

The Peace and Security Council of the African Union: The Known Unknowns

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As we know,
There are known knowns.
There are things we know we know.
We also know
There are known unknowns.
That is to say
We know there are some things
We do not know.
But there also unknown unknowns,
The ones we don't know we don't know.

—Donald H. Rumsfeld¹

I. INTRODUCTION

The protocol establishing the Peace and Security Council of the African Union (AUPSC Protocol) will likely come into force in 2004 and will serve as the continent's first continent-wide, regional, collective security system.² It also will form a vital part of the African regional human rights system. The AUPSC joins the Economic Community of West African States Mechanism on Conflict Prevention, Management, and Resolution, Peace-Keeping and Security (ECOWAS Mechanism) and the South African Development Community Organ on Politics, Defense and Security Cooperation (SADC Organ) as one of three African mechanisms established to manage conflict through military intervention.³

The AUPSC will operationalize and provide structure and an enforcement mechanism for several Organization of African Unity (OAU) decisions, declarations, and conventions related to peace, security, stability, and development including:

¹ DONALD H. RUMSFELD, *The Unknown*, in *PIECES OF INTELLIGENCE: THE EXISTENTIAL POETRY OF DONALD H. RUMSFELD* (Hart Seely ed., 2003).

² See *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (July 9, 2002), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 161 (Jeremy I. Levitt ed., 2003) [hereinafter *African Peace Protocol*].

³ See *Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-Keeping, and Security* (Dec. 10, 1999), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 259 (Jeremy I. Levitt ed., 2003) [hereinafter *ECOWAS Protocol*]; *Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation* (Aug. 14, 2001), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 309 (Jeremy I. Levitt ed., 2003) [hereinafter *SADC Protocol*].

- Declaration on the Establishment of the OAU of a Mechanism for Conflict Prevention, Management, and Resolution (MCPMR);⁴
- Decisions AHG/Dec.141 (XXXV) and AHG/Dec.142 (XXXV) on Unconstitutional Removal of Governments;⁵
- Declaration AHG/Decl.5 (XXXVI) on the Framework for an OAU Response to Unconstitutional Changes of Government;⁶
- Declaration AHG/Decl.4 (XXXVI) on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA);⁷
- The New Partnership for African Development (NEPAD);⁸ and
- Convention on the Prevention and Combating of Terrorism.⁹

The AUPSC Protocol was endorsed on July 9, 2002 at the First Ordinary Session of the Assembly of the African Union in Durban, South Africa.¹⁰ It was adopted, pursuant to Article 5(2) of the Constitutive Act of the African Union (Constitutive Act),¹¹ “as a standing decision-making organ for the prevention, management and resolution of conflicts” and to serve as “a

⁴ *Declaration of the Assembly of Heads of State and Government on the Establishment of the OAU of a Mechanism for Conflict Prevention, Management and Resolution* (June 30, 1993), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 219 (Jeremy I. Levitt ed., 2003) [hereinafter *Establishment of the OAU*].

⁵ *Decisions on Unconstitutional Changes of Government*, AHG/Dec.141 (XXXV Sess.) and AHG/Decl.142 (XXXV Sess.) (July 12-14, 1999).

⁶ *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, AHG/Decl.5 (XXXVI Sess.) (July 10-12, 2000).

⁷ *Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)*, AHG/Decl.4 (XXXVI Sess.) (July 10-12, 2000).

⁸ The New Partnership for African Development, Oct. 2001, available at <http://www.dfa.gov.za/events/nepad.pdf> (last visited Dec. 4, 2003) [hereinafter NEPAD]. See also, *Declaration on the New Africa Initiative*, AHG/Decl.1 (XXXVII Sess.) (July 9-11, 2001), available at http://www.au2002.gov.za/docs/summit_council/ahg.pdf (last visited July 10, 2003). The New Africa Initiative was later termed the New Partnership for African Development. See NEPAD, *supra*.

⁹ *Convention on the Prevention and Combating of Terrorism* (July 12-14 1999), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 187 (Jeremy I. Levitt ed., 2003) [hereinafter *Convention on Terrorism*].

¹⁰ To date, South Africa, Algeria, Ethiopia, Equatorial Guinea, Mali, Mozambique, Libya, Malawi, Mauritius, Sierra Leone, Zambia, Ghana, the Sudan, and Rwanda have deposited their instruments of ratification of the AUPSC Protocol. *Decision of the Operationalization of the Protocol Relating to the Establishment of the Peace and Security Council, Decisions of the Assembly of the AU*, (II Sess.) (July 10-12, 2003), available at http://www.africa-union.org/official_documents/Decisions_Declarations/Assembly%20AU%20Dec%2016%20II.pdf (last visited Sept. 2, 2003).

¹¹ Article 5(2) empowers the AU to establish “[o]ther organs that the Assembly may decide to establish.” Constitutive Act of the African Union, July 11, 2000, OAU Doc. No. CAB/LEG/23.15 (entered into force May 26, 2001), available at http://www.africa-union.org/About_AU/Constitutive_Act.htm (last visited Nov. 28, 2003) [hereinafter *Constitutive Act*].

collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”¹² The AUPSC Protocol will codify, provide structure to, and operationalize key provisions in the Constitutive Act, including:

- Article 3(f): concerned with promoting “peace, security, and stability on the continent;”¹³
- Article 4(h): concerning the right of the AU to “intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;”¹⁴ and
- Article 4(j): concerning the right of the member states of the AU to “request intervention from the Union in order to restore peace and security.”¹⁵

The AUPSC Protocol will also reinforce the AU’s New Partnership for Africa’s Development (NEPAD) Peace and Security and Democracy and Political Governance initiatives,¹⁶ particularly its pledge to “manage all aspects of conflict” through, among other things, “peacemaking, peacekeeping and peace enforcement.” Under Article 22 of the AUPSC Protocol, the AUPSC will replace the Cairo Declaration and supersede the resolutions and decisions of the Central Organ of the Organization of African Unity Mechanism for Conflict Prevention, Management and Resolution (OAU MCPMR) and affiliated centers.¹⁷ Upon entry into force, the AUPSC Protocol will significantly impact the AU’s role in conflict prevention, management, and resolution by, among other things, conferring on it peacemaking powers unknown to its predecessor; hence, it is necessary to begin considering its effect.

Historically, African states have lacked the political will and capacity to manage interstate and intrastate conflict. This was particularly the case with the OAU, the continent’s foremost political organization composed of nearly all African states. As Robert Rotberg notes, civilian-led governments seem to lack “sufficiently strong political will in Africa, either at the OAU or the subregional levels, to direct the generals and their soldiers” to enforce peace.¹⁸ The most audacious interventions have been at the behest of strongmen heads of state—leaders who thoroughly commanded the body politic,

¹² *African Peace Protocol*, *supra* note 2, art. 2(1), at 166.

¹³ Constitutive Act, *supra* note 11, art. 3(f).

¹⁴ *Id.* art. 4(h).

¹⁵ *Id.* art. 4(j).

¹⁶ NEPAD, *supra* note 8.

¹⁷ *See African Peace Protocol*, *supra* note 2, art. 22, at 183.

¹⁸ Robert I. Rotberg, *African Responses to African Crises: Creating a Military Response*, in *PEACEKEEPING AND PEACE ENFORCEMENT IN AFRICA* 109 (Robert I. Rotberg et al. eds., 2000).

whether through popular democracy or autocracy. Former Tanzanian president Julius Nyerere's toppling of Idi Amin's oppressive regime in Uganda in 1979 and the bold interventions of former Nigerian head of state General Sani Abacha in Liberia and Sierra Leone in 1990 and 1997,¹⁹ respectively, are cases in point. The lack of political will and a viable and effective continent-wide peace and security system has meant that many small and preventable conflicts have escalated into full-blown protracted ones with serious regional consequences. From the Mano River region in West Africa to the Great Lakes and Horn of Africa, the last two decades reveal a pattern of brutal and unfettered warfare within and between states.²⁰ While the key patron states and transnational corporations of the Cold War have stimulated, manipulated, exacerbated, and exploited African conflict for geopolitical and economic gain, African elites generally lacked the political will to adopt concrete measures to prevent and resolve long-standing conflict. The OAU, for its part, did not possess the political mandate, resolve, or resources to manage conflict. On this point, Rotberg notes that the "OAU has had no effective early warning or early action capacity; nor has it had any military capability."²¹

This article examines how African states chose to evolve the AU regional collective security system. Particular attention is devoted to the concept of conflict management through military intervention in the AUPSC Protocol and relevant constitutive acts of African regional organizations. The first section analyzes key provisions of the Protocol. The second section contemplates the impact of the Protocol once it enters into force and the main stumbling blocks that will need to be addressed, including trans-regional conflicts of law. The third, concluding section suggests ways to strengthen the enforcement aims of the AUPSC within the context of the current African system.

