The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention

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One of the philosophical bases for cooperation under the new institutional framework of the African Union was that all member States of the Union had to observe certain fundamental values and standards, including respect for human rights, democratic governance, and the condemnation of unconstitutional changes of governments. A member State failing to observe those standards could be subject to political and economic sanctions.[1] Moreover, and what is of interest to us here, the Constitutive Act of the Union (the Act) provides for the right of the Union, in certain cases, to intervene in a member State and for the right of a member State to request such intervention. Article 4 of the Act provides for:

- "(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity"; and
- "(j) the right of Member States to request intervention from the Union in order to restore peace and security".

The Protocol on Amendments to the Constitutive Act, which was adopted in February 2003 and is not yet in force, amends Article 4 (h) by adding at the end of the sub-paragraph the words "as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council".[2]

This analysis examines the right of intervention within the framework of the African Union. It will raise a number of questions, including how the right of intervention is to be understood and why the heads of State and government thought it necessary to include it in the Constitutive Act, the only

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international treaty containing such a right. How did the OAU, the precursor of the African Union, respond to the issues for which intervention is now being envisaged and what lessons are to be learned from that experience? How will this right be implemented and what practical, legal and procedural difficulties are likely to arise, and how will they be surmounted? What will be the role of the United Nations, the only organization with the primary responsibility for the maintenance of international peace and security, and the specific right under international law to authorize intervention?

The right of intervention

The right of humanitarian intervention has always been a controversial right in international law. As Corten[3] noted, the term "right" or "duty" of "intervention" — to which the word "humanitarian" was soon added — was coined in the late 1980s by Mario Bettati, Professor of International Public Law at the University of Paris II, and by the French politician Bernard Kouchner, one of the founders of the aid organization *Médecins sans frontières*. He recalls that — as Kouchner put it — they were taking issue with "the old-fashioned theory of State sovereignty, used to fend off criticism of massacres". Corten notes that the idea caught on quickly, especially with the emergence of a new world order in which values like democracy, the rule of law and respect for human rights were supposed to be top priorities. The need to help peoples in distress would mean that everyone had a "duty to assist a people in danger" which would override the traditional legal rules, such as the principle of non-intervention. Corten concludes that where a massive violation has occurred, retaliatory measures and reprisals can be taken in political, diplomatic, economic and financial ways.

Humanitarian intervention has been defined by the Danish Institute of Foreign Affairs as "coercive action by States involving the use of armed force

1 Art. 23 (2) of the Constitutive Act provides: "... any Member State that fails to comply with the decisions and policies of the Union 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."

2 Art. 4 of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 3 February 2003. The Protocol shall enter into force thirty days after the deposit of instruments of ratification by a two-thirds majority of the Member States. The Protocol also amends Article 5 of the Constitutive Act to include the Peace and Security Council as one of the organs of the Union.

3 See O. Corten, "Un droit d'ingérence?", *Revue générale de droit international public*, Vol. 95, 1991, p. 664.

in another State without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law."[4]

In its report entitled *The Responsibility to Protect*, the International Commission on Intervention and State Sovereignty (ICISS)[5] made a deliberate choice not to adopt the terminology "humanitarian intervention", preferring to refer to either "intervention" or "military intervention" "for humanitarian protection purposes".[6] The approach taken by the International Commission was informed by a number of factors, including the controversy and lack of precision or common understanding of the meaning of the term "humanitarian intervention", but also to respond to the position taken by humanitarian agencies, humanitarian organizations and humanitarian workers towards any militarization of the word "humanitarian". By taking this approach, the Commission was also attempting to respond to the suggestion that the use of the word "humanitarian" tended to imply that the action taken or about to be taken was defensible, even when that was not the case. In addition, the Commission wanted readers of the report to look at the larger issues involved in the sovereignty-intervention debate, including the need to redefine and re-conceptualize the issues involved in intervention of any kind. The Commission expressed the view that any action taken against a State or its leaders, without its or their consent, for purposes that are claimed to be humanitarian or protective in nature, amount to intervention.[7]

According to the Danish Institute for Human Rights, what underlies the humanitarian debate is a perceived tension between the values of ensuring respect for fundamental human rights and the primacy of the norms of sovereignty, non-intervention and self-determination which are considered

4 Quoted by H. Corell, (UN Legal Counsel), "To intervene or not: the dilemma that will not go away", keynote address to the Conference on the Future of Humanitarian Intervention, Duke University 19 April 2001, unpublished. Also see Danish Institute of International Affairs 1999, *Humanitarian Intervention: Legal and Political Aspects*, submitted to the Minister of Foreign Affairs, Denmark, 7 December 1999 (called the "Danish Institute Report").

