 'collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.'⁵¹

In reality, though created by the AU Assembly pursuant to article 5(2) of the CA,⁵² recent practice and its allocated functions show the AU PSC possess more powers than the Assembly.⁵³ Significantly, the Peace and Security Council is empowered 'to 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

⁴³ Article 7 (1) Constitutive Act of the AU.

⁴⁴ Article 19 of the Protocol of the Court of Justice of the African Union adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

⁴⁵ Article 2 (2) the Protocol of the Court of Justice of the African Union.

⁴⁶ See the Rome Statute of the International Criminal Court: Article 6 (genocide), art 7 (crimes against humanity) and art 8 (war crimes).

⁴⁷ See chapter five.

⁴⁸ Jakkie Cilliers, 'Commentary: Towards the African Union', *supra* note 22.

⁴⁹ The PSC Protocol came into effect on 26 December 2003, after having been ratified by the requisite 27 Member States.

⁵⁰ Article 9 of the Protocol on Amendments to the Constitutive Act.

⁵¹ Article 2 of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁵² Provides that in addition to existing institutions, the AU also consists of 'organs that the Assembly may decide to establish'.

⁵³ See chapter nine.

circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments.’⁵⁴ In light of this provision, it is highly unlikely that the AU Assembly would overrule a recommendation from the AU PSC.

The AU PSC is also mandated to ensure the effective implementation of decisions of the AU member states in conflict prevention, peacekeeping, peace-support operations and intervention, as well as peace-building and post-conflict construction.⁵⁵ In carrying out these tasks, the AU PSC ‘is guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights.’⁵⁶ However, this directive remains unclear given the vague nature of the relationship between the AU, the UN and general international law discussed throughout this study. Nonetheless, as suggested below, a formalised division of labour would go along way in clarifying the evolving relationship of cooperation between the AU and UN.

In similar fashion to the UN Security Council, the AU PSC consists of 15 states.⁵⁷ However, its membership is tied to the commitment to uphold the principles of the Union as well as the contribution to the promotion and maintenance of peace and security in Africa, to which experience in peace support operations is an added advantage.⁵⁸ This arrangement automatically favours some states⁵⁹ over others.⁶⁰ Significantly, it also seems to go against the ‘the principle of equitable regional representation and rotation,’⁶¹ which is meant to ensure that the AU PSC reflects regional balance within Africa. This point is picked up below in the section that

⁵⁴ Article 7 (e) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁵⁵ Musifiky Mwanasali, ‘Emerging Security in Architecture in Africa’, *Centre for Policy Studies, Policy: Issues and Actors*, vol.7, no.4, February 2004, p. 13.

⁵⁶ See ‘Assembly of the African Union, First Ordinary Session: Protocol Relating to the Establishment of the Peace and Security Council of the African Union’, Durban, South Africa, 9 July, 2002.

⁵⁷ Article 5(1) of the Protocol Relating to the Establishment of the Peace and Security Council 2002.

⁵⁸ See article 5 (2)(a)-(i) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁵⁹ The most prominent African contributors to UN peacekeeping are Nigeria, Ghana, Kenya, South Africa, Ethiopia, Zambia, Senegal Guinea-Bissau and Tunisia.

⁶⁰ States such as Somalia, Sudan and other states with civil strife are the most unlikely to meet the criteria for PSC membership as they have made little, if any, contribution to UN peace operations.

⁶¹ See article 5 (2) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

discusses similarities, differences and the envisaged relationship between the AU PSC and the UN Security Council.

Meanwhile, member states to the AU PSC are also required to adhere to 'a commitment to honor financial obligations to the Union.'⁶² While this could significantly increase its funding, it may put off states that are already in arrears from seeking membership and potentially lead to the AU PSC being dubbed as the 'Rich Club'. Another key requirement relates to the respect for constitutional governance, the rule of law and respect for human rights.⁶³ However, the lack of clarity regarding any uniform standards expected under this condition may ultimately mean that key states, such as Nigeria, Libya, Algeria and Zimbabwe, could possess seats within the AU PSC due to their influence on the AU agenda despite potentially failing the test on democratic principles and respect for human rights.

Undoubtedly, such an episode would lead to the AU PSC losing international legitimacy and confidence which may in turn impact on the availability of external funding and result in decreased resources.⁶⁴ Finally, in similar fashion to members of the UN Security Council,⁶⁵ the AU PSC member states are also required to provide effective and continuous diplomatic presence⁶⁶ at the AU Headquarters in Addis Ababa.⁶⁷ This makes sense because the AU PSC functions continuously.⁶⁸ The AU PSC meets at the level of Permanent Representatives at least twice a month and at the Ministers or Heads of State and Government level at least once a year.⁶⁹ The continuous diplomatic presence also enables the AU PSC to meet at any time and thereby respond quickly to emerging crisis.

⁶² Article 5 (2) (j).

⁶³ Article 5(2) (g).

⁶⁴ J. Cilliers, K Sturman, 'Challenges facing the AU's Peace and Security Council', *African Security Review*, 2004.

⁶⁵ Article 28 of the UN Charter.

⁶⁶ Article 8 (1) of the 2002 Protocol establishing the Peace and Security Council.

⁶⁷ Article 5.

⁶⁸ Article 8 (1).

⁶⁹ Article 8(2). See Maluwa, T, 'Fast-tracking African Unity or Making Haste Slowly?', *supra* note 8.

However, whilst the meetings of the AU PSC are designated to be held at the Headquarters of the Union,⁷⁰ such meetings may be held at the invitation of a state provided that two-thirds of its members agree.⁷¹ The chairpersonship of the AU PSC is held for one calendar month on a rotational basis by its member states in the alphabetical order of their names and the numbers of members required to constitute a quorum is set at two-thirds of the total membership of the AU PSC.⁷²

In practice, the AU PSC has been one of the most visibly active organs of the AU. It has acted on the advice of the Military Staff Committee, which comprises senior military officers of the members of the AU PSC and assists in 'all questions relating to military and security requirements for the promotion and maintenance of peace and security in Africa'.⁷³ For example, immediately after its inception, the AU PSC authorized the deployment of 3,500 military and civilian personnel for the AU's first peace operation, the African Union Mission in Burundi (AMIB) in February 2003.⁷⁴

It later instituted the African Union Mission in Sudan (AMIS) in June 2004⁷⁵ and the African Union Mission in Somalia (AMISOM) in March 2007,⁷⁶ as its most recent deployment. As will be seen from chapter nine in regard to the Darfur conflict, despite the huge challenges, the AU PSC remains a 'potentially powerful tool for the prevention, management and resolution of violent conflict.'⁷⁷ Meanwhile, due to their overlapping mandates and the envisaged relationship of cooperation, a brief comparison is warranted at this stage between the AU PSC and the UN Security Council. This discussion will also highlight the intended linkages between the two institutional organs.

⁷⁰ Article 8 (3) of the 2002 Protocol establishing the Peace and Security Council.

⁷¹ Article 8(4).

⁷² Article 8 (6) and 8 (7).

⁷³ Article 13 (8) of the 2002 Protocol establishing the Peace and Security Council.

⁷⁴ See 91st Ordinary Session of the Central Organ of the (Organisation of African Unity) Mechanism for Conflict Prevention, management and Resolution, meeting at ambassadorial level in Addis Ababa on 2 April 2003 doc Central Organ/MEC/AMB/Comm. (XCI). See also Peace and Security Council, Second Ordinary Session 25 March 2004, Addis Ababa, Ethiopia, PSC/PR/Communique (II).

⁷⁵ See the Communiqué on Conflict Situations in Africa, 26 May 2006, PSC/AHG/Comm. (X), AU PSC 10th meeting. See also *Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan*, 4 June 2004.

⁷⁶ 'See '69th meeting of the peace and Security Council', *Agence de Presse Africaine*, 22 January 2007

⁷⁷ See Secretary-General Kofi Annan's message to the official ceremony marking the inauguration of the Peace and Security Council of the African Union, in Addis Ababa on 25/05/2004. UN Press Release SG/SM/9327 AFR/944.

2.2.1 The Similarities and Differences as well as the Relationship between the AU PSC and the UN Security Council

The AU PSC was intended to be an African version of the UN Security Council.⁷⁸ However, its powers are more clearly defined than those in Chapter VII of the UN Charter,⁷⁹ as shown below. It will be recalled from chapter three that the post 1945 international legal system entrusted the UN Security Council with the 'primary responsibility for the maintenance of international peace and security.'⁸⁰ Similarly in the African context, the AU PSC has wide powers it being the 'standing decision-making organ for the prevention, management and resolution of conflicts.'⁸¹ However, although the two bodies deal with peace and security and are patterned somewhat along the same lines, there are notable differences.

The key distinctions between the two bodies lie in composition, organisation and working. For example, in regard to composition and powers, a serious debate had ensued in regard to regional hegemony being allowed permanent seats and right of veto in the 15 member AU PSC.⁸² However, these arguments were rejected. Hence, In contrast to the UN Security Council, the AU PSC was founded without any distinction between permanent and non-permanent members. Instead, member states are elected 'on the basis of equal rights'⁸³ with each member possessing one vote. In further contrast to the UN Security Council,⁸⁴ there exists no right of veto within the AU PSC and the principle of consensus acts as the main guide in seeking resolutions. This means that the AU PSC possesses a strong authority and is capable of making decisions without the presence of a threat or use of veto.

⁷⁸ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 1. For more on the Peace and Security Council powers, see Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), pp. 213-251; Levitt, J. I., 'The Peace and Security Council of the African Union: The Known Unknowns', 13 *Transnational Law and Contemporary Problems* (2003), 109-37.

⁷⁹ See Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *ibid.*

⁸⁰ Article 24 (1) of the UN Charter.

⁸¹ Article 9 of the Protocol on Amendments to the Constitutive Act.

⁸² Musifiky Mwanasali, 'Emerging Security in Architecture in Africa,' *supra* note 55.

⁸³ Article 5 (1) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council. Note the contrast with the UN Security Council. See sections on Security Council (chapters three and eight).

⁸⁴ See chapter three.

In this regard, during voting, decisions on procedural matters are settled by simple majority and all other matters are determined by a two thirds majority.⁸⁵ However, it is worth noting that five of the AU PSC members are elected for a period of three years, while the remaining ten serve for two years.⁸⁶ This has been interpreted as necessary in order to 'guarantee a degree of continuity.'⁸⁷ However, Adebajo observes that the creation of five renewable three-year seats⁸⁸ to work alongside 10 non renewable two-year seats is a recognition that some countries are still 'more equal than others.'⁸⁹ This anomaly is despite the obligation to 'apply the principle of equitable regional representation and rotation,'⁹⁰ ensuring that the AU PSC reflects regional balance within Africa.

In parallel to the member states obligation under articles 24 (1)⁹¹ and 25⁹² of the UN Charter in relation to the Security Council, member states of the AU are similarly obligated to 'agree to accept and implement the decisions of the Peace and Security Council,'⁹³ which 'acts on their behalf.'⁹⁴ In this regard, African states are required to 'extend full cooperation to, and facilitate action by the Peace and Security Council for the prevention, management and resolution of crises and conflicts, pursuant to the duties entrusted'⁹⁵ to the organ.

One key similarity between the two bodies is that the UN Security Council and the AU PSC may hold closed meetings.⁹⁶ However, and in sharp contrast to UN Security Council practice, any member of the AU PSC that is party to a conflict or a situation under consideration by the AU PSC is barred from participation in either in the discussion or in the decision making process relating to that conflict or situation.⁹⁷ Notably, this provision is aimed at enhancing neutrality and impartiality in

⁸⁵ See article 8 (13) of the Protocol Relating to the Establishment of the Peace and Security Council.

⁸⁶ Article 5 (1) & (2).

⁸⁷ Omar A. Touray, 'The Common African Defence and Security Policy', *African Affairs*, volume 104 number 417, pp. 635-656, (2005).

⁸⁸ Currently occupied by Nigeria, South Africa, Algeria, Ethiopia, and Gabon.

⁸⁹ Adekeye Adebajo, 'The Curse of Berlin: Africa's Security Dilemmas', *IPG* 4/2005.

⁹⁰ See article 5 (2) of the Protocol Relating to the Establishment of the Peace and Security Council.

⁹¹ See chapter three.

⁹² *Ibid.*

⁹³ Article 7 (3) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁹⁴ Article 7 (2).

⁹⁵ Article 7 (4).

⁹⁶ See article 48 of the UN Security Council - Provisional Rules of Procedure, United Nations, New York, 1983, S/96/Rev.7 & article 9 of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁹⁷ Article 7 (4) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

deliberations which would otherwise be at risk of being tainted by an influence of a AU PSC member state in pursuit of its national interests. However, the AU PSC may invite such a member 'to present its case to the Peace and Security Council as appropriate, and shall, thereafter, withdraw from the proceedings.'⁹⁸

It is worth noting that the AU PSC may also hold open meetings and in this regard invite member states not members of the AU PSC, to present their case and participate in deliberations so long as they are 'party to a conflict or a situation under consideration by the Peace and Security Council'.⁹⁹ In addition, it may invite non-members of the Peace and Security Council in matters where the states' 'interests are especially affected.'¹⁰⁰ Finally, 'any Regional Mechanism, international organization or civil society organization involved and/or interested in a conflict or a situation under consideration by the AU PSC may be invited to participate, without the right to vote, in the discussion relating to that conflict or situation.'¹⁰¹ The latter provision is significant for reasons explained below in regard to the Continental Early Warning System.

The AU PSC will undoubtedly regulate much of Africa's relationship with the UN Security Council.¹⁰² Certainly, the compatibility of the functioning of the AU PSC with the UN Charter and general international law is evident in the former's adherence to the principles such as that of 'peaceful settlement of disputes and conflicts', 'respect for the sovereignty and territorial integrity of Member States' and the principle of 'non interference by any member state in the internal affairs of another.'¹⁰³ However, a key principle which is absent in the AU PSC framework is the prohibition against the use of force.¹⁰⁴ This may appear surprising given the nature of this norm in international relations.¹⁰⁵ Nevertheless, as shown in the coming chapter, when read together, the AU and the UN framework on the use of force are in more harmony than previously thought. Furthermore, the Protocol Establishing the Peace

⁹⁸ Article 8 (9).

⁹⁹ Article 8 (10) (a).

¹⁰⁰ Article 8 (10) (b).

¹⁰¹ Article 8 (10) (c). See also article 11.

¹⁰² J Cilliers, K Sturman, 'Challenges facing the AU's Peace and Security Council', *supra* note 64.

¹⁰³ See article 4 of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

¹⁰⁴ On the prohibition against the use of force, see chapter three.

¹⁰⁵ Maluwa, T, 'Fast-tracking African Unity or Making Haste Slowly?', *supra* note 8.

and Security Council is an amendment of the Constitutive Act whose article 4 (f) clearly outlines the application of the prohibition against the use of force.¹⁰⁶

However, there is hardly any provision within the AU PSC framework that corresponds to article 53 of the UN Charter or obligates it to report to, or seek its authorisation or supervision from the UN Security Council for any operations it undertakes. Nevertheless, the Protocol relating to the establishment of the PSC details how the Peace and Security Council will collaborate and compliment the UN Security Council. Under the protocol, the AU PSC is mandated to ‘cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security.’¹⁰⁷

In this regard, the AU PSC is required to develop a strong ‘partnership of peace and security between the Union and the Security Council.’¹⁰⁸ Moreover, ‘in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security,’ the Union is obligated to seek recourse, where appropriate to ‘the United Nations [in order] to provide the necessary financial, logistical and military support for the African Unions’ activities in the promotion and maintenance of peace, security and stability in Africa.’¹⁰⁹

It deserves to be mentioned that the AU PSC faces many hurdles some of which are similar to those facing the UN Security Council, although the majority portray the unique circumstances facing Africa.¹¹⁰ Firstly, in spite of its immense powers, the AU PSC lacks a formal secretariat to support its work.¹¹¹ This is compounded, as will be shown further below, by the limited availability of resources facing the AU as a whole. Furthermore, despite the envisaged relationship of cooperation between the AU PSC, sub-regional organisations and member states discussed further below, there exist

¹⁰⁶ See chapter seven.

¹⁰⁷ Article 17 (1) of the 2002 Protocol Establishing the Peace and Security Council.

¹⁰⁸ Article 7 (k).

¹⁰⁹ Article 17 (2).

¹¹⁰ see Jeremy L. Levitt, ‘The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, supra note 78.

¹¹¹ Alex Ramsbotham, Alhaji M.S. Bah & Fanny Calder, ‘Enhancing African Peace and Security Capacity: A Useful Role for the UK and the G8? *International Affairs*, Volume 81, Number 2, March (2005), pp. 325-339(15).

fundamental coordination problems amongst these entities. These shortcomings have ensured that the AU PSC has sometimes revealed poor coordination and disparate working cultures, resulting in inconsistent policies and divergent expectations.¹¹² These failings are highly significant given the envisaged system of coordination between the AU PSC and the organs that function in conjunction with the latter and which now fall for consideration.

2.3 The Separate Organs working in Conjunction with the Peace and Security Council

In carrying out its mandate, the AU PSC is supported by the Commission, a Continental Early Warning System, an African Standby Force, a Panel of the Wise and a Special Fund.¹¹³ In this regard, the PSC 'shall use its discretion to effect entry, [into a member state] whether through the collective intervention of the Council itself, or through its Chairperson and/or the Chairperson of the Commission, the Panel of the Wise, and/or in collaboration with the Regional Mechanisms.'¹¹⁴ While the Special Fund will be discussed further below under a more suitable heading, what follows here is an analysis of the Commission, the Early Warning System, the AU Standby Force, the Panel of the Wise and their relationship with Regional Mechanisms.

2.3.1 The Commission of the AU

The AU Commission, in similar fashion to the EU Commission, constitutes the Secretariat of the Union. The Commission, being the AU's bureaucratic wing that manages the day to day work of the Union, requires considerable skill for the effective management of continental affairs, particularly in the area of peace and security.¹¹⁵ For this reason, the institution is headed by a Chairperson and number of Commissioners dealing with several different areas of policy.¹¹⁶ The Chairperson and

¹¹² Katherine N. Andrews and Victoria K. Holt, 'United Nations-African Union Coordination on Peace and Security in Africa', *Issue Brief*, (2007).

¹¹³ Article 2 (2) of the 2002 Protocol Establishing the Peace and Security Council.

¹¹⁴ Article 9 (2).

¹¹⁵ Jakke Cilliers, 'From Durban to Maputo: A Review of 2003 Summit of the African Union', *JSS Paper 76*, (2003).

¹¹⁶ The Commission has its headquarters in Addis Ababa, Ethiopia. Its departments include the Directorate of Peace and Security; Directorate of Political Affairs; Directorate of Women, Gender and Development; Directorate of Infrastructure and Energy; Directorate of Social Affairs; Directorate of Conferences and Events; Directorate of Trade and Industry; Directorate of Rural Economy and Agriculture; Directorate of Programming, Budgeting, Finance and Accounting; Directorate of

vice-chair of the Commission are elected by the AU Heads of State while the remaining commissioners are appointed by the Executive Council.¹¹⁷

Currently headed by H.E. Jean Ping, the Chairperson of the Commission is mandated to act under the authority of the AU PSC.¹¹⁸ However he may through his 'own initiative' 'use his/her good offices, either personally or through special envoys, special representatives, the Panel of the Wise or the Regional Mechanisms, to prevent potential conflicts, resolve actual conflicts and promote peace-building and post-conflict reconstruction.'¹¹⁹ In doing so, the Chairperson is required to engage 'in consultation with all parties involved in a conflict, [to] deploy efforts and take all initiatives deemed appropriate to prevent, manage and resolve conflicts.'¹²⁰ Thus, the Chairperson is able to play a key role in the pursuit of peaceful settlement of disputes in similar fashion to that of the UN Secretary General under Chapter VI of the UN Charter.¹²¹ In this regard, the chairperson has appointed a Special Representative of the Chairperson of the Commission for both Ivory Coast and the Democratic Republic of Congo.¹²²

The Chairperson is also designated to bring to the attention of the AU PSC or the Panel of the Wise any matter that may threaten peace, security and stability in the Continent.¹²³ Subsequently, the Commission is under the mandate to ensure the implementation and follow-up of the decisions of the AU PSC, including mounting and deploying duly authorized peace support missions.¹²⁴ Significantly, the Commission is obliged to 'ensure the implementation and follow-up of the decisions taken by the Assembly in conformity with Article 4 (h) and (j) of the Constitutive Act with respect to intervention by the Union.'¹²⁵ Furthermore, the Chairperson is also required to 'prepare comprehensive and periodic reports and documents, as required,

Economic Affairs; Directorate of Administration and Human Resources Development and Office of the Legal Counsel.

¹¹⁷ Rule 5 (e) of the Rules of Procedure of the Executive Council adopted by the Assembly of the African Union, First Ordinary Session, 9-10 July, Durban, South Africa, 2002.

¹¹⁸ Article 10(1) of the 2002 Protocol establishing the Peace and Security Council.

¹¹⁹ Article 10 (2) (c).

¹²⁰ Article 10(1).

¹²¹ See Chapter VI of the UN Charter.

¹²² Peace and Security Council, Communiqué of the Peace and Security Council, PSC/PR/Comm. (V) of 13 April 2004, paras D (7) and E (4).

¹²³ Article 10 (2)(a) and (b) of the 2002 Protocol establishing the Peace and Security Council.

¹²⁴ See article 10 (3) (a).

¹²⁵ See article 10 (3) (b).

to enable the Peace Security Council and its subsidiary bodies to perform their functions effectively.¹²⁶

As will be shown further below, the Chairperson of the Commission is responsible for raising and accepting voluntary funds from sources within and outside Africa that goes to the Peace Fund.¹²⁷ Other key functions include the appointment of the Panel of the Wise¹²⁸ as well as acting as the head of the chain of command of the African Standby Force,¹²⁹ which is discussed further below. It is important to note that in the exercise of the designated functions and powers described above, the Chairperson of the Commission is assisted by the AU commissioner in charge of the Directorate of AU PSC within the Secretariat.¹³⁰

Currently headed by Ambassador Djnnit, the AU commissioner in charge peace and security is responsible for the affairs of the AU PSC in its role of dealing with conflict prevention, management and resolution.¹³¹ The fact that the Peace and Security Directorate is the largest of the eight substantive Directorates 'reflects the inevitable focus of the AU on (more expensive) conflict management as opposed to (much cheaper) conflict prevention.'¹³² This is a matter of regret as more emphasis ought to be have been placed on conflict prevention with key roles assigned to the Panel of the Wise for reasons discussed further below. Finally, the Commission also receives information from the Continental Early System,¹³³ which now falls for discussion.

2.3.2 The Continental Early Warning System

In sharp contrast to the OAU's regional mechanism of peace and security, the AU framework consists an early warning system. The Continental Early Warning System is a mechanism which is aimed at locating potential threats to peace and security and recommending appropriate responses with the intention of forestalling crisis before their escalation. Instituted against the background of Rwanda, the Early Warning System is designed to anticipate and prevent disputes and conflicts, as well as policies

¹²⁶ See article 10 (3) (c).

¹²⁷ Article 21 (3).

¹²⁸ Article 11.

¹²⁹ Article 13 (6).

¹³⁰ Article 10 (4).

¹³¹ Article 10 (4).

¹³² J. Cilliers, K Sturman, 'Challenges facing the AU's Peace and Security Council,' *supra* note 64.

¹³³ The African Union's Continental Early Warning System was established by article 12 (1) of the 2002 Protocol establishing the Peace and Security Council.

that may trigger the commission of genocide, crimes against humanity, war crimes and threats to legitimate order.¹³⁴ This is primarily meant to be achieved by warning the AU PSC of impending threats to state and regional security.¹³⁵ Despite some obvious similarities, it deserves to be mentioned from the onset that the concepts of early warning and conflict prevention are different from the concept of traditional intelligence and state security.¹³⁶

The Continental Early Warning System consists of an observation and monitoring centre, known as 'The Situation Room.' This early warning System is located at the Conflict Management Directorate of the Union, and is responsible for data collection and analysis on the basis of an appropriate early warning indicators module.¹³⁷ The Continental Early Warning System is linked to situation rooms in each of the five regions in order to disseminate and share information with the AU PSC.¹³⁸ Thus information will be relayed from monitoring units situated in sub-regional mechanisms under the guise of agencies such as such as the Economic Community of West African States (ECOWAS), the Inter-Governmental Authority on Development (IGAD) and the Southern African Development Community (SADC), which have established early warning units and are discussed below.

The transmission of information is made possible by virtue of the fact that the Continental Situation Room consists of 'observation and monitoring units of the Regional Mechanisms' which are 'linked directly through [the] appropriate means of communications to the Situation Room' which in turn collect and process data at their level and transmit the same to the Situation Room.¹³⁹ It is under this mechanism that the Chairperson of the Commission is mandated, as shown above, to 'use the information gathered through the Early Warning System timeously to advise the

¹³⁴ These situations are designated as 'grave circumstances' under article 4(h) of the Constitutive Act of the African Union. See chapter seven.

¹³⁵ Jakke Cilliers and Kathryn Sturman, 'Challenges facing the AU's Peace and Security Council,' *supra* note 64.

¹³⁶ Jakke Cilliers, 'Towards a Continental Early Warning System for Africa', *Occasional Paper 102, ISS*, (April 2005).

¹³⁷ See article 12(2) (a) of the 2002 Protocol establishing the Peace and Security Council.

¹³⁸ Jakke Cilliers and Kathryn Sturman, 'Challenges facing the AU's Peace and Security Council,' *supra* note 64.

¹³⁹ See article 12 (2) (b) of the 2002 Protocol establishing the Peace and Security Council

Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action'.¹⁴⁰

Significantly, member states are under the obligation to 'commit themselves to facilitate early action by the AU PSC and or the Chairperson of the Commission based on early warning information.'¹⁴¹ It has been observed that the effective functioning of the Early Warning System depends on the political will of member states to alert the Union during looming crisis such as those in Darfur, Somalia and Zimbabwe rather than the technical, financial or sociological obstacles.¹⁴² In maintaining the theme of cooperation between the AU and the UN, the Commission is required to 'collaborate with the United Nations [and] its agencies' to facilitate the effective functioning the Early Warning System¹⁴³ In this regard, there lies the possibility of the African early warning information being included in the UN standby databases and also gain access to information such as the UN peace operations mechanisms as suggested below.

Finally, the 'Chairperson of the Commission is required to consult with member states, the regional mechanisms, the United Nations and other relevant institutions,'¹⁴⁴ including research centers, academic institutions and NGOs, in order to facilitate the effective functioning of the Early Warning System.¹⁴⁵ The inclusion of civil society organisations is significant because as discussed above, the AU PSC may invite persons or entities involved or interested in a conflict or a situation under its consideration to participate, without the right to vote, in the discussion relating to that conflict or situation.¹⁴⁶ Finally, the reliance on information from the Early Warning System, as well as the collaboration of the AU PSC and the AU Commission may lead to the invocation of the African Standby Force System discussed below.

¹⁴⁰ Article 12 (5).

¹⁴¹ Article 12 (6).

¹⁴² Jakke Cilliers and Kathryn Sturman, 'Challenges facing the AU's Peace and Security Council,' *supra* note 64. Jakkie Cilliers, 'Towards a Continental Early Warning System for Africa', *supra* 136.

¹⁴³ See article 13 of the 2002 Protocol establishing the Peace and Security Council.

¹⁴⁴ Article 12 (7).

¹⁴⁵ Article 13.

¹⁴⁶ Jakke Cilliers and Kathryn Sturman, 'Challenges facing the AU's Peace and Security Council,' *supra* note 64; Jakkie Cilliers, 'Towards a Continental Early Warning System for Africa,' *supra* note 136.

2.3.3 The African Standby Force: Prospects and Challenges

Interestingly, the AU, while awarding itself the right to intervene did not at that time 'provide for the tools or mechanisms that [would] implement, monitor, or advance [its] ambitious but lofty ideas'.¹⁴⁷ Significantly, it neither possessed a standing force or rapid reaction force available to key regional organisations such as NATO.¹⁴⁸ However, African leaders had learnt from the weaknesses of the UN whose failure to establish an armed force¹⁴⁹ in support of its collective security system had catastrophic consequences on the continent,¹⁵⁰ most notably Rwanda.¹⁵¹ Hence, the AU subsequently established the African Standby Force,¹⁵² in order 'to enable the Peace and Security Council 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.'¹⁵³

This was a highly significant development for a number of reasons. Firstly, it will be recalled from chapter five that Ghadaffi of Libya had proposed a single African Army with a single joint command, in order to '[secure] peace and stability, avert the outbreak of any internal armed dispute and [safeguard] the sovereignty, security, and safety of the Union.'¹⁵⁴ These calls were reminiscent of the earlier calls by Nkrumah of a common military and defence strategy during the 1960s. Thus, the creation of the African Standby Force seemed to be a step in the direction advocated for by the federalists. However, as stated before, both Nkrumah's and Libya's proposals for a Union government were outrightly rejected.

It should therefore be made clear from the onset that the concept of a 'force' is misleading.¹⁵⁵ In fact, the African Standby Force does not, as yet, constitute an army.

¹⁴⁷ N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', Vol. 17 *American University International Law Review*, (2002), p. 1177.

¹⁴⁸ On NATO's Rapid Reaction Force, see D Riggio, 'EU-NATO Cooperation and Complementarity between the Rapid Reaction Forces', *The International Spectator*, 2003.

¹⁴⁹ See force envisaged under article 43 of the UN Charter. On the same, see chapter three.

¹⁵⁰ See chapter three.

¹⁵¹ See chapter five.

¹⁵² For more on the African Standby Force, see Franke, Benedikt, 'A Pan-African Army: The Evolution of an Idea and Its Eventual Realisation in the African Standby Force', *African Security Review*, Vol. 15, No. 4 (2006), 2-16.

¹⁵³ Article 13 (1) of the 2002 Protocol establishing the Peace and Security Council.

¹⁵⁴ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 8.

¹⁵⁵ De Coning, 'Refining the African Standby Force Concept', *Conflict Trends*. 2 (2004): 22; De Coning, 'A Peacekeeping Stand-by System for SADC: Implementing the African Stand-by Force Concept in Southern Africa', *Paper* commissioned for the 2nd *South African Institute of International*

Instead, as will be shown below, it is a standby system since the components remain in their countries of origin pending an authorised deployment.¹⁵⁶ Rather than intending to create an African standing army, it was indeed the lessons drawn from the horrors of Rwanda (1994) that compelled the African Peace and Security structure to envisage the creation of an African Standby Force.¹⁵⁷ The modalities for the proposed force were subsequently worked out at a meeting of African Chiefs of Defence Staff held in Addis Ababa in May 2003.¹⁵⁸

The establishment of the Standby Force is an ongoing project. It is 'based on brigades to be provided by the five African Regions' consisting of 'military, police and civilian components and will operate on the basis of the various scenarios under the African Union mandates' and will be available by 2010.¹⁵⁹ In order to prevent imminent catastrophe, multidisciplinary contingents of 15,000-25,000¹⁶⁰ troops are designated to be ready for rapid deployment at appropriate notice.¹⁶¹ For this reason, member states are required 'to establish standby contingents for participation in peace support missions decided on by the Peace and Security Council or intervention authorized by the Assembly.'¹⁶²

In this regard, several states from several sub-regional organisations have embarked on a collaborative implementation of the African Standby Force Framework. They include IGAD which established the East African Brigade Force (EASBRIG)¹⁶³ in 2005 in line with the requirements of the AU PSC.¹⁶⁴ Similarly, the SADC Brigade of

Affairs (SAIIA) workshop on 'the SADC Organ on Politics, Defence and Security', at Jan Smuts House, Johannesburg, 24 June 2004.

¹⁵⁶ De Coning, 'Refining the African Standby Force Concept,' *ibid.*

¹⁵⁷ T, 'Fast-tracking African Unity or Making Haste Slowly?,' *supra* note 8.

¹⁵⁸ See, African Union, 'First Meeting of the African Ministers of Defence and Security on the Establishment of the African Standby Force and the Common African Defence and Security policy', EXP/Def&Sec.(IV) Rev.1 of 17-18 January 2004.

¹⁵⁹ African Union, *Solemn Declaration on a Common African Defence and Security Policy*, Second Extra-Ordinary Assembly of the Union of 28 February 2004, 19, Section A (1) (iii). See also an analysis of the common policy the Gambian Ambassador to the African Union Omar A. Touray, 'The Common African Defence and Security Policy,' *supra* note 87.

¹⁶⁰ Policy Framework for the Establishment of an African Standby Force and the Military Staff Committee (Part 1), 12-14 May 2003, Addis Ababa, Exp, ASF-MS/2(1.).

¹⁶¹ Article 13 (1) of the 2002 Protocol establishing the Peace and Security Council.

¹⁶² Article 31 (2).

¹⁶³ Contributing forces include Djibouti, Kenya, Rwanda, Somalia, Sudan, Uganda, and Ethiopia.

¹⁶⁴ Nelson Alusala, 'African Standby Force: East Africa Moves', *African Security Review* Vol 13 No 2, (2004).

the African Standby Force (SADCBRIG) was launched in August 2007¹⁶⁵ while the Economic Community of Central African States (ECCAS) has agreed to create a brigade-sized sub-regional standby force.¹⁶⁶ As will be seen below, while the ECOWAS Standby Brigade¹⁶⁷ remains the most developed amongst the five sub-regions, some such as Arab Maghreb Union (AMU), which operates in northern Africa, has hardly established a peace and security mechanism and some states remain uncommitted to a particular brigade.

The framework of the African Standby Force is designed around various operational scenarios with scenario six designed to prevent the recurrence of another Rwanda by providing for the invocation of article 4(h) of the Constitutive Act. It will be shown in chapter seven that this provision allows the AU to embark on intervention in a member state without necessarily waiting for the consent of neither the country in question nor the UN Security Council's authorisation.¹⁶⁸ Furthermore, in addition to acting on intervention that is authorised by the AU with respect of grave circumstances, the African Standby Force is also empowered to intervene at the request of a AU member state, in order to restore peace and security in accordance with article 4 (j) of the Constitutive Act.¹⁶⁹

The African Standby Force may also be mandated, *inter alia*, to engage in observation and monitoring missions,¹⁷⁰ and other types of peace support missions.¹⁷¹ The Standby Force can also embark on preventive deployment, in order to prevent '(i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighbouring areas or States, and (iii) the resurgence of violence after parties to a

¹⁶⁵ See Speech by His Excellency the President of the Republic of Zambia and SADC Chairperson mr Levy Patrick Mwanawasa, SC, On the Occasion of the Official Launch of the Southern African Development Community Brigade (SADCBRIG) in Lusaka, Zambia, August 17, 2007. Available at http://www.polity.org.za/article.php?a_id=115536. See also Innocent Gore, 'Southern Africa: SADC Peacekeeping Brigade Launched', *The Herald* (Harare), 20 August 2007.

¹⁶⁶ De Coning, 'Refining the African Standby Force Concept,' *supra* note 155; UN OCHA Integrated Regional Information Network (IRIN), Weekly Round-up for Central & Eastern Africa, 25-31 October 2003.

¹⁶⁷ Jakkie Cilliers and Mark Malan, 'Progress with the African Standby Force', *Occasional Paper 98, ISS*, (May 2005).

¹⁶⁸ Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

¹⁶⁹ Article 13 (3) (c) of the 2002 Protocol establishing the Peace and Security Council.

¹⁷⁰ Article 13 (3)(a).

¹⁷¹ Article 13 (3) (b).

conflict have reached an agreement.’¹⁷² Furthermore, the mandate of the African Standby force is extended to peace-building, including post-conflict disarmament and demobilization; humanitarian assistance to alleviate the suffering of civilian population in conflict areas; and any other functions as may be mandated by the AU PSC or the Assembly.¹⁷³

Once again, in maintaining the theme of complementarity between the AU and the UN, the African Standby Force is required to take certain measures. Firstly, in undertaking the functions listed above, the African Standby Force ‘shall, where appropriate, cooperate with the United Nations.’¹⁷⁴ Preferably, the African Standby Force would act under a UN Security Council mandate. However, as made clear in the coming chapter, the AU PSC is authorised to deploy troops during grave circumstances, particularly when a Security Council mandate is subject to delay or not forthcoming.¹⁷⁵ What is important to note here is that the AU PSC is able to deploy the Standby Force both under Chapter VIII of the UN Charter and under the AU’s constitutional framework. It is thus hoped that the evolving relationship of cooperation which has been evident in recent practice will open opportunities for a clear division of labour between the two organisations. This is discussed further below and in chapter eight.¹⁷⁶

Meanwhile, it is worth noting that there are serious challenges that face the African Standby Force, particularly given the stringent time frames and in particular its goal of five regional brigades by 2010.¹⁷⁷ One of the hurdles the African Standby Force faces is the difficulty that might be encountered by large UN troop contributors such as Nigeria, South Africa, Kenya, Ghana and Zambia. These states may find it hard to maintain their current deployment levels at the UN and at the same time participate in standby regional brigades under the ASF framework.¹⁷⁸ However, De Coning argues

¹⁷² Article 13 (3) (d).

¹⁷³ Article 13 (3) (g).