II. KEY PROVISIONS IN THE PROTOCOL

It is essential to examine the text of the Protocol in order to appraise its efficacy in Africa's current legal, sociopolitical, and economic environment. Since it is newly adopted and it will be some time before AU leaders consider adopting another security framework,²² it is important to reflect on the

¹⁹ Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Case of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333 (1998) [hereinafter *Humanitarian Intervention*]. See also Jeremy Levitt, *African Interventionist States and International Law*, in AFRICAN INTERVENTIONIST STATES: THE CONFLICT RESOLUTION BROKERS (Oliver Furley & Roy May eds., 2001) [hereinafter *African Interventionist States*].

²⁰ *Report of the Secretary-General to the Security Council on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, A/52/871-S/1998/318 (LII Sess.) (Apr. 13, 1998), available at <http://unbisnet.un.org> (last visited Oct. 21, 2003).

²¹ Rotberg, *supra* note 18, at 101.

²² The signatories of the AUPSC Protocol are legally bound by the treaty and must refrain from any action that defeats its object and purpose. *Vienna Convention on the Law of Treaties*, in

character of the AUPSC, which has been charged with ensuring peace, security, and stability in a continent of nearly one billion people. This section highlights and examines the central objectives, composition, functions, powers, procedures, and organs of the AUPSC. Before key provisions of the Protocol can be discussed, we must first consider its relationship to the OAU MCPMR.

A. The Relationship Between the OAU MCPMR and the AUPSC

Paragraph 4 of the Preamble to the AUPSC Protocol states that pursuant to a decision of the 37th Ordinary Session of the OAU Assembly of Heads of State and Government in Lusaka, Zambia, in July 2001, the Assembly “decided to incorporate the Central Organ of the OAU Mechanism for Conflict, Prevention, Management, and Resolution as one of the organs of the Union, in accordance with Article 5(2) of the Constitutive Act of the African Union.”²³ Article 5(2) empowers the AU Assembly to establish organs as it deems necessary.²⁴ It follows that paragraph 4 also “requested the [OAU] Secretary-General to undertake a review of the structures, procedures and working methods of the Central Organ [of the OAU MCPMR], including the possibility of changing its name.”²⁵ Thereafter, the OAU Secretary-General produced a report titled *Background Document on the Review Structures, Procedures and Working Methods of the Central Organ* (Background Report) that served as the conceptual foundation for the creation of the AUPSC Protocol.²⁶

The Background Report draws on the experiences of the OAU MCPMR in conflict prevention through preventive diplomacy in, for example, Uganda and Rwanda (2001), the Central African Republic (2001-present), Côte d’Ivoire (2000-present), the Comoros (1997-2001), Sierra Leone (1996-1999), and Liberia (1990-1997).²⁷ It is also informed by the MCPMR’s conflict resolution activities through peace negotiations and agreement monitoring, to various types of observation missions in the Democratic Republic of the Congo (1998-present), Rwanda (1993-1994), Burundi (1993-2001), and Ethiopia and Eritrea (1998-2001).²⁸ Given the OAU Assembly’s reluctance to engage in conflict management through peace enforcement or intervention, there is limited experience from which to draw lessons. The Background

BASIC DOCUMENT SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS, arts. 12(1)(b-c), 18(a), at 88, 90 (Louis Henkin et al. eds., 3d ed. 1993) [hereinafter *Vienna Convention*].

²³ *African Peace Protocol*, *supra* note 2, pmb., at 163.

²⁴ Constitutive Act, *supra* note 11, art. 5(2).

²⁵ *Id.*

²⁶ Organization of African Unity, *Background Document on the Review Structures, Procedures and Working Methods of the Central Organ* 1-42 (2002) (unpublished document, on file with author) [hereinafter *OAU Background Document*].

²⁷ *Id.* at 7-17.

²⁸ *Id.*

Report implies that the Assembly erred when, in founding the MCPMR, it concluded that the “emphasis of the OAU Mechanism on anticipatory and preventive measures and concerted action on peacemaking and peace-building would obviate the need to resort to complex and resource-demanding peacekeeping operations, which African countries could find difficult to finance and carry out.”²⁹ The OAU Secretary-General’s report recommended that, given the failure of the United Nations (U.N.) to forestall African conflict and the bold intervention provisions in the AU Constitutive Act, “the mandate of the Mechanism be enlarged to provide for the deployment of peacekeeping forces and peace-enforcement in circumstances provided in Article 4(h) and (j) of the Constitutive Act of the African Union.”³⁰

Rather than simply incorporate the MCPMR into the AU as originally decided by the 37th Ordinary Session of the OAU Assembly, one year later the First Ordinary Session of the Assembly of the African Union adopted a completely new framework in the Protocol establishing the AUPSC. Although the AUPSC Protocol was heavily informed by the recommendations in the Background Report, it was far more liberal than the latter on the issue of intervention or peace enforcement, largely due to the broad powers conferred on the Assembly to enforce peace under Article 4(h) of the AU Constitutive Act. Upon entering into force, the AUPSC Protocol will “replace the Cairo Declaration” and “supercede the resolutions and decisions of the OAU relating to the Mechanism for Conflict Prevention, Management and Resolution in Africa, which are in conflict with the present Protocol.”³¹ Let us now consider the normative aspects of the AUPSC Protocol.

B. AUPSC Objectives, Composition, and Functions

1. Objectives

The objectives of the AUPSC are not new to the African political landscape. They complement those in Article 3 of the AU Constitutive Act³² and echo the collective security framework proffered in the Draft Kampala Document for the Conference on Security, Stability, Development and Cooperation in Africa in 1991.³³ As stated, the AUPSC Protocol was

²⁹ *Id.* at 4.

³⁰ *Id.* at 39. Article 4(h) empowers the AU with 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.” Constitutive Act, *supra* note 11, art. 4(h)-(j). Article 4(j) sanctions “Member States to request intervention from the Union in order to restore peace and security.” *Id.*

³¹ *African Peace Protocol*, *supra* note 2, art. 22, at 183.

³² See Constitutive Act, *supra* note 11, art. 3.

³³ *Draft Kampala Document for a Proposed Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)* (May 22, 1991), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 227 (Jeremy I.

established to be a permanent decision-making, collective security, and early-warning arrangement to facilitate timely and efficient response to conflict and other crises in Africa.³⁴ Its key objectives are to “promote peace, security and stability;” “guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development;”³⁵ “anticipate and prevent conflicts;”³⁶ “promote and implement peace-building and post-conflict reconstruction activities;”³⁷ “co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism;”³⁸ “develop a common defence policy;”³⁹ and “promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law.”⁴⁰ These objectives are indeed grand, given the questionable record of its predecessor, general lack of resources of AU member states, and the acute security challenges facing the continent. In order for the AUPSC to have any semblance of success, African states will need to make realistic commitments about the amount of human and tangible resources needed to “endow” it.

2. Composition

The composition of the AUPSC is not wholly unique. In some ways it emulates the structure of the United Nations Security Council (UNSC), particularly on issues concerning membership, core functions, and voting. This may be, in part, because the AU relied on UNSC staffers as advisers during the drafting of the Protocol. Notwithstanding, the AUPSC is more democratic than its U.N. counterpart as it does not provide for permanent membership or for any veto power. All decisions will be made by consensus.⁴¹ Hence, no member state will be able to deadlock the activities of the AUPSC. Similar to the UNSC, the AUPSC is composed of fifteen members who will serve two and three-year terms.⁴² AUPSC members will be “elected on the basis of equal rights” and according to the “principle of equitable regional representation and rotation.”⁴³ Prospective members are elected according to

Levitt ed., 2003) [hereinafter *CSSDCA*].

³⁴ *African Peace Protocol*, *supra* note 2, art. 2, at 166.

³⁵ *Id.* art. 3(a).

³⁶ *Id.* art. 3(b).

³⁷ *Id.* art. 3(c).

³⁸ *Id.* art. 3(d).

³⁹ *African Peace Protocol*, *supra* note 2, art. 3(e), at 166.

⁴⁰ *Id.* art. 3(f), at 167.

⁴¹ *Id.* art. 8(13), at 172.

⁴² *Id.* art. 5(1), at 167.