5 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Commission on Intervention and State Sovereignty, International Development Research Centre, Ottawa, 2001. The report is also available at <http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf>.

6 *Ibid*., pp. 8-9, paras. 1.37 to 1.41.

7 *Ibid*., p. 8, para. 1.38.

essential factors in the maintenance of peace and international security.[8] Penelope C. Simmons has pointed out that whilst these values are set out in the United Nations Charter as fundamental purposes of the United Nations, with mechanisms therein for the protection and enforcement of international peace and security (i.e. Article 2(4) and Chapter VII), there are no equivalent provisions or mechanisms in the Charter for the protection of human rights. She notes that there appears to be no agreement among the legal scholars surveyed that the Security Council has a legal right to authorize the use of force to prevent widespread deprivations of internationally recognized human rights and that international human rights and humanitarian norms have watered down the concept of sovereignty.[9]

The establishment of the African Union

The establishment of the African Union (the Union) was inspired and influenced by a number of factors, ranging from historical to socio-economic, as well as by developments around the world. For a start, frustration was expressed with the slow pace of socio-economic integration on the African continent. Secondly, African leaders felt that the many problems the continent was confronted with required a new way of doing things; such a new approach should include building partnerships between governments and all segments of civil society, in particular women, youth and the private sector, as well as strengthening the common institutions and providing them with the necessary powers and resources to enable them to discharge their respective mandates effectively.[10] Furthermore, the leaders were of the view that there was an imperative need to find collective ways and means of effectively addressing the many grave problems of the continent such as endemic poverty, HIV/AIDS and armed conflicts, as well as responding to the challenges posed by a globalizing and integrating world. The leaders were generally in agreement on the need to promote and consolidate African unity, to strengthen and revitalize the continental organization to enable it to play a more active role and keep pace with the political, economic and social developments taking place within and outside the continent, to

8 See note 5, pp, 14-15.

9 P.C. Simons, *Humanitarian Intervention: A Review of Literature*, Ploughshares working paper 01-2, also available at <www.ploughshares.ca/CONTENT/WORKING%PAPERS/wp012Ibid>, pp. 3-4.

10 Preamble of the Constitutive Act Establishing the African Union, adopted by the OAU Assembly of Heads and Government, Lomé (Togo), 11 July 2000, available at <www.africa-union.org>.

eliminate the scourge of conflicts on the continent, and to accelerate the process of implementation of the Treaty Establishing the African Economic Community.

On the strengthening of African unity, Colonel Muammar Gaddafi had submitted two alternative proposals directly to the Sirte Summit, one for the establishment of the United States of Africa (the USA model), and the other for the Union of African States (the former Soviet Union model). The leaders discussed the proposals made by Colonel Gaddafi and the predominant opinion was that Africa was not yet ready for a federation or confederation, as there were many preparatory activities that had to be undertaken before these proposals could be actualized. At the end of the debate, the leaders agreed that an African union be established in conformity with the ultimate objectives of the OAU Charter and the Treaty Establishing the African Economic Community (Abuja Treaty), and that the process of implementation of the Abuja Treaty be accelerated by shortening the periods it specified and ensuring the speedy implementation of all the institutions provided for therein, such as the Pan African Parliament, the Court of Justice and the financial institutions. So although there was no unanimity on the manner of responding to the challenges and problems commonly identified, the leaders were nevertheless able to fashion a compromise between those who preferred a revolutionary approach and those who preferred a gradualist approach.[11] The response by the leaders entailed not only the strengthening of existing mechanisms but also a re-examination of the philosophical, legal and other bases for closer cooperation.