¹⁷⁴ Article 13 (4).

¹⁷⁵ See chapter seven.

¹⁷⁶ On this point, see De Coning, ‘Refining the African Standby Force Concept,’ *supra* note 155.

¹⁷⁷ Author conversation on 18th October, 2007 with Major Tim Cross (Rtd) who is an adviser to the East African Regional Brigade. Major Cross also served second in command in the post-war planning of Iraq in 2003.

¹⁷⁸ De Coning, ‘Refining the African Standby Force Concept,’ *supra* note 155.

that this may be appeased by synchronising the AU sub-regional standby initiatives with the UN's operational deployments such as its Standby System.¹⁷⁹

However, in spite of the above, a key problem with the African Standby Forces is that they are not solely under the control and authority of the AU but are instead under the direction of the regional mechanisms.¹⁸⁰ This is particularly worrisome given the occasional competition between the AU and the regional mechanisms, which is discussed below. What is clear at this point is that this decentralized approach potentially creates or reinforces additional layers of bureaucracy which may in turn lead to major repercussions due to slow responses to conflicts. Other problems that may arise as a result of the current arrangement relate to the lack of standardised training of the Standby Force, regional politics and the issue of funding that is discussed further below.

Nevertheless, despite the setbacks Murithi maintains that the African Standby Force possess the potential to prevent future Rwandas and promote and maintain the concept of shared responsibility for stability in Africa.¹⁸¹ Having said so, it deserves to be mentioned that the envisaged completion of the process establishing the African Standby Force remains extremely ambitious with little hope that this will indeed be achieved.¹⁸² And even when complete, the invocation of the African Standby Force requires clear command and control structures, a well trained personnel, communications, logistics and equipment ensuring that the AU's right to intervene can be matched by the necessary capability. Nevertheless, in line with the theme of cooperation between the AU and the UN, discussed below, the Security Council has recently underlined its support for the operationalisation of the AU Standby Force.¹⁸³

¹⁷⁹ This was envisaged in the 2005 World Summit Outcome Document, 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, U.N. Doc A/60/L.1 (Sept.20, 2005). See also The Secretary General's report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, para. 13; De Coning, 'Refining the African Standby Force Concept,' *supra* note 151.

¹⁸⁰ Jakke Cilliers, & Mark Malon, 'Progress with the African Stand-by Force' *supra* note 166.

¹⁸¹ Timothy Murithi, *The African Union: Pan-Africanism, peacebuilding and development*, (Aldershot, UK: Ashgate, 2005), p. 101.

¹⁸² Jakke Cilliers, & Mark Malon, 'Progress with the African Stand-by Force,' *supra* note 167.

¹⁸³ See SC Res. 1809 (2008), 16 April, 2008.

2.3.4 The Panel of the Wise

As stated above, both the AU PSC and the Commission are authorised to utilise their discretion and convene the Panel of the Wise (the Panel). This is in order to take initiatives and action they deem appropriate regard during situations of potential conflict, as well as to those that have already developed into full-blown conflicts.¹⁸⁴ The Panel consists of five highly respected African personalities¹⁸⁵ who must have contributed to the cause of peace, security and development of the continent.¹⁸⁶ The idea of a Panel was borrowed from the ECOWAS peace and security structure which includes a Council of Elders.¹⁸⁷ The members of the Panel are selected by the Chairperson of the Commission, to serve for a period of three years, after consultation with the member states and in accordance with the principle of equitable regional representation.¹⁸⁸

The Panel's mandate is primarily advisory, mainly in the areas of peace and security.¹⁸⁹ However, the Panel is authorised to take appropriate actions to support the AU PSC and the Chairperson of the Commission in their efforts to prevent conflict.¹⁹⁰ In this regard, despite the fact that the Panel reports to the Assembly through the AU PSC,¹⁹¹ it may on its own initiative, pronounce on issues relating to the promotion and maintenance of peace and security in Africa.¹⁹²

However, a key problem with the Panel is that the requisite modalities for the operationalisation of its work have not been implemented.¹⁹³ Furthermore, the current

¹⁸⁴ Article 9 and 10 (b) of the Protocol Establishing the Peace and Security Council.

¹⁸⁵ Elected in January 2007, the Panel is currently composed of Salim Ahmed Salim, former Secretary-General of the Organisation of African Unity, representing the East African region; Brigalia Bam, Chairperson of the Independent Electoral Commission of South Africa, representing the Southern Africa region; Ahmed Ben Bella former President of Algeria, representing the North Africa region; Elisabeth Pognon, President of the Constitutional Court of Benin, representing West Africa; and Miguel Trovoadá, former President of Sao Tomé and Príncipe, representing Central Africa. See the African Union Decision on the Appointment of the Members of the Panel of the Wise – Doc. Assembly/AU/13 (VIII), adopted during the Eighth Ordinary Session, 29-30 January, 2007, Addis Ababa, Ethiopia, Assembly/AU/Dec.152 (VIII).

¹⁸⁶ Article 11(1) of the Protocol Establishing the Peace and Security Council.

¹⁸⁷ Article 20 of the ECOWAS Protocol on the Establishing the Mechanism for Conflict Prevention, Management, Peace-Keeping and Security 1999.

¹⁸⁸ Article 11 (2) of the Protocol Establishing the Peace and Security Council.

¹⁸⁹ Article 11(3) of the AU Protocol Establishing the Peace and Security.

¹⁹⁰ Article 11 (1).

¹⁹¹ Article 11(5).

¹⁹² Article 11 (4).

¹⁹³ Tim Murithi, 'Panel of the Wise: Operationalising the African Union's mediation framework', *Institute for Security Studies*, (2007); Tim Murithi, '23 August 2007: Panel of the Wise - Operationalising the African Union's Mediation Framework', *Institute for Security Studies*, (2007).

set up lacks 'a robust mediation support unit within the African Union Commission' and lacks 'political officers who have experience in bilateral and multilateral negotiation settings.'¹⁹⁴ These are vital in order for the Panel to be effective in its roles of preventive diplomacy and peacemaking.¹⁹⁵ Furthermore, the absence of system-wide coordination means that there is a 'real danger that the activities of the Panel will be routinely undermined.'¹⁹⁶

Nevertheless, the role of the Panel remains vital, particularly in the prevention of conflicts and in the role of advising and supporting the AU PSC and the Commission once conflicts have escalated, as well as engaging in mediation and overseeing agreements.¹⁹⁷ Certainly, the working of the Panel is able to build on the noteworthy personal roles of eminent African personalities, such as Nelson Mandela and Mwalimu Julius Nyerere, who were prominent in situations of armed conflicts where massive violations of fundamental human rights were taking place. Indeed, it was the mediation process led by the two aforementioned leaders that culminated in the Arusha Agreement for Peace and Reconciliation for Burundi, which was signed on 28 August 2000.¹⁹⁸ The resulting agreement subsequently led to the deployment of the first African Union Mission in Burundi (AMIB) in 2003.

More recently, the function of mediation as a strong African tradition was witnessed in Kenya where the former UN Secretary General Kofi Annan, himself an eminent African personality, was able to embark on reconciliation efforts between warring parties and opposition amidst violence over a disputed election in early 2008. It is primarily for this reason that, as suggested above, more attention should have been given to the function of the Panel. Undoubtedly, given Africa's respect for elders, the Panel may succeed in reconciling warring parties and promote peace and security.¹⁹⁹ Nevertheless, the scarce attention and resources awarded to the Panel is somewhat

¹⁹⁴ Tim Murithi, 'Panel of the Wise,' *ibid.*

¹⁹⁵ Laurie Nathan, 'Mediation and the African Union's Panel of the Wise', Submission to the Commission for Africa, 15 July 2004. See author chapter in Shannon Field (ed), 2004. *Peace in Africa: Towards a Collaborative Security Regime*, (Johannesburg: Institute for Global Dialogue)

¹⁹⁶ Tim Murithi, 'Panel of the Wise,' *ibid.*

¹⁹⁷ Laurie Nathan, 'Mediation and the African Union's Panel of the Wise', *supra* note 195.

¹⁹⁸ See the Transitional Government of Burundi (TGoB) and the Burundi Armed Political Parties and Movements (APPMS) signed on 7 October 2002 and the other between TGoB and the CNDD-FDD of Pierre Nkurunziza signed on 2 December 2002.

¹⁹⁹ Kithure Kindiki, 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives', Monograph 131, in *Rethinking the Role of the United Nations and the African Union in Darfur*, (Institute of Security Studies, May 2007).

appealed by the increased role that is envisaged for sub-regional organisations in the promotion of regional peace and security.

3.1 The Relationship between the AU and its Regional Mechanisms

The OAU had failed to determine the actual relationship between the continents' sub-regional groupings. In particular, its Charter did not contain any specific provision clarifying the continental hierarchy of institutions and organisations. This resulted in the lack of proper coordination which in turn led to increasing tensions between the OAU and the remaining web of sub-regional organisations.²⁰⁰ Subsequently, the sub-regional organisations took it upon themselves to modify their largely economic based constituent instruments to adapt to the prevailing peace and security challenges.²⁰¹

Fortunately, the AU was keen on learning from the shortcomings of the OAU's relationship with regional mechanisms. Indeed, it was prepared to capitalise on their transformation to peace and security entities.²⁰² Therefore, the AU emphasises that '[t]he Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.'²⁰³ Hence, the AU PSC and the Chairperson of the Commission are 'required to harmonize and coordinate the activities of Regional Mechanisms in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the Union.'²⁰⁴

Moreover, the AU Commission is mandated to 'work 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.'²⁰⁵ In addition, the AU PSC is under the obligation to promote initiatives aimed at anticipating and preventing conflicts and, in circumstances where conflicts have

²⁰⁰ Benedikt F. Franke, 'Competing Regionalisms in Africa and the Continent's Emerging Security Architecture', *African Studies Quarterly*, Volume 9, Issue 3, (Spring 2007).

²⁰¹ See chapter four. For a general discussion on these transformations, see Alex Ramsbotham, Alhaji M.S. Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

²⁰² See chapter seven.

²⁰³ Article 16 (1) of the 2002 Protocol Establishing the Peace and Security Council

²⁰⁴ Article 16 1 (a).

²⁰⁵ See article 16 (1) (b).

occurred, peace-making and peace-building functions in consultation with Regional Mechanisms.²⁰⁶

Indeed, a direct relationship between the AU PSC and Regional Mechanism is articulated in the requirement to ensure 'the full involvement of Regional Mechanisms in the establishment and effective functioning of the Early Warning System and the African Standby Force' as they are 'linked directly through the appropriate means of communication' to the situation room.²⁰⁷ Under this framework, emphasis is put on the need for the harmonisation and coordination of activities of the regional mechanisms and the AU PSC. To this end, the AU PSC and regional mechanisms are required to keep each other 'fully and continuously informed of their activities.'²⁰⁸ This would be by way of periodic meetings,²⁰⁹ discussions of any question by the AU PSC relating to relevant regional mechanisms²¹⁰ and invitation to deliberations,²¹¹ setting up of liaison offices,²¹² as well as agreeing to Memorandum of Understanding on Cooperation between the bodies.²¹³

The Common African Defence and Security Policy (2004) lists a number of 'essentially economic oriented'²¹⁴ sub-regional organisations which arguable constitute regional mechanisms under the 2002 Protocol Establishing the Peace and Security Council. These include the Economic Community of West African States (ECOWAS),²¹⁵ the Economic and Monetary Community of Central African States (CEMAC),²¹⁶ the Intergovernmental Authority on Development (IGAD),²¹⁷ the Southern African Development Community (SADC),²¹⁸ the East African Community

²⁰⁶ Moreover, see article 16 (2).

²⁰⁷ Article 12 (2) (b).

²⁰⁸ Article 16 (3).

²⁰⁹ Article 16 (4).

²¹⁰ Article 16 (6).

²¹¹ Article 16 (7).

²¹² Article 16 (8).

²¹³ Article 16 (9).

²¹⁴ African Union, Solemn Declaration on a Common African Defence Policy, Second Extra-Ordinary Assembly of the Union of 28 February 2004, 26, para 25.

²¹⁵ The sixteen ECOWAS members are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

²¹⁶ Member state include Angola, Burundi, Cameroon, the Central African Republic, Chad, the DR Congo, Congo, Equatorial Guinea, Gabon and Sao Tome and Principe.

²¹⁷ IGAD member states are: Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea.

²¹⁸ SADC member states include: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

(EAC),²¹⁹ the Community of Sahelo-Saharan States, (CEN-SAD),²²⁰ the Arab-Maghreb Union (AMU),²²¹ and the Common Market for Eastern and Southern Africa (COMESA).²²²

However, as stated above, the interplay of continental organisations and the capacity to respond both politically and via military means has only been evident in the activities of sub-regional organisations, such as ECOWAS, SADC and IGAD, which took a leading role in addressing the security related conflicts in their respective regions. Recently, ECOWAS troops in concert with French forces monitored the cease-fire that ended the civil war in Cote D'Voire and deployed peacekeepers in Liberia, pending the arrival of the UN forces in 2003. These actions were commended by the UN Security Council which welcomed the actions of ECOWAS troops in February 2003 by way of resolutions 1464²²³ and 1497²²⁴ for their responses to the violence in Cote D'Voire and Liberia respectively.²²⁵

Similarly, SADC intervened in Lesotho and the Democratic Republic of Congo (DRC) in 1998 and engaged in attempts at mediation and deployment of troops.²²⁶ Meanwhile, despite some set backs in funding, logistics and expedience available to ECOWAS and SADC, IGAD engaged in mediation in Sudan and Somalia and requested AU deployment of troops in the latter.²²⁷ However, other sub-regional blocks such as AMU have remained dormant due to poor relations amongst member

²¹⁹ EAC member states are Kenya, Uganda, Tanzania, Rwanda and Burundi.

²²⁰ CEN-SAD member states include Burkina Faso, Chad, Libya, Mali, Niger, Sudan, Central African Republic, Eritrea, Djibouti, Gambia, Senegal, Egypt, Morocco, Nigeria, Somalia, Tunisia, Benin, Togo, Côte d'Ivoire, Guinea-Bissau, Liberia, Ghana, Sierra Leone, Comoros and Guinea.

²²¹ AMU Member states are Algeria, Libya, Mauritania, Morocco and Tunisia.

²²² COMESA member states include Angola, Burundi, Comoros, Libya, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

²²³ SC Res. 1464 (2003), 4 February 2003.

²²⁴ SC Res. 1497 (2003), 1 August 2003.

²²⁵ Christine Gray, *International Law and the Use of Force*, (Oxford University Press; Second Edition (2004) pp. 257-258.

²²⁶ See chapter seven. See also, N Ngoma, 'Hawks, Doves or Penguins? A Critical Review of the SADC Military Intervention in the DRC', *Institute for Security Studies*, Occasional Paper 88, Pretoria 2004.

²²⁷ See 'Building an African Union for the 21st Century: Relations with Regional Economic Communities (RECS), NEPAD and Civil Society', *Policy Seminar Report*, The Vineyard Hotel, Cape Town South Africa, 20-22 August, 2005; Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

states meaning that they have hardly taken an active role in the mediation of conflicts and peacekeeping missions.²²⁸

However, recent practice demonstrates that there is evidence of the some level of commitment of the AU's relationship with its regional mechanisms across the designated regions. For example, as stated above, IGAD set up the East African Brigade Force (EASBRIG)²²⁹ in 2005 to operate as part of the envisaged Standby Force in line with the requirements of the AU PSC.²³⁰ Furthermore, the activation of IGAD's early warning system (CEWARN) could provide valuable lessons to the AU's own Continental Early Warning System.²³¹ In West Africa, the decision to host the AU's regional office at the ECOWAS headquarters situated in Abuja, Nigeria increases the coordination of information and roles. However, the 'structural inequalities' and mutual mistrust amongst Southern African States has hampered SADC's ability to fully integrate within the AU's continental system.²³² Nevertheless, the AU has concluded a memorandum of understanding with the various Regional Mechanisms, such as SADC and ECOWAS.²³³ Moreover, there have been regular meetings and exchange of notes between the AU and the Regional Economic Communities.²³⁴

Having said so, it deserves to be mentioned that the proliferation of sub-regional organisations has led to the 'confusion, duplication and a dissipation of energies and resources.'²³⁵ For example, countries such as Libya have membership of COMESA, CEN-SAD and AMU while Lesotho, Botswana and Swaziland are all members of both the Southern African Customs Union (SACU) and SADC. Meanwhile the whole

²²⁸ For more on AMU, see Ali F. Darrat and Anita Pennathur, 'Are the Arab Maghreb countries really integratable?: Some evidence from the theory of cointegrated systems', *Review of Financial Economics*, Volume 11, issue 2, (2002), pp. 79-90.

²²⁹ Contributing forces include Djibouti, Kenya, Rwanda, Somalia, Sudan, Uganda, and Ethiopia.

²³⁰ Nelson Alusala, 'African Standby Force: East Africa Moves', *supra* note 164.

²³¹ 'Building an African Union for the 21st Century', *supra* note 227.

²³² 'Building an African Union for the 21st Century,' *ibid*; Ngubane, Senzo and Solomon, Hussein, *Projects gone too far: Sub-regional Security Efforts in Africa* (Centre for International Political Studies, Pretoria, 2001), 5; Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

²³³ Jakkie Cilliers, 'UN Reform and Funding Peacekeeping in Africa', *African Security Review* Vol 14 No 2, (2005).

²³⁴ Olonisakin, Funmi, 'African Peacekeeping at the Crossroads: An Assessment of the Continent's Evolving Peace and Security Architecture', (United Nations Peacekeeping Best Practices, New York, 2004), p. 8.

²³⁵ 'Building an African Union for the 21st Century: Relations with Regional Economic Communities (RECS), NEPAD and Civil Society', *supra* note 227; Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

of Arab North Africa simultaneously holds membership of the Arab League and the AMU. In fact, of the 53 states within the AU, only six states hold membership in just one regional community.²³⁶

The confusion created by the duplication of membership is further compounded by the fact that, despite some similarities, there exist distinct differences in institutional structures, financial patrons as well as ideologies and strategies amongst these organisations and the AU.²³⁷ However, it is worth mentioning that this ambiguous arrangement is not unique to Africa. Indeed, Europe also possesses a highly complex regional security architecture that includes the multiplication of state membership to various institutions such as the 55-member Organisation for Security and Co-operation in Europe (OSCE), the 26-member NATO and the 28-member West European Union (WEU), as well as the EU.

In the African context, it would appear that the states possess a degree of discretion in choosing between the AU and the relevant sub-regional organisations in key matters, such as the resolution of disputes and the allocation of resources. Despite the occasional references in regard to cooperation, it is still not clear in which instances there will be a stand-alone AU action, a set out AU cooperation with the regional communities, or a designated collaboration with the UN and other international actors. In addition, there is also the danger that those wishing to play a continental role might neglect institutional development at the sub-regional level.²³⁸ On the other hand, there remains the concern that since regional major powers, such as Nigeria and South Africa, may not be able to project their relative strength in the AU PSC, they may redirect their strength to the sub-regional organisations where member states may be easily influenced.

²³⁶ United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa* (UNECA, Addis Ababa, 2004), 39-40; African Union Commission/Economic Commission for Africa, *Report on Meeting of Experts on the Rationalisation of the Regional Economic Communities (RECs)*, EX.CC/220(VIII), 2005.

²³⁷ Benedikt F. Franke, 'Competing Regionalisms in Africa and the Continent's Emerging Security Architecture', *supra* note 199; Adejo, Dr. Armstrong Matiu 'From OAU to AU: New Wine in Old Bottle?', *Paper* prepared for presentation at the 10th CODESRIA General Assembly, Nile International Conference Centre, Kampala, December 8-12, 2002; Alex Ramsbotham, Alhaji M.S. Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity', *supra* note 111.

²³⁸ Maxi Schoeman, 'The African Union after the Durban Summit', *Occasional Paper*, Centre for African Studies, University of Copenhagen, 2003. Available at http://www.teol.ku.dk/cas/nyhomepage/mapper/Occasional%20Papers/Schoeman_internetversion.doc.

For the moment, there remains competing interests amongst the AU, RECs and member states,²³⁹ which in turn has resulted in obstacles to coherent integration and has slowed down the goals of a unified African government.²⁴⁰ What is abundantly clear is that the arrangement under the current AU organisation calls for the consolidation of shared objectives as well as properly defined collaboration in the areas of overlap between its various regional mechanisms.

4.1 The Overall Capacity of the AU, Financial Issues and the Special Fund

Subsequent to the creation of the AU's institutional security framework, African leaders pledged 'to take all necessary measures' to strengthen the common institutions discussed above and to 'provide them with the necessary powers and resources to enable them [to] discharge their respective mandates effectively.'²⁴¹ However, in similar fashion to the OAU, the AU largely depends on statutory contributions as well as voluntary contributions by member states to finance its activities.²⁴² Indeed, a key problem with this arrangement is that some states are always behind with their membership contributions. And although the defaulting states face the possibility of sanctions²⁴³ for non-payment, few of these countries hardly ever abide by their debt repayment plan.²⁴⁴

It thus became clear from the onset that this was an area where the AU, just like the OAU, would struggle to secure the necessary finances, including attaining annual subscription fees that would in turn impact on its effectiveness and overall running. Inevitably, the 'increased operational requirements made it imperative to identify

²³⁹ Chris Landsberg and Shaun Mackay, 'Engaging the New Pan-Africanism: Strategies for Civil Society', *ActionAid International and Open Society Initiative for Southern Africa*, 2004, p.12.

²⁴⁰ Address by the Chairperson of the African Union, H.E. President J.A. Kofuor at the Opening of the Ninth Ordinary Session of the Assembly of the African Union, Accra, Ghana, 28-29 June : 11th Ordinary Session of the Executive Council. Available at <http://www.african-union.org/root/au/Conferences/2007/june/summit/9thAUSummit.htm>.

²⁴¹ Preamble to the Constitutive Act of the AU, para. 10.

²⁴² See African Union, 'Experts' Preparatory Meeting for The Conference of African Ministers of Economy and Finance CAMEF', 4-5 May, 2005, AU/EXP/Rpt (1), Addis Ababa, Ethiopia.

²⁴³ E.g. during the Maputo Summit in 2003, Guinea Bissau, Liberia, the Central African Republic, the Democratic Republic of the Congo, São Tomé and Príncipe, Seychelles, Somalia and the Union of Comoros were eventually placed under sanctions for the Maputo meeting

²⁴⁴ See the *Report of the Second Ordinary Session of the Sub-Committee on Contributions, Executive Council*, Third Ordinary Session, 4-8 July 2003, Maputo, Mozambique, EX/CL/27(III), Par 20. See also Report of the Sixth Ordinary Session of the Permanent Representatives' Committee, Permanent Representatives' Committee, Sixth Ordinary Session, 4-5 July 2003, Maputo, Mozambique, PRC/RPT(VI), para. 38.

other financing sources.²⁴⁵ This led to the re-invention of the Special Fund, which includes a Trust Fund that is governed by the relevant Financial Rules and Regulations of the Union.²⁴⁶ Also known as the Peace Fund, the Special Fund operates under the AU Commission and is made up of financial appropriations from the regular budget of Union, including arrears of contributions, voluntary contributions from member states and from other sources both within and outside the continent.²⁴⁷

This arrangement is highly significant. As shown below, the AU's lack of funds attracts the attention of the UN and the wider international community and paves the way for a collaborative effort between the two organisations. Indeed, in April 2008, the Security Council recognised that one major constraint facing the AU 'in effectively carrying out the mandates of maintaining regional peace and security is securing predictable, sustainable and flexible resources.'²⁴⁸ In this regard, the Council welcomed the Secretary-General's proposal to set up an AU-UN panel consisting of distinguished persons to consider in-depth the modalities of how to support AU operations under a UN mandate, in particular start-up funding, equipment and logistics and to consider lessons from past and current AU peace efforts.²⁴⁹

However, such a possibility had been put forward by the Secretary General much earlier. Indeed, the report, *In Larger Freedom* of 2005, proposed that the rules of the UN peace operations budget should be amended to give the UN the option of using assessed contributions to finance authorized regional operations or the participation of regional organisations in multi-pillar missions 'under the overall United Nations umbrella.'²⁵⁰ This proposal was subsequently heeded at a meeting in May 2007 between the representatives of the AU, UN, G-8 countries and delegates from the EU and Africa's regional economic communities. These organisations endorsed the possibility of providing financial assistance to the AU through UN funding

²⁴⁵ See African Union, 'Experts' Preparatory Meeting for The Conference of African Ministers of Economy and Finance CAMEF', *supra* note 241.

²⁴⁶ Article 21 (1) and (4) of the 2002 Protocol Establishing the Peace and Security Council.

²⁴⁷ Article 21 (2) and (3).

²⁴⁸ See SC Res. 1809 (2005), 16 April, 2008.

²⁴⁹ *Ibid*

²⁵⁰ Secretary General's report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005, para. 215.

mechanisms.²⁵¹ This was soon followed by issuance of a joint communiqué by the AU PSC and UN Security Council in which they agreed to examine the possibility of UN financing for AU or AU-authorized mission.²⁵²

Yet, in the meantime, it was the assistance and cooperation given to the AU from the developed countries and the other regional groupings that 'to continue[d] to give logistic and financial support to the speeding up of the establishment of an African Standby Force.'²⁵³ In this regard, during the Maputo Summit in 2003, the AU Assembly asked the EU to establish a Peace Facility 'to fund peace support and peacekeeping operations conducted under the authority of the AU.'²⁵⁴ This request was approved during the ACP-EC Council of Ministers in December 2003,²⁵⁵ which was followed by a formal announcement of a total of €250 million to be made available to the AU Peace Facility at an EU-African meeting in April 2004.²⁵⁶

Designed to support African-led peace operations, as well as capacity building for the institutional security structure of the AU, part of this finance saw the AU Mission in Sudan (AMIS) designated as the first recipient of the fund.²⁵⁷ However, as it turned out, the AMIS operation was cash strapped from the very beginning of its existence despite the financial support.²⁵⁸ Furthermore, the EU funding of the Peace Facility is curtailed due to the fact that the financing comes from the European Development Fund (EDF). The EDF forms the financial instrument of the Cotonou Agreement and is itself renegotiated every five years meaning that there has to be a new agreement at subsequent meetings by the EU Council of Ministers.²⁵⁹ And with the current fund

²⁵¹ African Union 'Annual Consultation between the African Union (AU), the Regional Economic Communities (RECs)/Regional Mechanisms for Conflict Prevention, Management and Resolution, the G8 Member Countries, and Other Partners: Communiqué,' Addis Ababa, 14 May 2007, para. 2.

²⁵² The United Nations & African Union 'Joint Communiqué' Agreed by the UN Security Council and AU Peace and Security Council," 16 June 2007, para. 10

²⁵³ See *the Common African Position on the Proposed Reform of the United Nations, 'the Ezulwini Consensus*, adopted by the Executive Council of the African Union at the 7TH Extraordinary Session, 7- 8 March 2005, Addis Ababa, Ethiopia. Ext/EX.CL/2 (VII).

²⁵⁴ See Assembly/AU/Dec.24 (II) adopted in Maputo, in July 2003.

²⁵⁵ Decision 2003/3 of the ACP-EC Council of Ministers of 11 December 2003.

²⁵⁶ See EU Council, 'EU-Africa Ministerial meeting -Dublin, Ireland 1 April 2004', 5/4/2004 - Press:104 Nr: 8230/04.

²⁵⁷ Jakkie Cilliers, UN Reform and Funding Peacekeeping in Africa', *supra* note 233.

²⁵⁸ See chapter nine.

²⁵⁹ For a general discussion on the Cotonou Agreement, see Stephen Kingah, 'The Revised Cotonou Agreement between the European Community and the Africa, Caribbean and Pacific States: Innovations on Security Political Dialogue, Transparency, Money and Social Responsibility', *Journal of African Law*, 50, 1 (2006), 59-71.

nearly depleted, a major concern arises in regards to the impact that this situation promises to have on Darfur and other emerging crises.²⁶⁰

From this discussion, it can be safely be concluded that in similar fashion to the OAU, which had to rely on donor financial support and could only fund a very limited peacekeeping observer mission for a limited period, the AU can still only undertake symbolic post-conflict reconstruction activities.²⁶¹ What is even more concerning is the impact that the AU's financial weakness may have on the AU PSC, the Commission, the African Standby Force, the Panel of the Wise, the Military Committee and the Early Warning System, particularly given their crucial roles within the continental institutional security set up.

However, as suggested earlier, the lack of sufficient funds creates an interesting dynamic. This is because the consensus amongst the UN member states on the need to promote the evolving African regional peace and security framework increases opportunities for proper coordination between the AU and the UN. In this regard, the UN Security Council has welcomed the developments regarding cooperation between the UN, the AU as well as hailed the contribution of the EU to the enhancement of AU capacities.²⁶² As shown below, the potential of transforming the AU's shortcomings into strengths seems to have been foreseen by the drafters of the Constitutive Act.

5.1 The envisaged Relationship of Cooperation with the UN under the AU's Constitutional Framework

The AU's overall relationship with the UN, in regards to peace and security, has often been perceived as one of contest rather than complimentary.²⁶³ Indeed, the AU's constitutional framework has been described as 'the first true blow to the constitutional framework of the international system established in 1945.'²⁶⁴ Part of

²⁶⁰ The EU/AU Partnership in Darfur: Not Yet a Winning Combination', *Africa Report* N°99 – 25 October 2005.

²⁶¹ Jakkie Cilliers, 'UN Reform and Funding Peacekeeping in Africa' *supra* note 233. See also Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

²⁶² See SC Res. 1809 (2008), 16 April, 2008.

²⁶³ See chapter seven.

²⁶⁴ Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union,' 8 MAX PLANCK Y.B. INT'L L. 237, 238 (2004).

this reason is that the AU framework ambiguously provides that '[t]he Regional Mechanisms are part of the overall security architecture of the Union, which has the *primary responsibility* ²⁶⁵ for promoting peace, security and stability in Africa.'²⁶⁶ Therefore, by seeming to entrust itself with the primary responsibility for promoting peace and security within the continent, the AU raised fundamental questions with respect to the role left for the UN Security Council which, traditionally, is designated the same function.²⁶⁷

The assertion that the AU's Constitutive Act signifies an exit from the UN system is supported by the Act's and the Protocol's silence when it comes to placing the Union's activities under the subordination of the UN Security Council as dictated by the UN Charter.²⁶⁸ Instead, the Protocol establishing the AU PSC merely lists the UN as only one of the many organisations that will assist the AU Peace and Security Council.²⁶⁹ However, on closer reading, it soon becomes clear that article 16 of the Protocol merely affirms the AU's superiority over regional mechanisms, which form part of its architecture of peace and security. Furthermore, article 16 of the Protocol refers to the *promotion* and not maintenance of peace and security, and thus is arguably complimentary to the UN system. Clearly the mandate of the UN Security Council to 'maintain' international peace and security is wider than that of the AU's responsibility for the 'promotion' of peace within Africa.²⁷⁰ Moreover, taken together, the major provisions of the AU framework, including the right to intervene discussed in the next chapter, reaffirm, rather than deny, the UN's primacy in the discharge of its primary responsibility for peace and security.

Indeed, the pre-eminence of the AU in the promotion of peace and security in the continent, compliments, rather than contradicts the collective security system under the Charter, which vests the Security Council with overall powers in the area of peace and security. This interpretation is further evidenced within the AU PSC's mandate to 'cooperate and work closely with the United Nations Security Council, which has the

²⁶⁵ Emphasis added.

²⁶⁶ Article 16 (1) of the Protocol Establishing the Peace and Security Council

²⁶⁷ Article 24 UN Charter. See also Section on the Security Council (Chapter Three)..

²⁶⁸ See Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 263.

²⁶⁹ On one interpretation of article 17 (1) of the Protocol Establishing the Peace and Security Council, see *ibid.*

²⁷⁰ *Ibid.*

primary responsibility for the maintenance of international peace and security.’²⁷¹ In addition, the AU PSC is required to cooperate and work closely with other relevant UN agencies in the promotion of peace, security and stability in Africa.²⁷² Thus, rather than a contest, the true dynamic relationship is articulated by Kofi Annan:

Within the context of the United Nations primary responsibility for matters of international peace and security, providing support for regional and sub-regional initiatives is both necessary and desirable. Such support is necessary, because the United Nations lacks the capacity, resources and expertise to address all the problems that may arise in Africa. It is desirable because wherever possible the international community should strive to compliment rather than supplant Africa’s efforts to resolve Africa’s problems.²⁷³

Indeed, in April 2008, in its resolution 1809,²⁷⁴ the Security Council expressed ‘its determination to take effective steps to further enhance the relationship with the AU under Chapter VIII of the UN Charter and ‘make more effective its cooperation’ with the AU PSC. However, this view had also been affirmed in March 2007 during a thematic debate focusing on Africa where, through a presidential statement, the UN Security Council stressed that the collaboration between the UN and regional organisations ‘should be based on their complimentary capacities and comparative advantages.’²⁷⁵ The Council further expressed encouragement for increased exchange of information and shared experience, best practices and lessons learnt between the Security Council and the AU.²⁷⁶

In this regard, the establishment of a Peace and Support Team (PST) in 2006, in order to build and enhance the AU long-term capacity, particularly with regard to the African Standby Force and AU headquarters is most promising.²⁷⁷ Other notable instances of cooperation between the UN and the AU have also been witnessed in the recent past. For example, in regard to the Darfur crisis, the UN Secretariat assisted the AU with planning and assessment for the expansion of its monitoring mission in

²⁷¹ Article 17 (1) of the 2002 Protocol Establishing the Peace and Security Council.

²⁷² Article 17 (1).

²⁷³ Annan, Kofi, 1998, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Report of the Secretary General*. UN Doc S/1998/318/37/ILM (1998) 913.

²⁷⁴ SC Res. 1809 (2008) of 16 April 2008.

²⁷⁵ S/PRST/2007/7, 28 March, 2007.

²⁷⁶ *Ibid.*

²⁷⁷ United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2006 substantive session*, New York, 27 February–17 March 2006, A/60/19, 22 March 2006,

Darfur in accordance with Security Council resolution 1556.²⁷⁸ Other examples of cooperation include the deployment of the AU Mission in Burundi (AMIB) 2003, which was a holding operation pending the deployment of a UN Security Council mandated peacekeeping mission.²⁷⁹ Not only does the evolving practice demonstrate how the UN and the AU may cooperate with each other effectively, it also shed light on the form that a division of labor is likely to take.

5.2 The AU's Relationship with the UN: The Case for Division of Labour in Peace Operations

The UN's acceptance and support of the regional mechanisms such as the AU, ECOWAS and SADC in their quest to promote peace and security in their respective regions was largely accepted but also raised several concerns. In particular, by entrusting these organisations with responsibility for regional conflict, the international community alongside the UN risked abrogating its duty to maintain peace and security in Africa. This is partly because it was hardly envisaged by the drafters of the UN Charter that the institution vested with primary responsibility for the maintenance of international peace and security would play a mere supporting role in operations led by other regional organisations.²⁸⁰

However, on this point, the UN Secretary General took note of the fact that the active role played by regional mechanisms did not absolve the UN from its responsibilities.²⁸¹ The problem remains that he did not set forth any formal pattern of relations between the UN, nor called for any specific division of labour. This was in spite of the compelling arguments which emphasised the potential of regional agencies that needed to be utilised.²⁸² In this regard, some commentators have called for a formalised division of labour between the UN and the AU. For example, Cilliers argues that although 'a clear hierarchy and division of responsibility [...] is probably

²⁷⁸ SC Res. 1556 (2004), 30 July 2004.

²⁷⁹ Festus Agoagye, *The African Mission in Burundi: Lessons Learnt from the First African Union Peacekeeping Operation* ISS (2004). Available at www.issafrica.org/pubs/Other/CT2_2004%20PG9-15.pdf. See also Security Brief - *African Security Review* Vol 12 No 2, (2003).

²⁸⁰ See chapter four.

²⁸¹ Report of the Secretary-General, *In Larger Freedom*, *supra* note 250.

²⁸² Christine Gray, *International Law and the Use of Force*, *supra* note 225, p. 283. See also chapter four.

neither desirable nor achievable in all instances, this is clearly a requirement for Africa.²⁸³

Indeed, the current institutional system creates an interesting dynamic which strengthens the case for a division labour between the UN and the AU. As will be shown in the next chapter, even though the UN possess the legal authority and institutional capacity to address conflicts, it is often slow in responding to crisis particularly in Africa. On the other hand, while the AU and its sub-regional organisations, are often quicker to respond to crisis, they hardly possess the resources and mandate to conduct complex peace operations.²⁸⁴ Hence, a division of labour between the AU and the UN would 'play into the strengths and compensate for the weaknesses of both types of organisations.'²⁸⁵

Furthermore, such an arrangement would lead to the replacement of the current *ad hoc* systems which lacked coherent practice, with 'the establishment of an interlocking system of peacekeeping capacities that will enable the United Nations to work with relevant regional organizations in predictable and reliable partnerships.'²⁸⁶ A formalised division of labour between the UN and AU would also alleviate the overlap, duplication and disagreements with regard to mandates most recently manifest in the Darfur conflict in connection to whether to establish a UN, a hybrid operation or strengthen an AU-led mission.²⁸⁷

It is important at this point to consider how such a division of responsibilities may be established. A formalised division of labour between the two organisations would require the UN to build on its achievements with the AU in Africa.²⁸⁸ For a start, the AU has observer status and a Permanent Mission to the UN. As shown in chapter four, the UN Security Council and the General Assembly have also made declarations promoting cooperation between the UN and regional organisations which include

²⁸³ Jakke Cilliers, 'UN Reform and Funding Peacekeeping in Africa,' *supra* note 233.