⁴³ *Id.* art. 5(1)-(2), at 168-69.

numerous criteria, including their ability and willingness to uphold, promote, financially support, advocate the principles of the Union,⁴⁴ and actively participate in subregional and regional peace-making and peace support operations.⁴⁵ Respect for the rule of law, in particular constitutional governance structures, and for human rights are also key criteria for membership.⁴⁶ How the “respect for the rule of law” criterion may be quantified in legal terms⁴⁷ and, if international standards are the means of measurement, how many African states genuinely would be entitled to AU membership are questions that cannot be answered at this time.

3. Functions

The AUPSC is empowered to carry out several important functions that complement and contradict the other security mechanisms in Africa,⁴⁸ including the ECOWAS Mechanism, the SADC Protocol, and the Inter-Governmental Authority on Development (IGAD) conflict mechanism.⁴⁹ The key function of the AUPSC is to “promote peace, security and stability in Africa.”⁵⁰ It envisages doing this through early warning, preventive diplomacy,⁵¹ mediation,⁵² and, perhaps more importantly, peace support operations, *intervention*,⁵³ humanitarian action, disaster management,⁵⁴ “peace-building and post-conflict reconstruction,”⁵⁵ and “any other function as may be decided by the Assembly.”⁵⁶ While these functions are indeed important, neither the Constitutive Act nor the AUPSC Protocol defines what these terms mean from an operational or policy standpoint. Nevertheless, it is clear that the AUPSC may employ force in multiple contexts, whether to thwart conflict and safeguard human rights, to ensure access to humanitarian agencies, or to deliver humanitarian relief during natural

⁴⁴ *African Peace Protocol*, *supra* note 2, art. 5(2)(a)-(c), (e), (j), at 167-68.

⁴⁵ *Id.* art. 5(2)(d)-(e).

⁴⁶ *Id.* art. 5(2)(g).

⁴⁷ *Id.*

⁴⁸ See discussion of these differences *infra* Part III.

⁴⁹ There is no provision in the IGAD Mechanism for peacekeeping or peace enforcement. *Protocol on the Establishment of a Conflict Early Warning and Response Mechanism for the Inter-Governmental Authority on Development (IGAD) Member States*, reprinted in AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES 333 (Jeremy I. Levitt ed., 2003) [hereinafter *Protocol for the IGAD*].

⁵⁰ *African Peace Protocol*, *supra* note 2, art. 6(a), at 168.

⁵¹ *Id.* art. 6(b).

⁵² *Id.* art. 6(c).

⁵³ *Id.* art. 6(d).

⁵⁴ *Id.* art. 6(f).

⁵⁵ *African Peace Protocol*, *supra* note 2, art. 6(e), at 168.

⁵⁶ *Id.* art. 6(f).

disasters.⁵⁷ The next section provides insight into the proposed operational and policy activities of the AUPSC.

C. Powers, Procedures, and Organs

1. Powers

The AUPSC Protocol sets forth eighteen major “powers” or responsibilities of the organization. These powers cover the gamut of peacemaking activities, from policy oversight and quality control responsibilities to full-fledged military intervention. Military intervention includes preemptively engaging states that have policies that may lead to genocide and crimes against humanity,⁵⁸ authorizing nonmilitary peace-support missions,⁵⁹ and recommending to the AU Assembly military intervention pursuant to Article 4(h) of the Constitutive Act in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity.⁶⁰ Furthermore, the AUPSC will be charged with, among other things, instituting “sanctions whenever an unconstitutional change of Government takes place;”⁶¹ “implementing a common defense policy;”⁶² combating terrorism in accordance with the OAU terrorism convention;⁶³ and coordinating and cooperating with subregional and regional mechanisms—including the U.N.—particularly on peace and security issues.⁶⁴ AU member states are bound by the decisions and actions of the AUPSC and “shall extend full cooperation to, and facilitate action by the Peace and Security Council for the prevention, management and resolution of crises and conflicts.”⁶⁵

The powers of the AUPSC are more clearly defined than those enumerated in Chapter VII of the U.N. Charter. In fact, the AUPSC sets out clear bases on which intervention may take place and creates a positive duty to institute sanctions whenever there are unconstitutional changes of government.⁶⁶ From this background, it is quite clear that the functions and powers of the AUPSC were informed by Africa’s pressing security challenges

⁵⁷ *Id.*

⁵⁸ *Id.* art. 7(1)(a), at 169.

⁵⁹ *Id.* art. 7(1)(b).

⁶⁰ Constitutive Act, *supra* note 11, art. 4(h).

⁶¹ *African Peace Protocol*, *supra* note 2, art. 7(1)(g), at 169.

⁶² *Id.* art. 7(1)(h).

⁶³ *Id.* art. 7(1)(i).

⁶⁴ *Id.* art. 7(1)(k), at 169.

⁶⁵ *Id.* art. 7(2)-(4).

⁶⁶ *African Peace Protocol*, *supra* note 2, art. 7(1)(g), at 168.

and the fact that African leaders established the AUPSC to deal with any and all security issues, whether man-made or acts of God.

2. Procedures

The AUPSC will meet at the headquarters of the Union in Addis Ababa, Ethiopia.⁶⁷ If a member state invites the AUPSC to meet in its country, that state will defray the additional costs incurred by the AU Commission as a result of holding the meeting away from headquarters.⁶⁸ It will convene “as often as required at the level of Permanent Representatives, but at least twice a month.”⁶⁹ Ministers and heads of state of government will meet at least once a year.⁷⁰ The chairmanship of the AUPSC will rotate annually among its members.⁷¹ AUPSC meetings will be closed, and any member state that is party to a dispute being considered by the Council may “not participate either in the discussion or in the decision making process” relating to the dispute.⁷² At least two-thirds of the total AUPSC membership is required to constitute a quorum.⁷³ Since the AUPSC is not yet in force, there exist no rules of procedure to guide the convening of meetings, conduct of business, or other aspects of its work. However, Article 8(14) requires that it “submit its own rules of procedure . . . for consideration and approval by the Assembly” once the AUPSC becomes operative.⁷⁴

The AUPSC may hold open meetings where a non-AUPSC member state at conflict or party to a situation under Council review “shall be invited to present its case as appropriate and shall participate, without the right to vote, in the discussion.”⁷⁵ States not at conflict or under review of the AUPSC may be invited to participate in discussions “whenever that Member State considers that its interests are especially affected.”⁷⁶ International organizations, regional organizations and mechanisms, and civil society entities party to or interested in a situation under review of the AUPSC may be invited to participate as nonvoting observers.⁷⁷ Furthermore, the AUPSC may hold “informal consultations” for any and all interested or affected

⁶⁷ *Id.* art. 8(3), at 170.

⁶⁸ *Id.* art. 8(4), at 170-71.

⁶⁹ *Id.* art. 8(2), at 170.

⁷⁰ *Id.*

⁷¹ *African Peace Protocol*, *supra* note 2, art. 8(6), at 171.

⁷² Any party to a dispute may be invited to present its case to the AUPSC.

⁷³ *African Peace Protocol*, *supra* note 2, art. 8(8), at 171.

⁷⁴ *Id.* art. 8(14), at 172.

⁷⁵ *Id.* art. 8(10)(a), at 171-72.

⁷⁶ *Id.* art. 8(10)(b).

⁷⁷ *Id.* art. 8(10)(c).

parties to a situation under its consideration.⁷⁸ The Protocol provides civil society institutions a venue in which to participate directly or to weigh in on matters being considered by the Council.⁷⁹ Furthermore, Article 20, "Relations with Civil Society Organizations," commits the AUPSC to "encourage" non-governmental organizations and all other forms of community-based entities, particularly "women's organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa."⁸⁰ This is a significant development considering the state-centric, gender-biased, and elitist characteristics of its predecessor, the OAU Central Organ/MCPMR, particularly on peace and security issues. If civil society entities are permitted to participate in discussions before the AUPSC, African people will have an opportunity to influence and be informed about the policy prescriptions of their governments on critical security issues affecting them.

3. Organs

The AUPSC Protocol provides for the establishment of three noteworthy operational organs: the Panel of the Wise (Panel), the Continental Early Warning System (CEWS), and the African Standby Force (ASF). The Panel will advise and support the "efforts of the Peace and Security Council and those of the Chairperson of the Commission, particularly in the area of conflict prevention" (including preventive diplomacy and mobilizing public opinion) and on "all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa."⁸¹ It will be composed of five eminent African personalities who have made an "outstanding contribution to the cause of peace, security and development on the continent."⁸² Panel members will be "selected by the Chairperson of the Commission" upon consultation with the "Member States concerned, on the basis of regional representation and appointed by the Assembly" for three-year terms.⁸³ The Panel will "report" to the AUPSC and through it to the AU Assembly.⁸⁴ If the Panel is to be a viable mechanism in assisting the AUPSC to avert conflict, its members must be viewed as impartial and must be respected and trusted by all segments of African society. The character of the AUPSC also will impact the way in which parties at conflict regard the Panel.