²⁸⁴ See SC Res. 1809 (2005), 16 April, 2008.

²⁸⁵ De Coning, 'Refining the African Standby Force Concept,' *supra* note 155; A. Adebayo & C. Landsberg, 'Back to the Future: UN Peacekeeping in Africa,' in A. Adebayo & C.L. Sriram (eds.), *Managing Armed Conflicts in the 21st Century*, (Frank Cass, London, 2001; Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *The Journal of Humanitarian Assistance*, (2006); Theo Neethling, 'Realising the African Standby Force as a Pan-African Deal: Progress, Prospects and Challenges,' *Journal of Military and Strategic Studies*, Vol. 8, Issue 1, (2005), pp. 1-25.

²⁸⁶ Report of the Secretary General, *In Larger Freedom*, *supra* note 250, para. 112.

²⁸⁷ See chapter nine.

²⁸⁸ See SC Res. 1631 (2005), 17 October 2005.

African regional and sub-regional organisations.²⁸⁹ Similarly, recent key UN reports have emphasised the role of regional organisations in conflict prevention and peace operations, which should be expanded and strengthened.²⁹⁰

Most recently, the AU and UN, through the UN Secretary-General and the Chairperson of the AU Commission, signed a Declaration on 'Enhancing UN-AU Cooperation' in November 2006.²⁹¹ The Declaration 'provided a framework for the evolving UN Ten Year Capacity Building Programme for the African Union and an expression of the common commitment of both institutions to work together on issues of peace and human security, human rights, post-conflict reconstruction and regional integration.'²⁹² Similarly, the Security Council has also recently held a special meeting to discuss UN collaboration with African regional organizations, particularly the AU.²⁹³ In an apparent reference to previous lack of coordination in the past, the AU Peace and Security Council and the UN Security Council in their joint communiqué expressed their commitment to develop 'a stronger and more structured relationship' in regard to the management of peace and security.²⁹⁴

Most recently, in April 2008, the Security Council expressed 'its determination to strengthen and make more effective its cooperation with relevant organs of regional organisations, in particular the African Union Peace and Security Council.'²⁹⁵ It is therefore hoped that as evidenced by recent practice, including the plans of a stronger inter-organizational relationship, the two bodies 'are moving towards a more coherent

²⁸⁹ A/Res/49/57, 9 December 1994. See also A/Res/46/58 (1991), A/Res/47/38 (1992) and A/Res/48/36 (1993); S/Res/1631 (2005).

²⁹⁰ See *Report of the Secretary-General's High Level Panel on Threats, Challenges and Change*, (United Nations, 2004) and the Report of the Secretary-General, *In Larger Freedom*, *supra* note 250, para. 213.

²⁹¹ 'Declaration, Enhancing UN-AU Cooperation Framework: for the Ten-Year Capacity Building Programme for the African Union', 16 November 2006. See *Report of the Secretary-General on the Work of the Organization*, GA, 62nd Session, Supplement No.1 (A/62/1), New York, 31 August, 2007. See also the AU Assembly Decision on Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity-Building Programme for the African Union, Assembly/AU/Dec.140 (VIII), adopted at the Eighth Ordinary Session, 29-30, January 2007, Addis Ababa, Ethiopia.

²⁹² Statement by Mr. Abdoulaye Jannet, UN Under-Secretary-General and Executive Secretary of ECA, Tenth Ordinary Session of the Executive Council of the African Union, Addis Ababa, Ethiopia, 25 January 2007.

²⁹³ See S/PV.5649, Wednesday, 28 March, 2007, New York.

²⁹⁴ The United Nations & African Union 'Joint Communiqué' Agreed by the UN Security Council and AU Peace and Security Council, 16 June 2007, para. 7.

²⁹⁵ See SC Res. 1809 (2005), 16 April, 2008.

institutional division of labor, in line with political realities and their respective capacities, and thus, more predictable responses in the future.’²⁹⁶

Indeed, it is clear that the emergence of a division of labour between the UN and the AU is slowly but surely occurring ‘as the disinterest of the most powerful members of the UN Security Council in politically risky interventions in Africa is forcing a rethink of how best to guarantee a *Pax Africana* on the world’s most volatile continent.’²⁹⁷ As suggested by the Secretary General’s March 2005 report *In Larger Freedom*, a memorandum of understanding may govern such a relationship.²⁹⁸ It is therefore submitted that the approach could lead to the formalisation of clear lines of responsibility and more efficient relationship of collaboration between the AU and UN. It is therefore primarily for this reason that the issue is picked up later in chapter eight on the discussion of Africa’s agenda in the reform of the UN. What will become clear is that such an arrangement would not only support the evolving relationship of cooperation between the two organisations, but would also improve the coherence and coordination of the work of other international partners supporting peace and security initiatives under the AU’s leadership but under the UN’s umbrella.

C: Conclusion

This chapter showed that the AU’s institutional framework represents a significant departure from the political, legal and institutional framework of the OAU.²⁹⁹ Indeed, the AU set up is founded on new approaches to peace and security that are based on calculated linkages between the member states, regional mechanisms and the UN, as well as the wider international community. It is therefore expected that the organs and systems put in place will anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity, war crimes and situations amounting to threats to legitimate order. However, measured against the high, and often, unrealistic expectations within and beyond Africa, not only does the

²⁹⁶ Katherine N. Andrews and Victoria K. Holt, ‘United Nations-African Union Coordination on Peace and Security in Africa’, *supra* note 112.

²⁹⁷ Adekeye Adebajo & Chandra Lekha Sriram, *Managing Armed Conflicts in 21st Century*, (Frank Cass Publishers, 2001), p. xv.

²⁹⁸ The Secretary General’s report, ‘In Larger Freedom,’ *supra* note 250, para. 13. See chapter four.

²⁹⁹ T Maluwa, ‘The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa’, *supra* note 1.

AU's institutional framework possess many shortcomings, it also faces serious challenges.³⁰⁰

It deserves to be mentioned at this stage that that the institutional structure of the Union as envisaged by the Constitutive Act of the AU 'was not a program of action but [merely] a legal constitutional framework.'³⁰¹ Thus the current institutional structure of the AU is incomplete and hence constitutes an ongoing project. It will also be recalled that the formation of the AU was not an event but rather, it represents a gradual process of for the future political integration the continent.³⁰² Therefore, a key problem with the majority of the criticisms levelled against the current AU set up is they ignore the fact that it is a recent initiative. Having been formally inaugurated in 2002, its peace and security institutional structures have only been in place since mid-2004. Furthermore, it will be recalled that it took many years for other comparable regional organisations in Latin America, Asia, and Europe to acquire institutional capacity in their respective regions.³⁰³ Moreover, it is visibly notable that, though still in its early stages, the AU's institutional framework is better organised and equipped than its predecessor, which failed to deal with conflict resolution and management.³⁰⁴

However, the concerns that the AU represents a reincarnation of the OAU remain.³⁰⁵ It will be recalled that OAU's failures were attributed to African leaders' own failure to live up to the norms and principles that they themselves had established.³⁰⁶ To confront its challenges, the AU will particularly need to address the lack of political consensus among African leaders on situations amounting to grave circumstances. At this point, it is worth noting that there has been hardly any call by any African leader to recommend the intervention of the AU in circumstances such as those occurring in Sudan, Northern Uganda and Zimbabwe despite the situations in those regions

³⁰⁰ See chapter nine.

³⁰¹ Nsongurua J. Udombana, 'Critical Essay: Can the Leopard Change Its Spots?', *supra* note 147.

³⁰² See chapter five.

³⁰³ Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

³⁰⁴ T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post Colonial Africa', *supra* note 1.

³⁰⁵ N.J. Udombana, 'Can the Leopard Change its Spots?', *supra* note 147. See also Adekeye Adebajo, 'The Curse of Berlin,' *supra* note 89, p 85; Adejo, Dr. Armstrong Matiu 'From OAU to AU,' *supra* note *supra* 237; Cameron Duodu, 'Give Unity a Chance', *News Africa Magazine*, July 29, 2002, pp.20-21; Jakke Cilliers, 'Towards the African Union', *supra* note 22.

³⁰⁶ See chapter five.

arguably meeting the grounds contained in article 4 of the Constitutive Act.³⁰⁷ These situations beg the question as to whether African leaders are serious about the principles to which they committed themselves to being the signatories of the Constitutive Act of the AU.³⁰⁸ It thus remains imperative that the AU transforms its norms and principles into practical policies.

Another major criticism facing the AU is that it contains remarkable internal organizational barriers. Despite the notable improvement from the practice of the OAU, the systems of relationship between the AU, member states and the Regional Mechanisms (RECs) still need to be worked out.³⁰⁹ This is particularly important given their vast responsibilities for peace and security within their respective regions. For the moment, the lack of proper coordination means that the AU's reliance on regional economic communities will not evolve in a uniform manner, particularly given that they are not evenly developed nor are they organised in a synchronised manner.

These disparities are partly due to the fact that 'the AU exists but African unity does not.'³¹⁰ In agreeing to the new constitutional framework, the majority of African States have discovered that the Union can be a useful tool for the pursuit of their national interests.³¹¹ While this may in the long run be useful to the AU, the influence of hegemonic states such as Libya, Nigeria and South Africa remains of major concern given their previous use of sheer strength to push the Union's agenda, in order to further their national interests.³¹² However, the rules on voting and decision making within the AU organs curtail this possibility. Moreover, the member states are likely to reject the domination of the Union's affairs by one state due to the continent's history of slavery, colonialism, and globalisation which entrenched a strong African tradition of equality.³¹³ Ultimately the success of the AU depends on the ability of African leaders to strike the right balance between pursuing their

³⁰⁷ J. Cilliers, K Sturman, 'Challenges facing the AU's Peace and Security Council', *supra* note 64.

³⁰⁸ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 4.

³⁰⁹ Franke, Benedikt, *Enabling a Continent to Help Itself: US Military Capacity Building and Africa's Emerging Security Architecture*, Strategic Insights, Vol. 6, No. 1 (2007).

³¹⁰ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 5.

³¹¹ Thomas Kwasi Tiekou, 'Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union', *African Affairs* (2004), 103, 249-267.

³¹² *Ibid.*

³¹³ J. Cilliers, K Sturman, 'Challenges facing the AU's Peace and Security Council', *supra* note 64.

national interests and possessing the political will to forgo certain aspects of their national sovereignty for the common interests of the continent.³¹⁴

Having said that, a fundamental challenge facing the architecture of the AU's regime for security remains that of availability of resources, particularly given the increase in its budgetary requirements. The Union currently lacks sufficient funds from its member states which inevitably means that it has to turn to funding from external sources. Given that the emergence of crises exacerbates already weak capacity for strategic, long-term planning, the AU's ability to clearly determine its budgetary requirements are further curtailed making it difficult to secure coherent donor assistance.³¹⁵ Furthermore, concern has also emerged that the AU's reference to principles of democracy and human rights could be a 'mere cosmetic exercise' to impress western donor states and international financial institutions.³¹⁶

In any case, reliance on external funds means that the success of crucial operations may ultimately depend on the donor's readiness to support the deployment of the Union's activities in conflict regions. Such an arrangement not only compromises continental autonomy but also waters down the rhetoric of 'African solutions to African problems'. However, it is hoped that the lack of resources and other shortcomings of the AU will attract the UN and other international partners to cooperate and act decisively in support of the AU's efforts to lead. In this regard, a formalised division of labour between the AU and the UN in the promotion of peace and security possesses the potential at ensuring the Secretary General's vision of a 'unity of purpose as the foundation of Africa's partnership with the United Nations.'³¹⁷ Such an arrangement would then create the appropriate conditions for an environment where 'international law would now find itself in a phase of mature constitutionalization, envisaging new forms of cooperation on a regional scale to carry the common values.'³¹⁸

³¹⁴ Adejo, Dr. Armstrong Matiu "From OAU to AU," *supra* note 237.

³¹⁵ Alex Ramsbotham, Alhaji M.S.Bah & Fanny Calder, 'Enhancing African Peace and Security Capacity,' *supra* note 111.

³¹⁶ N.J. Udombana, 'Can the Leopard Change its Spots?,' *supra* note 147.

³¹⁷ See Secretary General, 'Through the Unity of Purpose, 'There is No Limit to What We Can Achieve', SG/SM/10861, AFR//1493, 29 January 2007.

³¹⁸ Andrea Gattini 'Sense and Quasisense of Schmitt's *Großraum* Theory in International Law – A Rejoinder to Carty's 'Carl Schmitt's Critique of Liberal International Legal Order,' *Leiden Journal of International Law* (2002), 15. 53-68.

Chapter Seven

The AU's Constitutional Framework: The African Right to Intervene and its Relationship with the UN and International Law

A: Introduction

In spite of the uncertainties that would later emerge, the collapse of the Berlin Wall revived new hopes for a new age of cooperation in pursuit of a more just and peaceful world.¹ Indeed the optimism of the post Cold War era led the period 1990-1999 being designated as the 'United Nations Decade of International Law.'² During this era, states undertook to uphold the respect for the principles of international law, including promoting the means and methods for the peaceful settlement of disputes. But it is also within this time that conflicts such as the Rwandan genocide (1994), the ECOWAS intervention in Liberia (1991) and Sierra Leone (1997), the East Timor crisis (1999), as well as the NATO bombings of Kosovo in 1999, took place.

In the African context, internal wars such as those raging in Sudan, Somalia, D.R. Congo, Ethiopia and Mozambique not only led to the deaths of millions of citizens but also threatened to cripple Africa's management of continental affairs. The despair, destitution, poverty, disease and number of displaced persons led to serious moral, legal and political questions as to whether African states could afford to continue to uphold their strict adherence to the OAU's policy of non-interference in the affairs of member states. Equally compelling questions were with respect to whether African leaders could sole rely on the rules of the UN Charter as their justification for failing to prevent heinous crimes, such genocide, war crimes and crimes against humanity.

It was shown in chapter four that the post-Cold War era compelled organisations such as NATO, the AU and ECOWAS to transform themselves from purely defence and economic blocks to peace and security regimes in preparedness to confront the new and potential threats. However, it was their subsequent actions that raised fundamental questions relevant to international law, particularly with regard to whether it would be

¹ See chapters three and four

² See GA/ Res/44/23 of 17 November 1989.

'legitimate for a regional organisation to use force without a UN mandate' or if it was 'permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked.'³

It was in this context that African states seemed 'willing to push the frontiers of collective stability and security to the limit without any regard for legal niceties such as the authorisation of the Security Council.'⁴ Although these organisations seemed to challenge the UN rules on intervention, theirs was a response to the dilemma brought about by the predicament that arose due to an impotent Council in times of grave peril.⁵ This quandary had been eloquently articulated by the UN Secretary General who posed a question to 'those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate.' '[I]n the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?'⁶

Africa's reply to this challenge was groundbreaking. Indeed, the AU's Constitutive Act, being the first and only international treaty to contain the right to intervene in grave circumstances, raised fundamental questions relevant to international law, particularly with respect to the Act's compatibility with traditional concepts such as the key provisions in article 2(4) and Chapter VIII of the UN Charter, discussed in chapters three and four. While the UN's adoption of the responsibility to protect as its own response to its past failures is acknowledged in chapter eight, the present chapter examines the AU's right to intervene and the move away from the principle of non-interference in the affairs of member states to that of non-indifference. Furthermore it also demonstrates the manner through which the AU, while paying lip service to the UN Charter, sought to broaden the two permitted exceptions to the ban on the use of force and awarded itself a new role as a regional organisation under Chapter VIII of the UN Charter.

³ Koffi. Annan, 'Two Concepts of Sovereignty', *The Economist*, Sept. 18, 1999.

⁴ B. Kioko, 'The Right of Intervention Under the African Union's Constitutive Act; Non-Interference to Non-Intervention,' *International Review of the Red Cross*, no. 85, 2003.

⁵ See chapters three and eight.

⁶ Kofi Annan's speech on 20 September 1999 before the UN General Assembly: *Balance State Sovereignty with Individual Sovereignty!* http://users.lmi.net/wfanca/pp_annan_on_sov.html.

B: Aims, Purpose and Structure

The *leitmotiv* of the present chapter is to consider African perspectives of international law, including how African states have understood, interpreted and applied key provisions of the UN Charter, international custom and other general principles of international law. Taking in to account the political context in which the major provisions were inserted in the Constitutive Act of the AU, the chapter aims to ultimately determine whether African agreements were reached at the expense of sound legal rules.

Amongst its major conclusions, it is argued that the AU's right to intervene is not only compatible with international law, it also seeks to strengthen the principles and purposes of the UN Charter. In doing so, the chapter picks up on the AU's envisaged system of cooperation between itself and the UN, described in the previous chapter. Thereafter, the discussion herein reiterates a key theme of the thesis which perceives the envisaged cooperation between the Security Council and the AU Peace and Security as evidence of great potential that should be tapped from regional organisations.⁷

In order to meet its objectives, the chapter is divided into three main sections. The first part begins with the definition and analysis of the concept of intervention and how it fits in within the AU's constitutional framework. This will be followed by an article-by-article analysis of the key principles of the AU's Constitutive Act and their compatibility with established legal rules, in the second section. Finally, having demonstrated the relationship with articles 2(4), 53 and 103 of the UN Charter, the last section ends with a discussion of the role of sanctions in the overall AU framework and its connection with the emerging right to democratic governance.

1.1 The Background to Article 4 of the Constitutive Act and the intense debate

It will be recalled from chapter five that the International Panel of Eminent Personalities investigating the causes and atrocities committed during the Rwandan genocide blamed African states for their inaction and strongly recommended that the OAU 'establish appropriate structures to enable it to respond effectively to enforce

⁷ See chapters four, seven, eight and nine.

peace in conflict situations.’⁸ The call for the establishment of a new AU was subsequently enacted upon in the Sirte Declaration,⁹ which was closely followed by the drafting of the legal text of the AU contained in the Constitutive Act. Having been adopted by the OAU Assembly of Heads of State and Government meeting, in Lomé, Togo in July 2000, the Constitutive Act of the AU entered into force on 26 May 2001, after the 36th depositary of instrument of ratification by its member states.¹⁰

As stated above, the establishment of the AU was not only a recognition of the UN’s ambivalent attitude towards African conflicts but also due to Africa’s own internal shortcomings.¹¹ Hence, in establishing the AU, member states agreed to abide by a constitutional framework that obligated all member states to observe certain fundamental values, including respect for human rights and democratic governance. In addition, it condemned unconstitutional change of governments.¹² As will be shown further below, failure to abide by these principles leads to sanctions being imposed on defaulting member states.¹³

Most significantly, the breach of fundamental values of African regional law gave the AU the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.¹⁴ Member states would also be able to request intervention from the AU to restore peace and security.¹⁵ Although controversial, Maluwa, who was the Legal Adviser to the AU at the relevant time, explained the justification for the new thinking by Africa leaders, which contradicted the OAU’s principled of non-interference and challenged universal customary laws of non-intervention:¹⁶

⁸ Organisation of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*, 2000.

⁹ See the Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya. EAHG/Draft/Decl. (IV) Rev.1

¹⁰ In line with article 36 of the Constitutive Act of the AU.

¹¹ See introduction and chapter five.

¹² See chapter five.

¹³ Article 23 (2) of the Constitutive Act of the AU.

¹⁴ See article 4(h).

¹⁵ See article 4 (j).

¹⁶ See chapters two, three, five eight and nine. See also article 2 (7) of the UN Charter, article 3 of the Charter of the Organisation of African Unity.

[i]n an era in which post-independence Africa has witnessed the horrors of genocide and ethnic cleansing perpetrated on its own soil and against her own kind, it would have absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of such grave circumstances as war crimes, genocide and crimes against humanity.¹⁷

In doing so, although the majority of African states agreed to award the AU with the right to intervene in grave circumstances, including war crimes, genocide and crimes against humanity, Libya led the onslaught in advocating for a wider right to intervene that provoked an intense debate.¹⁸ While Libya's suggestion was far-reaching, as it had also sought the inclusion of the right to intervene to deal with situations of a 'serious threat to legitimate order,' its proposal was initially rejected by some states as 'being both premature and potentially dangerous, in the absence of an agreed mechanism within the context of the African Union for assessing whether and to what extent such a threat existed, and what constituted legitimate order.'¹⁹ Furthermore, in apparent reference to general international law, delegates notably from the Arab Republic of Egypt at the session of the OAU Council advocated for an article 4(h) limited to war crimes, genocide and crimes against humanity, which constituted clear international crimes.²⁰ However, in spite of the earlier opposition, Libya's proposal was later approved by the Assembly without much deliberation when it adopted the draft Protocol on the Amendments to the Constitutive Act of the African Union.²¹ Thus, the AU's right in article 4 (h) was phrased as follows:

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 a serious threat to legitimate order to restore peace and stability in the Member State of the Union upon the recommendation of the Peace and Security Council.

¹⁷ T Maluwa 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union' (2002) 8 *African Yearbook of International Law* 28.

¹⁸ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union', *Netherlands International Law Review*, Volume 51, Issue 02.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See Doc. Ex/ Assembly/4/(I): Assembly of the African union, First Extraordinary session, 3-4 February, Addis Ababa, Ethiopia. See also T. Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union', *Netherlands International Law Review*, Volume 51, Issue 02, (2004).

The problem with the Constitutive Act of the AU is that, in a similar fashion to the UN Charter, it does not define what it means by 'intervention' and whether the concept includes military measures or whether it is restricted to non-forcible measures. Nevertheless, generally speaking, the concept of intervention has been described as having a distinct character.²² Although several definitions exist with regard to intervention, these contain minor differences.²³ According to Oppenheim's classical description, '[i]ntervention is dictatorial interference by a [s]tate in the affairs of another [s]tate for the purpose of maintaining or altering the actual condition of things.'²⁴ Similarly, Hedley Bull terms it as a 'dictatorial or coercive measure, by an outside party or parties, in the spheres of jurisdiction of a sovereign state, or more broadly of an independent political community.'²⁵

It is clear that military intervention under article 4 of the Constitutive Act would apply to 'grave circumstances' which are listed by the Act to include; war crimes, genocide and crimes against humanity. This is because these transgressions are normally committed in the context of armed conflicts and whose proportionate response would arguably require armed force.²⁶ However, in addition to outright military intervention permissible under the AU framework, the definition of intervention may be broadened to include 'political, economic or any other form of coercion.'²⁷ This description is clear from the practice of the AU, which has made use of sanctions during situations that arguably amount to 'a threat to legitimate order' under the Constitutive Act of the AU, as will be shown further below. In using this approach, a uniting thread running through the different forms of intervention is the concept of interference in the affairs

²² Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law* (London: Longmans, 1996), pp. 428—434; and Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp. 44—45.

²³ See definitions in R.J. Vincent, *Nonintervention and International Order*, (Princeton, NJ: Princeton University Press, 1974), p. 3; Lous Jacquet, (ed.), *Intervention in International Politics*, (The Hague:Nijhof Press, 1971), p. 40; Stanley Hoffman, *Duties Beyond Borders: On the Limits and Ethical International Politics*, (Syracus, University Press, 1981), p. 11.

²⁴ Oppenheim, L.: 1905, *International Law: A Treatise*, (1st edn. Longmans, Green, London), p. 181.

²⁵ Hedley Bull, 1984, *Intervention in World Politics*, (Oxford University Press, USA), p. 1.

²⁶ K. 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', 3 (1) *African Human Rights Law Review Journal* (2003).

²⁷ See The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res.2625 (XXV), 1970. See also the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, GA Res. 2131(XX) 1965; the 1974 Definition of Aggression, GA Res. 3314 (XXIX) and the Resolution on the Enhancing the Effectiveness of the Prohibition of the Use of Force, GA Res. 42/22, 1987.

of other member states by the AU, regardless of whether it is a forcible or a non-forcible measure.

With this background, a major object of this thesis has been to address the fundamental questions raised by the AU's right to intervene, particularly with regard to its compatibility with traditional concepts such as the key provisions in article 2(4) and Chapter VIII of the UN Charter.²⁸ However, before doing so, it is of crucial importance to understand the African context before moving on to the broader questions of international law, in order to fully understand the origins, institutionalisation and dynamics of the right to intervene. Firstly, immediately after the AU's establishment, its right to intervene provoked deeply divisive debates amongst African scholars and states over the nature, extent and discretion awarded to the AU.

For some, the right to intervene went too far and ought to be rephrased as 'assistance.'²⁹ On the other hand, some writers argued that it did not go far enough and that the decision making process under of article 4(h) should have been expressed as an obligation, as opposed to being phrased as a discretion. On this point, Kindiki opined that expressing it as a 'right' was unfortunate as it purports to give the Union 'discretion' to decide whether or not to intervene.³⁰ However, such a view fails to take into account of the fact that it would be due to lack of political will, rather than absence of the law³¹ that would determined the effectiveness of the AU, as shown in chapter nine with regard to the Darfur conflict. In any case, it remains 'doubtful

²⁸ See Jean Allain 'The True Challenge to the United Nations System of the Use of Force: The failures of Kosovo and Iraq and the Emergence of the African Union' *Max Planck Yearbook of United Nations Law*, Vol.8, (2004), pp. 237-289.

²⁹ Tim Murithi, 'Institutionalising Pan-Africanism: Transforming African Values and Principles into Policy and Practice', *ISS Paper* 143, (2007).

³⁰ See also Kithure Kindiki, 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives', Monograph 131, in *Rethinking the Role of the United Nations and the African Union in Darfur*, Institute of Security Studies, May 2007; K. 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, *supra* note 26; Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene: A Shift From Human Security to Regime Security,' *African Security Review* 12, no. 2 (2003).

³¹ On this point, see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2003). Generally, see Nicholas J. Wheeler, *Saving Strangers* (Oxford: Oxford University Press, 2000); and Michael Walzer, 'The Argument about Humanitarian Intervention,' *Dissent* 49, no. 1 (Winter 2002), pp. 29-37.

whether African states pay attention to such details as to whether they have a right or a duty to act in a certain way.’³²

What is relevant here is that, despite the consensus that the AU could intervene where the UN had failed, it nevertheless gave the Union a broad margin of discretion in its decision making.³³ In this context, in similar fashion to the UN Security Council under Chapter VII of the UN Charter, the AU’s right to intervene was not designed to issue the regional organisation with any specific obligation but rather a wide discretion to intervene, which in turn is likely to be dictated by regional politics as opposed to the law. Meanwhile, as shown below, disagreements emerged with regard the compatibility of the AU’s right to intervene with African regional norms, particularly with respect to the norm of non-intervention. Although the Constitutive Act of the AU contains no less than sixteen principles, what follows here is a review of some of the key provisions, including articles 4(f), (g), (h) and (j), which touch upon and concern the right to intervention within the AU’s framework.

2.1 Article 4(g): Non-interference in the internal affairs of another State

This article provides for the non-interference by any AU member state in the internal affairs of another. Interestingly, the provision in article 4 (g) arguably resembles article 2(7) of the UN Charter, which forbids the UN from intervening ‘in matters which are essentially within the domestic jurisdiction of any state.’ Regrettably, the Constitutive Act fails to make mention on what constitutes ‘internal affairs of another,’ which potentially leaves member states ‘to give whatever interpretation that suits them best.’³⁴ Furthermore, its silence on the matter also begs the question as to whether matters that are a threat to peace and security or amount to gross violations of human rights should be denied the character of ‘internal affairs,’ particularly where they form the grounds for intervention under the AU framework.³⁵

³² Evarist Baimu and Kathryn Sturman, ‘Amendment to the African Union’s Right to Intervene,’ *supra* note 30.

³³ See chapter six.

³⁴ Nsongurua J. Udombana, ‘Critical Essay: Can the Leopard Change Its Spots? The African Union Treaty and Human Rights’, Vol.17, No. 6, *American University Law Review*, (2002).

³⁵ On this point, see O.U. Umozurike, *Introduction to International Law*, (Ibadan Nigeria: Specter Books, 1993), p. 235.

In addition, on simple reading, article 4(g) seems to be in contradiction with the AU's right to intervene as it does not expressly refer to article 4 (h) as an exception. Thus it seems to effectively disempower article 4(h) by affirming the 'non interference by any member state.'³⁶ However, on a closer analysis, it becomes clear that the stipulation in (g) prohibits interference from an AU 'Member State' and not intervention by the AU itself. Hence, this provision stands in contrast to article 2 (7) of the UN Charter which is expressly addressed to the UN.³⁷ Therefore, it specifically deals with the relations between member states and does not in any way refrain the AU from interfering in the affairs of member states.³⁸ From this interpretation, these provisions reject unilateralism and favor the regional collective action which is considered to be more legitimate.³⁹ Finally, it clearly reflects the veracity of the international norm of non-intervention which prohibits one state from interfering in another.⁴⁰

2.2 Article 4 (f): The Prohibition of the Use of Force or Threat to Use Force among Member States of the Union

Article 4 (f) prohibits the use of force or threat to use force amongst AU member states and therefore is a restatement of the ban on the threat or use of force contained in article 2 (4) UN Charter. It will be recalled from chapter three that the prohibition on the recourse to use of force lies at the heart of international law and instils a fundamental obligation amounting to *jus cogens* whereby derogation by states is not allowed.⁴¹ Recently, the principles of non-intervention and the ban on the prohibition of force have also been reiterated in the recent two African cases concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda & Democratic Republic of the Congo v Rwanda)* in 2005.⁴²

Furthermore, in support of the prohibition against the use of force, states undertake to abide by the objectives of the AU, including to 'encourage international cooperation,

³⁶ Adejo, Dr. Armstrong Matiu 'From OAU to AU: New Wine in Old Bottle?' *Paper* prepared for presentation at the 10th CODESRIA General Assembly, Nile International Conference Centre, Kampala, December 8-12, 2002.

³⁷ See also Kithure Kindiki, 'Intervention to Protect Civilians in Darfur,' *supra* note 30.

³⁸ Jean Allen, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

³⁹ Alex J Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics & International Affairs* 20 (2), (2006), 143-169.

⁴⁰ See chapters two, three, five eight and nine. See also article 2 (7) of the UN Charter, article 3 of the Charter of the Organisation of African Unity.

⁴¹ Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making,' *EJIL* Vol 1 (2) (1991).

⁴² Posted on the ICJ website.

taking due account of the [UN] Charter and the Universal Declaration of Human Rights.’⁴³ The Act also seeks to promote peace, security and stability in Africa⁴⁴ and to ‘[p]romote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.’⁴⁵ In particular, states undertake to pay respect to the sanctity of human life,⁴⁶ condemn and reject impunity⁴⁷ and shun political assassination, acts of terrorism⁴⁸ and subversive activities.⁴⁹

Interestingly however, the Constitutive Act is silent on the exceptions contained in the UN Charter, namely self-defence and Chapter VII measures under article 51 and 42 of the UN Charter respectively. This lack of reference to the exceptions could be interpreted as an emphasis on the AU’s mandate to act collectively in self-defence of a victim state and individuals during grave circumstances, as suggested in chapter four. However, the AU recently acknowledged the role the right to self-defence in its *Common Policy on Reform* of 2005 where it explained that ‘any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act should be prohibited.’⁵⁰

However, the Constitutive Act of the AU, despite paying lip service to the UN Charter and its vague references to the Security Council, as shown below, failed to pronounce on any obligations it may have under Chapter VIII of the UN Charter. With this stance standing in sharp contrast to the Constitutive instruments of other major regional organisations,⁵¹ such as the OAS⁵² and NATO,⁵³ the AU’s own preparedness to exercise its right to intervene under article 4 (h), raised questions regarding to its compatibility with the UN Charter. While this specific issue is addressed further

⁴³ Article 3 (e) Constitutive Act of the AU.

⁴⁴ Article 3 (f).

⁴⁵ Article 3 (h).

⁴⁶ *Ibid.*

⁴⁷ Article 4 (o).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ See the *Common African Position on the Proposed Reform of the United Nations*, ‘the Ezulwini Consensus’ adopted by the Executive Council of the African Union at the 7TH Extraordinary Session, 7- 8 March 2005, Addis Ababa, Ethiopia. Ext/EX.CL/2 (VII)

⁵¹ See chapter four.

⁵² See article 1 of the Charter of the Organisation of American States.

⁵³ See Article 1 and 7 of the NATO Treaty.

below, what follows here is an analysis of the actual right to intervene as envisaged under the AU framework.

2.3 Article 4 (h): Intervention in Respect to Grave Circumstances

Predictably, article 4(h) is the most controversial as it specifically offers the unprecedented right of intervention. Precisely, article 4(h) provides for intervention in situations of grave circumstances and in particular, territories where serious crimes and human right violations are taking place. Although this seems to be contradicted by the principle of non-interference,⁵⁴ the latter provision applies between AU states and in no way bars the Union acting collectively to halt systematic violations of human rights.⁵⁵

With respect to the grounds of intervention in article 4(h), a common thread originally united war crimes, crimes against humanity and genocide. As shown in chapter one, in addition to these crimes having attained the status of *jus cogens*, they also form the *ratione materiae* of the Yugoslav⁵⁶ and Rwandan⁵⁷ International Criminal Tribunals⁵⁸ and fall under the jurisdiction of the International Criminal Court where they have been termed as crimes of 'greatest concern to the international community.'⁵⁹ What aroused considerable debate was the amendment⁶⁰ to article 4 (h), which added a further ground of intervention namely, 'serious threats to legitimate order.' However this ground is discussed under the more appropriate section relating to the emerging African regional right to democratic governance. What follows is a discussion of other instances that permits intervention under the AU framework.

2.4 Article 4 (j): Intervention in Order to Restore Peace and Security

This article provides for the 'right of member states to request intervention from the Union in order to restore peace and security.' Questions have arisen as to how this

⁵⁴ See article 4 (g) of the Constitutive Act of the AU.

⁵⁵ Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

⁵⁶ See article 3, 4 and 5 of the Statute of the International Tribunal for Former Yugoslavia.

⁵⁷ See article 2, 3 and 4 of the Statute of the International Criminal Tribunal for Rwanda.

⁵⁸ See SC Res. 827 (1993) of 25, May, 1993 and SC Res. 955 (1994) of 8 November 1994 on the creation of the International Criminal Tribunals for Yugoslavia and Rwanda respectively.

⁵⁹ See art 2 Rome Statute establishing the International Criminal Court.

⁶⁰ See article 4, Protocol on Amendments to the Constitutive Act of the African Union on 03 February and 11 July 2003.

right is to be construed.⁶¹ In particular, could a member state ask the AU to intervene in another member state or is intervention limited to states that request the intervention themselves? On this question, the AU Assembly,⁶² in its Rules of Procedure,⁶³ opted for a narrow interpretation in Rule 4, which reads that the Assembly shall '(f) decide on intervention in a Member State at the request of that Member State in order to restore peace and security.'⁶⁴ This is consistent with international law's recognition of a government's sovereign right to request for external assistance, particularly during armed conflict.⁶⁵

In light of the foregoing, article 4 (j) has been 'interpreted in a manner that restricts the application of the clause to when an affected member state requests intervention itself, rather than other members states requesting intervention in a third country.'⁶⁶ However, this narrow interpretation seems to be contradicted by the Protocol establishing the Peace and Security Council, which maintains the 'right of Member States to request intervention from the Union in order to restore peace and security in accordance with article 4(j) of the Constitutive Act.'⁶⁷

While the former speaks of a 'member state', the latter mentions 'Member States.' In spite of the uncertainty, it is worth noting that with respect to interpretation, while the Rules of Assembly are mere internal and thus secondary legislation, the Protocol establishing the Peace and Security Council is an international agreement. Therefore the latter, being a treaty based on state consent will carry more weight.⁶⁸ In any case, the question that needs to be asked goes to the legality of such a premise within and beyond Africa and whether it is supported by state practice and *opinio juris*. Part of

⁶¹ On this question, see Jean Allain 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

⁶² For illustration on the AU Assembly, see chapter six.

⁶³ See Rule 4 (1) (f) Assembly of the African Union, 'Rules of Procedure of The Assembly of The Union', First Ordinary Session 9-10 July 2002, Durban South Africa. /2(I) ASS/AU – a.

⁶⁴ Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

⁶⁵ On this point, see McCoubrey & White, *International Law and Armed Conflict*, (Dartmouth, 1992), pp. 318-9. See also Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government,' *1985 British Yearbook of International Law* (Oxford: Clarendon Press, 1985); O.Schachter, 'The Rights of States to use Armed Force', *82 Michigan Law Review*, (1984), pp. 1620-1646.

⁶⁶ J. Cilliers/ K. Sturman, 'The Right Intervention: Enforcement Challenges for the African Union,' *African Security Review* 11(2002) 29.

⁶⁷ See article 4(k) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council.

⁶⁸ Article 38 (1) Statute of the International Court of Justice 1945.

the answer lay in yet another development arising, unsurprisingly, from the Security Council's unwillingness or inability to act in conflicts that threatened regional stability.⁶⁹ In particular, the interventions in Liberia and Sierra Leone, both without Council authorisation, under the auspices of ECOWAS were witnessed by AU member states that would later be eager to take on board the lessons learnt.

2.5 The Genesis of the African Regional Right to Intervene: The Impact of ECOWAS interventions on State Practice

The 1990s Africa saw two interventions, in Liberia (1991)⁷⁰ and Sierra Leone (1997)⁷¹ that had not been authorised by the United Nations and which remain controversial.⁷² What is more, ECOWAS interventions in West Africa 'gravely undermined the sacrosanct tenets guiding international relations among Africa's post-independence political leaders.'⁷³ Indeed, this action set in motion what was to later play a crucial role in influencing the reformulation of the OAU's cardinal principle of non-interference in the internal affairs of member states.⁷⁴ As Chairman of the OAU, President Museveni, who had earlier liberated Ugandans from Idi Amin's regime,⁷⁵ joined the then OAU Secretary General Salim A. Salim in supporting ECOWAS' intervention in Liberia (1991).⁷⁶

⁶⁹ H. Howe, *Ambiguous Order: Military Forces in African States*, (Boulder, Cob.: Lynne Rienner, 2001), p. 136.

⁷⁰ On this intervention see Ikechi Mgbogji, *Collective Insecurity: The Liberian Crisis, Unilateralism, and Global Order*, (University of British Columbia Press, 2004); Ofuatey-Kodjoe, 'W., Regional Organisations and the Resolution of Internal Conflict: The ECOWAS Intervention in Liberia,' *International Peacekeeping*, Vol. 1, No. 3, Autumn 1994; A., *Historical Background to the Liberian Crisis* in Vogt, M., (ed), *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peacekeeping*, (Lagos: Gambumo Publishing, 1992).

⁷¹ Berger, Lee F. 'State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone,' 11(3) *Indiana International & Comparative Law Review* 605 (2001); Nowrot, Karsten, *et al*, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone,' 14(2) *American University International Law Review* 321 (1998).

⁷² On literature looking at both interventions, see Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone,' *Temple International and Comparative Law Journal* 12, no. 2 (1998); Mitikishe Maxwell Khobe, *The Evolution and Conduct of ECOMOG Operations in West Africa*, in *Monograph No.44*, Institute for Security Studies, (2000).

⁷³ Emmanuel Kwesi Aning, 'Towards the new Millennium: ECOWAS' evolving Conflict Management System', *African Security Review*, Vol 9. No 5/6, (2000).

⁷⁴ Article 3 of the OAU Charter.

⁷⁵ See chapter five.

⁷⁶ Emmanuel Kwesi Aning, 'Towards the new Millennium,' *supra* note 73. See generally, M.Weller (ed.), *Regional Peacekeeping and International Enforcement: The Liberian Crisis* (Grotius Publications, Cambridge, 1994).

During this time, a new interpretation of the territorial principle contained in the African Charter took into account of the dignity and worth of the African and rejected the formulation of the term 'non-interference as meaning *indifference*.'⁷⁷ This reasoning was first utilised following the collapse of President Doe's regime that led to the ensuing civil war in Liberia in 1990. Subsequently, the Economic Community of West African States Monitoring Group (ECOMOG) was established by the ECOWAS Standing Mediation Commission to keep the peace, restore order and monitor the cease-fire between the government and the rebels.⁷⁸ To some, this intervention formed 'the first real attempt by African countries to [re]solve an African conflict.'⁷⁹ It deserves to be mentioned that the UN Security Council, despite not having authorised ECOMOG, endorsed the intervention two years later. By way of resolution 788 (1992),⁸⁰ the Council having determined that the 'deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole', enforced a complete arms embargo on Liberia. The resolution, which has been cited as retrospective authorisation by the Council,⁸¹ further commended ECOWAS, 'for its efforts to restore peace, security and stability in Liberia.'⁸²

In 1997, ECOMOG was again mandated by ECOWAS to enforce sanctions and restore law and order in Sierra Leone following the ousting of the democratically elected government that again led to a civil war. As shown further below, on this occasion, at the OAU Summit in Harare, Zimbabwe in May 1997, the Council of Ministers strayed far away from the very much revered African principle of non-interference, and publicly, strongly and unequivocally condemned the *coup d'état* and appealed to the leaders of ECOWAS to assist the people of Sierra Leone to restore

⁷⁷ Emmanuel Kwesi Aning, 'Towards the new Millennium,' *supra* note 73.

⁷⁸ See ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90, on the Cease-fire and Establishment of ECOWAS Cease-fire Monitoring Groups for Liberia, Banjul, Republic of Gambia, August 7, 1990; See also D.Wippman, 'Enforcing the Peace; ECOWAS and the Liberian Civil War', in L.Damrosch, *Enforcing Restraint: Collective Intervention in Internal Conflicts*, (1993), p. 167.

⁷⁹ The OAU Secretary General Salim Ahmed Salim, quoted in *The Guardian*, Nigeria, 08 May 1991. See also the African Concord, Nigeria, of 22 April 1991 and Emmanuel Kwesi Aning, 'Towards the new Millennium,' *supra* note 73.

⁸⁰ See SC Res. 788 (1992) of 19 November 1992

⁸¹ Aoife O'Donoghue, (2005), 'Humanitarian Intervention Revisited', 1 *HanseLR* 165-175.

⁸² SC Res. 788 (1992) of 19 November 1992.

constitutional order to the country.⁸³ Meanwhile, in addition to the condemnation of the coup by the President of the Security Council,⁸⁴ its members adopted resolution 1132 (1997),⁸⁵ which determined that the situation constituted a threat to regional peace and security. Furthermore the Council demanded that 'the military junta take immediate steps to relinquish power in Sierra Leone.' Having imposed an embargo on the junta, the Council authorised ECOWAS 'to ensure strict implementation of the provisions' in regards to the blockade.⁸⁶ As showed further below, ECOMOG intervened in 1998 again without Council authorisation reinstalling the democratically elected president, which in turn led to questions relating to the emerging right of democratic governance in Africa.⁸⁷ Meanwhile, the Council welcomed the actions by ECOWAS in a presidential statement⁸⁸ and later in resolution 1162 (1998).⁸⁹

Although lacking the Security Council's prior authorisation, these interventions found legitimacy from the fact that not only was there hardly any criticisms from the Council, they had considerable international support especially by member states of the OAU.⁹⁰ Meanwhile, by 1999, ECOWAS had institutionalised its right to intervene by deciding that its newly established Mediation and Security Council could, 'authorise all forms of intervention and decide particularly on deployment of political and military missions.'⁹¹ On this point, Abass argues that the ECOWAS Mechanisms could be perceived as the 'first attempt by a regional arrangement to pursue a course of a completely decentralised collective security.'⁹² In regard to the reaction of states to questions on the apparent usurpation of the Security Council, Ben Kioko, the Legal Advisor to the AU, explains that '[i]t would appear that the UN Security Council has

⁸³ Organisation of African Unity Council of Ministers Sixty-sixth Ordinary Session, 28-30 May 1997, Harare, Zimbabwe, Draft Decisions, CM/Draft/Dec. (LXVI) Rev.1, p.18

⁸⁴ *Statement by the President of the Security Council*, UN SCOR, 52nd Session, UN Document S/PRST/1997/29 (1997).

⁸⁵ See SC Res. 1132 (1997) of 8 October, 1997.

⁸⁶ SC Res. 1132 (1997) of 8 October 1997.

⁸⁷ Nowrot, Karsten, et al, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14(2) *American University International Law Review* 321 (1998).

⁸⁸ UN Document S/PRST/1998/5.

⁸⁹ See SC Res. 1162 (1998) of 17 April 1998.

⁹⁰ J. Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts', *supra* note 72.

⁹¹ Article 10 (c) ECOWAS, Protocol concerning the Mechanism for Conflict Prevention, Management Resolution, Peace-keeping and Security 10 December (1999). The Protocol mandates ECOWAS to engage in, *inter alia*, preventive diplomacy, peacekeeping and humanitarian assistance.

⁹² A. Abass, 'The New Collective Security Mechanism of ECOWAS: Innovations and Problems', *Journal of Conflict and Security Law*, Vol. 5 No. 2, (2000), pp. 211-229.

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 the time.’⁹³

Indeed, the intervention by the ECOWAS in the shape of ECOMOG in Liberia (1991) and Sierra Leone (1997) would develop into a customary regional law⁹⁴ that would later be codified in the Constitutive Act of the AU. Moreover, although contested by certain quarters,⁹⁵ an emerging African practice led to the position whereby an otherwise illegal intervention becomes lawful after an *ex-post facto* authorisation.⁹⁶ It is particularly important to note that with regard to the ECOWAS intervention in Liberia (1991) and Sierra Leone (1997), there was hardly any justification as to the legality of both operations. These interventions neither put up the traditional argument of self-defence nor sought Security Council authorisation.⁹⁷ Significantly however, there was hardly any condemnation of the intervention.⁹⁸

As mentioned earlier, ECOMOG interventions in Liberia and Sierra Leone, both without Security Council authorisation, were witnessed by the draftsmen of the AU’s right to intervene who would codify the new norm in the Constitutive Act of the AU. Therefore, in picking up on the lessons learnt, the AU, while agreeing that the ‘intervention of Regional Organisations should be with the approval of the Security Council,’ affirmed that ‘in certain situations, such approval could be granted ‘after the fact’ in circumstances requiring urgent action.’⁹⁹ Therefore, in such situations, the AU may intervene, particularly after the Security Council has determined that a situation is a threat to international peace and security and thereby remains seized of the matter but fails to act due to a deadlock in the Council.¹⁰⁰ Meanwhile, the move away from

⁹³ B. Kioko, ‘The Right of Intervention under the African Union’s Constitutive Act,’ *supra* note 4.

⁹⁴ On local or regional customary law, see *The Asylum Case (Colombia v. Peru, 1950 I.C.J. 266*.

⁹⁵ E.g. See Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, (Manchester University Press, 2006).

⁹⁶ Jeremy L. Levitt, ‘The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), pp. 213-251. See also Jeremy L. Levitt., ‘The Peace and Security Council of the African Union: The Known Unknowns’, 13 *Transnational Law and Contemporary Problems* (2003), 109–37.

⁹⁷ Christine Gray, *International Law and the Use of Force*, (Oxford University Press; Second Edition, 2004).

⁹⁸ *Ibid.*

⁹⁹ See *the Common African Position on the proposed Reforms of the United Nations*, *supra* note 50. See chapter eight.

¹⁰⁰ A. Abass, ‘The New Collective Security Mechanism of ECOWAS,’ *supra* note 92.

the principle of indifference to non-interference exhibited by the ECOWAS interventions formed a significant page in Africa's history and would later be incorporated in the Constitutive Act of the AU, as shown below¹⁰¹

2.6 The AU' Codification of the African Norm of Intervention: It's Relation to Sovereignty and the Question of Consent

In signing up to the Constitutive Act of the AU, member states abandoned their jealously guarded sovereignty and unanimously agreed to attach the condition of respect for human rights on their territorial authority. However, despite their conscious acceptance allowing the AU to intervene in their territories, it will be recalled that the norm of non-intervention is still a cornerstone of international law,¹⁰² whose breach may entail state responsibility.¹⁰³ On the other hand, regardless of the sacrosanct nature of this doctrine, it is important to note that the ILC Articles on State Responsibility contain several circumstances, including that of consent which when invoked, would justify an otherwise illegal act.¹⁰⁴

In this regard, Abass and Baderin explain that *what* the AU member states contracted out of by giving their consent to intervention was the principle of non-intervention. Therefore, in ratifying the AU Act, African countries must be understood to have 'conceded a quantum of their legal and political sovereignty' to the AU.¹⁰⁵ Similarly, Naldi and Magliveras, on their part, perceive the right to intervene as 'an obvious trend in the Act towards limiting the sacred sovereignty [...] and moving towards limiting the direction permitting the involvement of the Union in the domestic affairs of participating countries.'¹⁰⁶

What is important to note here is that this consent was not to be abused or frivolously utilised. Indeed, had the provision allowed such infringement, 'the member states

¹⁰¹ On this point, see also Jean Allain 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

¹⁰² See chapters two, three and nine.

¹⁰³ On state responsibility, see chapters one and nine.

¹⁰⁴ Article 20, I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the 53rd Session, I.L.C. (2001), G.A.R. 56 Session, Supplement 10.*

¹⁰⁵ A. Abass and M. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union', 49 *Netherlands International Law Review* (2002), 1 19.

¹⁰⁶ Magliveras K.D and Naldi G.J, 'The African Union: A New Dawn for Africa', *International and Comparative Law Quarterly*, Volume 51, Number 2, (April 2002), pp. 415-425(11).

would not have agreed to allow the provision in the Act.¹⁰⁷ In this regard, African countries, by being state parties to the Constitutive Act, a multilateral treaty, consent to the institutional invocation of this right by the appropriate body within the Union.¹⁰⁸ Hence, the fact that AU member states consent to intervention by AU in clearly defined circumstances would remove responsibility entirely.

However, article 26 of the ILC Articles invalidates any invocation of consent in situations involving a peremptory norm of international law.¹⁰⁹ Hence, the problem with the above argument is that the prohibition of the use of force in member states, being a rule of *jus cogens* renders void any consent that African states have given the AU to intervene.¹¹⁰ This point is reinforced by the Vienna Convention on the Law of Treaties which provides that '[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.'¹¹¹ Furthermore, it shall be recalled¹¹² that the UN Charter provides that obligations of member states under the UN Charter supersede their obligations under any other treaty.¹¹³

Therefore, the principles of the AU, from the start, raise fundamental questions relevant to international law, particularly in regard to article 2(4) and Chapter VIII of the UN Charter. For the most part, the question that arises is whether the provisions in article 4 of the Constitutive Act, interpreted narrowly or permissively, are in harmony with established normative rules of the UN Charter. However, it is argued below that as shown in chapter four, rather than relying on the internal mechanisms of regional arrangements in order to determine an organisation's legality, it is more preferable to assess their overall compatibility with the purposes of the UN by examining the practice between the UN and the said organisations.¹¹⁴

¹⁰⁷ K. 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', 3 (1) *African Human Rights Law Review Journal* (2003).

¹⁰⁸ On the means of expressing consent, see article 11 of the Vienna Convention on the Law of Treaties 1969.

¹⁰⁹ On this point see, Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis', *International and Comparative Law Quarterly* (2004) 53(1):211-225.

¹¹⁰ See also Kithure Kindiki, 'Intervention to Protect Civilians in Darfur', *supra* note 26.

¹¹¹ Article 53 of the Vienna Convention on the Law of Treaties 1969.

¹¹² See chapters two and three.

¹¹³ Article 103 of the UN Charter. See chapters three and four.

¹¹⁴ Christine Gray, *International Law and the Use of Force*, *supra* note 97, p. 287.

3.1 The AU's Right to Intervene as Measured against the Prohibition in Article 2(4) of the UN Charter

The first issue to be considered in this section is with respect to the relationship between the AU's right to intervene and the key peremptory norm of international law contained in article 2(4) of the UN Charter. Although the Constitutive Act of the AU does not expressly challenge this norm, its clear lack of reference to its obligations under Chapter VIII of the UN Charter, which stands in sharp contrast to the OAS and NATO,¹¹⁵ raises serious questions as to whether political negotiations within member states had been reached at the expense of sound legal rules.

Hence, unsurprisingly, several commentators conclude that the right to intervene under the AU's constitutional framework is at crossroads with the prohibition on the use of force found in article 2(4) of the UN Charter.¹¹⁶ Such a conclusion is particularly significant given that it will be recalled¹¹⁷ that the legality of this ban is not only of 'universal validity'¹¹⁸ but has acquired the status of *jus cogens*¹¹⁹ and thereby constitutes an integral part of a 'higher law,' which is of overriding importance and in which no derogation is permitted.¹²⁰

However, chapter four raised the question concerning the extent to which regional organisations, including the AU, are bound by certain key provisions of the UN Charter. This point is significant because the ban on recourse to force is addressed to member states of the UN and not regional organisations, which possess an international legal personality that is independent of their member states.¹²¹ Borrowing from this argument, it will be recalled from the discussion above that it is

¹¹⁵ See chapter four.

¹¹⁶ Article 2 (4) of the UN Charter. See also chapter three and four.

¹¹⁷ See chapter three.

¹¹⁸ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (7th rev. ed. Routledge, 1997), p. 309.

¹¹⁹ See *Nicaragua v United States* ICJ Reports (1986) 14, para 190. See also the *Palestinian Wall Advisory Opinion*, ICJ Rep (2004) para 87. For an appraisal of the *Nicaragua Case*, see Christenson, 'The World Court and Jus Cogens', 81 *American Journal of International Law* (1987) 93. See also Ronzitti, 'Use of Force, Jus Cogens and State Consent', in Cassese (ed.), *Developments in International Law, the Current Regulation of the Use of Force*, (Brill Academic Publishers, 1986) 147; Weisburd, 'The Emptiness of the Concept of *jus Cogens*, as Illustrated by the law Bosnia-Herzegovina', *Michigan Journal of International Law* (1995-6) 591. See also Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making,' *supra* note 41.

¹²⁰ Article 53 of the Vienna Convention on the Law of Treaties 1969.

¹²¹ *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174. See also chapter four.

the AU, and not member states that are assigned the right to intervene. Hence, the AU arguable escapes from the dictates of article 2(4) of the UN Charter. But the problem with this argument is that the international law rules relating to the use of force are not dependent upon any distinction between a state and a regional organisation.¹²²

Indeed, 'it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization.'¹²³ Therefore, the general understanding is that there is currently no legal right of states or regional organisations to forcefully intervene in violation of article 2(4) for humanitarian reasons or due to defects of the UN system, notwithstanding there may be a moral right to intervene in such circumstances. And although the AU's right is grounded on member states' prior consent to intervention, the Vienna Convention¹²⁴ and the ILC Articles¹²⁵ invalidate any notion of consent in situations involving a peremptory norm of international law, including the one found in article 2(4) of the UN Charter.

Nonetheless, it has been suggested that only parts of article 2(4) of the UN Charter are *jus cogens*.¹²⁶ In this regard, a distinction has been made between coercive use of force and a consensual use of force. In this context, it has strongly been argued that while the prohibition in article 2 (4) of the UN Charter prohibits the former, it does not restrict the latter.¹²⁷ Following this reasoning, in signing up to the Constitutive Act, AU member exercised permissible sovereign rights which allows them to consensually authorise the AU to use force on their territories. This argument is based on the recognised rights of states, in the absence of a civil war, to request for intervention.¹²⁸

¹²² On this point, see chapter three.

¹²³ Report of the International Law Commission on the Work of its Thirty-Fourth Session, A/37/10, II *Yearbook of the International Law Commission* (1982), Part Two, at 56.

¹²⁴ Article 53 of the Vienna Convention 1969.

¹²⁵ Article 26 ILC Draft Articles *supra* note 104.

¹²⁶ Rein Müllerson, 'Jus Ad Bellum: Plus Ça Change (Le Monde) Plus C'Est La Même Chose (Le Droit) ?', *Journal of Conflict and Security Law* (2002) 7(2):149-190 ; Ademola Abass, 'Consent Precluding State Responsibility,' *supra* 109.

¹²⁷ Ademola Abass, 'Consent Precluding State Responsibility,' *ibid*. See also David Wippman, 'Treaty-Based Intervention: Who Can Say No?', *University of Chicago Law Review*, (1995).

¹²⁸ On this point, see O.Schachter, 'The Rights of States to use Armed Force,' *supra* note 65; H. McCoubrey & N.D White, *International Law and Armed Conflict*, *supra* note 65, pp. 318-9. See also Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government,' *supra* note 65.

Regardless of the above, it needs to be emphasised that even if the whole ban on the use of force amounts to *jus cogens*, the AU's right of intervention does not discount the status of article 2(4) of the UN Charter as a peremptory norm but is framed with the intention of broadening the rule in order to halt human rights situations that give rise to *jus cogens* violations and *erga omnes* obligations.¹²⁹ Here, it is argued that the lack of hierarchy of these norms, as shown in chapter one, means that the AU has some discretion in event of a conflict between fundamental rules of international law. In this regard the AU, while seemingly acting in apparent violation of article 2(4) of the UN Charter, would actually be complying with other international criminal law obligations that mandate the Union to halt the international crimes of genocide, war crimes and crimes against humanity, in order to restore peace and security in accordance with the principles of the UN Charter. In this context, given the criticisms¹³⁰ that the UN provisions on the protection of human rights are 'relatively few and far between,'¹³¹ it could be argued the AU's right of intervention is Africa's attempt to rectify this defect.

Furthermore, such an interpretation would set right the shortcoming in article 2(4) of the UN Charter, which merely prohibits the use of force by states in 'international relations' and therefore does not specifically address conflicts within states, such as the Darfur conflict, where gross human rights violations take place as rebel factions challenge the authority of the government.¹³² In this context, it will be recalled that article 2 (4) is limited to inter-state conflict and thus does not extend to internal wars which are arguably out of reach of the Charter's provision.¹³³ Therefore, it could thus be argued the AU right of intervention is Africa's attempt to remedy this flaw by interpreting the ban on the use of force to cover internal wars involving grave circumstances.

¹²⁹ For example Genocide. See *Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 1951 I.C.J. 1, 15 (May 28); *Convention on the Prevention and the Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277. M Cherif Bassiouni, 'International crimes: *Jus cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63, 66. See also Raphael Lemkin, 'Genocide as a crime under international law' (1947) 41(1) *American Journal of International Law* 145, 197.

¹³⁰ E.g. A. Abass and M Baderin 'Towards Effective Collective Security and Human Rights Protection in Africa,' *supra* note 105.

¹³¹ N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council', in Mashood A. Baderin, Robert Mccorquodale, *Economic, Social and Cultural Rights in Action*, (Oxford University Press, 2007), p. 89.

¹³² See chapter three, four and nine.

¹³³ Yorum Dinstein, *War, Aggression and Self-Defence*, (Cambridge University Press), 1992, p. 80.

Moreover, the AU, in its actions, would not infringe the territorial integrity or political independence of states, given that the right to intervene is consciously awarded to the AU by its member states.¹³⁴ However, in spite of the foregoing, it deserves to be recalled that the rationale and reasoning behind such intervention was not only rejected by the ICJ in the *Corfu Channel*¹³⁵ and *Nicaragua*¹³⁶ cases, it has also been repudiated by notable academics¹³⁷ who favour an all encompassing interpretation of article 2(4) of the UN Charter.

However, the emphasis on the circumstances allowing for the AU's intervention merits further discussion as the viewpoints held above may have been overtaken by events, particularly where states issue their consent to intervention in pursuit of more fundamental values. In this regard, in order to prevent and halt the commission of war crimes, genocide and crimes against humanity, the AU's right to take action 'presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories.'¹³⁸ At this point it is interesting to note that in the 2005 World Summit Document,¹³⁹ which led to the adoption of the responsibility to protect,¹⁴⁰ the world leaders did not include the words 'against territorial integrity or political independence of any state' when reiterating the norm in article 2(4) of the UN Charter. Instead, it was agreed that the AU's grounds of

¹³⁴ K. 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,' *supra* note 26; Kithure Kindiki, 'Intervention to Protect Civilians in Darfur,' *supra* note 30. For wider literature in regard to this reasoning see eg. William M. Reisman, 'Criteria for the Lawful Use of Force in International Law', 10 *Yale Journal of International Law and Policy* 279 (1985); William M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law, 84 *American Journal of International Law*, 866, (1990).

¹³⁵ *Corfu Channel Case*, Pleadings, Vol III, p 296. See Bowett, *Self-Defence in International Law*, (Manchester University Press, 1958), p. 152; Simma B., (ed.), *The Charter of the United Nations: A Commentary*, (Oxford; New York: Oxford University Press, 1994), p. 106; Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des Cours* (1952)415.

¹³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, *Jurisdiction and Admissibility*, 1984 ICJ Rep. 392 June 27, 1986.

¹³⁷ See e.g., Ian Brownlie, *International Law and the Use of Force Between States*, *supra* note 22; Yoram Dinstein, *War Aggression and Self-Defence*, *supra* note 133; Leland M. Goodrich, Edvard Hambro & Anne P. Simons, 'Charter of the United Nations', in Luis Henkin, *International Law: Politics Values and Functions*, 216, *Recueil Des Cours De La Academie De Droit International* 9 (1989-IV); Oscar Schachter, *International Law in Theory and Practice*, Springer, (1 edition, 1991).

¹³⁸ K. 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,' *supra* note 26.

¹³⁹ 2005 *World Summit*, Sept.14-16, 2005, *2005 World Summit Outcome*, U.N. Doc A/60/L.1 (Sept.20,2005).

¹⁴⁰ See chapter eight.

intervention warrant action by the 2005 World Summit Document, which is discussed in chapter eight.

According to the Legal Adviser of the AU at the relevant time, the original proposal to incorporate the right to intervene was heavily debated and its limitation to 'grave circumstances' was agreed upon in order for the Constitutive act of the AU to be in line with the rapidly developing international criminal law.¹⁴¹ In this context, as shown in the opening chapter, the peremptory nature of war crimes, genocide and crimes against humanity means that their violation entail aggravated state responsibility.¹⁴² Their special status in turn imposes a positive duty on states to take positive measures to bring the violation to an end.¹⁴³ While bearing in mind that the Articles on State Responsibility do not expressly refer to intervention in this regard, neither do they expressly forbid the latter.¹⁴⁴ Therefore, while making note of Brownlie's perception of the relative ineditability of peremptory rules, such as that found in article 2(4) of the UN Charter, it is submitted that the wide acceptance of the AU's right to intervene, so long as it is backed by state practice and proof of *opinio juris*, amounts to the formation of a subsequent customary rule.¹⁴⁵ Indeed, the *Asylum Case*¹⁴⁶ acknowledged international law's recognition of regional customary law such as that emerging from the developing practice on intervention invoked on the African continent in support of collective peace and security.

¹⁴¹ See Maluwa Tinanjana, 'The OAU/African Union and International Law: Mapping New Boundaries of Revising Old Terrain,' ASIL Proceedings, 98, (2004)232 at 236. On the development of international criminal law, see generally, Antonio Cassese, *International Criminal Law*, (Oxford University Press; 2Rev Ed edition, 2008); William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge University Press; 3 edition,2007); Gerhard Werle, Florian Jessberger & Wulf Burchards, *Principles of International Criminal Law*, (Asser Press, 2005); Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction*, (Oxford: Oxford University Press, 2007); Cherif M. Bassiouni, *Introduction to International Criminal Law*, (Ardsley, NY: Transnational Publishers, 2003); Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, (Kluwer, 1997).

¹⁴² Article 40, I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 104. See chapter eight.

¹⁴³ Article 41, I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 104.

¹⁴⁴ See chapter eight.

¹⁴⁵ I. Brownlie, *Principles of International Law*, (Oxford University Press, USA; 6 edition 2003), p. 488.

¹⁴⁶ See *the Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266.

3.2 The AU's Right to Intervene and its Compatibility with Chapter VIII of the UN Charter: In Conflict or Cooperation?

The provisions in article 4 of the Constitutive Act also raised fundamental questions with respect to article 53 of the UN Charter as well as its relationship with the universal role played by the Security Council in its 'primary responsibility to the maintenance of international peace and security.'¹⁴⁷ Muluwa observes that although 'some delegations implicitly raised the problem of reconciling' the right to intervene 'with the requirement of prior authorization by the United Nations Council of enforcement action by regional organizations or arrangements under article 53 of the UN Charter, the issue was not as such addressed in these debates.'¹⁴⁸ Ben Kioko, Legal Adviser to the Union confirms the reason being that:

When questions were raised as to whether the Union could possibly have the inherent right other than through the Security Council, they were dismissed out of hand. This decision [to provide for 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.¹⁴⁹

However, in spite of the above, the AU's right to intervene without clearly subordinating itself under the Security Council nor outlining its obligations under Chapter VIII was hotly contested by legal commentators who perceived it as 'the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force' by the Security Council.¹⁵⁰ At this point, it is interesting to note that African leaders had themselves previously denounced regional intervention involving the use of force and stressed the primacy of the Security Council.¹⁵¹

This position was clearly manifest in Africa's reaction to NATO's intervention of Kosovo in 1999, where Namibia voted with Russia and China in condemning the

¹⁴⁷ See article 24 (1) of the UN Charter.

¹⁴⁸ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?', *supra* note 21.

¹⁴⁹ See B Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 4.

¹⁵⁰ Jean Allain, 'The True Challenge to the United Nations System of the Use of Force', *supra* note 28.

¹⁵¹ Alex J. Bellamy, 'Whither the Responsibility to Protect?', *supra* note 39.

action, which was publicly shared by both South Africa and Nigeria.¹⁵² Here, Africa noted 'with grave concern, the growing marginalisation' of the UN and its role of the maintenance of international peace and security' and declared that the unilateral use of force, outside the duly conferred mandate of the Council, 'opens the way to practices inimical to world peace and security.'¹⁵³ Similarly, although post-Cold War practice shows that regional organisations have increased their tendencies to adopt enforcement measures without Council authorisation, the increasing propensity by regional agencies to take up enforcement roles has been met with protests and objections from commentators.¹⁵⁴

These arguments have led scholars such as Gazzini to conclude that the right to intervene embodied in the evolving African regional security, under organisations such as the AU and ECOWAS is scarcely compatible with the UN Charter and any enforcement by the AU, without authorisation by the Council, would be illegal despite its legitimacy under article 4(h) of the Constitutive Act.¹⁵⁵ The scepticism behind the legality of the AU's right to intervene also seems to be in line with the UN reforms contained in the 2005 World Summit Document,¹⁵⁶ as well as the earlier UN High-Level Report,¹⁵⁷ which seek to centralise the military interventions in the Security Council as envisaged during the UN's inception back in 1945.¹⁵⁸

However, an alternative reading of the AU framework would resist such strict interpretations of the UN Charter. Bearing in mind that the UN Charter is 'not static,

¹⁵² Philip Nel, 'South Africa: The Demand for Legitimate Multilateralism,' in Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship* (Tokyo: UN University Press, 2000), pp. 245–59.

¹⁵³ Algiers Declaration, 12–14 Jul. 1999, O.A.U. Doc. AHG/Decl.1 (XXXV) (1999).

¹⁵⁴ E.g. see Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, *supra* note 95, p. 114.; A Gioia, 'The United Nations and Regional Organizations in the Maintenance of Peace and Security,' in M.Bothe/N. Ronzittie/A. Rosas, *The maintenance of peace and security: conflict prevention, crisis management and peaceful settlement of disputes*, (The Hague, London, Boston, Kluwer Law international, 1997), p.197; C. Walter, 'Security Council Control over Regional Action', *Max Planck UNYB* 1, (1997), p. 129.

¹⁵⁵ See Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, *supra* note 95, p. 114.

¹⁵⁶ *2005 World Summit*, *supra* note 139.

¹⁵⁷ See the Report of the United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004. See also ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, (Ottawa: International Development Research Council, 2001).

¹⁵⁸ See chapter eight.

and is open to adapt to emerging norms of international law,¹⁵⁹ a rejection of a 'static vision of the Charter [in]favour of a more flexible and mainly inductive approach based on the analysis of the practice of states'¹⁶⁰ would resist a strict textual interpretation of the Charter. In its place, a preferable approach would be based on the understanding that the UN Charter is to be interpreted bearing in mind 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'¹⁶¹

In this regard, it will be recalled that a regional customary right had emerged in Africa primarily due to the deficiency of the UN system. In spite of the lack of UN authorisation, the African interventions in West Africa, referred to above, received the support of the Security Council and the wider international community. And in demonstration of the special customary nature of the right of intervention, its acceptance by Africa and the international community stood in sharp contrast to NATO's military attack on Kosovo (1999).¹⁶² In the African context, UN Security Council has hardly complained with regard to the usurpation of its powers by the AU and has instead, routinely retrospectively ratified African state practice that would otherwise be unlawful. And as with ECOWAS interventions in West Africa, described above, a tacit authorization is possible and may be manifest in the Council's inaction, silence and quiet support of an AU action, in urgent situations.¹⁶³ Combined with the arguments outlined earlier with regard to the emergence of the AU's right to intervene as a regional customary law, it is submitted that the African constitutional framework arguably amended and developed the collective security system, as shown throughout this study. Indeed, the AU has sought to vary the peremptory norms that lie at the heart of the international system through the prioritisation of the fundamental freedoms against war crimes, genocide and crimes against humanity.

¹⁵⁹ *Case Concerning the GabčEDkovo-Nagymaros Project (Hungary/Slovakia)*, 37 ILM 162 (1998). See also the *Namibia (Legal Consequences) Advisory Opinion*, ICJ Reports (1971) 31.

¹⁶⁰ See Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, *supra* note 95, p. 1 and 123.

¹⁶¹ See article 31 (3) (b) Vienna Convention on the Law of Treaties.

¹⁶² See chapter three.

¹⁶³ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 50. See A Chayes, 'Law and the Quarantine of Cuba', *Foreign Affairs*, 41 (196-63), 550; L.C. Meeker, 'Defensive Quarantine and the Law', *AJIL* 57, 1963, 515; M. Bettati, 'Les premieres lecons du Kosovo', *Le Courrier de l'UNESCO*, juillet-aout (1999), 60.

Meanwhile, it needs to be emphasised here that in possessing the right to intervene, the AU hardly seeks to challenge the authority of the UN but on the contrary, is more readily prepared to act upon future Security Council mandates through its possession of the right to intervene. Therefore, as ECOWAS practice demonstrates, the AU can act during situations involving 'grave circumstances' and address gross violations of human rights should the Council be unable or unwilling to act decisively. In other words, although the Council's authorisation of AU action should preferably be express, such approval would also include the Council's tactical acceptance 'after the fact.'¹⁶⁴ Although there is clearly no guarantee of getting *ex post facto* approval, this interpretation is based in the Council's practice in regard to regional action in Africa, particularly its acquiescence in ECOWAS operations in West Africa. Nevertheless, in spite of the foregoing arguments, there are more issues with regard to the overall relationship between the AU and the UN that need further examination and clarification, as shown below.

3.2 The Relationship between the AU's Right to Intervene and Article 103 of the UN Charter

Although this thesis takes the premise that the AU framework is compatible with international law and that it indeed seeks to strengthen the principles and purposes of the UN Charter, it deserves to be mentioned that reservations have also been made with regard to its potential conflict with the UN Charter. On this point, Rudolf Bernhardt comments that the special status of the territorial integrity of all states and the prohibition of the use of force would render any agreement amongst regional arrangements permitting forceful intervention incompatible with the Charter and would fall under article 103.¹⁶⁵

However, the problem with this position is that it ignores the fact that article 103 is addressed to states and not regional arrangements, which have a legal personality that is independent of their members, as shown in chapter four. Secondly, and in any case, the position by Bernhardt is subject to dispute because it is one thing to doubt the compatibility of the AU's framework with the UN and another to rule on its

¹⁶⁴ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 50.

¹⁶⁵ R. Bernhardt, 'Article 103', in Simma et al. (eds), *The Charter of the United Nations: A Commentary*, (Oxford University Press, 2002), p. 1297.

lawfulness or validity.¹⁶⁶ In this context, it needs to be pointed out that article 103 does render void any incompatible international agreement but merely sets it aside to the extent of the conflict.¹⁶⁷

Furthermore, even supposing that it purported to do so, it is argued that the UN Charter would not prevail with regard to AU's right to intervene because article 103 does not apply to conflicts between the Charter and customary international law.¹⁶⁸ As mentioned above, the Constitutive Act of the AU is not merely a treaty but also amounts to a codification of African regional principles founded on sufficient practice to acquire the status of special regional customary law. Moreover, as argued in chapter four, article 103 cannot be interpreted as being able to override the peremptory norms against genocide, war crimes and crimes against humanity, which the AU seeks to protect.¹⁶⁹ Finally, as argued earlier and in the last chapter, the AU does not deny but, on the contrary, acknowledges and reinforces the primacy of the UN in maintaining international peace and security. In any event, it also argued that the cooperation between the AU and the UN, when operative, has the potential to render the invocation of article 103 to be of little practical significance.¹⁷⁰

¹⁶⁶ Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 96, pp. 213-251; Levitt, J. I., 'The Peace and Security Council of the African Union,' *supra* note 96.

¹⁶⁷ Karl Zemanek, 'General Course on Public International Law,' *Recueil des Cours*, vol. 266 (1977), p. 230; Michael Wood, 'The Security Council and the 'Constitutionalization' of International Law', *Paper*, University of Leeds, 14 March 2007. Available at <http://www.law.leeds.ac.uk/leedslaw/webdocs/leedslaw/uploadeddocuments/cfig-wood.doc>; Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 96.