⁷⁸ *African Peace Protocol*, *supra* note 2, art. 8(11), at 171-72.

⁷⁹ *Id.* art. 8(10)(c), (11).

⁸⁰ *Id.* art. 20, at 182.

⁸¹ *Id.* art. 11(1), (3), (4), at 174.

⁸² *Id.* art. 11(2), at 174.

⁸³ *African Peace Protocol*, *supra* note 2, art. 11(2), at 174.

⁸⁴ *Id.* art. 11(5), at 174-75.

The CEWS is an appendage of the OAU MCPMR and will be integrated into the AUPSC. It will consist of an "observation and monitoring center" that will be referred to as the "Situation Room," which will be responsible for data collection and analysis.⁸⁵ It is envisaged that the CEWS will be linked to subregional conflict mechanisms including the ECOWAS Mechanism, the SADC Organ, and the IGAD conflict mechanism. The CEWS will supply the Commission (AU Secretariat) with timely information and analysis "to advise the Peace and Security Council on potential conflicts and threats to peace" and recommend courses of action with the purpose of taking early action.⁸⁶

The ASF is arguably the most important organ in the AUPSC framework. It will be a rapid deployment force "composed of standby multidisciplinary contingents, with civilian and military components."⁸⁷ AU member states will be responsible for establishing standby contingents for AUPSC peace support operations and intervention.⁸⁸ It is sanctioned to conduct several types of operations including:

1. [O]bservation and monitoring missions;⁸⁹
2. [O]ther types of peace support missions;⁹⁰
3. [I]ntervention in a member state in respect of grave circumstances or at the request of a member state in order to restore peace and security, in accordance with Article 4(h) and (j) of the Constitutive Act;⁹¹
4. [P]reventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighboring areas or states, and (iii) the resurgence of violence after parties to a conflict have reached an agreement;⁹²
5. [P]eace-building, including post-conflict disarmament and demobilization;⁹³
6. [H]umanitarian assistance to alleviate the suffering of civilian populations in conflict areas and support efforts to address major natural disasters;⁹⁴ and

⁸⁵ *Id.* art. 12(2)(a), at 175.

⁸⁶ *Id.* art. 12(5)-(6), at 175-76.

⁸⁷ *Id.* art. 13(1), at 176.

⁸⁸ *African Peace Protocol*, *supra* note 2, art. 13(2), at 176.

⁸⁹ *Id.* art. 13(3)(a).

⁹⁰ *Id.* art. 13(3)(b).

⁹¹ *Id.* art. 13(3)(c).

⁹² *Id.* art. 13(3)(d), at 176-77.

⁹³ *African Peace Protocol*, *supra* note 2, art. 13(3)(e).

⁹⁴ *Id.* art. 13(3)(f).

7. [A]ny other functions as may be mandated by the Peace and Security Council or the Assembly.⁹⁵

While undertaking these functions, the ASF is supposed to cooperate with the U.N. and its agencies and other relevant international and regional organizations, national authorities, and nongovernmental organizations.⁹⁶ The strategy and modus operandi for ASF missions will be approved by the AUPSC on the recommendation of the AU Secretariat.⁹⁷ A Special Representative of the Chairman of the Commission will head ASF missions,⁹⁸ and a Force Commander, who will report to the Special Representative,⁹⁹ will coordinate and direct ASF operations.¹⁰⁰ The AUPSC Protocol also provides for a Military Staff Committee that will provide military and security-related advice to the AUPSC and liaise with the Force Commander.¹⁰¹

Although on paper the lines of authority are prescribed in the Protocol, only time will determine whether the AUPSC will be able to deal with the numerous and complex issues involved with managing peace operations, let alone the heated geopolitical antagonisms that often surface in African peacekeeping operations.

III. LIKELY IMPACT AND MAJOR STUMBLING BLOCKS

A. Likely Impact

This section considers the impact of the AUPSC Protocol once it enters into force and the main stumbling blocks that will need to be addressed, including transregional conflicts of law.

Although in operational terms it is too early to consider the impact of the AUPSC Protocol on Africa's collective security landscape, it is not premature to assess the efficacy of its proposed structure. There can be no question that the AUPSC will, at least initially, suffer from the same resource and logistical inadequacies as its predecessor, the OAU Central Organ/MCPMR. The new AU law of intervention, which obligates it to forestall conflict, by coercive means if necessary, presents enormous political, economic, and logistical challenges, not to mention issues related to the rate and consistency of intervention that will no doubt surface given the numerous protracted conflicts that need intervention on the continent. For example, while the AU

⁹⁵ *Id.* art. 13(3)(g).

⁹⁶ *Id.* art. 13(4).

⁹⁷ *Id.* art. 13(5), at 176-77.

⁹⁸ *African Peace Protocol*, *supra* note 2, art. 13(6).

⁹⁹ *Id.* art. 13(7).

¹⁰⁰ *Id.* art. 13(6), (7).

¹⁰¹ *Id.* art. 13(8)-(12), at 177-78.

sought to end the crisis in Burundi in 2002¹⁰² through preventive diplomacy and peace observation missions, it wrestled with ways and ultimately did very little to diffuse conflict in Liberia during the same period¹⁰³—while the latter country perhaps was in greater need of intervention.

From a structural standpoint, the AU's new collective security framework will have greater longevity and legitimacy than prior OAU conflict mechanisms because of its robust mandate to enforce peace—authority lacking in those organizations that preceded it.¹⁰⁴ Only nine years after the institution of the OAU MCPMR, the mandate and approach that underpinned its creation was overhauled with the adoption of the AUPSC Protocol in July 2002. Again, this is partly due to the MCPMR's limited mandate—it did not include conflict management or intervention—but also is due to the impact of conflict on African development generally.¹⁰⁵ African leaders also seem to recognize that new solutions are necessary to curb the devastating effects of civil conflict on African people, and that sovereignty is no longer a shield from intervention when human suffering exists on a great scale. As Nsongurua Udombana rightly points out:

The OAU Central Organ sanctioned many *observer missions* and *neutral investigations* during the past decade with the intention of moving towards a larger U.N. mission as well as to demonstrate an African commitment commensurate with that of the United Nations. But where has all this left Africa? Today, more than a dozen conflicts, both old and new, still ravage the continent, a clear indication that current methods do not sufficiently tackle the problems. Is it not time to try other solutions?¹⁰⁶

The AUPSC is another solution. African leaders have consciously and willingly contracted away sovereignty for greater aspirations of peace, security, stability, and development. Such a course of action was not imaginable a decade ago.

The AU's proposed collective security framework is more democratic, transparent, and inclusive than that of its predecessor. Under the AUPSC

¹⁰² *Report of the Secretary-General to the Security Council on the Situation in Burundi*, U.N. SCOR, S/2002/1259, at 1 (Nov. 18, 2002), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/697/17/pdf/NO269717.pdf?OpenElement> (last visited Oct. 21, 2003).

¹⁰³ Jeremy Levitt, *It's Time America Comes to Liberia's Assistance*, CHI. SUN TIMES, June 6, 2003, at 27A, available at <http://www.suntimes.com/output/otherviews/cst-edt-ref06.html>.

¹⁰⁴ The OAU Central Organ only permitted and equipped the MCPMR to launch non-military peace observation missions.

¹⁰⁵ “[O]nce started, civil wars retard economic and social development and aggravate poverty—completing the vicious circle of conflict poverty, and exclusionary politics.” THE WORLD BANK, CAN AFRICA CLAIM THE TWENTY-FIRST CENTURY? 58 (2000).

¹⁰⁶ Nsongurua J. Udombana, *Can the Leopard Change its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177, 1224 (2002) (emphasis added).

framework, the regional conflict mechanisms of regional bodies such as ECOWAS, SADC, and IGAD “are part of the overall security architecture of the Union.”¹⁰⁷ In this context, the AU commits itself to “harmonize and coordinate” and partner with regional mechanisms to achieve peace,¹⁰⁸ security, and stability on the continent through the exchange of information and analyses,¹⁰⁹ and the establishment of “liaison offices” in the regional mechanisms.¹¹⁰ It also seeks to work more closely with the U.N., particularly the UNSC, and other international organizations in the “promotion and maintenance of peace, security and stability in Africa.”¹¹¹ Better cooperation among African conflict mechanisms and between the UNSC and the AU should fast-track African crises on the U.N. agenda—which may result in more concerted action.