¹⁶⁸ Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *ibid*; N.D. White, 'The Applicability of Economic and Social Rights to the UN Security Council,' in Mashood A. Baderin & Robert Mccorquodale, *Economic, Social and Cultural Rights in Action*, *supra* note 131. See also See El Erian, 'The Legal Organization of the International Society', in M. Sørensen, ed., *Manual of Public International Law*. (London, Macmillan 1968), pp. 79-80; Gardam, 'Legal Restraints on Security Council Military Enforcement Action', 17 *Michigan JIL* (1996) 302; Zemanek, 'The Legal Foundations of the International System. General Course on Public International Law' 266 *RCADI* (1997), 230; R Bernhardt, 'Article 103', in Simma (ed), *The Charter of The United Nations. A Commentary*, *supra* note 165.

¹⁶⁹ On article 103 and peremptory norms, see Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', *European Journal of International Law*, Vol. 16 (2005) No. 1. See also Alexander Orakhelashvili, *Peremptory Norms in International Law*, (Oxford University Press, 2008).

¹⁷⁰ See chapters four.

However, a theoretical example would be where there is disagreement between the AU and the UN Security Council. Such a possibility is hardly far fetched given Africa's position contained in the Ouagadougou Decision, which saw the OAU's concerted defiance of the UN Security Council sanctions imposed on Libya in connection to the Lockerbie bombings.¹⁷¹ However, during this instance, it can be argued that Africa was expressing its disapproval of the controversial sanctions imposed on Libya as opposed to questioning the authority of the UN. Indeed, as shown below, in awarding sanctions a key role within its framework, the AU seeks to fill some of the well acknowledged gaps that exist within the UN system.

In this context, it is the emerging relationship of cooperation between the two organisations that should lie at the heart of the debate, rather than treating the two as possibly in contest. As shown in the previous chapter, the AU does not challenge the UN Charter but instead seeks to 'forge closer cooperation and partnership between the United Nations, other international organizations in the promotion and maintenance of peace, security and stability in Africa.'¹⁷² Having analysed the framework of intervention in the grave circumstances discussed above the latter point is important in discussing the further ground of intervention under the AU framework. The distinction between the AU's right to intervene in cases of war crimes, genocide and crimes against humanity is particularly important given the difficulty that has emerged with regard to the extent to which the latter can be reconciled with intervention in 'situations that amount to a serious threat to legitimate order.'

3.4 The AU's Right to Intervene in Respect of 'Serious Threat to Legitimate Order' and its Relationship with the African Right to Democratic Governance

As shown above, while the grave circumstances outlined in the right to intervene were agreeable to the majority of states and scholars, the inclusion of a further ground stirred immediate concerns with regard to what amounts to serious threat to legitimate order.¹⁷³ Given that it had not been defined in the Constitutive Act or in subsequent protocols, the main question that emerged was: a) does it refer to internal order of member states or international order and; b) what does 'legitimate order' itself entail?

¹⁷¹ T. Maluwa, 'Reimagining African Unity,' *supra* note 18. See chapter five.

¹⁷² The preamble to the Protocol Establishing the Peace and Security Council. See also article 17.

¹⁷³ Evarist Baimu & Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 30.

Furthermore, it is also not clear whether there has to be a nexus between 'serious threat to legitimate order' and the wider threat to regional peace and security for any resort to intervention. Indeed, the phrase 'threats to legitimate order' remains radically different from the three crimes underlined above and has not been defined as an international crime in treaties.¹⁷⁴ This lack of definition further means that it cannot be measured against those crimes that are of the highest concern to the international community.

In the broader context, Baimu and Sturman make special note of the threat to legitimate order as a ground for intervention. They argue that allowing the AU to intervene in situations amounting to 'serious threat to legitimate order' broadens the grounds of intervention much wider than is envisaged by the UN Charter and is remote from the objective of promoting regional peace and security.¹⁷⁵ According to this reasoning, the legitimacy of AU intervention under this ground thus rests on 'shaky grounds' and is hardly consistent with the purpose of the UN. Furthermore, the insertion of this provision has been interpreted as 'signifying [an] expensive attempt to avoid conceding to controversial or regressive amendments to the Constitutive Act while keeping an influential and potentially troublesome [Libyan] Member State 'inside the OAU tent.'¹⁷⁶

However, on this point, two interrelated justifications are put forward by the AU's first and second Legal Advisers. Firstly, Ben Kioko justifies the amendment to be a residual clause that allowed the AU to 'decide on intervention in situations where the provision relating to genocide, war crimes and crimes against humanity is not applicable, but where the situation nevertheless warrants the intervention.'¹⁷⁷ This raises the question as to what criteria would be utilised in the relevant circumstances. On this point, Maluwa argues that the policy organs would 'necessarily be guided by other relevant norms and instruments,'¹⁷⁸ of which he gives the examples of the Lome Declaration on

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 4.

¹⁷⁸ Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly?,' *supra* note 21.

the Framework for an OAU Response to Unconstitutional Changes of Government¹⁷⁹ and the Declaration Governing Democratic Elections in Africa.¹⁸⁰

According to Maluwa, both of the aforementioned Declarations may provide guidance and shed light on the meaning of a 'serious threat to legitimate order.' Furthermore, he observes that the absence of a definition of what constitutes a threat to legitimate order 'is not, as such, the most critical issue' as an analogy could be found in the UN Charter which does not define what constitutes the terms 'threat to peace,' 'breach to peace,' or 'act of aggression.' Therefore, the lack of a definition notwithstanding, what constitute these terms may be inferred from the practice of the AU itself, the General Assembly and the Security Council.¹⁸¹

Moreover, the coming to effect of the African Court of Justice, which is the 'principle judicial organ of the Union,'¹⁸² may assist in the interpretation and application of the Constitutive Act of the AU and all subsidiary legal instruments, including what would amount to a serious threat to legitimate order.¹⁸³ Alternatively, the AU Assembly which is chief decision-making body could rule on what would qualify as a threat to legitimate order.¹⁸⁴ However, there exists the worry that the perceived threat could be utilised as a pretext for intervention for other political reasons hence violating the very principles the Union seeks to uphold. Furthermore, serious doubts have also been expressed over whether progressive interpretation of such provision can be expected from the Assembly given the tendency of African leadership to stick together.¹⁸⁵

On their part, Packer and Rukare warn that this provision could be subject to abuse by governments who may request an AU intervention in order to keep them in power in the face of popular rebellion.¹⁸⁶ It is in this context that the provision was described as

¹⁷⁹ Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)).

¹⁸⁰ See African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

¹⁸¹ *Ibid.*

¹⁸² Article 2 (2) the Protocol of the Court of Justice of the African Union.

¹⁸³ Article 19 of the Protocol of the Court of Justice of the African Union.

¹⁸⁴ Article 7 of the Constitutive Act and Rule 18 of Rules of Procedure of the Assembly.

¹⁸⁵ Evarist Baimu & Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 30.

¹⁸⁶ C Packer and Rukare, 'The New African union and its Constitutive Act', 96 *American Journal of International Law* (2002), 372.

backward step and has been criticized as amounting to a shift from human security to regime security.¹⁸⁷ This is because the provision 'could actually provide cover for Africa's celebrated dictators to continue to perpetrate human rights abuses,'¹⁸⁸ such as those reported in countries such as Sudan¹⁸⁹ and Zimbabwe.¹⁹⁰ However, in response to this argument, Ben Kioko disagrees and expresses the view that in deciding on intervention, African leaders would be bound to adhere to the Constitutive Act, the African Peer Review Mechanism (APRM) and the Solemn Declaration and Memorandum of Understanding on the Conference on Security, Stability and Development in Africa.¹⁹¹ As mentioned in chapter six, these instruments mandate the AU to provide for human security based on due process and democratic principles in line with the aspiration of African peoples.

Having said so, for now, until a criteria is agreed upon, what ultimately amounts to a serious threat to legitimate order will be determined by the discretion arrived at by consensus or, failing that, by a two-thirds majority of members eligible to vote in the Assembly.¹⁹² Nevertheless, as shown further below, there is sufficient practice to suggest that the AU is likely to intervene in practice by way of sanctions in situations that appear to amount to threats to legitimate order due to the breach of democratic principles. Given this background, what follows is a brief discussion on the role of sanctions under the AU framework of peace and security.

3.5 The Function of Sanctions in the Promotion of Peace and Security in Africa

A key feature within the AU's constitutional framework is the function of sanctions as a mechanism of enforcing the goals of the Union. It will be recalled that in establishing the AU, member states agreed to abide by a constitutional framework that obligated all member states to observe certain fundamental values including respect for human rights, democratic governance and condemned unconstitutional change of

¹⁸⁷ Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 30.

¹⁸⁸ Nsongurua J. Udombana, 'Critical Essay,' *supra* note 34.

¹⁸⁹ See chapter nine.

¹⁹⁰ See Masipula Sithole, 'Fighting Authoritarianism in Zimbabwe,' *Journal of Democracy* 12 (2001), 162-163.

¹⁹¹ B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 4.

¹⁹² Article 7 of the Constitutive Act and Rule 18 of Rules of Procedure of the Assembly. On this point, see Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene,' *supra* note 30.

governments. Failure to abide by these principles would lead to sanctions¹⁹³ being imposed on the defaulting member states. In particular, article 23 (2) of the Constitutive Act provides that the failure to comply with decisions and policies of the AU may be subjected to 'sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.'

In contrast to countermeasures which are taken by states, sanctions are non-forcible measures taken by international organisations.¹⁹⁴ It is undisputed that universal organisations such as the UN¹⁹⁵ can legally impose sanctions.¹⁹⁶ However, questions arise as to whether a regional organisation may legally impose sanctions as an enforcement measure without the authorisation of the UN Security Council. On this point, it is argued that 'Article 53 UN Charter seemed to provide that any non-forcible measure taken by regional organizations that amounted to 'enforcement action' would require the authorization of the Security Council.'¹⁹⁷

However, in practice, as with military interventions, the determining factor of legality of sanctions as enforcement action by a regional organisation has traditionally been decided by the position taken by the Security Council and the wider international community.¹⁹⁸ This is clear from the OAS recommendation that its member states impose sanctions on Haiti in 1991, which was agreed upon without seeking Security Council authorisation.¹⁹⁹ In this instance, there was hardly any criticism by the international community on the usurpation of the Council's powers by the regional organisation. Also, this view is supported by the evidence provided by the East African Community's trade and economic sanctions on Burundi in 1996 which, despite lacking Security Council authorisation, were endorsed and supported by the

¹⁹³ For a discussion on the meaning of sanctions, see Nigel D. White & Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2006), p. 524.

¹⁹⁴ *Ibid*, p. 509.

¹⁹⁵ See chapter three and nine. See also article 41 UN Charter.

¹⁹⁶ See chapter three.

¹⁹⁷ N. D. White & Ademola Abass, 'Countermeasures and Sanctions' in Malcolm D. Evans (ed.), *International Law*, *supra* note 193 .p 511.

¹⁹⁸ See above and chapter four.

¹⁹⁹ OAS doc. MRE/RES. 1/91, OAS Ser. F/V.1,3 October 1991.

OAU.²⁰⁰ As shown below, in the recent past, the AU has taken a strong stance and imposed sanctions on member states, without seeking Council authorisation in regard to the violation of respect for democratic governance.

3.6 The Emergence of an African Regional Right to Democratic Governance

In the July 2000 Summit in Togo, the AU Assembly adopted the Lome Declaration on the framework for an OAU Response to Unconstitutional Changes of governments.²⁰¹ This Declaration was highly significant because the post-colonial era had seen the 48 states of sub-Saharan Africa experience 80 successful and 108 failed *coups d'états* between 1956 and 2001.²⁰² Despite the fact that Article III (5) of the OAU Charter prohibited 'subversive activities,' military coups were predominant. The prevalence of coups was largely due to OAU's principles of non-intervention in the internal affairs of its members as evidenced in the statement by the Ugandan representative in 1971:

The question of a change in government in one country is purely an internal matter which is not the concern of the OAU. Twenty member states of the OAU which are now taking their seats in the OAU conference have had changes of government through coups and counter-coups. We strongly feel that if the OAU tries to involve itself in the internal affairs of member states, it is going to destroy itself.²⁰³

However the series of *coups d'états* in Sierra Leone during the 1990s brought a dramatic change in the OAU's response to military take-overs.²⁰⁴ This transformation reached its watershed when the democratically elected President Ahmed Kabbah was ousted in a coup orchestrated by Armed Forces Revolutionary Council in May 1997. As mentioned above, this coup was widely condemned internationally and the OAU argued that other states had a duty not to cooperate with the junta.²⁰⁵ Subsequently, Kabbah's government was restored nine months later after the intervention of

²⁰⁰ B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 4.

²⁰¹ Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)).

²⁰² Patrick J. McGowan, 'African military *coups d'états*, 1956–2001', *Journal of Modern African Studies*, 41, 3 (2003), pp. 339–70.

²⁰³ Claude Welch Jr., 'The OAU and human rights: toward a new definition', *Journal of Modern African Studies*, 19, 3 (1981), p. 404.

²⁰⁴ Paul D. Williams, 'The African Union's Emerging Security Culture: Options for U.S. Policymakers', *Centre for Strategic & International Studies (CSIS) Forum*, (July 2007).

²⁰⁵ Decisions Adopted by the 66th Ordinary Session of the OAU Council of Ministers, CM/Dec.330–363 (LXVI), Dec.356 (1997).

ECOMOG, which had been mandated by ECOWAS to enforce sanctions and restore law and order in Sierra Leone.²⁰⁶

The OAU later took a common position on military takeovers at its Harare Summit meeting in 1997.²⁰⁷ This was followed by the Algiers decision on Unconstitutional Changes of Government (1999).²⁰⁸ Subsequent to the Lome Declaration mentioned above, African leaders passed the 'Declaration on the Principles Governing Democratic Elections in Africa'²⁰⁹ in 2002. All these declarations reiterated that governments which came to power through unconstitutional means would not be allowed to take part in the activities of the AU.²¹⁰ Significantly, the Constitutive Act, in contrast to the OAU Charter, introduced and affirmed the respect for democratic principles, human rights, the rule of law and good governance.²¹¹ However, a key problem with the Constitutive Act is that it failed to define what constitutes an unconstitutional change of governments. This meant that reliance would have to be placed on other formulae, such as that found in the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Governments of 2000.²¹²

The AU's commitment to ensure the strict adherence to democratic principles is evident in the sanctions imposed against governments that come to power through unconstitutional means.²¹³ In practice, this principle has since been applied in respect to the African states of Togo and Mauritania which were suspended from the Union subsequent to a series of coups in 2005 as will be shown below. Meanwhile, it deserves to be reiterated that the AU's recent practice on the matter stands in sharp

²⁰⁶ See above.

²⁰⁷ Organisation of African Unity Council of Ministers Sixty-sixth Ordinary Session, 28-30 May 1997, Harare, Zimbabwe, Draft Decisions, CM/Draft/Dec. (LXVI) Rev.1, p.18. On this position, see Jakkie Cilliers, 'Commentary: Towards the African Union', *African Security Review* Vol 10 No 2, 2001.

²⁰⁸ Algiers Declaration on Unconstitutional Changes of Government adopted by the Assembly of Heads of State, AHG/Dec. 141, 142 XXXV, Algiers, Algeria 12 to 14 July, 1999.

²⁰⁹ See OAU/ AU Declaration on the Principles Governing Democratic Elections in Africa, OAU Doc. AHG/ Decl. 1 (XXXVIII), para. 1,4 OAU Assembly of Heads of State and Government, 38th Ord. Sess., Durban, South Africa, July 8, 2002.

²¹⁰ See article 30 Constitutive Act of African Union.

²¹¹ Article 4(m).

²¹² See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Governments, OAU Doc. AHG/ Decl. 5 (XXXVI) (2000).

²¹³ Article 30 of the Constitutive Act.

contrast to that of the OAU, which had affirmed the 'right of any member state to change its government in any way it sees it.'²¹⁴

However, despite the recent change in image, the remnants of previous practice are still somewhat manifest in practice, as illustrated in the position of AU Assembly with regard to the Darfur conflict, as shown in chapter nine. On this occasion, subsequent to their rejection of Sudan's assumption of the Chairmanship of the AU Assembly²¹⁵ in January 2006, due to its human rights record, African leaders, after much bargaining, handed the Chair to Congo's President Sassou-Nguesso, who himself came to power in a *coup d'état* in 1997. Meanwhile, leaders, such as Namibia's Sam Nujoma,²¹⁶ Uganda's Yoweri Museveni,²¹⁷ and Chad's Idris Deby,²¹⁸ amended their domestic constitutions in order to extend their terms. Most disturbingly, whilst the majority of the attention was focused on Robert Mugabe's attempt to stay in power in Zimbabwe in 2008, the Cameroonian president, Paul Biya, who has been in power for 26 years, scrapped the country's presidential term limits to enable him to run for the presidency until 2018.²¹⁹

Nevertheless, the AU's emerging practice of condemning coups seems to give recognition to Thomas Frank's assertion of an emerging right to democratic governance whereby 'only democracy validates governance.'²²⁰ The new thinking was in line with the practice of the Organization of American States (OAS). Subsequent to the overthrow of the democratically elected president of Haiti, Jean-Bertrand Aristide, by military coup in September 1991, the OAS unanimously recommended its member states to take 'action and to bring about the democratic isolation of those who hold power illegally in Haiti.'

²¹⁴ See the Council of Ministers of the OAU in regard to Samuel Does's military regime in Liberia, Liberia: Coup Topples Tolbert, 17 *Afr. Res. Bull.* 5639, 5649 (1980).

²¹⁵ On presidency of the AU Chairmanship, see chapter six.

²¹⁶ See 'President For Life? Take Note', *Afrobarometer Press Briefing*, 24 May 2006

²¹⁷ See Marc Lacey, 'Museveni extends his rule in Uganda', *International Herald Tribune*, 26 February, 2006. Anne Mugisha, 'Change in Uganda: Museveni's Machinations', *Journal of Democracy* 15.2 (2004) 140-144.

²¹⁸ See BBC Profile on Chad, International Version, available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1068700.stm.

²¹⁹ See 'Deputies extend Biya's Term', *Afrol News*, 11 April, 2008; 'Cameroon: Parliament Extends President Paul Biya's Rule for Life', *Catholic Information Service for Africa*, 11 April 2008.

²²⁰ Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, (1992), pp. 46-91.

The organization further called on states to 'suspend their economic, financial and commercial ties' until constitutional order was restored.²²¹ Significantly, the UN Security Council resolution 841 (1993)²²² authorised enforcement action against the military junta that took power in Haiti. Subsequently, the OAS moved beyond the *ad hoc* approach and institutionalized democratic principles which are now incorporated in its Charter.²²³ Other organizations that have amended their charters to incorporate democratic principles include the Common Market of the South (Mercosur) and the European Union.²²⁴

In the African context, the AU's Constitutive Act adopted several programmes such as the New Partnership for Africa's development (NEPAD),²²⁵ which seeks to promote democracy, good governance and economic development. In addition, the African Peer Review (AFPR)²²⁶ aims to monitor the adherence of political, economic and corporate governance values, codes and standards among African states within NEPAD. The renewed commitment to the adherence of democratic principles has given weight to the right of the AU to impose sanctions in situations that have been interpreted as amounting to threats to legitimate order, as illustrated below. What becomes clear here is that in addition to reiterating that sanctions should not be left to the Security Council alone, and that they ought to be exercised in accordance with the UN Charter and international law,²²⁷ the AU's practice demonstrates wide discretion in an area where it has rarely sought the approval of the UN but at the same time, has not been contested.

²²¹ Cited in Thomas M. Franck, 'The Emerging Right to Democratic Governance', *ibid.* See also Support to the Democratic Government of Haiti, OEA/ser. F/ V. 1/ MRE/ RES. 1/91, corr.1, paras. 5, 6 (1991).

²²² UNSC/ Res/841 (1993), June 16, 1993.

²²³ The Inter-American Democratic Charter, 2001.

²²⁴ See Amendment effected by the Treaty of Amsterdam to article 309 of the Treaty of Rome.

²²⁵ The NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia.

²²⁶ On the AFPR, see Ayesha Kajee, 'NEPAD's APRM: A Progress Report, Practical Limitations and Challenges', *South African Institute of International Affairs SA Yearbook of International Affairs*, 2003/04. See also Ross Herbert, 'Becoming my brother's keeper' *eAfrica* (October 2003).

²²⁷ See the *Common African Position on the Proposed Reform of the United Nations*, *supra* note 50.

3.7 The AU's Use of Sanctions in Support of Democratic Principles: The Togo and Mauritania Case Studies

It was five years after its adoption in Togo that the provisions of the Lome Declaration on the framework for an OAU Response to Unconstitutional Changes of Government were put to effect, ironically against the host country. In particular, the AU publicly denounced the naming of Gnassingbé Eyadéma's son as president of Togo and described it as a military coup following the latter's death in February 2005.²²⁸ The AU further demanded that the Togolese Armed Forces comply with the constitution and threatened to impose sanctions under article 7(g) of the Protocol relating to the establishment of the AU PSC and the OAU's July 2000 Declaration.²²⁹

Furthermore, the AU PSC mandated ECOWAS 'to take all such measures as it deems necessary to restore constitutional legality in Togo within the shortest time.'²³⁰ Heeding this call, ECOWAS, imposed sanctions against Togo that were soon followed by the AU's own suspension of Togo's membership and a further travel ban on Togolese leaders, as well as economic sanctions. Following the announcement by Faure Gnassingbe that he was stepping down after increasing international pressure, the sanctions against Togo were lifted by ECOWAS²³¹ and the AU PSC²³² in February and May 2005 respectively. However, the decision to lift the sanctions was controversial on two fronts.

Firstly, the subsequent support by both the AU and ECOWAS of an election process which, according to the European Parliament, 'did not comply with the principles of transparency, pluralism and the freedom of the people to determine their own future,'²³³ 'demonstrated the willingness of Africa's regional organizations to support

²²⁸ See BBC News, 'AU denounces Togo 'military coup,' Sunday, 6 February, 2005.

²²⁹ AU Peace and Security Council, 24th Meeting, Addis Ababa, PSC/PR/Comm. (XXIV), 7 February 2005, p. 2.

²³⁰ AU Peace and Security Council, 25th Meeting, Addis Ababa, PSC/PR/Comm. (XXV), 25 February 2005.

²³¹ BBC News, 'West Africans lift Togo sanctions', Saturday, 26 February, 2005 .See also BBC News, 'African Union lifts Togo embargo', Friday, 27 May, 2005.

²³² AU Peace and Security Council, 30th Meeting, Addis Ababa, PSC/PR/Comm. (XXX), 27 May 2005.

²³³ See European Parliament resolution P6_TA (2005)0184, Strasbourg, France, 12 May 2005.

a façade of constitutionality.’²³⁴ Secondly, the attempts by the Nigerian President, who was then the Chairman of the AU, Olusegun Obasanjo, ‘to broker a government of national unity irrespective of the presidential election results,’²³⁵ cast doubts on African leader’s commitments on their own stated democratic principles.

Meanwhile, it was hardly three months after Togo’s reinstatement and participation in the organization’s activities when the AU was compelled to act on the *coup d’état* that occurred in Mauritania on 3 August 2005. Once again, the AU was to be tested on its commitment on the principles of democracy. However, it was on the following day that, in conformity with the Lomé Declaration and article 30 of the AU Constitutive Act, the AU PSC condemned the unconstitutional change of government and suspended Mauritania’s participation in AU activities.²³⁶ This time, ‘the AU’s dilemma was that although its support for this new norm [of democratic principles] meant it had to condemn the *coup d’état* in principle, the junta’s ousting of the unpopular President Taya generated some international sympathy as well as significant domestic support.’²³⁷

Indeed, the Mauritania case raised the question of whether bloodless *coups d’états* that topple authoritarian regimes in exchange for a democratic process, may advance the AU’s stated goal of democratisation. One interpretation is articulated by South Africa’s ambassador to Mauritania who gave the view that ‘[t]he principle of the AU is not to agree with coups but we believe we shall not have one policy to fit every situation.’²³⁸ As it turned out, Mauritania was readmitted to the AU in April 2007 with full rights after the country’s Constitutional Council officially confirmed Sidi Ould Cheikh Abdallahi as the country’s first democratically elected president since independence.²³⁹

²³⁴ Paul D. Williams, ‘From the Norm of Non-Intervention to Non-Indifference: The Origins and Development of the African Union’s Security Culture’, *African Affairs*, (March 2007). See also Paul Simon Handy, ‘The dynastic succession in Togo’, *African Security Review*, 14, 3 (2005), pp. 47–51.

²³⁵ Ibid. see also Andreas Mehler, ‘The hidden costs of power-sharing: reproducing insurgent violence in Africa’, *African Affairs*, 104, 416 (2005), pp. 393–4.

²³⁶ See Peace and Security Council, ‘Statement’, 36th Meeting, 4 August 2005, Addis Ababa, Ethiopia. PSC/PR/Stat.(XXXVI)-(ii).

²³⁷ Paul D. Williams, ‘From the Norm of Non-Intervention to Non-Indifference,’ *supra* note 234.

²³⁸ ‘AU Seeks Mauritania junta talks’, *BBC International Version*, 9 August 2005.

²³⁹ See, AU Peace and Security, ‘Communique on the Situation in the Islamic Republic of Mauritania’ 76th Meeting, PSC/PR/Comm(LXXVI), 10 April 2007, Addis Ababa, Ethiopia.

While the adherence to democratic principle remain one of the most visible changes manifest in the transformation from the OAU to the new AU, it is worth mentioning that 'unconstitutional changes of government do not only come about through *coups d'états*.²⁴⁰ As suggested above, fraudulent elections and alteration of constitutions by regimes which seek to hold on to power may also make a mockery of democracy, as was clearly the case in Zimbabwe's elections of 2000, 2005²⁴¹ and 2008. Furthermore, the attempts by African leaders, notably those in Chad, Nigeria and Uganda to amend the constitution in order to hold on to power serve as obstacles to the emerging norm of right to democratic governance in modern Africa. Nevertheless, the clear shift from Africa's strict interpretation of sovereignty to that of non-indifference has the potential to redraw the landscape of international law and further community values.

C: Conclusion

The AU's constitutional framework brought with it the potential to redraw the way in which the world understands, interprets and applies mechanisms for peace and security with serious ramifications for the UN, member states and other regional arrangements. However, it is the interventionist approach of the AU that brought the relationship between universalism and regionalism with respect to peace and security into sharper focus. In the process, it exhibited its considerable force in norm making in several key areas. Firstly, article 4(h) introduces new grounds for intervention that are 'wider' but at the same time more specific than those in the UN Charter (i.e. threats to peace, breach of peace and aggression).²⁴² In doing so, the AU also institutionalises other grounds for intervention wider than those established under the UN Charter namely self-defence and measures under Chapter VII. Although absent in the Charter, the new grounds of intervention including genocide, war crimes and crimes against humanity are relatively clear in international law, as a common thread that unites these heinous crimes is that they have attained the status of international crimes forming the *ratione materiae* of the current international tribunals.

Moreover, against the background of Rwanda, the AU framework also brought to the fore the notion that the 'once sacrosanct legal principle of the sovereignty of, and non-

²⁴⁰ Paul D. Williams, 'From the Norm of Non-Intervention to Non-Indifference,' *supra* note 234.

²⁴¹ See James Sturcke and agencies, 'Mugabe's party wins Zimbabwe election', *Guardian Unlimited*, April 1, 2005.

²⁴² Jean Allain, 'The True Challenge to the United Nations System of the Use of Force,' *supra* note 28.

interference in, the domestic affairs of states has been weakened if not yet abandoned.²⁴³ Indeed, in its adoption of the Constitutive Act, not only did Africa reject its own previous reliance on the policy on non-interference, it effectively endowed a regional customary law, which at the same time filled the institutional void left by the UN's inaction in the face of African conflicts. Therefore, the legality of AU's constitutional framework is based on unfolding interpretation of the UN Charter and African regional law. Taking a more humane approach to the two treaties, despite the occasional inconsistencies, the Constitutive Act of the AU, read together with the UN Charter, affirm the prohibition of the use of force and place a distinct emphasis on the protection of fundamental human rights. Together, these Charters also reject unilateral intervention and instead, favour collective action. This is made clear from the fact that any recourse to force outside the framework of articles 42 and 51 of the UN Charter and article 4 (h) of the AU Constitutive Act is prohibited under the AU framework.²⁴⁴

However, AU's right to intervene must not be interpreted as an opening of the flood gates for other regional organisations such as NATO and OAS. This is particularly significant given that some have utilised the practice of ECOWAS as justifications for controversial interventions, such as the NATO intervention in Kosovo.²⁴⁵ As made clear in the chapter, the legality of the AU's right to intervene is grounded upon a regional customary law that was subsequently codified in the Constitutive Act of the AU. Its unique characteristics also includes the fact that African countries, by being state parties to the Constitutive Act, a multilateral treaty, consent to institutional invocation of this right by the AU.²⁴⁶ Finally, it is considered a legitimate right bearing in mind that the right to intervene is not assigned to a single or particular group of states but to the AU acting collectively.

²⁴³ Adekeye Adebajo, 'Collective Security and Humanitarian Intervention', United Nations // United Nations Foundation // United Nations and Global Security (2004) available at www.un-globalsecurity.org/pdf/Adebajo_paper_hum_intervention.pdf.

²⁴⁴ See *the Common African Position on the Proposed Reform of the United Nations*, supra note 50.

²⁴⁵ See Belgium's argument in *the Case Concerning Legality of Use of Force*, (Serbia and Montenegro v Belgium and others) ICJ 1999. See also B. Simma, "NATO, the UN and the Use of Force: Legal aspects", *European Journal of International Law*, Vol.10, (1999); A Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community", *European Journal of International Law*, Vol.10, (1999).

²⁴⁶ On the permissible means of consent to treaties, see Article 11 of the Vienna Convention on the Law of Treaties 1969.

In the broader context, the two Charters, as well as recent practice, portray the current shift of international law to a new position where, in grave circumstances, the concept of the sovereignty of states is at variance with the emerging responsibility to protect human life.²⁴⁷ However, a key problem with the AU framework, in similar fashion to that of the UN, is that the current authorisation to intervene leaves the AU free to act at its discretion or even not to act at all. Indeed, in similar fashion to the Security Council's authority under Chapter VII of the UN Charter, the AU's powers under the Constitutive Act were not designed to issue the regional organisation with any specific obligation but rather a broad discretion to intervene. This means that, as Darfur shows, the AU's failure to intervene is more likely to be influenced by regional politics as opposed to the legal rights and duties with regard to intervention under the African Constitutive Act and the UN Charter.²⁴⁸

On a more positive note, the emergence of an African regional right to democratic governance, which itself is a developing principle of the UN,²⁴⁹ deserves special mention, particularly given the potential that the ongoing collaborative efforts between the AU and UN hold in entrenching democratic governance at the universal level. Indeed, the use of sanctions in support of the latter visibly shows the clear shift in paradigm and the move away from the OAU's principle of non-interference in the affairs of member states to that of non-indifference on the part of the AU. In light of the foregoing, it 'is hoped that the new standards of democracy, accountability and good governance enforced by the Constitutive Act's provision for the possible imposition of sanctions will oblivate the need for costly interventions.'²⁵⁰

Having said so, as shown in the coming chapters, although the AU framework is designed to further the principles of the UN, permitting regional action in Africa may be potentially dangerous as it could further marginalise Africa and lead to further abrogation of the Security Council's duty to take primary responsibility for international peace and security. It is in this context that this thesis calls for a

²⁴⁷ See chapter eight. See also ICISS, *The Responsibility to Protect*, *supra* note 157.

²⁴⁸ See chapter nine.

²⁴⁹ See G.A Res. 51/101, 12 December 1996. On this point, see also Richard Burchill, *Regional Organizations and the Promotion and Protection of Democracy as a Contribution to International Peace and Security*, in Richard Burchill, N.D. White & Justin Morris, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, (Cambridge University Press, 2005), pp.209-234.

²⁵⁰ B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act,' *supra* note 4.

strengthened relationship between the UN and the AU, and in particular one that consists of a formalised division of responsibilities between the two organisations,²⁵¹ as argued in the next chapter.

²⁵¹ See chapters four and six.

Chapter Eight

African Perspectives on UN Reform, Regional Action and Future Prospects

A: Introduction

In September 2005, representatives of the 192 member states converged in New York City to celebrate 60 years of the UN. However, there was a tone of caution contained in the words of the Secretary General. The international community 'must recognize that the world today is very different from that of our founders. The United Nations must reflect this new age, and respond to its challenges.'¹ This message was made in a broad context. The threats brought about by the post 9/11 terrorism phenomenon and its relation to rogue states and non-state actors, the proliferation of weapons of mass destruction and environmental degradation were said to be the major challenges facing the world at the turn of the 21st century.

Yet this assumption did not necessarily represent the reality for the African region. Rather, the reincarnation of horrors from the Rwandan genocide (1994), which were visibly manifest in the Darfur conflict (2004), confirmed that it was the prevalence of regional conflicts created by internal wars that posed the greatest challenge to the continent's peace and security. Indeed, the African perception of the matter was hardly surprising given that the state of affairs had resulted in tens of millions of deaths and brought with it despair, destitution, poverty, disease, and displaced persons in Africa more than in any other continent.²

Nevertheless, irrespective of differing perceptions amongst states of what constituted threats to peace, the combination of catastrophic events proved that the existing collective security institutions had failed 'to keep pace with the nature of threats facing the international community.'³ This conclusion was based on the dreadfulness of Rwanda (1994), the attacks of 11th September 2001, as well as the invasion of Afghanistan (2001) and Iraq (2003), which pointed towards the realisation that the

¹ The Secretary General, 'Message on United Nations Day', 24, October, 2005.

² The Organisation of African Unity (OAU), Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaounde Declaration (Africa: Preparing for the 21st Century), AHG Decl. 3, pmbl. para. 2, OAU AHG/Res. 247-257 (XXXII) (8-10 July 1996).

³ See the Report of the United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, UN doc. A/59/2005, 2 December 2004, p. 13.

UN Charter, a 1945 document, could not realistically be expected to meet the challenges of the 21st century and beyond.

The dramatic response of the international community highlighted an overwhelming consensus over the key challenges facing the world at the entry of the new millennium, which in turn led a wide array of key publications, all stressing the need for UN reform. These reports include one written by the UN High-level Panel on Threats, Challenges and Change, titled *A More Secure World: Our Shared Responsibility* (2004),⁴ and the other, titled *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, inscribed by 250 experts under the direction of Jeffrey D. Sachs in 2005.⁵ Finally, the Secretary-General published his own report, *In Larger Freedom: Towards Security, Development, and Human Rights for All* (2005).⁶

These blueprints later set the agenda for the *2005 World Summit*, which the UN described as ‘a once-in-a-generation opportunity to take bold decisions,’⁷ in crucial areas, such as that of peace and security as well as UN reform.⁸ In turn, the high stakes for Africa ensured that the AU was the first and only continental organisation to adopt a *Common Policy on UN Reform*, in March 2005.⁹

B: Aims Purpose and Structure

This chapter explores the current UN reform debate and assesses African perspectives in the area of regional peace and security. In particular, it seeks to offer valuable insights as to how the current proposals on UN reform measure against Africa’s own understanding, interpretation and application of key provisions of the UN Charter, international custom and other general principles of international law. In order to do so, the chapter relies heavily on the proposals set forth in the documents mentioned above, particularly the *2005 World Summit Outcome Document*. Reliance on this

⁴ *Ibid.*

⁵ See the UN Millennium Project. 2005. *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*. New York. See also Jeffery Sachs, ‘The Millennium Project: From Words to Action,’ in Paul Heinbecker and Patricia Goff (eds.), *Irrelevant or Indispensable? The United Nations in the 21st Century*, (Ontario, Canada: Wilfrid Laurier University Press, 2005), pp.19-23.

⁶ Kofi Annan, *In Larger Freedom. Towards Development, Security and Human Rights for All*, UN doc. A/59/2005, 21 March 2005.

⁷ See the 2005 World Summit, ‘An overview’, www.un.org.

⁸ *Ibid.*

⁹ See the *Common African Position on the Proposed Reform of the United Nations*, ‘the Ezulwini Consensus’ adopted by the Executive Council of the African Union at the 7TH Extraordinary Session, 7- 8 March 2005, Addis Ababa, Ethiopia. Ext/EX.CL/2 (VII). See also Chris Landsberg, ‘The UN High-Level Reports and Implications for Africa’, *Security Dialogue*, Vol. 36, No. 3, 388-391 (2005).

Document is based on the premise that although hardly a treaty, it makes 'an important contribution to international law' in that 'it builds on recent trends in international law and practice and codifies them in an agreement.'¹⁰

Further reference is made to the *African Common Policy on UN Reform*. What will become clear is that Africa's contribution to the debate, including its role as an obstacle to certain aspects of change in the UN structure, proved that the continent had finally come of age and was 'now in a position to influence the proposed UN reforms by maintaining her unity of purpose.'¹¹ In order to reach its conclusions, the chapter restricts itself to the matters that immediately touch and concern Africa's regional peace and security. It thereby precedes in three main parts which primarily explore the vital questions of; 1) the prospects of Security Council reform; 2) the doctrine of responsibility to protect and; 3) the regionalisation of peace operations.