State actors are not the only beneficiaries of the AU’s new security framework. The Pan-African Parliament has gained a type of quasi-oversight function over the AUPSC, requiring the latter to “maintain close working relations with the Pan[-]African Parliament;”¹¹² submit reports to the former on request, including a separate annual report on the “state of peace and security in the continent;”¹¹³ and “facilitate the exercise by the Pan-African Parliament of its powers” under the Protocol to the Treaty establishing the African Economic Community.¹¹⁴ The AUPSC also will “seek close cooperation” with the African Commission on Human and People’s Rights (Commission) in all matters relevant to its objectives and mandate.” The Commission will notify the AUPSC of any information relevant to its objectives and mandate.¹¹⁵ The recognition of the Commission in the AUPSC Protocol is an important development because it recognizes and codifies the link between conflict, human rights violations, and intervention in the law *jus ad bellum* and regional security policy in Africa. Another important aspect of the AUPSC framework is its commitment to engage with civil society organizations—and the obligation of the AUPSC to “encourage non-

¹⁰⁷ *African Peace Protocol*, *supra* note 2, art. 16(1), at 180.

¹⁰⁸ *Id.* art. 16(1)(a).

¹⁰⁹ *Id.* art. 16(4).

¹¹⁰ *Id.* art. 16(8), at 180-81. Regional mechanisms are also “encouraged” to establish liaison offices at the Commission. *Id.*

¹¹¹ *Id.* art. 17(1), at 181.

¹¹² *African Peace Protocol*, *supra* note 2, art. 18(1), at 182.

¹¹³ *Id.* art. 18(3).

¹¹⁴ *Id.* art. 18(3). One of the key objectives of the Pan-African Parliament is to “promote peace, security and stability” throughout Africa. Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, Mar. 2, 2002, art. 3(5), *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/treaties/pap_protocol.pdf (last visited Nov. 28, 2003).

¹¹⁵ *African Peace Protocol*, *supra* note 2, art. 19, at 182. Yet it is unclear how and in what form the Commission will “bring to the attention” relevant information to the AUPSC.

governmental organizations” and any other type of “community-based” organizations, “particularly women’s organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa.”¹¹⁶ The recognition of the importance of civil society actors in the AUPSC Protocol is a progressive development considering that African governments historically have been very wary of them. Taken together, the inclusive approach to conflict management outlined in the AUPSC Protocol may enable it to more easily promote and build institutional trust among stakeholders during conflict, including combatants, the AU, the U.N., regional conflict mechanisms, and civil society institutions.

However, before the AUPSC can function efficiently, it will need to address several structural faults. The major structural impediments needing urgent attention concern regional conflicts of law between the U.N. and the AU on one hand, and among African regional organizations and the AU on the other.

B. AU/U.N. Stumbling Blocks

The major stumbling blocks that have gone virtually unnoticed by the AU leadership concern conflicts of law between the AU and the U.N. on the law *jus ad bellum*. This section will examine two sets of stumbling blocks between the organizations.

The first stumbling blocks between the AU and the U.N. arise within the AUPSC Protocol. Under Article 16 the AUPSC devolves to itself the “*primary responsibility* for promoting peace, security and stability in Africa,”¹¹⁷ but in Article 17 it commits itself to “cooperate and work closely” with the UNSC, seemingly recognizing that the UNSC “has the primary responsibility for the maintenance of international peace and security.”¹¹⁸ These provisions are somewhat contradictory; it is not clear whether the AU has reserved for itself primary responsibility for peace and security in Africa rather than leaving it to the UNSC. Notwithstanding, nothing in the AU Constitutive Act or in the AUPSC Protocol explicitly requires the AU to seek prior authorization from the UNSC before authorizing or launching interventions.¹¹⁹ The decision not to include such language in the Protocol, according to a senior AU official, “was a conscious decision by AU leaders due to the debacles in Somalia and Rwanda so the Assembly decided not to bind themselves to rules and systems

¹¹⁶ *Id.* art. 20. Civil society organization may even be invited to address the PSC.

¹¹⁷ *Id.* art. 16(1), at 180 (emphasis added).

¹¹⁸ *Id.* art. 17(1), at 181. Article 24 of the U.N. Charter stipulates that “[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” U.N. CHARTER, art. 24.

¹¹⁹ This is in stark contrast with SADC law, which requires UNSC authorization before embarking on peacekeeping operations. See discussion *infra* Part III.c-d.

that have failed Africa, or the policy prescriptions of certain powers.”¹²⁰ Although AU leaders recognize that in an ideal world the UNSC should take primary responsibility for maintaining international peace and security in Africa, the U.N.’s peacemaking record on the continent has been shamefully poor, particularly with respect to the permanent members of the UNSC.¹²¹ Hence, interestingly, Article 17(2) of the AUPSC Protocol, which deals with the relationship between the AU and U.N., states:

Where necessary, recourse will be made to the United Nations 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, in keeping with the provisions of Chapter VIII of the U.N. Charter¹²²

Although Article 53(1) of the Charter requires that “no enforcement action shall be taken under regional arrangements . . . without the authorization of the Security Council,”¹²³ the AU does not directly acknowledge this provision and obligation, but rather acknowledges Chapter VII as a whole. Taken together, Articles 4(h) and (j) of the Constitutive Act¹²⁴ and Articles 4(j) and (k),¹²⁵ 6(d),¹²⁶ 7(c)-(g),¹²⁷ 16(1),¹²⁸ and 17(1) and (2) of the AUPSC Protocol¹²⁹ reveal that while the AU acknowledges the “primary” role of the U.N. in maintaining international peace and security,¹³⁰ particularly in Africa, it reserves the right to authorize interventions in Africa—seeking U.N. involvement “[w]here necessary.”¹³¹

The pro-intervention language in the AU Constitutive Act and AUPSC presents a dilemma because they arguably conflict with Articles 2(4) and

¹²⁰ Telephone Interview with AU Officer, Office of the Legal Counsel, The African Union (Feb. 4, 2003) [hereinafter Telephone Interview].

¹²¹ The failure of the U.N. to forestall conflict in Liberia (1990), Sierra Leone (1997), Central African Republic (1997), Guinea-Bissau (1998), Lesotho (1998), Congo (1998), Guinea (1999), Côte d’Ivoire (2003), and Liberia (2003) are just a few examples.

¹²² *African Peace Protocol*, *supra* note 2, art. 17(2), at 181 (emphasis added).

¹²³ U.N. CHARTER, *supra* note 118, art. 53(1), at 19.

¹²⁴ Constitutive Act, *supra* note 11, art. 4(h)-(j).

¹²⁵ *African Peace Protocol*, *supra* note 2, art. 4(j)-(k), at 167.

¹²⁶ *Id.* art. 6(d), at 168.

¹²⁷ *Id.* art. 7(c)-(g), at 169.

¹²⁸ *Id.* art. 16(1), at 180.

¹²⁹ *Id.* art. 17(1)-(2), at 181.

¹³⁰ *African Peace Protocol*, *supra* note 2, art. 17(1), at 181.

¹³¹ *Id.* art. 17(2). Here, the AU seems to view Article 52 of the U.N. Charter as an independent provision unhindered by the “pre-authorization” requirement in Article 53. It also appears to reserve the right to be the sole arbiter of authorizing interventions vis-à-vis other African conflict mechanisms and states. U.N. CHARTER, *supra* note 118, arts. 52-53.

53(1) of the U.N. Charter.¹³² This places both AU instruments in conflict with U.N. Charter Article 103, which states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail.”¹³³ On the issue of regional intervention and Article 103, Rudolf Bernhardt comments:

[I]f the members of a regional arrangement, or even two States, agree that in case of internal disturbances or other events within one of the States concerned, the other State(s) can intervene with military forces without the consent of the *de jure* or *de facto* government, the compatibility of such a special agreement [e.g., AU Constitutive Act and AUPSC Protocol] with the Charter becomes *doubtful* and must in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force are at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103.¹³⁴

While Bernhardt may be correct in doubting the compatibility of regional intervention agreements or provisions with the U.N. Charter, this does not necessarily mean that they are not lawful or valid, nor does it mean that they must in principle be voided or suspended in whole or in part. This is true because African state practice and the resulting intervention-based treaty law developments—particularly Articles 4(h) and (j) of the Constitutive Act and the AUPSC Protocol—are not in fact inconsistent with the Charter’s schemata. Both instruments recognize the primacy of the U.N. in maintaining international peace and security, and both reinforce its core mission: keeping international peace through regional action in accordance with Article 52 of the Charter. Furthermore, acting under its Chapter VII powers, the UNSC has retroactively authorized African regional interventions taken under the authority of hardened regional customary law that has been codified into treaty.¹³⁵ In this sense, the conflicting African

¹³² Article 2(4) requires that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER, *supra* note 118, art. 2(4). Any such conflicts of law between AU law and Article 2(4) may be limited to interstate conflict because intrastate conflict is arguably out of the reach of the Charter’s provision. YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENSE* 80 (3d ed. 2002).

¹³³ U.N. CHARTER, *supra* note 118, art. 103. Article 30 of the Vienna Convention on the Law of Treaties also recognizes the supremacy of Article 103 of the U.N. Charter. *Vienna Convention*, *supra* note 22, at 93.

¹³⁴ RUDOLF BERNHARDT, *Article 103*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1297 (Bruno Simma et al. eds., 2d ed. 2002) (emphasis added).

¹³⁵ The retroactive authorizations of ECOWAS to restore peace in Liberia and Sierra Leone through, among others, UNSC resolutions 788, 866, and 1132, respectively, are cases in point. *See generally, African Interventionist States*, *supra* note 19. Moreover, it can be argued that

interventionist treaty law indefinitely prevails over Article 103 and dependent provisions. Article 103 seems to create an exception for African interventionist treaties¹³⁶—to argue otherwise is to assert that the UNSC violated Article 103 by authorizing *ex post facto* interventions prohibited under Article 103, a difficult claim to make given the broad discretionary powers of the UNSC. Furthermore, the AU's position fills a gap in U.N. law and complements Article 2(7) of the U.N. Charter concerning U.N. involvement in intrastate conflicts, in which the framers of the U.N. did not envisage the organization involving itself. The Charter explicitly prohibits the organization from intervening in "matters that are essentially within the domestic jurisdiction of any state" without prejudicing the "application of enforcement measures under Chapter VII."¹³⁷

The approach taken by the AU is in accord with customary international law use of force developments, namely, the hardening and mainstreaming of the doctrine of humanitarian intervention into treaty law and the wider corpus of international law. In the post-Cold War era, this doctrine has largely been generated from African state practice (see Tables 1 and 2)¹³⁸; UNSC's ratification of African interventions;¹³⁹ and military action taken by the North American Treaty Organization (NATO) in Kosovo in 1999.¹⁴⁰

nothing in the *travaux préparatoires* of Article 103 indicates that it applies to codifactory as opposed to legislative treaties.

¹³⁶ The same logic or analysis applies to ECOWAS law.

¹³⁷ U.N. CHARTER, *supra* note 118, art. 2(7), at 6-7.

¹³⁸ The ECOWAS interventions in Liberia (1990-1997), Sierra Leone (1997-2000), Guinea (2000), Guinea-Bissau (2001), and Côte d'Ivoire (2002); SADC intervention in Lesotho (1998); and MISAB and CEMAC interventions in the Central African Republic in 1996 and 2003, respectively.

¹³⁹ See generally *Humanitarian Intervention*, *supra* note 19; *African Interventionist States*, *supra* note 19.

¹⁴⁰ Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L. Q. 330 (2000).

Table 1 Selected African Military Interventions, 1990-2003

<i>Group¹⁴¹</i>	<i>Place of Intervention</i>	<i>Year of Intervention</i>	<i>Length of Mission*</i>
ECOMOG	Liberia	1990	8 years
MISAB	Central African Republic (CAR)	1997	9 months
ECOMOG	Sierra Leone	1997	2 years
ECOMOG	Guinea-Bissau	1998	1 year
SADC	Lesotho	1998	1 month
ECOMOG	Côte d'Ivoire	2003	ongoing

* These are conservative estimates because the ECOWAS and MISAB missions were later converted into U.N.-sanctioned operations.

Table 2 Non-Humanitarian Legal Forcible Military Interventions by Individual African States

<i>State</i>	<i>Place of Intervention</i>	<i>Year of Intervention</i>	<i>Length of Mission</i>
Nigeria	Sierra Leone	1997	3 months
Senegal	Guinea-Bissau	1998	6 months
Guinea	Guinea-Bissau	1998	6 months

These interventions have solidified and further evolved the law *jus ad bellum*, which the AU has codified in the Constitutive Act and the AUPSC Protocol.

The second set of stumbling blocks is found in the differing laws of intervention prescribed in AU and U.N. Charter law and customary international law.

Under U.N. law and general and customary international law, the threat or use of force by a state or group of states in another state for purely humanitarian purposes is unlawful and a breach of the target state's political independence and territorial integrity, absent that state's consent or explicit authorization from the UNSC.¹⁴² Many scholars consider intervention,

¹⁴¹ The acronyms signify: Economic Community of West African States Cease-Fire Monitoring Group (ECOMOG); Mission for the Implementation of the Bangui Agreement (MISAB); Nigerian Forces Assistance Group (NIFAG); and South African Development Community (SADC).

¹⁴² See generally L. OPPENHEIM, INTERNATIONAL LAW § 134, 305 (Laughterpacht ed., 8th ed. 1955); Ulrich Beyerlin, *Humanitarian Intervention*, in 3 ENCYCLOPEDIA OF PUBLIC

regardless of its humanitarian motives, taken outside of these parameters to be unlawful.¹⁴³ This is largely because, until recently, states have strictly interpreted and adhered to the international law doctrine of state sovereignty and the principle of non-intervention in the internal affairs of states. On this point, Dino Kritsiotis states:

Constructed as a basic legal proposition, the right of humanitarian intervention—that is, the transnational application of force by states under the banner of humanitarian concern—challenges the fundamental doctrine upon which the contemporary system of international law operates: the doctrine of state sovereignty and the concomitant principle of non-intervention in the internal affairs of states.¹⁴⁴

Notwithstanding, those who subscribe to the non-interventionist position are at a loss to explain the UNSC's retroactive authorizations of a wave of seemingly illegal humanitarian interventions that have taken place since the end of the Cold War.¹⁴⁵

As mentioned, Articles 4(h) and (j) of the AU Constitutive Act and Articles 7(e) and (f), among others, of the AUPSC Protocol explicitly empower the AU Assembly to launch and authorize humanitarian interventions.¹⁴⁶ In contrast, Article 2(4) of the U.N. Charter forbids states 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 U.N."¹⁴⁷ In this context, AU and U.N. law seem to conflict. As Yoram Dinstein aptly points out, "the use or threat of force is abolished in Article 2(4) only in the 'international relations' of Member States. Intra-State clashes therefore are out of the reach of the Charter's provision."¹⁴⁸ In the present author's view, the AU and other African regional organizations may lawfully employ force in states to forestall intrastate conflict for two reasons: (1) because general and regional customary international law and treaty law developments permit it, and (2) because

INTERNATIONAL LAW 211, 212 (Rudolph Dolzer et al. eds., 1982); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); Roselyn Higgins, *Peace and Security Achievements and Failures*, 6 EUR. J. INT'L L. 445 (1995); John Quigley, *The "Privatisation" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249, 249-50 (1995-96).

¹⁴³ *Id.*

¹⁴⁴ Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005 (1998).

¹⁴⁵ The ECOWAS interventions in Liberia, Sierra Leone, and Guinea-Bissau are cases in point.

¹⁴⁶ The law of ECOWAS maintains a similar position. *ECOWAS Protocol*, *supra* note 3, art. 25, at 274.

¹⁴⁷ U.N. CHARTER, *supra* note 118, art. 2(4).

¹⁴⁸ DINSTEIN, *supra* note 132, at 80.

such conflict arguably falls outside of the jurisdictional mandate of the U.N., and U.N. law does not forbid it.¹⁴⁹

Furthermore, as previously mentioned, Article 103 of the U.N. Charter states that U.N. Charter law prevails when there is a “conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement.”¹⁵⁰ The aforementioned “conflict between obligations” is vital to ascertaining and applying the law *jus ad bellum* and to pertinent wider international peace and security policy considerations. A simple reading of Article 103 would seem to resolve the issue—meaning that U.N. Charter law would prevail over the interventionist provisions of AU law. Unfortunately, as demonstrated above, the issue cannot be resolved so easily. AU law is not simply treaty law, but rather codified regional and international custom; hence, the U.N. Charter would not “prevail” because Article 103 does not apply to conflicts between the U.N. and customary law. In fact, during the course of deliberations over Article 103, “[a] formula according to which all other commitments, including those arising under customary law, were to be superceded by the Charter, was ultimately not included.”¹⁵¹ Apparently the framers of Article 103 were not comfortable with it superceding conflicting customary law developments.