The first part begins by looking at the institutional reform of the UN Security Council and demonstrates the manner in which Africa may, itself, be an obstacle to UN reform. Highlight shall also be made of the practice of the permanent members of the Council, which set forth a stringent standard that made reform, without their consent, beyond the bounds of possibility.¹² This section will also demonstrate how the veto power possessed by these states has further reinforced their seemingly unfettered discretion in pursuit of their national interests, occasionally to the detriment of international peace and security, including during grave circumstances.¹³

¹⁰ See Alicia L. Bannon 'The responsibility to Protect: The U.N. World summit and the Question of Unilateralism' *Yale Law Journal*, 1157 (2006). See also Blaine Sloan, *United Nations General Assembly Resolutions in Our Changing World*, (New York: Transnational Publishers Inc. 1991), pp. 71-75. On soft law, see generally, C. Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *ICLQ* 850; H Hillberg, 'A Fresh Look at Soft Law' 10 *European Journal of International Law* (1999), 499; KW Abbott & D Snidal, 'Hard and Soft Law in International Governance' 54 *International Organization* (2000), 421.

¹¹ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

¹² See article 108 of the UN Charter. For general discussion of difficulty of achieving UN reform, see Thomas G. Weiss, 'The Illusion of Security Council Reform' *The Washington Quarterly* 26.4 (2003) 147-161; See also Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Washington, D.C.: Brookings Institution, 1958), pp. 742-749. See also Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno, (eds.), *The United States and Multilateral Organizations* (Oxford and New York: Oxford University Press, 2003); B. Fassbender, 'All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform of the UN Security Council', 7 *Max Planck Yearbook of United Nations Law*, 2003, pp. 283-98; M.J. Glennon, 'Why the Security Council Failed', *Foreign Affairs*, (May/ June 2003), p.16.

¹³ See chapter three.

This discussion paves way for the second section that introduces the controversial doctrine of responsibility to protect, of which Africa had considerable interest. Although the legality of this concept is more conclusively analysed in relation to the Darfur conflict, which served as the first test of the doctrine's application,¹⁴ this part analyses its impact on the reform debate. It then examines the concept's compatibility with the AU's right to intervene, including the major differences, similarities as well as relationship between the two principles.

Given that the AU will primarily be involved in consensual peace operations, as opposed to forceful interventions, the final section assesses Africa's viability and potential in exercising its regional responsibility to protect in this area. Having done so, the section argues that the lessons from recent practice call for a formal division of labour between the AU and the UN, and further suggests how this may be achieved. Finally, this part ends with a brief analysis of the newly created Peacebuilding Commission and explains how this organ fits within developing cooperation between the AU and UN, in the promotion and maintenance of regional and international peace and security.

1.1 The Prospects of Institutional Reform and African's Position on the Modification of the Security Council

The issue of Security Council reform was the most discussed subject in the run up to the World Summit.¹⁵ It will be recalled that the Council possesses the 'primary responsibility for the maintenance of international peace and security,'¹⁶ and is the most powerful organ of the UN.¹⁷ Founded in the aftermath of World War II, its constitution and powers remain archaic and properly fits Krauthammer's description of being 'nothing more than the victory coalition of 1945.'¹⁸ It therefore follows that its current membership and powers portray the balance of power of the aftermath of the Second World War, as opposed to reflecting the realities facing the international

¹⁴ See chapter nine.

¹⁵ Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf: Essays on Africa and the United Nations* (Johannesburg: Jacana, 2006), p. 3.

¹⁶ Article 25 of the UN Charter.

¹⁷ See chapter three.

¹⁸ Charles Krauthammer, 'Don't Go Back to the UN,' *Washington Post*, 21 March 2003, p. A-37.

community of the 21st century.¹⁹ What is equally disturbing are the deep disagreements over its reform, whose frustration has led some to say that it 'seems that the debate itself is still locked up in the realities of 1945 or earlier.'²⁰

For an era that emphasises democracy and accountability,²¹ the absence of African regional representation within the Council, despite the fact that the 54 states in the continent account for over twenty five percent of UN membership, is of major concern. What is more, Africa's situation as the only continent without a permanent seat is tied to a historical injustice, as the majority of African states were under colonial rule in 1945.²² Indeed, it was not until 1963, when the OAU was set up, that African leaders made their demands for equitable representation for the continent within the main institutions of the UN, including the Security Council.²³ In this context, after decades of Cold War realignments, Africa finally united in voicing its frustration in 1997 during the Harare Declaration on UN reform.²⁴

Significantly, the Declaration reiterated the dire 'need to democratize the Council and make it more efficient and transparent', 'enlarge the composition of the Council and reform its decision-making process' and stressed 'the imperative need of ensuring equitable geographical representation.'²⁵ Finally, the OAU officially stated that any democratised, effective and transparent Security Council must include African representation.²⁶ In carrying on with this theme, the 2005 *African Common Policy on UN Reform* went further. It demanded for no less than two permanent seats within the Security Council that would comprise of states selected by the AU itself.²⁷ However, what was more controversial was its stipulation that the new seats were also to

¹⁹ Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 15, p.1.

²⁰ Karel van Kesteren, 'Reform of the UN Security Council: A No-Win Situation?' in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force: Theory and Reality-A Need for Change?*, (Leiden, Martinus Nijhoff, 2005), p. 268.

²¹ See generally Gregory H. Fox & Brad R. Roth, *Democratic Governance and International Law*, (Cambridge University Press, 2000). On the application of democracy in Africa, see chapter seven.

²² See chapter five on impact of colonialism on Africa.

²³ See Lucien Manokou, "L'Afrique et le Conseil de sécurité de l'ONU (1946-1990)", *Guerres mondiales et conflits contemporains*, Paris, n° 196, December 1999.

²⁴ Assembly of the Heads of State and Governments, Thirty-Third Ordinary Session, AHG/Decl.3 (XXXIII), Harare, Zimbabwe, 2 to 4 June 1997.

²⁵ *Ibid.*

²⁶ Harare Declaration of the Assembly Heads of State and Government of the OAU on the Reform of the UN Security Council, OAU Assembly of Heads of State and Government, 2-4 June 1997, Harare, Zimbabwe AHG/Decl.1-4 (XXXIII) AHG/Dec.120-123 (XXXIII) AHG/AEC/Dec.1 (I).

²⁷ See the *Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

possess all the prerogatives and privileges of permanent membership including, as shown below, the right of veto.²⁸

Meanwhile, the desire to enlarge the Council went beyond Africa's borders and incorporated the majority of states within the UN General Assembly.²⁹ However, the debate on the Security Council brought deep divisions as states aligned themselves in groupings based on strategic national and regional interests.³⁰ During this time, the disagreements centred on the proposals put forward by the so-called G-4 states³¹ (Japan, Germany, Brazil and India), the Uniting for Consensus group³² (Pakistan, Italy, Canada and Mexico) and the AU block. As shown below, the failure to reform the Council was later attributed to the AU's refusal to compromise on its 'intransigent demand'³³ of two veto-wielding permanent Security Council seats, which stood in sharp contrast to the position adopted by other states.

Meanwhile, despite the show of African solidarity that manifest itself in the adoption of the *AU's Common Policy on UN Reform*, internal divisions ensued as to not only which states would secure permanent seats but also on how Africa should be represented in the Council.³⁴ And while commentators mainly focussed their debate on the 'Byzantine contest' between the candidacy of Nigeria, South Africa and Egypt, the states of Kenya, Libya and Senegal similarly expressed their interests.³⁵ Despite the obvious strengths that made them favourites, cynics dismissed Nigeria as too 'anarchic'; Egypt as too 'Arab'; and South Africa as too 'albinoic.'³⁶

²⁸ *Ibid.*

²⁹ E.g. GA Res. 47/62, UN Doc. A/ Res/ 47/62 (1992); GA Res 48/26, UN Doc. A/Res/ 48/26 (1993).

³⁰ Jean Pierre Cot, 'Reforming the Security Council: Is There a Hidden Agenda?', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p. 276.

³¹ A/59/L.64, 6 July 2005, re-tabled as A/60/L.46, 9 January 2006. See also 'Reform '05. Joint position paper by Brazil, India, Japan and Germany on Security Council reform', New York, 31 March 2005; 'Draft Resolution on Security Council reform', 13 May 2005, and 'Draft Resolution on Security Council reform', 8 June 2005, available at <http://www.globalpolicy.org/>.

³² A/59/L.68, 21 July 2005.

³³ Shaun Benton, 'No UN Reform Likely, Say Directors of Africa Policy Think-Tanks', *BuaNews*, August 27, 2005.

³⁴ Felix Onuah, 'Africa Fails to Break Deadlock Over UN Reform', *Reuters*, June 9, 2005; Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 14, p.4.

³⁵ Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *ibid.* See also Jibrin Abubakar, 'Egypt Slams Nigeria Over UN Seats,' 28 July 2005, *Daily Trust*, 28 Dec. 2005.

³⁶ Adekeye Adebabo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *ibid.*

As it turned out, although the *Africa's Common Policy on UN Reform* signified real consensus within the continent, its refusal to compromise on the veto and reach an agreement with the G4 states, impacted negatively on the enlargement of the Council.³⁷ Meanwhile, the veto remained a stumbling block to any real reform of the Council particularly because not only were major disagreements tied to its power, any prospects of reform would itself be subject to the threat or use of veto, as discussed below.

1.2 Criticisms of the Veto Power and State Practice within the Security Council

It was mentioned in chapter three that in exercising its powers under the UN Charter, the Security Council is bound by the requirement of consensus amongst its permanent members.³⁸ Although hardly mentioned in the Charter, the political supremacy of the veto, which was awarded to the Allied Powers in the aftermath of World War II, imposed a 'form of victor's justice'³⁹ within the UN organisation. Consequently, not only does it contradict a major UN theory, which affirms the 'principle of the sovereign equality of all UN member states,'⁴⁰ it enables each permanent member to invoke a single blocking vote with the capability of outweighing any majority within the Council.⁴¹

³⁷ Amber Henshaw, 'African Leaders Reject Compromise on UN Security Council', *Associated Press*, August 5, 2005; Shaun Benton, 'No UN Reform Likely,' *supra* note 33.

³⁸ Article 27 (3) UN Charter. Note that the Namibia Advisory Opinion, the ICJ ruled that an abstention by permanent members would not bar the lawful adoption of a decision under article 27 (3) of the UN Charter. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971, ICJ Rep. 16, 22, 21 June, 1971, para. 22. For a historical account on the creation and scope of the veto power, see Jan Wouters & Tom Ruys, 'Security Council Reform: A New Veto for a New Century?', *Egmont Papers* 9, Royal Institute for International Relations, Brussels, (August 2005). See also Inis Claude, 'The Security Council', in E. Luard (ed), *The Evolution of International Organizations*, (New York: Frederick A Praeger, 1966).

³⁹ Jan Wouters & Tom Ruys, 'Security Council Reform,' *ibid*. See also Tad Daley and David Lionel, 'Reinventing the United Nations,' in: *Foreign Service Journal*, Vol. 83, No. 9, (2006), pp. 33-39; p. 36.

⁴⁰ Article 2(1) of the UN Charter.

⁴¹ See Statement of the Permanent Representative of Mexico to the United Nations, 21 April 1998, available at <http://www.un.int/mexico/discur97/veto-eng.htm>. See also Wouters, Jan & Ruys, Tom, 'Security Council Reform,' *ibid*; Hans Köchler, 'Security Council Reform: A Requirement of International Democracy', Lecture delivered at the International Seminar on *Reforming the United Nations: Democracy, Justice and Security in the Age of Globalization*, Center for the Study of Federalism, Turin, Italy, 8 June 2007, available at www.hanskoechler.com/Koechler-Security_Council-Reform-CSF-TurinV3-25Aug07.pdf -See also Hans Köchler, *The Voting Procedure in the United Nations Security Council Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, XVII., Vienna: International Progress Organization, 1991.

Although vastly unpopular, the veto power was the 'price' which the world community had to pay in order for permanent members, such as the US and Soviet Union, to create the UN in 1945.⁴² Thereafter, the apparent breach of their undertaking 'not to use their 'veto' power wilfully to obstruct the operation of the Council,'⁴³ has served as a powerful hindrance to the proper functioning of the UN organisation.⁴⁴ For this reason, there exists an array of fierce criticism of this power since Briery first pointed out that the veto was a significant flaw in the organisation's collective security system, barely a year after the establishment of the UN.⁴⁵

Chief amongst the criticisms associated with the 'very special power'⁴⁶ provided by the veto is that it has often been used as a sovereign right of powerful states to protect or further their individual interests, rather than for the purpose of reflecting the collective will of the Security Council.⁴⁷ Indeed, there exists a pattern of practice which illustrates instances where permanent members of the Council used the veto's 'extraordinary decision blocking competence'⁴⁸ to merely pursue their national interests, during before and after the fall of the Berlin Wall.⁴⁹

For example during the Cold War era, the UK's decision to unilaterally exercise its veto power in regards to Rhodesia (now Zimbabwe), on no less than seven occasions,

⁴² Sir Michael Wood, 'The UN Security Council and International Law', *Paper*, Hersch Lauterpacht Memorial Lectures, Lauterpacht Centre for international Law, University of Cambridge, 7-9 November, 2006; Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 20, p.8.

⁴³ See Statement by the Delegation of the Four Sponsoring Governments on Voting Procedure in the Security Council', June 7 1945, UNCIO vol. XI, p. 754.

⁴⁴ Dwight Lee, 'The Genesis of the Veto,' *International Organisation* 33(1947); J.L. Briery, 'The Covenant and the Charter', 23 *British Yearbook of International Law* 83, (1946) pp 89-90; Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Hart Publishing, 2004), p. 88.

⁴⁵ J.L. Briery, 'The Covenant and the Charter', *ibid*, p. 92. For additional criticisms of the veto power, See B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, The Hague/London/Boston, 1998); I. Razali, 'The United Nations in the 21st Century: Prospects for Reform', 14 *Medicine, Conflict and Survival* 97, (1998); Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 20, p.8. See also the legal adviser to the Palestine Liberation Organization, Gregory Khalil 'Just Say No to Vetoes', *New York Times*, July 19, 2004; Céline Nahory, 'The Hidden Veto', *Global Policy forum*, May 2004.

⁴⁶ B. Simma (ed), *The Charter of the United Nations*, (Oxford University Press, USA, 2002, p. 508.

⁴⁷ On the corporate will of the Council, see N.D White, 'The Will and Authority of the Security Council After Iraq', *Leiden Journal of International Law*, 17 (2004), pp.645-672.

⁴⁸ Inis Claude, 'The Security Council', in E. Luard (ed), *The Evolution of International Organizations*, *supra* note 38, p. 71.

⁴⁹ On the misuse of the veto power, see Jan Wouters, & Tom Ruys, 'Security Council Reform,' *supra* note 38.

is more readily justifiable on grounds of national interests, as opposed to furthering the maintenance peace and security.⁵⁰ Similarly, France hardly refused to exercise its power of veto to protect its national interests, including during its confrontation with Comoros over the disputed Island of Mayotte, in 1976.⁵¹ Interestingly, this action stood in sharp contrast to its earlier position at the San Francisco Conference in May 1945, where it had forcefully argued for certain restrictions on the use of veto power,⁵² a position it seemed to abandon as soon as it acquired permanent membership.

However, the optimism that came along with the entry of the post-Cold War era⁵³ saw the dramatic decline of the use of veto.⁵⁴ Nevertheless, recent examples of the continued use of veto to protect and promote national interests include China's rejection of the deployment of military observers to Guatemala (1997)⁵⁵ and Macedonia (1999),⁵⁶ on the account of the latter's perceived support of Taiwan, which it considers part of its territory.⁵⁷ Furthermore, in order to guard its immediate interests, the United States vetoed resolutions that had sought to condemn its attacks on Libya (1986),⁵⁸ as well as its military activities in Panama (1989).⁵⁹

Similarly, Russia controversially blocked a resolution outlining new UN security arrangements in Cyprus that would have taken effect if Greek and Turkish Cypriots

⁵⁰ S/PV. 1069 para 64, S/5425/Rev.1, 13 September, 1963; S/PV. 1534 para 207, S/9696 + Corr.1,2, 17 March, 1970; S/PV. 1556 para 212, S/9976, November 10, 1970; S/PV. 1639 para 48, S/10606, 4 February, 1974; S/PV. 1666 para 119, S/10805/Rev.1 op. para 1, 29 September, 1972; S/PV. 1666 para 120, S/10805/Rev.1 op. para 5, 29 September, 1972; S/PV. 1666 para 121, S/10805/Rev.1 as Amended, 29 September 1972; S/PV. 1716 para 48, S/10928, 22 May, 1973.

⁵¹ S/PV. 1888 para 247, S/11967, 6 February, 1976 in U.N.Y.B, 1976, pp. 179-181.

⁵² See Statement of the Permanent Representative of Mexico referring to the early French position to the United Nations, April 21, 1998, available at <http://www.un.int/mexico/discurs97/veto-eng.htm>.

⁵³ On the post Cold War optimism, see chapter three, four and five.

⁵⁴ David M. Malone, 'Introduction', in David M. Malone, ed., *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), pp. 1-16; Thomas G. Weiss, 'The Illusion of Security Council Reform,' *supra* note 12; Christine Gray, *International Law and the Use of Force: Foundations of Public International Law*, (Oxford University Press, 2nd edition), 2004, p.204.

⁵⁵ See Security Council 3730th Meeting, Press Release SC/6311, 10 January, 1997. See also F. HAQ, 'The veto: a case study. The China veto and the Guatemalan Peace Process', 20 January 1997, available at <http://www.globalpolicy.org/security/membership/chinavet.htm>.

⁵⁶ See S/PV.3982, p.5, S/1999/201, 25 February 1999.

⁵⁷ For an international law perspective on the China-Taiwan issue, see Leopoldo Lovelace, Jr, 'Is There A Question of Taiwan In International Law?' *4 Harvard Asia Quarterly* 3, (2000). For a political perspective, see John F. Copper, *Playing with Fire: The Looming War with China over Taiwan*, (Praeger Security International General Interest-Cloth, 2006)

⁵⁸ U.N.Y.B (1986), pp. 247-257.

⁵⁹ U.N.Y.B (1989), pp. 173-174.

voted in favour of reunification, in April 2004.⁶⁰ The exercise of the veto on a technicality in the latter case, as well as its misuse referred to above, not only raised reservations as to the veto's relation to peace and security but also cast doubts on the compatibility with the purposes and principles of the UN Charter.⁶¹

Before embarking on a critique of the current reform proposals on the veto power, mention ought also to be made of a further, but equally problematic hindrance to the proper functioning of the United Nations. Although less visible than its actual practice suggests, the significance of the quiet threat of veto cannot be understated.⁶² Also known as the 'hidden veto,' 'the mere presence of the threat of the veto [...] determines the way the Council conducts its business.'⁶³ Some illustration of the impact of the threat of veto is important at this point, particularly that which highlights some of the instances where the proper functioning of the UN was compromised by the will of powerful states often leading to disastrous consequences.

A clear example of the impact of a threat of veto is manifest in the warning by the US to block an extension of the UN mission in Bosnia, unless its nationals were protected from prosecution by the ICC in July 2002.⁶⁴ Similarly, as will be shown in the next chapter, Security Council resolution 1593 of March 2005⁶⁵ with regard to the Darfur conflict was only approved upon by the US condition that it gave blanket immunity from prosecution to designated peacekeepers.⁶⁶ What is disturbing about this practice is that in addition to shaping the Council's affairs, the threat of veto may, in itself, engender a threat to peace and security.⁶⁷

⁶⁰ Security Council 4947 Meeting, 21 April 2004, UN Doc.S/2004/313, 21 April 2004.

⁶¹ N.D White, 'The Will and Authority of the Security Council After Iraq,' *supra* note 47.

⁶² See Céline Nahory, 'The Hidden Veto', *supra* note 45.

⁶³ Ambassador Curtis Ward of Jamaica, Statement at the Wrap-Up Session of August 2001, S/PV. 4363, p.7. See also Tono Eitel, 'The UN Security Council and its Future Contribution to the Field of International Law: What we May Expect', *Max Planck Y.B.* 4 (2000).

⁶⁴ Security Council 4568th Meeting, UN. Doc. SC/7445/Rev.1, 10 July 2002. See Security Council Resolution 1422 (2002), 12 July 2002.

⁶⁵ See Security Council 5158th Meeting, Press release SC/8351, 31 March, 2005.

⁶⁶ For discussion on the question of immunity and the relationship between the Security Council and the ICC, see Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court', (2005), 16 *EJIL*, 239. See also Robert Crier and N.D. White, 'The Security Council and the International Criminal Court: Who is feeling Threatened?' 8 *Yearbook of International Peacekeeping* (2002), 141 and Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', (2003) 14 *EJIL* 85.

⁶⁷ N.D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 47.

The most catastrophic illustration of this point remains the tragic failure of the Council to intervene during the Rwandan genocidal massacre (1994).⁶⁸ Most notably, it will be recalled that the Council failed to act during this episode due to the threats of vetoes of France and the US who 'consciously chose to abdicate their responsibility for Rwanda.'⁶⁹ Criticisms of the states' pursuit of national interests were made. In particular, an US influential human rights organisation concluded that 'the Americans were interested in saving money, the Belgians were interested in saving face, and the French were interested in saving their ally, the genocidal government.'⁷⁰ In the end, their inaction ensured that the Council, as a whole, bore responsibility for failing to 'stop the killing.'⁷¹

Despite the lessons from Rwanda, the disturbing remnants of this practice were visible at the turn of the 21st century. In particular, it was hardly 10 years after the 1994 genocide when the threats of veto by China severely restricted UN action in Darfur.⁷² The Chinese position during this episode was attributed to its commercial ties with Sudan⁷³ despite the Khartoum government's involvement in 'violations of human rights.'⁷⁴ Meanwhile, evidence of the impact of the threat to use the veto was also evident in the negotiations which determined the legality of the Iraq war (2003) and the controversy surrounding the extension of UN mission in Bosnia (2002).⁷⁵

Read together, the alarming episodes described above are attributable to the lack of accountability of the Council for its actions. And although commentators have been keen to argue that the Council's resolutions can be *ultra vires*, there remains a

⁶⁸ See chapter three and five.

⁶⁹ Organisation of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding events*, 2000 para. 13.1. See also *Independent UN Inquiry into the Actions of the UN during the 1994 Genocide*, UN Doc. S/1999/1257, December 15, 1999.

⁷⁰ Alison Des Forges, 'Leave None to Tell the Story: Genocide in Rwanda' *Human Rights Watch*, March 1999.

⁷¹ *Independent UN Inquiry into the Actions of the UN during the 1994 Genocide*, *supra* note 60, at 30.

⁷² See chapter nine.

⁷³ *Ibid.* See also Scott Peterson, 'Sudan's Key Ties at the UN', *Christian Science Monitor*, August 31, 2004, p 5; Human Rights Watch, 'The United Nations and Darfur', available at <http://www.hrw.org/wr2k5/darfur/3.ht>; Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 20, pp. 213-251.

⁷⁴ *Report of the High-Level Mission on the situation of human rights in Darfur in pursuant to Human Rights Council decision S-4/101, A/HRC/4/80*, Human Rights Council Fourth Session, March 2007.

⁷⁵ Nigel D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 47.

practical difficulty of any tribunal carrying out judicial review of the Council's decisions.⁷⁶ Therefore, this means that resort to informal methods, such as intense lobbying by the civil society and world opinion serve as the only method of review of Council decisions. These handicaps have in turn raised major questions in relation to the extent to which: 1) the threat and use of veto may be restricted or abolished altogether, and; 2) whether the power should be awarded to future Council members, including African regional representation, as discussed below.

1.3 A Critique of Reform Proposals on the Veto Power

With the notable exception of the permanent members and a few others,⁷⁷ the vast majority of states and organisations, including the AU, the Arab League, and the Group of Non-Aligned Nations, in principle support the abolition of the veto power.⁷⁸ Interestingly however, the basis of the continuing debate has centred on the continuing existence of the veto power, as opposed to its elimination. This consensus is borne out of the realisation that the chances for the abolition of the veto remain

⁷⁶ On judicial review of Security Council, see Martenczuk, Bernd, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999). *EJIL*, Vol. 10, pp. 517-547, (1999); Werner W.G., 'Securitization and Judicial Review: A Semiotic Perspective on the Relation Between the Security Council and International Judicial Bodies', *International Journal for the Semiotics of Law*, Volume 14, Number 4, (2001), pp. 345-366(22); Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts*, (Martinus Nijhoff, 1995); Bardo Fassbender, 'Quis iudicabit? The Security Council, Its Powers and Its Legal Control', *EJIL*, Vol. 11 (2000) No. 1; Ioana Petculescu, 'The Review of the United Nations Security Council Decisions by the International Court of Justice', *NILR*, (2005), 52 (2), p. 167; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing, 2005); David Schweigman, 'The Authority of the Security Council under Chapter VII of the Charter. Legal Limits and the Role of the International Court of Justice', *Nordic Journal of International Law*, Volume 71, Number 3 (January, 2002); Vera Gowlland-Debbas, "The Relationship Between Political and Judicial Organs of International Organisations: The Role of the Security Council in the New International Criminal Court", in Boisson de Chazournes, Laurence, Romano, Cesare, and Mackenzie, Ruth (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects*, (Transnational Publishers, 2002), pp.195-219; John Dugard, 'Judicial Review' of Sanctions', in Gowlland-Debbas, Vera (ed.), *United Nations Sanctions and International Law*, (Kluwer Law International, 2001), pp. 83-92; Franck, M. Thomas, 'The 'Powers of Appreciation': Who Is the Ultimate Guardian of UN Legality?', *AJIL*, vol. 86/3, (1992), pp. 519-523. Gowlland-Debbas, Vera, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie case', *AJIL*, vol. 88/4, (1994), pp. 643-677.

⁷⁷ For example, see Polish position paper, UN Doc. A/AC.247/1997/CRP.9, 12 June, 1997. Ernesto Zedillo, 'An Overview', in Ernesto Zedillo ed., *Reforming the United Nations for Peace and Security, Proceedings of a Workshop to Analyze the Report of the High-level Panel on Threats, Challenges, and Change*, (New Haven, CT: Yale Center for the Study of Globalization, 2005), p.6.

⁷⁸ See I. Winkelmann, 'Bringing the Security Council into a New Era', 1 *Max Planck Y.B.*, 75-83.; see Russell, *History of the United Nations Charter*, *supra* note 12, pp. 713-719; Bruce Russett, ed., *The Once and Future Security Council* (New York: St. Martin's Press, 1997), pp. 2-5; Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the U.N.* (New Haven: Yale University Press, 1997), pp. 198-203.

'hopeless,'⁷⁹ or are 'hardly realistic,'⁸⁰ particularly given that the issue would itself be subject to the threat and use of the veto power.⁸¹ Therefore, to confront this reality, the majority of states and commentators have directed their energy at ensuring that the veto power reflects the evolving character of international legal system, particularly in its quest to protect and promote fundamental human rights.⁸²

With this regard, it has been perceived as more useful to 'constrain the use of veto by law, while at the same time leaving it intact as a core power.'⁸³ Such proposals are intended not only to prevent the use of 'unreasonable vetoes,'⁸⁴ but also promote a 'veto free'⁸⁵ culture. In this regard, the UN General Assembly,⁸⁶ the Non-Aligned Movement,⁸⁷ the AU,⁸⁸ the 'Group of Ten'⁸⁹ and several individual UN States⁹⁰ have previously urged for restrictions on the use of the veto.⁹¹ However, these proposals have often met fierce resistance from permanent members such as the US and Russia who have persistently resisted the imposition of any limitations on their veto power.⁹²

⁷⁹ N D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 47.

⁸⁰ Sir Michael Wood, 'The UN Security Council and International Law', *supra* note 42.

⁸¹ See article 108 of the UN Charter. See also B. Fassbender, 'Pressure for Security Council Reform', in David M. Malone (ed.), *The UN Security Council*, *supra* note 54.

⁸² See chapter one. See also Robert McCorquodale, 'The Individual and the International Legal System', in Malcolm D. Evans, *International Law*, (Oxford University Press, 2006), pp. 307-332.

⁸³ N.D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 47.

⁸⁴ For a discussion of the unreasonable veto, see Nicholas J. Wheeler and Tim Dunne, 'Moral Britannia: Evaluating the Ethical Dimension in Britain's Foreign Policy', *Foreign Policy Centre*, April 26, 2004, pp. 28-32; available at fpc.org.uk/fsblob/233.pdf.

⁸⁵ Statement by H.E. Mr. Anders Lidén, 'Permanent Representative of Sweden to the United Nations', At the General Assembly on "Question of equitable representation on and increase in the membership of the Security Council and related matter: draft resolution (A/59/L.64), June 2005.

⁸⁶ See Fifty-Sixth General Assembly Plenary 36th Meeting, UN Press Release, GA/9945, 01 January, 2001.

⁸⁷ Letter from the Permanent Representative of Egypt, 28 July 1999, UN Doc. A/53/47, Annex X.

⁸⁸ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

⁸⁹ Proposals on decision-making in the Security Council, including the veto', 25 June 1998, Annex XVI to UN Doc. A/52/47. The Group of Ten consists of Austria, Australia, Belgium, Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Portugal and Slovenia.

⁹⁰ For example see the Statement of the Permanent Representative of Mexico to the United Nations, April 21, 1998, available at <http://www.globalpolicy.org/security/docs/mexrefmp.htm>; for the German position, see UN Doc. A/AC.247/2000/CRP.4; Annexes XIV and XXII to UN Doc. A/52/47, available at <http://www.globalpolicy.org/security/reform/scref98.htm>; See also S.R. Weisman 'U.S. firm in rebuff of German bid at UN', *International Herald Tribune*, 9 June 2005.

⁹¹ On proposals restricting the power of veto, see Jan Wouters, & Tom Ruys, 'Security Council Reform,' *supra* note 38.

⁹² For example, see Statement by a Representative of the Russian Federation, 24 March 1999, available at <http://www.globalpolicy.org/security/docs/russia99.htm>; Statement by Cameron R. Hume, US Minister Counsellor for Political Affairs, 23 May 1996, available at <http://www.globalpolicy.org/security/docs/hume.htm>; Thomas G. Weiss, 'The Illusion of Security Council Reform,' *supra* note 12.

In spite of the above, the practice of the permanent five portrays a dramatic decline in veto usage in the post-Cold War era⁹³ and much significance has been attached to the fact that the Council is in theory restricted by the law.⁹⁴ However, the lack of a mechanism to curb the misuse of the veto power remains of major concern as the recent restraint on the use of veto fails to offer sufficient guarantees that the Council will be more readily willing to act in order to avert future catastrophe.

Meanwhile, as the debate rages on, reliance is placed upon the hope that in times of deep disagreements, permanent members should resort to principles, such as that of good faith, which arguably apply to the working of the Council.⁹⁵ This viewpoint was favoured by the ICISS and UN High Level Panel, which recommended that in grave circumstances, the permanent members should limit the use and threat of veto to cases where 'vital interests' are genuinely at stake.⁹⁶ In Africa for example, this could mean that the veto ought not to be used in well defined circumstances, such as those recognised by Constitutive Act of the AU namely; war crimes, genocide and crimes against humanity.⁹⁷ Unfortunately however, not only did these reports fall short of elaborating what 'vital interests' would entail, they failed to identify who would determine when they are at stake.⁹⁸ This aspect is picked up for consideration under the more appropriate heading dealing with the responsibility to protect, discussed further below.

1.4 The Question of Extending the Veto Power to Future Security Council Members

Mention was made earlier of the disagreements that emerged in relation to the proposed increment of Security Council membership from the current 15 to 24.⁹⁹

⁹³ Malone, David M., 2004. 'Introduction', in David M. Malone, ed., *The UN Security Council*, *supra* note 54; Thomas G. Weiss, 'The Illusion of Security Council Reform', *ibid*; Christine Gray, *International Law and the Use of Force*, *supra* note 54, pp.204.

⁹⁴ See chapter three.

⁹⁵ T.M. Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995, p.51-3 & 219-220. See also R. Cryer, 'The Security Council and Article 39: A Threat to Coherence?', *Journal of Armed Conflict Law* (1996), 161 at 165.

⁹⁶ See the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: ICISS, 2001), p. xiii and UN High Level Panel, *A more secure world*, *supra* note 3, para. 256.

⁹⁷ Article 4 (h) of the Constitutive Act of the African Union.

⁹⁸ Sir Michael Wood, 'The UN Security Council and International Law', *supra* note 42.

⁹⁹ UN High Level Panel, *A More Secure World*, *supra* note 3; Kofi Annan, *In Larger Freedom*, *supra* note 4. For a discussion on the models that seek to increase the membership of the Council, see Ernesto

While some have cast doubts on the whether an enlarged Council would improve its efficiency,¹⁰⁰ others contend that wider representation would lead ‘to a more democratic decision-making process.’¹⁰¹ Meanwhile, a further, but equally serious, question that also arose was in regard to whether the power of veto should be extended to states who acquire Council permanent membership in the future. On this issues, deep divisions gained prominence amongst UN member states following the G-4 states’ initial proposal that new ‘permanent members should have the same responsibilities and obligations as the current permanent members.’¹⁰² While this position had the support of France and Russia,¹⁰³ it was vehemently opposed by the US which argued that the veto power ought to rest with the current permanent five members alone.¹⁰⁴

In the meantime, the AU was opposed, in principle, to the veto.¹⁰⁵ However it explained the ‘view that so long as it exists, and as a matter of common justice, it should be made available to all permanent members of the Security Council.’¹⁰⁶ Although this position was expressly shared by the Arab League,¹⁰⁷ the permanent member states of China and the UK did not express their position on the matter.¹⁰⁸ As it turned out, the lack of sufficient support from the General Assembly later forced the

Zedillo, ‘An Overview’, in Ernesto Zedillo ed., *Reforming the United Nations for Peace and Security, Proceedings of a Workshop to Analyze the Report of the High-level Panel on Threats, Challenges, and Change*, (New Haven, CT: Yale Center for the Study of Globalization, 2005), pp.1-18.

¹⁰⁰ K. van Kesteren, ‘Reforming the Security Council: Views from Practice’, in N. M. Blokker and N. J. Schrijver (eds.), *The Security Council and the Use of Force*, *supra* note 20, pp. 261–268 ; S. Neil Macfarlane, Carolin J. Thielking, and Thomas G. Weiss, ‘The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?’ *Third World Quarterly* 25, no. 5 (2004); Thomas G. Weiss, ‘The Illusion of Security Council Reform’ *supra* note 12; James Paul and Céline Nahory, ‘Theses Toward a Democratic Reform of the UN Security Council’, 13 July 2005, *Global Policy Forum*, 27 Dec. 2005; P. van Walsum, ‘A hitch could still stall the momentum in favour of a P-11 UN Security Council’, *Financial Times*, 18 April 2005; Ernesto Zedillo, ‘An Overview’, and Muchkund Dubey, ‘Comments on the Report of the High-Level Panel on Threats, Challenges and Change’, in Ernesto Zedillo ed., *Reforming the United Nations for Peace and Security, Proceedings of a Workshop to Analyze the Report of the High-level Panel on Threats, Challenges, and Change*, (New Haven, CT: Yale Center for the Study of Globalization, 2005), p. 5.

¹⁰¹ Philippine Ambassador Felipe Mabilangan, quoted in James A. Paul, ‘Security Council Reform; Arguments about the Future of the United Nations System,’ Feb. 1995, *Global Policy Forum*, 27 Dec. 2005, available at <<http://www.globalpolicy.org/Security/pubs/secref.htm>>

¹⁰² See ‘Draft Resolution on Security Council reform’, 13 May 2005, and ‘Draft Resolution on Security Council reform’, 8 June 2005, available at <http://www.globalpolicy.org/>.

¹⁰³ For example, see Statement by a Representative of the Russian Federation, 24 March 1999, available at <http://www.globalpolicy.org/security/docs/russia99.htm>.

¹⁰⁴ R.N. Burns, ‘On-the-record briefing on UN reform, 16 June 2005, available at <http://www.state.gov/>

¹⁰⁵ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

¹⁰⁶ *Ibid.*

¹⁰⁷ Letter from the Permanent Representative of Lebanon to the United Nations, 23 May 1997, Annex VIII to UN Doc. A/AC.247/1997/CRP.7.

¹⁰⁸ Wouters, Jan & Ruys, Tom, ‘Security Council Reform,’ *supra* note 38.

G4 states to subsequently drop their demands for the veto power and ultimately settle on their quest for permanent membership.¹⁰⁹ What is more, not only did the AU's stand on the matter and the deep divisions between states act as a stumbling block to the reform of the Council and its veto power, they further entrenched the status quo.

In the end, as with previous quests for reform, the failure to agree ensured that little progress was made in regard to the veto power, which further prevented the institutional reform of the UN Security Council.¹¹⁰ However, although the failure to amend the Council's membership and its decision making process was a major setback for the UN reform process, an international commitment by member states to protect citizens from avoidable catastrophe was a most important achievement of the *2005 World Summit*. However, a word of caution is vital from the onset. This is because of the fact that, in addition to the discretionary power of the Security Council in determining the existence of threat to peace,¹¹¹ the ultimate success of the doctrine of responsibility to protect remained tied to the presence of the veto and other deficient workings of the Council, as shown below.