The fact that the U.N. Charter is silent on the issue evidences the framers’ intent not to limit the legal efficacy of customary law developments. Moreover, again, Article 103 is applicable *only* when there is a “conflict between obligations,” which cannot be found in this case, given the UNSC’s consistent pattern or practice of retroactively ratifying African interventions,¹⁵² the majority of which were taken under the authority of customary international law and pro-intervention treaties. How can there be a conflict between obligations of AU and U.N. law under Article 103 when the UNSC, the guarantor of breaches of international peace and security, routinely ratifies under its Chapter VII powers African state practice that otherwise creates conflicting obligations?¹⁵³ Richard Lauwaars argues that the “only externally binding decisions are decisions of the Security Council concerned with the maintenance of international peace and security. These decisions clearly fall within the strictures of Article 103 and must be observed

¹⁴⁹ Although the U.N. does not forbid it, the author recognizes that it is debatable whether intrastate conflict falls outside of the jurisdictional mandate of the UNSC, given the way in which it has interpreted its discretionary powers and the language of Article 39 of the U.N. Charter since the end of the Cold War. However, such interpretations also may be viewed as exceptions to the general rule prohibiting such action.

¹⁵⁰ U.N. CHARTER, *supra* note 118, art. 103.

¹⁵¹ BERNHARDT, *supra* note 134, at 1293.

¹⁵² *Humanitarian Intervention*, *supra* note 19, at 373.

¹⁵³ Nothing in the U.N. Charter or the *travaux préparatoires* of Article 103 addresses the issue of consequences for breaches of the U.N. Charter: i.e., “whether incompatible agreements should be void or merely suspended.” BERNHARDT, *supra* note 134, at 1293.

by Member States and international organizations.”¹⁵⁴ If Lauwaars is correct in asserting that UNSC decisions fall within the purview of Article 103 and must be observed, then pro-interventionist African treaties (e.g., AU and ECOWAS law) and resultant interventions sanctioned by the UNSC *ex post facto*¹⁵⁵ also must be observed rather than viewed in conflict with Article 103.¹⁵⁶

This background supports an argument that the law of intervention in the U.N. and the AU form two independent norms of international law, based on the U.N. Charter on one hand and customary international law and treaty law on the other. In principle, these norms compete and are juxtaposed, creating normative friction, but in practice they have proven to be complementary,¹⁵⁷ filling an alarming gap in the international system of peace and security. Whatever the case may be, the U.N.’s poor peacemaking record in Africa has been the greatest force in generating competing customary law of intervention norms and pro-intervention treaties. Gross deficiencies in the UNSC system have been the greatest corroder of U.N. law.

C. AU/ECOWAS Stumbling Blocks

Serious stumbling blocks related to inter-African regional conflicts of law exist among the AU, ECOWAS, and SADC that have not received adequate attention by the AU.

As mentioned, the AUPSC had assigned itself primary responsibility for promoting peace, security, and stability in Africa,¹⁵⁸ a designation that in the jurisdictional sense supercedes any made by other African organizations. Under Article 16 of the AUPSC Protocol, the organ “shall 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.*”¹⁵⁹ In this sense, the AUPSC has been given a regulatory or quality control function vis-à-vis other regional organizations and responsibility to “ensure effective partnership between them and the Peace and Security Council in the promotion and maintenance

¹⁵⁴ Richard H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of Other International Organizations*, 82 MICH. L. REV. 1604, 1606 (1984).

¹⁵⁵ The retroactive authorizations of ECOWAS to restore peace in Liberia and Sierra Leone through, among others, UNSC resolutions 788, 866, and 1132, respectively.

¹⁵⁶ It is also important to note that pro-intervention treaties and provisions should not be looked at in isolation but rather in proximity to how they are employed in practice, particularly when such practice is consistent with the U.N. Charter framework, namely, maintaining international peace and security.

¹⁵⁷ Again, the UNSC *ex post facto* authorization of and co-deployment with ECOWAS forces in Liberia in 1992 through UNSC Res. 866 demonstrates this point. See *The United Nations and the Situation in Liberia*, at 35, U.N. Doc. [ST/] DPI/1668 (LII Sess.) (1997).

¹⁵⁸ *African Peace Protocol*, *supra* note 2, art. 16, at 180.

¹⁵⁹ *Id.* art. 16(1)(a) (emphasis added).

of peace, security and stability.”¹⁶⁰ Yet there is some discord between the AU and these regional mechanisms on the law *jus ad bellum*.

The laws of intervention in the AU and in ECOWAS are complementary. The AU under both the AU Constitutive Act and the AUPSC Protocol may authorize intervention to forestall war crimes, crimes against humanity, and genocide. Similarly, the ECOWAS—under both the Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (ECOWAS Framework) and the ECOWAS Mechanism—may invoke a right of “humanitarian intervention” in three cases: (1) in an internal conflict situation that “threatens to trigger a humanitarian disaster” or “that poses a serious threat to peace and security in the sub-region;”¹⁶¹ (2) “in the event of a serious or massive violation of human rights and the rule of law;”¹⁶² and (3) “in the event of an overthrow or attempted overthrow of a democratically elected government.”¹⁶³ While both the AU and ECOWAS have codified a right of intervention to forestall deadly conflict and remedy large-scale human suffering with or without prior authorization from the UNSC, the ECOWAS law goes further as it also provides for a pro-democratic right of intervention.¹⁶⁴ Although it is the policy of the AU to condemn unconstitutional changes of government,¹⁶⁵ it provides only for sanctions as a remedy, not military action.¹⁶⁶ It is unclear why the AU Constitutive Act and the AUPSC Protocol do not provide a military remedy for unconstitutional changes of government, especially since “respect for democratic principles, human rights, the rule of law and good governance” are core underlining principles of AU law and vital for sustainable peace and security on the continent.¹⁶⁷

Since coups in Africa typically are preceded or followed by breakdowns in the rule of law and massive human rights violations, Article 7 of the AUPSC Protocol, which empowers the AUPSC to “decide on any other issue having

¹⁶⁰ *Id.* art. 16(1)(b).

¹⁶¹ *ECOWAS Protocol*, *supra* note 3, art. 25(a)-(b), at 274.

¹⁶² *Id.* art. 25(b).

¹⁶³ *Id.*

¹⁶⁴ *African Interventionist States*, *supra* note 19, at 41.

¹⁶⁵ *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. No. AHG/Decl.5 (July 12, 2000) (document on file with author). Under the Declaration, the definition of situations that qualify as unconstitutional changes of government are as follows: (1) “military coup d’etat against a democratically elected government;” (2) “intervention by mercenaries to replace democratically elected Government;” (3) “replacement of democratically elected Governments by armed dissident groups and rebel movements;” and (4) “the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.” *Id.* This definition is far more expansive than that of ECOWAS.

¹⁶⁶ *African Peace Protocol*, *supra* note 2, art. 7(g), at 169.

¹⁶⁷ Constitutive Act, *supra* note 11, art. 4(m).

implications for the maintenance of peace, security and stability on the Continent,"¹⁶⁸ may provide it with the authority to authorize or employ force to prevent or reverse unconstitutional changes of government. After all, this is precisely what the OAU did in 1997, when it unequivocally condemned the coup d'état of the Kabbah regime and "appeal[ed] to the leaders of ECOWAS to assist the people of Sierra Leone to restore constitutional order to the country" by reversing the coup.¹⁶⁹ Hence, there exists a concrete example of the OAU sanctioning enforcement measures to forestall coups well before the adoption of the AU Constitutive Act and the AUPSC Protocol.

D. AU/SADC Stumbling Blocks

The discussion that follows examines conflicts in the law *jus ad bellum* between the AU and SADC. The law of SADC as prescribed in the SADC Organ on Politics, Defense and Security¹⁷⁰ and the SADC Protocol on Politics, Defense and Security Co-operation contradicts the law of AU and of ECOWAS.¹⁷¹ SADC law permits, among other things, intervention to remedy war crimes, crimes against humanity, and genocide,¹⁷² and to forestall military coups or other threats to legitimate authority,¹⁷³ but forbids any such action absent *prior authorization* from the UNSC. One of the guiding principles of the SADC Organ is that "military intervention of whatever nature shall be decided upon only after all possible political remedies have been exhausted in accordance with the Charter of the OAU and the United Nations."¹⁷⁴ This essentially means that intervention may not take place in contravention of U.N. law, namely, Article 53(1), barring enforcement action "without the authorization of the Security Council."¹⁷⁵ This contention is supported by Article 11(3)(d) of the SADC Protocol, which states that the SADC Summit "shall resort to enforcement action only as a matter of last resort and, in accordance with Article 53 of the United Nations Charter, only

¹⁶⁸ *African Peace Protocol*, *supra* note 2, art. 7(r), at 170.