2.1 Introducing the Responsibility to Protect: The Background and Africa's Contribution to the Emerging Norm

It will be recalled from chapter three that the so called right of humanitarian intervention remained ambiguous and fell short of acquiring the status of international law. This was primarily because it largely remained an academic debate centring on the uneasy relationship between law, politics and morals. However, the doctrine's failure posed a fundamental question that led to the Secretary-General's challenge to the international community; should the legal quandaries posed by intervention and sovereignty allow coalitions of states to stand aside and watch as horror unfolds on a future Rwanda or Srebrenica?¹¹²

¹⁰⁹ Shaun Benton, 'No UN Reform Likely,' *supra* note 33; Amber Henshaw, 'African Leaders Reject Compromise on UN Security Council', *supra* note 37.

¹¹⁰ On past attempts at UN reform, see Thomas G. Weiss, 'The Illusion of Security Council Reform,' *supra* note 12; See B. Fassbender, 'All Illusions Shattered?,' *supra* note 12; M.J. Glennon, 'Why the Security Council Failed', *supra* note 12; Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 14, p.3.

¹¹¹ See chapter three.

¹¹² Kofi Annan's speech on 20 September 1999 before the UN General Assembly: *Balance State Sovereignty with Individual Sovereignty!* http://users.lmi.net/wfanca/pp_annan_on_sov.html; Report of the Secretary General on the Work of the Organisation, A/54/1, 1999, p.48. see also Kofi Annan, 'Two Concepts of Sovereignty,' *Economist*, September 18, 1999.

In confronting this dilemma, the Canadian government responded by establishing the International Commission on Intervention and State Sovereignty (ICISS) in September 2000, which consisted of high level Commissioners led by Gareth Evans and Mohamed Sahnoun.¹¹³ Basically the Commission sought to address the political, operational, legal and ethical dilemmas posed by the issue of sovereignty and intervention.¹¹⁴ As it turned out, central to the ICISS's conclusion was the positing of a new norm which reinterpreted the doctrine of sovereignty to include a responsibility to protect, and not a mere authority to govern.¹¹⁵ Although the concept of responsibility to protect had prominently featured in the earlier manuscripts of Francis Deng,¹¹⁶ its publication by the ICISS immediately aroused immense interdisciplinary attention and academic review.¹¹⁷ The concept was subsequently taken up and

¹¹³ For details of commissioners, see <http://www.iciss.ca/members-en.asp>.

¹¹⁴ See ICISS, *The Responsibility to Protect*, supra note 96. Available at http://www.iciss.ca/05_Background-en.asp.

¹¹⁵ *Ibid* p.xi.

¹¹⁶ Francis M. Deng, 'Frontiers of sovereignty', *Leiden Journal of International Law*, 8, 2 (1995), pp. 249–86; Francis M. Deng *et al.*, *Sovereignty as Responsibility: Conflict Management in Africa*, (Washington D.C.: The Brookings Institution, 1996.); Francis Deng, *Protecting the Dispossessed* (Washington, DC: Brookings Institution, 1993).

¹¹⁷ They include Jeremy I Levitt, 'The Responsibility to Protect: A Beaver Without a Dam?', *Michigan Journal of International Law*, 25 (1), (2003), pp 153–177; Ian Williams, 'Righting the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty', *International Journal of Human Rights*, 6 (3), (2002), pp 103–113; David Ryan, 'Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect', *International Affairs*, 78 (4), (2002), pp 890–891; JL Holzgrefe & Robert O Keohane (eds), *Humanitarian Intervention : Ethical, Legal, and Political Dilemmas*, (Cambridge: Cambridge University Press, 2003); Jennifer Welsh (ed), *Humanitarian Intervention and International Relations*, (Oxford: Oxford University Press, 2003); Commission on Human Security, *Human Security Now*, New York: Commission on Human Security, 2003, pp 10, 57; Peter Singer, *One World: The Ethics of Globalization*, (New Haven, CT: Yale University Press, 2002); Kathleen Newland, *No Refuge: The Challenge of Internal Displacement*, (New York: OCHA, 2003); John Harker, 'Intervention is Served: the US Federal Alien Torts Claims Act and the irony of ironies', *Cambridge Review of International Affairs*, 16 (1), (2003), pp 155–164; Joelle Tanguy, 'Redefining Sovereignty and Intervention', *Ethics and International Affairs*, 17 (1), (2003), pp 141–148; Adam Roberts, 'The Price of Protection', *Survival*, 44 (4), (2002), pp 157–161; Peter J Burgess, 'The Foundation for a New Consensus on Humanitarian Intervention', *Security Dialogue*, 33 (3), (2002), pp. 383–384; Jane Boulden, 'Book review: The Responsibility to Protect', *Journal of Refugee Studies*, 15 (4), 2002, pp 428–429; Edward Newman, 'Humanitarian Intervention, legality and legitimacy', *International Journal of Human Rights*, 6 (4), (2002), pp 102–120; Thomas G Weiss, 'To intervene or not to intervene? A contemporary snapshot', *Canadian Foreign Policy*, 9 (2), (2002), pp 141–157; Jennifer M Welsh, 'Review Essay: From Right to Responsibility: Humanitarian Intervention and International Society', *Global Governance*, 8 (4), (2002), pp 503–521; Jennifer Welsh *et al.*, 'The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty', *International Journal*, 57 (4), (2002), pp 489–512 and; Daniel Warner, 'The Responsibility to Protect and Irresponsible, Cynical Engagement', *Millennium*, 32 (1), (2003), pp 109–121.

developed by the UN High Level Panel¹¹⁸ and later, incorporated into the Secretary General's report *In Larger Freedom*.

Meanwhile, the AU was the first regional organisation to approve the doctrine of responsibility to protect, in preparedness for the 2005 UN summit on reform of the organisation.¹¹⁹ As shown below, the *African Union's Common Policy on UN Reform* was to later contribute to the adoption of the doctrine at the World Summit.¹²⁰ What should be mentioned at this stage is that despite Africa's well documented strict adherence to the sovereignty principle,¹²¹ the AU's support of the emerging norm was hardly astonishing. This is because although African states 'historically are among the staunchest subscribers to the international law principles of nonintervention and state sovereignty,'¹²² their Constitutive Act¹²³ had earlier endorsed an interventionist approach towards 'cases of egregious human rights abuses, coups and regional instability.'¹²⁴

It was thus unsurprising when the African states of Benin, Rwanda and Tanzania, all gave strong explicit support for the concept at a UN Security Council debate on the responsibility to protect. Benin tried to build congruence by suggesting that 'collective responsibility to protect is the basis of the creation of the African Union and its structures concerned with the maintenance of peace and security.'¹²⁵ Similarly, Rwanda drew on its harrowing history to argue forcefully that international 'business as usual is inadequate and can no longer prevail.'¹²⁶ The East African country went on to support the use of Chapter VII action where states fail to live up to their sovereign responsibilities.¹²⁷ However, while emphasising Africa's regional

¹¹⁸ UN High Level Panel, *A More Secure World*, *supra* note 3, p. 66.

¹¹⁹ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

¹²⁰ Alex J Bellamy 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics & International Affairs* 20 (2) (2006), 143–169.

¹²¹ See chapter five.

¹²² Jeremy I Levitt, 'The Responsibility to Protect', *supra* note 117; See also Jeremy I Levitt *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian, and Judicial Issues*, (Ardsley, NY: Transnational Publishers, 2003).

¹²³ See chapter seven.

¹²⁴ Adekeye Adebajo, 'UN Reform Needs an African Perspective', *Mail & Guardian*, May 23, 2005. Available at <http://www.globalpolicy.org/reform/initiatives/annan/2005/0523african.htm>.

¹²⁵ UN doc. S/PV.5319, 9 December 2005, p. 11.

¹²⁶ UN doc. S/PV.5319 (Resumption 1), 9 December 2005, pp. 18–9.

¹²⁷ *Ibid.*

responsibility to protect, the AU warned that its position on the matter 'should not undermine the responsibility of the international community to protect.'¹²⁸

Ultimately, world leaders at the Summit heeded Africa's call and reaffirmed their readiness and willingness to take 'collective action' through the Security Council to protect populations where governments fail to do so. This responsibility to protect was phrased in two parts; first, each 'individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'¹²⁹ The second component of responsibility to protect was directed at the rest of the world and automatically comes to play when the individual state is unable or unwilling to protect its citizens. Specifically, the international community could embark on 'collective action' through the Security Council to protect populations where governments failed to do so.¹³⁰

Subsequently, on 28 April 2006, the Security Council unanimously adopted a historical resolution 1674, which made reference to the responsibility to protect.¹³¹ This resolution was unprecedented in that it was the first to 'reaffirm [...] the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'¹³² Furthermore, as shown in the next chapter, the new doctrine was also acknowledged by the Security Council in resolutions 1679¹³³ and 1706¹³⁴ regarding the Darfur conflict, which formed the first test of the doctrine's application.¹³⁵

It should be mentioned that the legal significance of the resolutions listed above cannot be over emphasised. Indeed, mention was made that article 25 of the UN Charter obligates UN member states 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Although not all Council resolutions are binding, it will be recalled from chapter three that decisions passed under

¹²⁸ See the *Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

¹²⁹ 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, para 138, U.N. Doc A/60/L.1 (Sept.20,2005). See also Gareth Evans and Mohamed Sahnoun, 'The responsibility to protect', *Foreign Affairs* 81, 6 (2002), pp. 99-110.

¹³⁰ *Ibid.*

¹³¹ SC Res 1674 (2006), 28 April 2006.

¹³² *Ibid.*

¹³³ SC Res 1679 (2006), 16 May 2006.

¹³⁴ SC Res 1706 (2006), 31 August 2006.

¹³⁵ See chapter nine.

Chapter VII of the UN Charter are legally binding.¹³⁶ Nonetheless, despite its adoption the following section makes clear that the responsibility to protect remains a controversial subject both within the UN Security Council, the General Assembly and the wider international community.¹³⁷

2.2 The Divergent Views on the Responsibility to Protect

From the onset, the permanent members of the Security Council were divided on the doctrine due to different reasons. The US initially rejected the criteria for intervention as they infringed on its discretion to intervene on grounds that suited its national interests, particularly in the aftermath of September 11, 2001.¹³⁸ Although China rejected the responsibility to protect, it nevertheless asserted that human rights violations were a 'legitimate concern of the international community.'¹³⁹ Russia on its part, despite its support of the concept, argued that the Security Council already had the mechanisms to deal with humanitarian crisis and opined that any action taken without the Security Council authorisation risked undermining the Charter.¹⁴⁰ Meanwhile, although the UK and France remained in strong support of the doctrine, they too expressed the concern that the agreement on criteria for action would not necessarily produce the required political will to avert a tragedy.¹⁴¹

¹³⁶ See also Sir Michael Wood, 'The UN Security Council and International Law,' *supra* note 42. See also the same author, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yearbook of United Nations Law* (1998).

¹³⁷ See Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?,' 101 *AJIL* 99 (2007); Susan Breau, 'Is the Responsibility to Protect Evolving into a Doctrine of International Law?', Paper presented at the University of Sheffield, School of Law, 29th November 2006. See also Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility*, (Cameron May, 2005).

¹³⁸ Jennifer M. Welsh, 'Conclusion: Humanitarian Intervention after 11 September,' in Jennifer M. Welsh, ed., *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), p. 180; Roberts, 'The United Nations and Humanitarian Intervention', in Welsh, *Humanitarian Intervention and International Relations*, pp 71–97; S. Neil Macfarlane, Carolin J. Thielking, and Thomas G. Weiss, 'The Responsibility to Protect,' *supra* note 100, Alex J. Bellamy, 'Whither the Responsibility to Protect?,' *supra* note 120.

¹³⁹ Government of China, 'Position Paper of the People's Republic of China on the United Nations Reforms,' June 7, 2005, pp. 10–12; available at www.china-un.org/eng/smhwj/2005/t199101.htm

¹⁴⁰ See Yevgeny Primakov, 'UN Process, Not Humanitarian Intervention, Is World's Best Hope,' *New Perspectives Quarterly* (September 2, 2004).

¹⁴¹ Jennifer M. Welsh, 'Conclusion: Humanitarian Intervention after 11 September,' in Jennifer M. Welsh, ed., *Humanitarian Intervention and International Relations*, *supra* note 138, p. 204.

Yet, the deep disagreements regarding the emerging concept extended beyond the premises of the Security Council, with divergence amongst states and commentators.¹⁴² For a start, the responsibility to protect was strongly opposed by some leaders, such as Hugo Chavez of Venezuela, who feared that such interventions might be used by powerful states, particularly the US, against developing countries.¹⁴³ And borrowing from Africa's past experience with colonialism, this argument had some support from the AU which, while advocating for the doctrine, warned that it should not be used 'as a pretext to undermine the sovereignty, independence, and territorial integrity of states.'¹⁴⁴

However, the Non-Aligned Movement (NAM) broke ranks with the AU and rejected the concept which, to them, represented a reincarnation of humanitarian intervention, which they had long concluded lacked any basis in international law.¹⁴⁵ Meanwhile, the controversial invasion of Iraq in 2003 seemed to trigger the G 77 group¹⁴⁶ to reiterate the principle of territorial sovereignty.¹⁴⁷ On the other hand, states such as

¹⁴² Alex J Bellamy (2006), 'Whither the Responsibility to Protect?', *supra* note 120. On the major divisions, see also S Neil Macfarlane, Carolin J. Thielking & Thomas G. Weiss, 'The Responsibility to Protect,' *supra* note 100; Mohammed Ayoob, 'Humanitarian Intervention and international society', *International Journal of Human Rights*, 6 (1), (2002), pp 81–102; David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, (Pluto Press: London, 2002); Lance Selfa, 'A new colonial 'Age of Empire'?', *International Socialist Review*, 23, 2002; David Rieff, *A Bed for the Night: Humanitarianism in Crisis*, (London: Vintage, 2002).

¹⁴³ See Statement by Hugo Chavez, President of Venezuela, at the General Debate of the 60th Session of the United Nations General Assembly, September 15, 2005; available at www.embavenez-us.org/news.php?nid=1745. See also Rosemary Foot, S Neil MacFarlane & Michael Mastanduno (eds), *The United States and Multilateral Organizations*, *supra* note 12; Michael Byers & Georg Nolte (eds), *United States Hegemony and the Foundations of International Law*, (Cambridge: Cambridge University Press, 2003); Chris Landsberg, 'The UN High-Level Reports and Implications for Africa,' *supra* note 9.

¹⁴⁴ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9. For an illustration of this point, see Mohammed Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration,' *10 Global Governance* 99, 115 (2004);

¹⁴⁵ See chapter 3 and the Statement by Radzi Rahman, Chargé d'Affaires ai, Permanent Mission of Malaysia to the United Nations, Chairman of the Coordinating Bureau of the Non-Aligned Movement, at the Informal Meeting of the Plenary of the General Assembly Concerning the Draft Outcome Document, June 21, 2005; available at www.un.int/malaysia/NAM/nam210605.html.

¹⁴⁶ On G-77, see Sauvart, Karl P. *The Group of 77: Evolution, structure, organization*, (New York: Oceana Publications, 1981).

¹⁴⁷ Statement by Stafford Neil, Permanent Representative of Jamaica to the United Nations and Chairman of the Group of 77, on the Report of the Secretary-General entitled *In Larger Freedom*, April 6, 2005; available at www.g77.org/Speeches/040605.htm. See also the earlier Declaration of the Group of 77 South Summit, 10-14 April, 2000 where the 133 member states rejected an interventionist approach to humanitarian crisis, including humanitarian intervention. Available at www.g77.org/summit/Declaration_G77Summit.htm - 61k. See also M. Byers, 'The Shifting Foundations of International Law: A Decade of Forcible Measures Against Iraq', *13 European Journal of International Law* 21,(2002), p. 28.

Argentina,¹⁴⁸ Australia,¹⁴⁹ Armenia, Colombia,¹⁵⁰ Greece,¹⁵¹ Ireland,¹⁵² New Zealand,¹⁵³ Norway¹⁵⁴ and Peru,¹⁵⁵ and many others advocated the concept.¹⁵⁶ Some, such as Korea, ironically then represented by the current UN Secretary General, wanted some conditions attached to the concept, including those that limited the situations during which the doctrine would override state sovereignty.¹⁵⁷

Meanwhile, although commentators, such as Todd Lindberg, described the concept as a 'revolution in the consciousness of world affairs,'¹⁵⁸ others fiercely disagreed.¹⁵⁹ For Michael Byers, the World Summit diluted the concept to the extent that it would lead to the failure of the Security Council to uphold the very principles embodied in the responsibility to protect.¹⁶⁰ For others, the doctrine risked undermining the UN Charter and general international law.¹⁶¹ At the same time, some dismissed the doctrine on the basis that it added little to the dilemma facing the world community,

¹⁴⁸ Statement by Ambassador Jorge Arguello, Permanent Representative of Argentina to the United Nations at the Open Debate on Agenda Item, 'Protection of Civilians in Armed Conflict', New York, 22 June, 2007.

¹⁴⁹ See Hon Robert Hill, Ambassador and Permanent Representative of Australia to the United Nations, Statement to the 62nd United Nations General Assembly, New York, 2 October, 2007.

¹⁵⁰ See S.E. Sra. Claudia Blum Ambassador and Permanent Representative of Colombia, Statement at the 2nd Open Debate on the Protection of Civilians, New York 4 December, 2006.

¹⁵¹ See Statement by Maria Telelian, Minister Counsellor, Deputy Permanent Representative of Greece to the United Nations, Open Debate on the Protection of Civilians, 28 June, 2006.

¹⁵² See the Republic of Ireland Statement by Mr. Dermot Ahern, T.D, Minister for Foreign Affairs, at the 61st Session of the General Assembly, United Nations New York, 26, September, 2006.

¹⁵³ See Letter dated 27 January, 2005, to the United Nations Addressed to the President of the Security Council by the representatives of New Zealand, Canada and Australia.

¹⁵⁴ Minister for Foreign Affairs, 'Norwegian Perspectives on International Peace and Security', *China Institute of International Studies Forum*, Beijing, 29, March, 2005.

¹⁵⁵ See Statement by Ambassador Oswaldo de Reviro, Permanent Representative of Peru at the Open Debate on Agenda Item, 'Protection of Civilians in Armed Conflict', 26 June, 2006, New York

¹⁵⁶ See government statements in Responsibility to Protect; Engaging Civil Society', available at http://www.responsibilitytoprotect.org/index.php/government_statements%22. See also Sixtieth General Assembly Plenary, GA/10385, 16 September, 2005.

¹⁵⁷ Statement by Ban Ki-moon, Minister of Foreign Affairs and Trade of the Republic of Korea, at the General Debate of the 60th Session of the United Nations General Assembly, September 18, 2005.

¹⁵⁸ Todd Lindberg, 'Protect the People,' *Washington Times*, September 27, 2005.

¹⁵⁹ David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto, 2002), p. 135.

¹⁶⁰ Michael Byers, 'High Ground Lost on UN's Responsibility to Protect,' *Winnipeg Free Press*, 18 September 2005, p. B3; Bellamy, Alex J, 'Whither the Responsibility to Protect?', *supra* note 120.

¹⁶¹ Mary Ellen O'Connell, *Taking Opinio Juris Seriously, in Customary International Law on the Use of Force* 28–29 (Enzo Cannizzaro & Paulo Palchetti eds., 2005); David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 *BYU J. Pub. L.* 1, 18–19 (2003); Yevgeny Primakov, 'UN Process, Not Humanitarian Intervention, Is World's Best Hope,' *New Perspectives Quarterly* (September 2, 2004).

and merely reinforced the status quo by continuing to vest the Council with the sole authority to decide when to act on the responsibility to protect.¹⁶²

Indeed, although the decision to retain the power to act within the Council may be in conformity with the principles of the UN Charter, it failed to provide the solution where disagreement, featuring the use or threat of veto, may lead to a paralysis within the Council. And given that it remains unlikely that the UN would act in defiance of a vetoed Council resolution,¹⁶³ the failure to identify any body which may exercise subsidiary responsibility *in lieu* of the Council turns regional organisations into viable candidates.

2.3 Enforcing the Emerging Doctrine and Africa's Regional Responsibility to Protect

A serious problem with the current concept of responsibility to protect is that in no way does it provide an impetus for the permanent Council members to refrain from use of the veto. This position is surprising given that the importance of guaranteeing the political will of the Security Council members during times of grave peril had been made clear during the drafting of the responsibility to protect.¹⁶⁴ However, during this time, rejection was made of a proposal compelling permanent members of the Council 'to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.'¹⁶⁵ As it turned out, the failure to obtain the necessary undertaking from the permanent five was a clear set back to the development of the concept as an emerging norm, at least as intended by its drafters.¹⁶⁶ Nevertheless, it follows that this anomaly and the potential failure of the

¹⁶² See, e.g., Jeremy I. Levitt, 'The Responsibility to Protect,' *supra* note 117; G. Weiss & Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background*, (Ottawa: IDRC Books, 2001). See also Chris Landsberg, 'The UN High-Level Reports and Implications for Africa', *supra* note 9.

¹⁶³ Nigel D White, 'The Will and Authority of the Security Council After Iraq', *supra* note 47.

¹⁶⁴ See ICISS, *The Responsibility to Protect*, *supra* note 96, paras. 6.19–6.21. ICISS, para. 6.21 See also Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect,' *supra* note 129; Nicholas J. Wheeler, 'Legitimizing Humanitarian Intervention: Principles and Procedures,' *Melbourne Journal of International Law* 2, no. 2 (2001), p. 566; Michael Byers, 'High Ground Lost on UN's Responsibility to Protect,' *supra* note 160.

¹⁶⁵ See Revised Draft Outcome Document of the High Level Panel Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly, 120, U.N. Doc A/59/HLPM/CRP.1/Rev.2 (August 10, 2005).

¹⁶⁶ Alex J. Bellamy, 'Whither the Responsibility to Protect?,' *supra* note 120.

Council to enforce the new doctrine strengthens the case for regional action on the basis of the responsibility to protect.¹⁶⁷

Indeed this argument seems to have been foreseen by the ICSS who stressed that it would be 'difficult to argue that alternative means of discharging the duty to protect can be entirely discounted,' 'if the Security Council expressly rejects a proposal for the intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within reasonable time'.¹⁶⁸ However, while a similar position found favour with the UN High Level Panel,¹⁶⁹ both reports not only failed to elaborate what would entail 'reasonable time', they fell short of identifying which entity would make the determination of such a finding.

Irrespective of its shortcomings, the view mentioned above was shared by some regional organisations. Specifically, although the AU agreed that 'intervention of Regional Organisations should be with the approval of the Security Council,' it explained that in certain situations, 'such approval could be granted 'after the fact' in circumstances requiring urgent action.'¹⁷⁰ Thus the AU expressed its preparedness to exercise its regional right to protect upon the UN's failure during circumstances requiring urgent action, and subsequently request for *ex post facto* authorisation, whose legality was addressed earlier.¹⁷¹

In such instances, rather 'than acting illegally, [the AU] states would be acting in a legal void opened by UN inaction and with the purpose of addressing an institutional failure.'¹⁷² In this regard, although the principle of responsibility to protect speaks of collective action through the UN, it ironically strengthens the legal justification for limited forms of regional action when the UN fails to act upon the doctrine.¹⁷³ Therefore, the failure by the 2005 World Summit to adequately address the

¹⁶⁷ See Alicia L. Bannon 'The responsibility to Protect,' *supra* note 10.

¹⁶⁸ See ICISS, The responsibility to protect, *supra* note 96, at 53.

¹⁶⁹ UN High Level Panel, A More Secure World, *supra* note 3, p. 71 para 272.

¹⁷⁰ See the Common African Position on the Proposed Reform of the United Nations, *supra* note 9.

¹⁷¹ *Ibid.* See also chapter seven.

¹⁷² See Alicia L. Bannon 'The responsibility to Protect,' *supra* note 10.

¹⁷³ *Ibid.* See also S Neil Macfarlane, Carolin J. Thielking & Thomas G. Weiss, 'The Responsibility to Protect,' *supra* note 100.

institutional hurdles that constrain UN action, including the threat and use of veto referred to above, ensured the possibility of regional action.¹⁷⁴

However, such a possibility is limited. This is because the doctrine of responsibility to protect only applies to a prescribed set of international crimes.¹⁷⁵ And even though the latter feature in both the AU and UN framework of intervention and responsibility to protect, the legal-political and operational hurdles persist within both organisations.¹⁷⁶ Furthermore, serious questions have also ensued with regard to the UN's new doctrine and its compatibility with the AU's own right to intervene, including the major differences, similarities as well as relationship between the two concepts.

2.4 Reconciling the AU's Right to Intervene and the UN's Responsibility to Protect

It is clear from the onset that both the AU's right to intervene and the UN's responsibility to protect are designed to restrict the doctrine of sovereignty which has been at the cornerstone of the international legal system.¹⁷⁷ The gradual erosion of the once sacrosanct doctrine was largely inspired by the increased consensus on the need to adhere to key peremptory norms,¹⁷⁸ particularly those protecting the individual, which take 'precedence over concerns of State sovereignty.'¹⁷⁹ Nevertheless, the first key distinction between the two doctrines is the phrasal difference between the AU's 'right to intervene'¹⁸⁰ and the UN's 'responsibility to protect.' The latter is described as 'not one of a right to intervene, but rather of a responsibility of the whole human race to protect our fellow human beings from extreme abuse wherever and whenever

¹⁷⁴ See Alicia L. Bannon 'The responsibility to Protect,' *supra* note 10.

¹⁷⁵ 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, para 138, U.N. Doc A/60/L.1 (Sept.20,2005). See also See also Gareth Evans and Mohamed Sahnoun, 'The responsibility to protect', *Foreign Affairs* 81, 6 (2002), pp. 99-110.

¹⁷⁶ See chapters three, seven and nine on the UN and AU constraints on their effective functioning.

¹⁷⁷ Chapter two. See also article 2(1) & (7) of the UN Charter. See ICJ decision in the *Corfu Channel* case, UK v. Albania) ICJ Reports, 1949, p. 4. On a summary of the scope and significance of state sovereignty, see Nico Shrijiver, 'The Changing Nature of State Sovereignty', *The British Year Book of International Law* 1999 (Oxford: Clarendon Press, 2000), pp. 69-70.

¹⁷⁸ See chapter one.

¹⁷⁹ The Secretary-General in an address to the United Nations Commission on Human Rights. Geneva, 7 April (1999) <http://www.freeserbia.net/Documents/Kosovo/Annan3.html>. See also chapter one.

¹⁸⁰ Article 4(h) of the Constitutive Act of African Union.

it occurs.’¹⁸¹ Hence, the responsibility to protect ‘is not a license for intervention [but] an international guarantor of international accountability.’¹⁸² However, what is clear is that the two doctrines apply to cases of ‘grave circumstances’¹⁸³ and where there is ‘serious and irreparable harm occurring to human beings or imminently likely to occur.’¹⁸⁴

Yet, and as the next chapter shows, there remains the distinct possibility that the AU and UN may have different ideas about the gravity of a particular situation.¹⁸⁵ However, the two concepts agree that situations amounting to genocide, war crimes, crimes against humanity would warrant action. A common thread that unites these crimes is that they have attained the status of international crimes forming the *ratione materiae* of the Yugoslav¹⁸⁶ and Rwandan¹⁸⁷ International Criminal Tribunals.¹⁸⁸ Significantly, they fall under the jurisdiction of the International Criminal Court where they have been termed as the ‘most serious crimes of concern to the international community.’¹⁸⁹

Nonetheless, it is worth noting that the responsibility to protect adds the crime of ‘ethnic cleansing’ to its list.¹⁹⁰ On the other hand, the AU framework contains a further ground of a situation that constitutes a ‘serious threat to legitimate order’.¹⁹¹ While the former consists of a lesser crime than those prescribed above, the latter’s status in international law is fiercely contested.¹⁹² Ultimately, the relevant discussion on the gravity of the Darfur conflict in the next chapter will demonstrate that despite the seriousness of these situations, disagreements with regard to their factual elements

¹⁸¹ Kofi Annan, Address to the Stockholm International Forum on Preventing Genocide, January 2004 - available at <http://www.preventinggenocide.com>. See also Dr. Susan Breau, ‘Is the Responsibility to Protect Evolving into a Doctrine of International Law?’, *supra* note 137.

¹⁸² Statement by Paul Martin, Prime Minister of Canada, at the General Debate of the 59th General Assembly, September 22, 2004; available at www.un.org/webcast/ga/59/statements/caneng040922.pdf.

¹⁸³ Article 4 Constitutive Act of African Union.

¹⁸⁴ ICISS, *The Responsibility to Protect*, *supra* note 96.

¹⁸⁵ Alex J. Bellamy, ‘Whither the Responsibility to Protect,’ *supra* note 120; Nicholas J. Wheeler, ‘Legitimizing Humanitarian Intervention: Principles and Procedures,’ *Melbourne Journal of International Law* 2, no. 2 (2001), p. 566.

¹⁸⁶ See article 3, 4 and 5 of the Statute of the International Tribunal for Former Yugoslavia.

¹⁸⁷ Article 2, 3 and 4 of the Statute of the International Criminal Tribunal for Rwanda.

¹⁸⁸ Yugoslav and Rwandan Tribunals created by Security Council resolution 955 (1994) of 8 November 1994 and resolution 827 (1993) of May 25, 1993 respectively.

¹⁸⁹ See Art 5 Rome Statute establishing the International Criminal Court.

¹⁹⁰ 2005 World Summit, Sept.14-16, 2005, *2005 World Summit Outcome*, para 139, U.N. Doc A/60/L.1 (Sept.20,2005).

¹⁹¹ Article 4 Constitutive Act of African Union.,

¹⁹² See chapter seven.

may be unduly influenced by politics 'giving the powerful an opportunity to sway others by bringing financial, military, and political pressure to bear.'¹⁹³

Meanwhile, another key distinction between the AU's right to intervene and the UN's responsibility to protect lies with the designated authority to act in situations entailing breach. It will be recalled that African states bestowed prior consent on the AU, in order to intervene in their territories during grave circumstances.¹⁹⁴ This position stands in contrast to the confusion that has arisen with regard to which legal entity would invoke the responsibility to protect, particularly in light of the Security Council's inaction.¹⁹⁵ Again, illustration of this point is made in the coming chapter in relation to the Darfur conflict, where it became relatively unclear as to whom, between the AU and the Security Council bore, the duty when Sudan appeared to fail on its responsibility to protect.

Nevertheless, the envisaged system of cooperation between the AU and the UN, when operative, has the potential to render this lack of clarity of little practical significance.¹⁹⁶ This is because the AU mandates the PSC, which is the standing decision-making organ of the Union¹⁹⁷ to 'work closely and cooperate' with the Security Council.¹⁹⁸ Furthermore, it will be recalled from chapter seven that the AU does not deny, but actually formally recognizes the primary responsibility of the Security Council in the maintenance of international peace and security.¹⁹⁹ Therefore, as argued below, a formal division of labour would develop a strong 'partnership of peace and security between the Union and the Security Council.'²⁰⁰

Meanwhile, from the analysis above, it can be concluded that in acting on its right to intervene, the AU would be carrying out its regional responsibility to protect, sanctioned by the UN. Indeed, although considered more appropriately in the next chapter on Darfur, it deserves mention here the doctrine of responsibility to protect has had an impact on peace operations, including those by the AU, where deployed

¹⁹³ Alex J. Bellamy, 'Whither the Responsibility to Protect?', *supra* note 120.

¹⁹⁴ Chapter seven.

¹⁹⁵ Alex J. Bellamy, 'Whither the Responsibility to Protect?', *supra* note 120.

¹⁹⁶ See chapter seven.

¹⁹⁷ Article 9 of the 2002 Protocol on Amendments to the Constitutive Act.

¹⁹⁸ Article 17 (1) of the Protocol Establishing the Peace and Security Council.

¹⁹⁹ *Ibid.*

²⁰⁰ Article 7 (k).

troops arguably have a duty to use force, in order to protect endangered civilians within their vicinity, as suggested by Breau.²⁰¹ This is clear from the recent joint AU/UN peace operations where the troops were issued with a mandate that was backed by an enforcement element. However, although the AU allows for an interventionist approach, its current practice, including in Burundi and Darfur, suggests that rather than engaging in forceful intervention, the organisation is more likely to embark in consensual regional peace operations.

3.1 Regionalisation of Peace Operations and a Further Case for a Division of Labour between the UN and AU

Peace operations involve the deployment of civilian, police and military personnel in post-conflict situations to carry out two coordinated functions.²⁰² Firstly, they are mandated to assist in the implementation of an agreement between warring states or factions by providing post-conflict security. Secondly, the deployed personnel assist in peacebuilding by leading efforts designed to enhance post-conflict recovery, reconstruction, institution-building and sustainable development, in countries emerging from conflict.²⁰³ As described below, although the two functions have been treated separately in the past, recent opinion, including that of the Secretary-General, advocates for the inclusion of peace-building functions within Peacekeeping operations.²⁰⁴

It is important to mention from the onset that amidst their similar identities,²⁰⁵ which often lead to the occasional blur, it is of crucial important to make a distinction between peace operations and enforcement measures taken by the Security Council

²⁰¹ Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping' *Journal of Conflict and Security Law*, Vol. 11, Issue 3, pp. 429-464, 2006.

²⁰² N.D. White, 'Key Concept: Peace Operations', in V. Chetail (ed.) *PeaceBuilding and Reconstruction* (2008). (Forthcoming, copy on file with author).

²⁰³ SC Res. 1645 (2005) of 20 December 2005.

²⁰⁴ *Report of the Secretary-General, Prevention of Armed Conflicts*, UN doc. A/55/985-S/2001/574, 7 June 2001, paras. 81-85. See also Kofi Annan, *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950, 14 July 1997. See also *Brahimi Report* of 21 August 2000, UN Doc. A/55/305-S/2000/809, para. 36-43.

²⁰⁵ On some of the similarities and differences between peace operations and Chapter VII measures, see See N.D White, 'Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)', *Journal of Conflict and Security Law*, Volume 6, Number 1, 2001; Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 20, pp. 1-29.

under Chapter VII of the UN Charter.²⁰⁶ It will be recalled from chapter three that the non-applicability of article 43 of the UN Charter made it the practice of the Council to sanction a coalition of the willing states to take authorised action against the sovereignty of a state, in order to restore peace and security.²⁰⁷ In sharp contrast, peace operations are not only voluntary and grounded on consent and cooperation of the host state, they are also normally limited by the concept of impartiality as well as by certain restrictions in regard to the use of force.²⁰⁸

It has already been mentioned that the paralysis of the Council during the Cold War era severely restricted the proper functioning of the collective security system, particularly the Security Council's enforcement mechanism.²⁰⁹ As a result of the occasional deadlock within the Council, lack of resources and other UN shortcomings, led to the development of peace operations, which emerged as a pragmatic solution to the deficiency of the UN system.²¹⁰ Consequently, as the practice below demonstrates, the deployment of peace support forces not only filled key gaps created by a defective

²⁰⁶ Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm N. Shaw, *International Law*, (OUP Oxford; 2 edition, 2006), p. 610; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *ibid*, p.91.

²⁰⁷ ND White, *Keeping the Peace. The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1993) p.30. See also L.Sohn, 'The authority of the United Nations to Establish and Maintain a Permanent Force', 52 *AJIL* (1958) 229, p.230; G. Schwarzenberger, 'Problems of a United Nations Force', 12 *CLP* (1959) 247, p. 254; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation of the UN Security Council of its Chapter VII Powers*, (Oxford: Oxford University Press, 1999); N.D. White, 'Key Concept: Peace Operations', in V. Chetail (ed.) *PeaceBuilding and Reconstruction*, *supra* note 202.

²⁰⁸ See *UNEP: Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN GAOR, Thirteenth Session, Annex 1, Agenda Item 65, UN doc. A/3943 (1958); *The Blue Helmets: A Review of United Nations Peacekeeping-Operations* (3rd edn., 1996) 7; *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, A/47/277 – S/24111 (1992), paras. 11–12; *Supplement to an Agenda for Peace*, A/50/60 – S/1995/1(1995), para. 33; *Report of the Panel on United Nations Peace Operations of 21 August 2000*, UN doc. A/55/305, S/2000/809, (Brahimi Report), para 48; Report of the Special Committee of Peacekeeping, UN Doc. A/56/767, 28 March, 2003, para 46. See also N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1997, pp. 232-244; Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', *Journal of Conflict and Security Law*, Volume 11, Number 3, (2006), pp. 465-482 and; M. Goulding, 'The Evolution of United Nations Peacekeeping', 69 *Int Aff* (1993), 451 at 455; Christine Gray, *International Law and the Use of Force*, *supra* note 54, p.201-251; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 20, pp.91-106.

²⁰⁹ See introduction and chapter three. See also N.D. White, *Keeping the Peace*, *supra* note 207, p 224; A. James, 'United Nations Peacekeeping and Non Alignment', in M.S. Rajan et al., *The Non Aligned and the United Nations*, (Oceana Publications, 1987), p. 93-9.

²¹⁰ Christine Gray, *International Law and the Use of Force*, *ibid*, p.22; Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm N. Shaw, *International Law*, *supra* note 206, p. 610.

UN arrangement, they remain an indispensable tool for strengthening peace and security.²¹¹

3.2 State Practice and the Development of Peace Operations

Peace operations have had undergone a remarkable development²¹² since the well known UN's deployment of UNEF I in 1956, following the Suez crisis within Egyptian territory.²¹³ Although the term peace operations hardly exists in the UN Charter, the ICJ ruling in the *Certain Expenses Case*,²¹⁴ recognised the UN's power to constitute peace operations. Since then, it has been the nature, rather than the constitutional basis of subsequent practice, that has led to much controversy.²¹⁵ This was particularly evident during the deployment of troops in Yugoslavia (1992) and Somalia (1993), whose vague mandates not only resulted in a blur of peace operations and enforcement action, but also undermined the concept of neutrality, consent and limitation on the use of force, which form the bedrock of peace operations.²¹⁶

The latter's challenge to the traditional rules governing the deployment of troops not only ended in failure, they also ensured that traditional peace operations, and not enforcement action, was carried out in the later UN missions.²¹⁷ Tragically, the

²¹¹ Antonio Cassese, *International Law*, (OUP Oxford; 2 edition, 2004), p. 345-346.

²¹² M.P. Karns & K.A. Mingst, 'Peacekeeping and the Changing Role of the United Nations: Four Dilemmas', in R. Thakur & Al. Schnabel (eds.), *United Nations Peacekeeping Operation: Ad Hoc Missions, Permanent Engagement* (2001) 215; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, pp. 91-106; Antonio Cassese, *International Law*, (OUP Oxford; 2 edition, 2004), p.34-346.

²¹³ See GA Res. 1000, UN Doc. A/Res/1000 (ES-I) (1956), see also R. Higgins, *United Nations Peacekeeping 1946-1967. Documents and Commentary*, (vol. 1, The Middle East, 1. London: Oxford University Press, 1969) 221-529; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p.94.

²¹⁴ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, ICJ Rep. 1962, 151, 163-168. See also F. Seyersted, *United Nations Force in the Law of Peace and War* (Leyden: A. W. Sijthoff, 1966), pp. 144-151, 211; Antonio Cassese, *International Law*, *ibid*, p. 344.

²¹⁵ Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm N. Shaw, *International Law*, *supra* note 206, p. 610.

²¹⁶ Secretary General, *Supplement to An Agenda for Peace*, UN Doc. S/1995/1, para.35,1995; N.D White, *Keeping the Peace*, *supra* note 208, p. 222; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p. 95; Christine Gray, *International Law and the Use of Force*, *supra* note 52, p.217-224; Danesh Sarooshi, *The United Nations and the Development of Collective Security*, *supra* note 207, p. 187-194.

²¹⁷ See N.D White, 'Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)', *Journal of Conflict and Security Law*, Volume 6, Number 1, (2001); Christine Gray, *International Law and the Use of Force: Foundations of Public International Law*, (Oxford University Press, 2nd edition, 2004), pp. 217-251.

horrifying lessons from this period were to later guide the developed states' reluctance to issue the UN with the necessary troops to intervene in Rwanda (1994).²¹⁸ This in turn led the catastrophic massacre of up to one million citizens of Tutsis and moderate Hutus.²¹⁹ The UN's disastrous failure during this period raised serious questions as to whether the organisation could solely be relied on to restore peace and security, particularly given its record in Africa. The answer lay in yet another development arising, unsurprisingly, from the Council's unwillingness or inability to act, that saw the genesis of the emerging practice from the ECOWAS operations in West Africa in the 1990s. As shown earlier in the thesis the evolving custom was later picked up by the drafters of the Constitutive Act of the AU.²²⁰

Meanwhile, although the UN has traditionally had the most experience in authorising and carrying out peace operations, recent practice by regional organisations and certain states across the globe confirm that the UN organisation has never possessed a monopoly over them.²²¹ Indeed some, but not all, of the operations were authorised by the Security Council. For example in Europe, Italy led the NATO peace operation in Albania in 1997 while Russian troops, under the umbrella of the Commonwealth of Independent States (CIS) deployed troops to Moldova (1992), Georgia (1993), and Tajikistan (1993). Also, NATO engaged in peace operation in Kosovo from 1999, as well as its control of Bosnia from 1995 before handing over to the EU in December 2004.

Furthermore, NATO took command of the International Security Assistance Force (ISAF) in Afghanistan in 2003. In the same year, the EU conducted Operation Concordia in Macedonia following NATO's departure and followed it on with a police mission, Proxima. Meanwhile in the Americas, the United States led a

²¹⁸ See chapter five. See also UN Publication, *The Blue Helmets: A Review of United Nations Peace Keeping*, 3rd Edition 1996; United Nations Department of Peace Keeping, *Comprehensive Report on Lessons Learnt from UNAMIR*; United Nations Blue Books Series, Vol X, *The United Nations and Rwanda 1993-1996*; Christine Gray, 'International Law and the Use of Force', *supra* note 54, pp.227-230.

²¹⁹ See chapter five.

²²⁰ See chapter seven. See also Jean Allain 'The True Challenge to the United Nations System of the Use of Force: The failures of Kosovo and Iraq and the Emergence of the African Union', *Max Planck Yearbook of United Nations Law*, Vol.8, (2004), pp 237-289.

²²¹ Alex J. Bellamy, Paul D. Williams, 'Who is Keeping the Peace? Regionalization and Contemporary Peace Operations', *International Security* 29.4 (2005) 157-195; Christine Gray, *International Law and the Use of Force*, *supra* note 54, pp.227-230.

multinational force into Haiti after the departure of President Jean-Bertrand Aristide in the spring of 2004. Moreover, in Asia, Australia also led peace operations in East Timor (1999) and the Solomon Islands (2003). Similarly, there were British operations in Sierra Leone, the French in Central African Republic and Côte d'Ivoire, and a French-led EU force in the Ituri region of the Democratic Republic of Congo (2003).²²²

In Africa alone, regional and sub-organizations have conducted no less than ten peace operations since 1990.²²³ In particular, ECOWAS conducted operations in Liberia (1991 and 2003), Sierra Leone (1997), Guinea-Bissau (1998) and Côte d'Ivoire (2002). Similarly, the Southern African Development Community (SADC) carried out operations in Lesotho (1998) and the Democratic Republic of Congo (1998). Meanwhile, the Economic and Monetary Community of Central African States (CEMAC) led peace operations in the Central African Republic (2002). Most recently, the AU deployed operations in Burundi (2003), and Sudan (2004).

It deserves to be pointed out that the dramatic increase in African regional activity stands in sharp contrast to the practice of the OAU which authorised a total of 11 peace operations during its 38 years of existence.²²⁴ As put forward throughout this study, the dramatic regionalisation of African peace and security has largely been a spirited response to the 'failure of the Security Council to act decisively in the face of serious threats to peace, security and human lives, particularly in Africa.'²²⁵ However, the decentralisation and subsequent reliance on regional organisations in

²²² Authorised by Security Council resolution 1484, S/ Res/1484 (2003), 30 May, 2003.

²²³ On some of these operations, see Christine Gray, *International Law and the Use of Force*, supra note 54; Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, supra note 20, pp.91-106.

²²⁴ The OAU authorised missions in Chad (2), Rwanda (3), Burundi (1), Comoros (3), DRC (1) and Eritrea/Ethiopia (1). See Erick G. Berman, 'African Regional Organisations' Peace Operations; Developments and Challenges', *African Security Review* Vol. 11 No 4, (2002). See also Terry M. Mays, 'Africa's First Peacekeeping Operation: The OAU in Chad, 1981-1982, (Greenwood Press, 2002); Festus Aboagye, 'Towards New Peacekeeping Partnerships in Africa?; The OAU Liaison Mission in Ethiopia - Eritrea', *African Security Review* Vol 10 No 2, 2001.

²²⁵ See Special Committee on Peacekeeping Operations 168th and 169th Meetings, UN Press Release GA/PK/175, 12 February, 2002. See also Declaration of African Heads of State and Governments, Lome, Togo, July 12, 2002; available at www.africanreview.org/docs/arms/lome.pdf; Ben Kioko, 'The Right of Interference Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention,' *International Review of the Red Cross* 85, no. 6 (2003), p. 852.

enforcements and peace operations also aroused intense debates on both the legality and viability of these entities in carrying out their mandates.²²⁶

3.3 UN verses Regional Peace Operations: The Academic and Political Debate

The diverse views on these questions taken by commentators divide the 'regionalists' and 'regiosceptics' schools of thought.²²⁷ On one hand, some believe that regional peacekeeping operations offer a number of advantages not available to the UN, such as their proximity to conflicts, common culture, and greater legitimacy.²²⁸ Furthermore, mention was made that these organisations also provide an alternative to the well documented deficient practices of the UN.²²⁹ However, some commentators remain highly sceptical of regional organisation's viability and ability to carry out peace operations.²³⁰

²²⁶ See, for example, Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the Post-Cold War Era* (The Hague: Kluwer Law International, 2000); Renata Dawn, *International Policing in Peace Operations: The Role of Regional Organizations* (Oxford: Oxford University Press, 2002); Paul Diehl and Joseph Leibold, eds., *Regional Conflict Management* (Lanham, Md.: Rowman and Littlefield, 2003); Connie Peck, *Sustainable Peace: The Role of the UN and Regional Organizations* (Lanham, Md.: Rowman and Littlefield, 1997); Jane Boulden, ed., *Dealing with Conflict in Africa: The United Nations and Regional Organizations* (New York: Palgrave, 2003); Michael Pugh and Waheguru Pal Singh Sidhu, eds., *The United Nations and Regional Security* (Boulder, Colo.: Lynne Rienner, 2003); and Paul Diehl, 'Forks in the Road: Theoretical and Policy Concerns for 21st Century Peacekeeping,' *Global Society*, Vol. 14, No. 3 (July 2000), pp.337-360; Christine Gray, *International Law and the Use of Force*, *supra* note 54, p. 282.

²²⁷ Terms used by Benedikt in Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *The Journal of Humanitarian Assistance*, (2006).

²²⁸ See *Report of the Secretary General on the Relationship between the United Nations and Regional Organisations, in Particular the African Union, in the Maintenance of International Peace and Security*, S/2008/186, 24 March, 2008. See also Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *ibid*; Oldrich Bures, 'Regional peacekeeping operations: Complementing or undermining the united nations security council?' *Global Change, Peace & Security*, Volume 18, Issue 2 June 2006, pp 83 – 99; Powell, Kristiana The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect, *ISS Monograph Series*, No. 119, (2005).

²²⁹ Frederick H. Fleitz Jr., *Peacekeeping Fiascoes of the 1990s: Causes, Solutions, and U.S. Interests* (Westport, Conn.: Praeger, 2002).

²³⁰ For a summary of the main arguments against regional peace operations, see Walter Dorn, Regional Peacekeeping is not the Way; *Peacekeeping and International Relations*, vol. 27, no. 2, 1998. See also Ghebremeskel, Adane 'Regional Approach to Conflict Management Revisited: The Somali Experience,' *The Online Journal of Peace and Conflict Resolution*, Vol. 4, No. 2, (2002), pp. 9-29; Jackson, Richard, 'The dangers of regionalising international conflict management: The African experience,' *Political Science*, Vol. 52, No. 1(2000), pp. 41-60; Juma, M. and A Mengistu, A., *The Infrastructure of Peace in Africa: Assessing the Peacebuilding Capacity of African Institutions*, (International Peace Academy, New York, 2002,).

For example, in apparent contradiction to his earlier emphasis on the role of regional organisations in the area of peace and security,²³¹ a former UN Secretary-General opined that regionalisation threatened to weaken the internationalist basis of the UN.²³² Meanwhile, others argue that, in addition to being susceptible to local hegemonies, regional organisations confront 'exactly the same problems the UN faces' and hence are 'quite limited in their capacity.'²³³ Finally, regional organisations were observed as lacking in experience, bureaucratic structures, and resources to conduct peace operations effectively.²³⁴

These heated disagreements also emanate, in part, from the lack of clarity deriving from the provisions in Chapter VIII of the UN Charter.²³⁵ Although the provisions therein envisage a relationship between the Security Council and regional organisations, they remain silent with regard to their constitutional relationship.²³⁶ Yet, key UN reports such as the *Agenda for Peace* (1992) and the *Brahimi Report* (2000)²³⁷ hardly fair any better, in the elaboration of the relationship between universalism and regionalism under the current UN system. In further irony, although their formulation of policy emphasises the role of regional organisations, these reports fail to call for specific division of labour and hardly offer details on how to formally improve the relationship and cooperation, particularly between the UN and Africa's regional and sub-regional organisations.²³⁸ However, as shown in the next chapter, there are key lessons learned from the practical cooperation between the UN and the AU, in particular in Burundi and Sudan, on the form that a division of responsibility is likely to take.

²³¹ See chapter four. See also Boutros-Ghali, Boutros, 1992, *Agenda for Peace: Preventive Diplomacy, Peace Making and Peacekeeping*, UN Doc. A/47/277-S/24111, 17 June 1992, paragraph 64; UN Document A/50/711 and S/1995/911, Improving preparedness for conflict prevention and peacekeeping in Africa: Report of the Secretary-General, 1 November 1995, paragraph 4.

²³² Boutros Boutros-Ghali, *Unvanquished: A U.S.-U.N. Saga* (London: I.B. Tauris, 1999), p.306.

²³³ Former UN Undersecretary-General Sir Brian Urquhart, email exchange with students from Marin Academy High School, UC Berkeley's Model UN Program, at Boalt Law School, March 1999, available at <http://globetrotter.Berkeley.edu/UN/Urquhart/urqchat99.peace.html>.

²³⁴ Marrack Goulding, *Peacemonger*, (London: John Murray, 2002), p.217.

²³⁵ See chapter four.

²³⁶ *Ibid.*

²³⁷ UN General Assembly and Security Council, *Report on the Panel on United Nations Peace Operations*, UN Doc. A/55/505-S/2000/809, 21 August 2000. Led by Ambassador Lakhdar Brahimi.

²³⁸ Christine Gray, *International Law and the Use of Force*, *supra* note 54, p. 283; Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 15.

3.4 Devising a Division of Labour based on a Relationship of Cooperation

Meanwhile, in spite the disagreements above, a clear development of increased cooperation between regionalism and universalism in the area of peace operations has emerged.²³⁹ Recent practice confirms that it is their coordination, as opposed to their antagonism, that should lie at the heart of the debate.²⁴⁰ This viewpoint found support with the UN's Special Committee, which not only stressed the need for enhanced African regional peace operations, but also recommended the development of a close relationship with the AU.²⁴¹ Significantly, important proposals relating to the complimentary partnership between the UN and regional organisations, particularly with African organisations were also put forward by key UN documents, such as the *UN High Level Panel Report*,²⁴² the Secretary General's Report *In Larger Freedom*²⁴³ and the 2005 *Summit Outcome Document*.²⁴⁴

African perspectives on the relationship with the UN were first discussed at a meeting of the UN High Level Panel with AU officials and civil society in 2004.²⁴⁵ Although the UN Panel devoted only five paragraphs out of 302 to Africa's peace operations challenge, it favoured a much more integrated approach to peace operations between the UN and regional organisations.²⁴⁶ However, the Secretary General's Report *In Larger Freedom* went further. It specifically called for the 'establishment of an interlocking system of peacekeeping capacities that will enable the United Nations to work with relevant regional organisations in predictable and reliable partnerships.'²⁴⁷

It is argued that a formalised division of labour would enable the AU and the UN to respond more quickly in a more comprehensive manner by building strengths and

²³⁹ See chapter four. UN Department of Peacekeeping, *Lessons Learnt, Cooperation between the United Nations and Regional Organizations/ Arrangements in a Peacekeeping Environment: Suggested Principles and Mechanisms*, March 1999; UN Press Release GA/10104, 21 November, 2002; UN Press Release SC/7724, SC 4739th meeting, 11 April, 2003; Christine Gray, *International Law and the Use of Force*, *supra* note, p. 284:

²⁴⁰ See chapter one.

²⁴¹ Special Committee Report, 2003, paras. 165-9.

²⁴² UN High-level Panel, *A More Secure World*, *supra* note 3.

²⁴³ Report of the Secretary General, *In Larger Freedom*, *supra* note 4.

²⁴⁴ 2005 *World Summit Outcome*, U.N. Doc A/60/L.1 (Sept.20,2005).

²⁴⁵ Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 15.

²⁴⁶ *Ibid.*

²⁴⁷ Report of the Secretary General, *In Larger Freedom*, *supra* note 4, para 112.

compensating for the weaknesses of both types of organisation.²⁴⁸ Such a formalisation of a division of labour may be achieved by acting on the Secretary General's pledge to 'introduce memoranda of understanding between the United Nations and individual organisations.'²⁴⁹ Given that the AU and its regional mechanism 'possesses a conflict prevention or peacekeeping capacity, these memoranda of understanding could place those capacities within the framework of the United Nations Standby Arrangement Systems.'²⁵⁰

Furthermore, the formalisation of a relationship that incorporates a division of labour may be drawn from the lessons learnt from the UN and ECOWAS collaboration in Liberia, Sierra Leone and Cote d'Ivoire.²⁵¹ And as the more recent practice in Burundi (2003) and Darfur conflicts suggests,²⁵² due to its proximity to local conflicts, the AU may provide the initial pacification of the conflict, and if needed, the deployment of a regional peace operation, while the UN flexes its muscle for peacebuilding and post-construction functions.²⁵³ Although the formalisation of such a system is yet to be devised, it is worth mentioning that the *2005 World Summit Document* urged 'further development of proposals for enhanced rapidly deployable capacities,' including 'an initial operating capability for a standing police capacity.'²⁵⁴

With regard to coordination, reliance could be made on the Secretary General's pledge to 'invite regional organisations to participate in meetings of the United Nations system coordinating bodies, when issues in which they have a particular interest are discussed.'²⁵⁵ Such arrangements would ease the work of the UN Security Council, which as shown in chapter seven, has borrowed from the reports referred to above, and stressed the benefits of closer cooperation, particularly with African

²⁴⁸ Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *supra* note 227; Theo Neethling, 'Realising the African Standby Force as a Pan-African Deal: Progress, Prospects and Challenges,' *Journal of Military and Strategic Studies*, Vol. 8, Issue 1, (2005), pp. 1-25, pg. 15; De Coning, 'Refining the African Standby Force Concept,' *Conflict Trends*. 2 (2004): 22; A. Adebayo & C. Landsberg, 'Back to the Future: UN Peacekeeping in Africa', in A. Adebayo & C.L. Sriram (eds.), *Managing Armed Conflicts in the 21st Century*, (Frank Cass, London, 2001).

²⁴⁹ United Nations General Assembly, *2005 World Summit Outcome* (2005), paras. 92-93.

²⁵⁰ *Ibid* at para. 213.

²⁵¹ Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm N. Shaw, *International Law*, *supra* note 206, p. 614.

²⁵² See chapter nine.

²⁵³ Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', *supra* note 227.

²⁵⁴ *2005 World Summit Outcome* (2005), paras. 92-93.

²⁵⁵ Report of the Secretary General, *In Larger Freedom*, *supra* note 4, para. 215

regional mechanisms in the maintenance of peace and security.²⁵⁶ In this context, it deserves to be mentioned that in recent practice, the Council welcomed African peace operations led by ECOWAS and the AU in Cote D'Ivoire (2003),²⁵⁷ Liberia (2003),²⁵⁸ and Burundi (2004) respectively.²⁵⁹

Significantly, its July 2007 resolution on Darfur, the Council affirmed that 'co-operation between the UN and the regional arrangements in matters relating to the maintenance of peace and security is an integral part of collective security as provided for in the Charter of the United Nations.'²⁶⁰ More recently, in April 2008, the Council also unanimously passed resolution 1809²⁶¹ which expressed 'its determination to take effective steps to further enhance' the relationship with the AU under Chapter VIII of the UN Charter and 'make more effective its cooperation' with the AU PSC.

Finally, the newly established Peacebuilding Commission deserves consideration, particularly given its relationship with the AU, whose regional mechanisms continue to adapt themselves to meet the challenges of post-conflict situations. It was mentioned earlier that the notion of peace building is an integral component of African regional peace and security.²⁶² It was also shown in chapter seven that the AU PSC,²⁶³ which is designated as the 'standing decision-making organ'²⁶⁴ of the Union, consists of the Peace and Security Directorate that is in turn divided into three main divisions.

This partitioning includes the Peace Support Division that consists of the Operations and Support Unit, the African Standby Force and the Military Staff Committee Unit. Meanwhile, the Conflict Management Division includes an Early Warning and Conflict Management, Resolution and Post-Conflict Unit. It will also be recalled that

²⁵⁶ E.g SC Res. 1809 (2008) of 16 April 2008, SC Res. 1625 (2005) of 14 September 2005, and SC Res. 1631 (2005) of 17 October 2005, S/PRST/2004/27 of 20 July 2004, S/PRST/2004/44 of 19 November 2004, S/PRST/2007/7 of 28 March 2007, S/PRST/2007/31 of 28 August 2007 and S/PRST/2007/42 of 6 November 2007; SC Res. 1325 (2000) of 31 October 2000, SC Res. 1612 (2005) of 26 July 2005 and SC Res. 1674 (2006) of 28 April 2006.

²⁵⁷ SC Res. 1464 (2003), 4 February 2003.

²⁵⁸ SC Res. 1497 (2003), 1 August, 2003.

²⁵⁹ SC Res. 1545 (2004), 21 May 2004.

²⁶⁰ SC Res. 1556 (2004), 30 July, 2004.

²⁶¹ SC Res. 1809 (2008) of 16 April 2008.

²⁶² See chapter seven. See also Musifiky Mwanasali, 'Emerging Security in Architecture in Africa', *Centre for Policy Studies, Policy: Issues and Actors*, vol.7, no.4, (February 2004), p. 13.

²⁶³ Article 6(e), 7 (b) & 14 of the 2002 Protocol establishing the Peace and Security Council

²⁶⁴ Article 9 of the 2003 Protocol on Amendments to the Constitutive Act.

the AU Chairperson,²⁶⁵ the Panel of the Wise,²⁶⁶ Regional Mechanisms,²⁶⁷ and the African Standby Force,²⁶⁸ all possess a wide mandate to promote peace-building and post-conflict reconstruction.²⁶⁹

3.5 The New Peacebuilding Commission: The Need for Further Cooperation

Given the UN's failure to embark on far reaching institutional reform, the establishment of the Peacebuilding Commission at the *2005 World Summit* was a notable achievement. Although a recent creation, the genesis of the new Commission can be traced from as early as 1991 when the Secretary-General's *An Agenda for Peace* considered not only peacekeeping, but also what he termed as 'post-conflict peace-building.'²⁷⁰ As mentioned earlier, this two tiered policy, embodied in the term peace operations, was later picked up by the later UN Secretary General Kofi Annan.²⁷¹ Having been carried forward by the Brahimi Report,²⁷² the idea of a Peacebuilding Commission was subsequently agreed upon at the *2005 World Summit*,²⁷³ following a proposal by the UN High Level Panel.²⁷⁴

Formed as an intergovernmental body, the Commission is designated to address a gap in the UN system by assisting states with the difficult transition from conflict to stability and development.²⁷⁵ Its mandate is therefore to 'marshal resources at the disposal of the international community, to advise and propose integrated strategies for post-conflict recovery, focusing attention on reconstruction, institution-building, and sustainable development in countries emerging from conflict.'²⁷⁶ It is in this context that the Commission's relationship with the AU is crucial, particularly given

²⁶⁵ Article 10 (2) (c) & 10 (3) (a) of the 2002 Protocol establishing the Peace and Security Council.

²⁶⁶ Article 11 (3) &(4).

²⁶⁷ Article 16 (2).

²⁶⁸ Article 13 of the 2002.

²⁶⁹ See Musifiky Mwanasali, 'Emerging Security in Architecture in Africa', *supra* note 262.

²⁷⁰ Boutros-Ghali, *An Agenda for Peace*, UN Doc. A/47/277 – S/24111, 17 June 1992, para. 21; Klaus Hüfner, 'Reforming the UN: The Case of the Peacebuilding Commission', *Global Policy Forum*, (January 2007).

²⁷¹ Kofi Annan, *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950, 14 July 1997. See also Prevention of Armed Conflicts, Report of the Secretary-General, UN doc. A/55/985-S/2001/574, 7 June 2001, paras. 81–85.

²⁷² *Brahimi Report* of 21 August 2000, UN Doc. A/55/305-S/2000/809, para. 36-43.

²⁷³ General Assembly, Outcome Document of the World Summit 2005, UN Doc. A/60/L.1, 15 September 2005.

²⁷⁴ UN High-level, *A More Secure World*, *supra* note 3, para. 264.

²⁷⁵ *Ibid*, para. 261.

²⁷⁶ SC Res. 1645 (2005) of 20 December 2005.

the prevalence of African conflicts and the challenges facing regional mechanisms as they struggle to adapt themselves to meet the challenges of post-conflict situations.

Amidst certain reservations, the new institution was created as a subsidiary organ of the General Assembly²⁷⁷ and the Security Council,²⁷⁸ under the legal provisions of article 22 and 29 of the UN Charter. On its creation, it is worth noting that the AU's *Common Policy on UN Reform* had argued that the Peacebuilding Commission should not be placed under the authority of the Security Council, due to the fact that the body needed to benefit from the contributions of all the major UN organs.²⁷⁹ Nevertheless, it was the issue of cooperation with the UN body that formed the AU's most immediate concern. Indeed, the Union's position on the matter went beyond the High Level Panel's call for 'predictable and reliable'²⁸⁰ partnership with the UN. Drawing from its past experience with regard to legal-political, logistical and financial hurdles, the AU specifically called for;

a promotion of closer cooperation and coordination between General Assembly, the Security Council, ECOSOC, the major Funds and Programmes, the UN Specialised Agencies, the Bretton Woods Institutions, the Member States and the Regional Organisations throughout the cycle of the conflict.²⁸¹

According to the AU, such a relationship would guarantee a 'harmonious transition from conflict management to long-term reconstruction until the danger of instability or the threat of resumption of the conflict has diminished.'²⁸² In the end, the African proposals were subsequently incorporated in the structure of the new Commission whose system of cooperation 'draws together all the relevant U.N. agencies, bilateral donors, international financial institutions and relevant government officials.'²⁸³

So far, Sierra Leone and Burundi have been assigned as the first 'clients' to be referred to the Commission, in July 2007.²⁸⁴ While it may still be too early to

²⁷⁷ See GA Res. 60/180 December 30, 2005.

²⁷⁸ See SC Res 1645, (2005), December 20, 2005.

²⁷⁹ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

²⁸⁰ UN High-level, *A More Secure World*, *supra* note 3, para. 112.

²⁸¹ See *the Common African Position on the Proposed Reform of the United Nations*, *supra* note 9.

²⁸² *Ibid.*

²⁸³ Gareth Evans, 'Building Peace from Ashes of War', *Baltimore Sun*, 20 January 2006

²⁸⁴ See United Nations Security Council Document 458, Report of the Peacebuilding Commission on its first session, A/ 62/ 137- S/2007/458, 25 July 2007.

examine with exact clarity as to the direction in which the current system will take, it is clear that the issue of funding remains of worrying concern, since the Standing Peacebuilding Fund will be achieved through voluntary contributions.²⁸⁵ This in turn becomes particularly alarming for the AU given the short time span in which it has authorised peace operations.

It will be recalled from chapter six that immediately after its inception, the AU PSC authorized the deployment the AU's first peace operation, the African Union Mission in Burundi (AMIB) in February 2003.²⁸⁶ This was closely followed by the deployment of the African Union Mission in Sudan (AMIS) in June 2004²⁸⁷ and the African Union Mission in Somalia (AMISOM) in March 2007.²⁸⁸ Finally, in addition to the haste, what is clear from this practice is the absence of a single forceful AU intervention makes clear the fact that the organisation will primarily be utilised in consensual peace operations, as opposed to military intervention. It is with this background that the AU's function in the Darfur region consequently falls for close examination in the next chapter.

C: Conclusion

The turn of the 21st century witnessed the international community's arrival at a 'historic junction' where a 'significant confluence of interests emerged between the center and periphery of the world system.'²⁸⁹ The deep differences amongst states were visibly manifest during the 2005 World Summit, which provided a rare opportunity for world leaders to arrive at a consensus that would fundamentally modify the international legal system, to adjust to the demands of the new millennium.

²⁸⁵ See UN 'Peacebuilding Fund: Terms of Reference', A/60/984, 22 August, 2006.

²⁸⁶ See 91st Ordinary Session of the Central Organ of the (Organisation of African Unity) Mechanism for Conflict Prevention, management and Resolution, meeting at ambassadorial level in Addis Ababa on 2 April 2003 doc Central Organ/MEC/AMB/Comm. (XCI). See also Peace and Security Council, Second Ordinary Session 25 March 2004, Addis Ababa, Ethiopia, PSC/PR/Communique (II). Further see Alex J. Bellamy and Paul D. Williams, 'Who's Keeping the Peace? Regionalization and Contemporary Peace Operations,' *International Security* 29, no. 4 (2005), pp. 157-95.

²⁸⁷ See the Communiqué on Conflict Situations in Africa, 26 May 2006, PSC/AHG/Comm. (X), AU PSC 10th meeting. See also *Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan*, 4 June 2004. Available <http://www.iss.co.za/AF/profiles/Sudan/darfur/soma.pdf>. See also Paul D. Williams, 'Military Responses to Mass Killing: The African Union Mission in Sudan,' *International Peacekeeping* 13, no. 2 (2006).

²⁸⁸ 'See '69th meeting of the peace and Security Council', *Agence de Presse Africaine*, 22 January 2007.

²⁸⁹ De Coning, Cédric, 'An African Perspective on United Nations Reform', *Agir*, no.22 (2005), pp 126-132.

In sharp contrast to 1945, when the UN was created, the impact of the *African Common Policy on UN Reform* at the Summit demonstrated that the continent undoubtedly possessed a central role to play, if any kind of progressive UN reform is to be made. In putting forward its perspectives on the modification of the UN system, the AU's recurring theme remained that it was the regional instability and underdevelopment, caused by episodes such as Rwanda and Darfur that was most pressing for Africa, and not the terrorism phenomenon and other major threats facing the developed world.²⁹⁰

However, its controversial role in the reform process also enlisted it as an active participant of past endeavours aimed at UN's institutional reform, the vast majority of which resulted in failure.²⁹¹ As it turned out, although some viewed the achievement of the Summit to be a success,²⁹² others were not so optimistic and argued that 'the lifeless corpse of UN reform was dead on arrival by the time world leaders flew into the 'big apple.'²⁹³ Meanwhile, others remained sceptical as to whether the current blueprint on reform would have a different fate from that of its predecessors, whose majority were 'politely ignored and gather dust on shelves.'²⁹⁴

The correct picture remains that there were key failures, but also notable achievements during the Summit, some of which deserve mention. Specifically, the inability to agree on the reform the Security Council, primarily due to the fact that powerful states chose to pursue their national interests, as opposed to strengthening peace and security, is a matter of serious regret. This failure is alarming given that 'today's threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels.'²⁹⁵ An equally

²⁹⁰ South African president Thabo Mbeki quoted in Angela Quintal, 'Mbeki sees the Awful Truth: The UN is but a Charade', *The Sunday Independent*, 26 September, 2004; Chris Landsberg, 'The UN High-Level Reports and Implications for Africa', *supra* note 9.

²⁹¹ See B. Fassbender, 'All Illusions Shattered?', *supra* note 12; M.J. Glennon, 'Why the Security Council Failed' *supra* note 12; Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 15, p. 3.

²⁹² Ian Williams, 'Reform or Counterrevolution at the UN?', *Foreign Policy in Focus*, August 7, 2006

²⁹³ Adekeye Adebajo, 'Chronicle of A Death Foretold: The Rise and Fall of UN Reform', in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf*, *supra* note 15, p. 1.

²⁹⁴ Jeane-Pierre Cot, 'Reforming the Security Council: Is There a Hidden Agenda?', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p. 270.

²⁹⁵ UN High Level Panel Report, *A More Secure World*, *supra* note 3.

disappointing, but hardly surprising outcome was the retention of the anachronistic power of the veto which stamped the system as the 'new form of global apartheid.'²⁹⁶

Irrespective of the shortcomings, the international community's recognition of an international collective responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity was of noteworthy accomplishment. Furthermore, the Security Council's subsequently endorsement of the concept, and the AU's move away from the strict interpretation of sovereignty and towards the emphasis on the rights and protection of the individual,²⁹⁷ confirms its emergence as a nascent international norm. However, the lack of legal standards and mechanisms of accountability pose a major problem, as there are currently no guarantees that the norm would prevent the veto from being utilised to prevent clear and legitimate cases of intervention.

The overall difficulty with the current debate is that, although there is wide agreement in principle with regard to UN reform, there remains deep divisions as to how this is to be achieved. For some, rather than 'tinkering at the margins' there ought to be a 'deep-seated overhaul of the Charter to bring about a truly rules-based global order suited to respond to current global challenges.'²⁹⁸ Meanwhile, others argue that the question of institutional reform of the UN focuses too much attention on Council and not enough on other issues.²⁹⁹ From this perspective, less effort should be made on institutional reform and more attention ought to be given to substantive issues of concern, so as to avoid modest proposals from being 'drowned in the uproar of a fruitless institutional debate.'³⁰⁰ Finally, some forcefully argue that reform of the UN requires innovation, such as that

²⁹⁶ Chris Landsberg, 'The UN High-Level Reports and Implications for Africa', *supra* note 9.

²⁹⁷ Jarat Chopra and Thomas G. Weiss, 'Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention,' *Ethics and International Affairs* 6 (1992), p. 95; Ramesh Thakur, 'Global Norms and International Humanitarian Law: An Asian Perspective,' *International Review of the Red Cross* 83, no. 841 (March 2001), p. 35; Adekeye Adebajo, 'Collective Security and Humanitarian Intervention', United Nations // United Nations Foundation // United Nations and Global Security (2004) available at www.un-globalsecurity.org/pdf/Adebajo_paper_hum_intervention.pdf.

²⁹⁸ Chris Landsberg, 'The UN High-Level Reports and Implications for Africa', *supra* note 9.

²⁹⁹ Jean- Pierre Cot, 'Reforming the Security Council: Is There a Hidden Agenda?', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p. 279; Adekeye Adebajo, 'UN Reform Needs an African Perspective', *Mail & Guardian*, 23 May 2005. Available at <http://www.globalpolicy.org/reform/initiatives/annan/2005/0523african.htm>.

³⁰⁰ Jean- Pierre Cot, 'Reforming the Security Council: Is There a Hidden Agenda?', in Niels Blokker and Nico Schrijver, *The Security Council and the Use of Force*, *supra* note 20, p. 277.

provided by 'outside competition,' through multilateral treaties.³⁰¹ Nevertheless, in spite of the lack of consensus on how best to achieve the objectives, the issue of UN reform is 'a glass at least half-full,'³⁰² and remains 'a process and not an event.'³⁰³

Meanwhile, the inveterate theme with regard to how the AU and UN can better their relationship in order to promote and maintain peace and stability remains ongoing. Important questions remain in regard to their decision making as well as the course of action to be taken, and by whom, during circumstances that call for action. Despite their complimentary nature, the huge gap between AU's and UN's formal recognition and implementation of their adopted principles remains the greatest challenge.³⁰⁴ In this context, there is a pressing need to formalise a division of labour that sets out the legal, operational and financial details in order to create a synergy between their respective institutions, particularly in the area of peace operations.³⁰⁵

Moreover, a well defined and structured relationship between the AU and UN would also go a long way in guaranteeing what the 2005 Summit termed as a 'culture of organizational accountability, transparency and integrity.'³⁰⁶ Although the foregoing chapters have showed the numerous problems in regard to the AU's internal structure and its relationship with the UN, the emerging practice between the two organisations portray important developments, in the promotion and maintenance of regional and international peace and security. It is within this context that the Darfur conflict, discussed in the next chapter, provides useful insights in regard to the direction that the cooperation between the UN and the AU may take in developing regional and universal norms that are essential for peace and security.

³⁰¹ See Ruth Wedgwood, 'Give the United Nations a Little Competition', *New York Times*, 5 December, 2005.

³⁰² K. Annan, 'A Glass At Least Half-Full', *Wall Street Journal*, 19 September 2005.

³⁰³ See Statement by His Excellency Professor Jayakumar at the General Assembly 60th Session, High-Level Plenary Meeting,, New York, 16 September, 2005; Hon Robert Hill, Ambassador and Permanent Representative of Australia to the United Nations, Statement to the 62nd United Nations General Assembly, New York, 2 October, 2007. See also Sir Michael Wood', *The UN Security Council and International Law*', *supra* note 42.

³⁰⁴ See chapter nine.

³⁰⁵ Benedikt F. Franke, 'In Defense of Regional Peace Operations in Africa', , *supra* note 227; Jakke Cilliers, 'UN Reform and Funding Peacekeeping in Africa', *African Security Review* Vol 14 No 2, (2005); De Coning, Cedric (2004), 'Towards a Common Southern African Peacekeeping System,' *Electronic Briefing Paper* No. 16, Center for International Political Studies, University of Pretoria.

³⁰⁶ UN Doc. A/60/L.1, 15 September, 2005, para. 161.