¹⁶⁹ Draft Organization of African Unity Council of Ministers, May 28-31, 1997, CM/Draft/Dec. (LXVI) rev. 1, at 18.

¹⁷⁰ The SADC Organ on Politics, Defense and Security was adopted in Gaborone, Botswana, June 28, 1996. *See generally*, *Southern African Development Community (SADC) Organ on Politics, Defense and Security* (June 28, 1996), reprinted in *AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN, AND JUDICIAL ISSUES* 323 (Jeremy I. Levitt ed., 2003) [hereinafter *SADC Organ*].

¹⁷¹ The SADC Protocol on Politics, Defence and Security Co-Operation was adopted in Blantyre, Malawi, Aug. 14, 2001, but has yet to receive the necessary ratifications to come into force.

¹⁷² *SADC Protocol*, *supra* note 3, art. 11(2)(b)(i), at 317.

¹⁷³ *Id.* art. 11(2)(b)(ii). Article 11 also permits intervention to forestall any "conflict which threatens peace and security in the Region or in another member state." *Id.* art. 11(2)(b)(iv).

¹⁷⁴ *SADC Organ*, *supra* note 170, princ. G, at 327.

¹⁷⁵ U.N. CHARTER, *supra* note 118, art. 53(1), at 19.

with the authorization of the United Nations Security Council.”¹⁷⁶ As a result, SADC may not “legally” partake in AU-sanctioned interventions (peace enforcement) without UNSC approval. This fact is somewhat troubling because the SADC Protocol, which was adopted over a year after the AU Constitutive Act, did not make reference to or consider the law permitting intervention in the treaty.

The legal, sociopolitical, and military implications of this conflict are serious, especially considering the geopolitical sensitivities among African states, which often are triggered by intervention and more nuanced security policy considerations (e.g., heated debates between South Africa and Zimbabwe over the standing of the SADC Organ).¹⁷⁷ Even so, the member states of the AU have agreed to take “*all necessary measures . . . to implement its provisions* and to ensure the establishment of the organs [e.g., the AUPSC] provided for under the Act”¹⁷⁸ The member states of the SADC form a critical block in the AU and are obliged to ensure that its principles are adhered to, its objectives are fulfilled, and its provisions are abided by. Therefore, AU law arguably should be considered supreme law trumping inconsistent regional, national, and local law. The member states of the AU—including the SADC—appear to have a positive duty to amend the laws of their states and regional organizations to comply with AU law.

IV. FINAL THOUGHTS

African leaders must address the known unknowns about the AUPSC in order for it to be a viable and credible conflict mechanism. While its aspiring principles and operational objectives are indeed progressive, they are useless absent the will to act by AU member states. While the AUPSC Protocol complements and adds content and structure to the AU’s New Partnership for Africa’s Development (NEPAD) Peace and Security and Democracy and Political Governance initiatives, particularly its commitment to “manage all aspects of conflict” through, among other things, “peacemaking, peacekeeping and peace enforcement,”¹⁷⁹ in order for it to serve its designated purpose—to mitigate human suffering—it must be improved. The fact that African leaders did not make provision for the OAU MCPMR or an AUPSC-like mechanism in the Constitutive Act is unforgivable, considering that the maintenance of peace and security and intervention in Africa are key objectives¹⁸⁰ and principles¹⁸¹ of the Act.¹⁸² One analyst has noted that this

¹⁷⁶ *SADC Protocol*, *supra* note 3, art. 11(3)(d), at 317-18.

¹⁷⁷ *SADC Organ*, *supra* note 170, at 323-25.

¹⁷⁸ Constitutive Act, *supra* note 11, art. 33(3) (emphasis added).

¹⁷⁹ See *NEPAD*, *supra* note 8.

¹⁸⁰ Constitutive Act, *supra* note 11, art. 3(f)-(h).

¹⁸¹ *Id.* art. 4(h)-(f).

omission may be due to the “haste with which the drafters [of the Act] had to meet the impatient deadlines set by Libya”¹⁸³ Whatever the case may be, let us hope that the AUPSC is a suitable remedy for such an omission.

Another core problem with the AUPSC is that it was never formally reviewed by a committee of legal experts,¹⁸⁴ which may explain the blatant conflicts of law and inconsistent terminology among the AU, ECOWAS, and SADC. For example, the differences, if any, between the terms “intervention” in AU law,¹⁸⁵ “humanitarian intervention” in ECOWAS law, and “peace-enforcement” in SADC law need to be worked out. This point is particularly important since the AUPSC is mandated to promote cooperation and coordinate and harmonize policy with regional organizations.¹⁸⁶ Here there is also a need for the AUPSC to lead the other regional organizations in fashioning African peacekeeping, peace enforcement, and intervention doctrine that is borne out of the African experience—the experiences of ECOWAS Cease-Fire Monitoring Group (ECOMOG) in Liberia, Sierra Leone, Guinea, Guinea-Bissau, and currently Côte d’Ivoire; MISAB in the Central African Republic; and SADC in Lesotho. An African doctrine would provide a basis on which AU member states could train and equip ASF-designated forces, allowing for greater uniformity and perhaps operational preparedness. On this issue, the establishment of AU liaison offices in or exchange of staffers with the ECOWAS, SADC, IGAD, and other regional conflict mechanisms is critical.¹⁸⁷ Had an AU office been set up in the ECOWAS, its role in resolving the ongoing conflict in Liberia (1999-2003) may have been more substantial—whether mobilizing resources, serving as a conduit between the United States and ECOWAS on the precise role of the former in resolving the crisis, or playing a greater role in diplomatic negotiations with the warring factions. As it currently stands, what incentive does the Nigerian-led ECOWAS Mission in Liberia (ECOMIL) have to defer to the policy prerogatives of the AU on the Liberian crisis or any other?¹⁸⁸ While the AU may lack the economic resources to respond rapidly to Africa’s conflicts, it

¹⁸² Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT’L L.J. 69, 122 (2002).

¹⁸³ Jakkie Cilliers, *Commentary: Towards the African Union*, AFR. SECURITY REV. 10-2 (2001), at 105, available at <http://www.iss.co.za/Pubs/ASR/10No2/Cilliers.html> (last visited Nov. 28, 2003).

¹⁸⁴ Telephone Interview, *supra* note 120.

¹⁸⁵ Neither the Constitutive Act nor the AUPSC Protocol defines “intervention.”

¹⁸⁶ *African Peace Protocol*, *supra* note 2, art. 16(1)(a), at 180.

¹⁸⁷ *Id.* art. 16(8), at 180-81.

¹⁸⁸ On August 4, 2003, the first 200 of what will likely be a 2,000-person force landed in Monrovia to keep the peace. *LIBERIA: Nigerian Troops Arrive, Delay Entry into Monrovia*, UNITED NATIONS INTEGRATED REGIONAL INFORMATION NETWORK (IRIN), Aug. 4, 2003, at http://www.irinnews.org/report.asp?ReportID=35781&SelectRegion=West_Africa&SelectCountry=LIBERIA (last visited Nov. 28, 2003). The AU’s role in forestalling the conflict in the country has been minimal—even as it relates to authorizing the intervention.

still can play a significant political role—whether it is preventive diplomacy, cease-fire monitoring, or *authorizing* intervention.¹⁸⁹

The member states of the African Union must move forward with ratifying the AUPSC Protocol and, in the process, amend it to address the aforementioned issues. The mere adoption of the AUPSC Protocol signals a progressive shift and willingness by African leaders to at least in a minimal fashion contract away state sovereignty for wider human and developmental ends.¹⁹⁰ Unless the AU and its partners take a holistic, action-oriented approach to ending the seemingly endless cycle of conflict throughout Africa and seek practicable ways to remedy resulting devastating socioeconomic and health impacts, particularly the violence against women and girls and the HIV/AIDS pandemic, the human condition of the majority of Africans may not be reversible and elements of the continent's sociopolitical architecture may become extinct.

¹⁸⁹ Since the AU became operational in July 2002, it has not featured prominently in authorizing uses of force in Africa.

¹⁹⁰ Let us hope that the AUPSC Protocol is more welcomed than the Protocol on the Establishment of an African Court on Human and Peoples' Rights, which seven years after its adoption in 1997 has yet to receive the necessary ratifications to come into force. The following states have signed and ratified the Protocol: Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda. *Report of the Interim Chairperson of the Commission of the Statues of AU Treaties* (as of Feb. 10, 2003), Executive Council, EX.CL/14 (II Sess.) (Mar. 3-6, 2003) (document on file with author).