At the different fora — of Experts/Permanent Representatives, the Ad-hoc Ministerial Committee, the Executive Council and the Assembly of the Union — at which the various proposals by member States were discussed, the necessity for the provision on intervention was premised on the original proposal by Libya to add the words "as well as in cases of unrest or external aggression in order to restore peace and stability to the Member of the Union". In the Explanatory Memorandum submitted by Libya, the rationale for this proposal was given as ensuring "the sovereignty and territorial integrity of the African Continent as well as the sovereignty and territorial

11 The difference in approach was characterized as being between those that wanted to run and those who wanted to walk by President Thabo Mbeki in his intervention during the debate at the 4th Extra-Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU), Sirte (Libya), 9 September 1999.

integrity of each Member State".[12] Thus, the proposer was not concerned about propping up unpopular regimes but rather the consequences of external aggression. In discussing this proposal, many delegations carried the day by pointing out that accepting it was like putting the cart before the horse, since the concerns expressed by the proposer would in any event be addressed within the framework of the comprehensive common defence and security framework envisaged by the Constitutive Act. However, many other delegations pointed out that the threshold set out in the Constitutive Act for a decision on intervention was too high and excluded situations that threatened regional or national peace and security and in which the Assembly would have otherwise decided on intervention. The additional clause to Article 4 (h) was therefore intended to give the African Union the necessary flexibility in deciding on intervention.

Intervention within the framework of the African Union

Why did the leaders of the African Union insert the right of intervention?

The decision by the Assembly of Heads of State and Government of the OAU who adopted the Constitutive Act of the African Union to incorporate the right of intervention in that Act stemmed from concern about the OAU's failure to intervene in order to stop the gross and massive human rights violations witnessed in Africa in the past, such as the excesses of Idi Amin in Uganda and Bokassa in the Central African Republic in the 1970s and the genocide in Rwanda in 1994. Indeed, this concern about their inability to prevent or halt the Rwandan genocide had already led the said heads of State and government to set up an International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events.[13] This panel blamed the neighbouring countries, but also the OAU, the United Nations and the international community at large for failing to call the killings in Rwanda by their proper name, namely genocide and for failing to stop the

12 The Memorandum (EX/Assembly/2 (I) went on to state: "Taking into account that one of the objectives and principles of the African Union is to promote peace and security of the continent, when the proposal for the establishment of an African defence and security framework comes into being, there will be no need for agreements with non-African States. In any case, the Constitutive Act in article 4 (d) makes it clear that there has to be a common defence policy for the African Union".

13 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, at the proposal of President Zenawi of Ethiopia. Its mandate was to "investigate

violence. Along the same lines, some of the heads of State might have recalled the ringing words of President Museveni of Uganda in his maiden speech to the Ordinary Session of Heads of State and Government of the OAU in 1986, in which he accused them of condoning the wholesale massacre of Ugandans by Idi Amin under the guise of not interfering because it was an internal affair of Uganda. Referring to previous regimes in his country, he stated:

> "Over a period of 20 years three quarters of a million Ugandans 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 in 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 inviolability of human life."[14]

Similarly, in his address to the 29th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Cairo in June 1993, President Aferwerki of Eritrea more or less repeated Museveni's accusation by stating that the OAU had failed the people of Africa and the people of Eritrea and was therefore a useless organization.[15]

In addition, the OAU had been hamstrung in its peacekeeping and peacemaking efforts by the non-cooperation of member States or of non-

the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region, as part of efforts made at averting and preventing further widespread conflicts in the… Region". The OAU requested the panel to "establish the facts about how such a grievous crime was conceived, planned, and executed, to look at the failure to enforce the United Nations Genocide Convention in Rwanda and in the Great Lakes Region, and to recommend measures aimed at redressing the consequences of the action of the genocide and at preventing any possible recurrence of such a crime". The panel was composed of H.E. Sir Quett Ketumire Masire (Chairperson; former President of Botswana), H.E. General Amadou Toumani Toure (former Head of State of Mali), Lisbet Palme (Chairperson of the Swedish Committee for UNICEF and Expert on the UN Committee on the Rights of the Child), Ellen Johnson-Sirleaf (former Liberian government minister; former Executive Director of the Regional Bureau of Africa of the United Nations Development Programme), Justice P.N. Bhagwati (former Chief Justice of the Supreme Court of India), Senator Hocine Djoudi (former Algerian Ambassador to France and UNESCO, Permanent Representative to the UN), and Ambassador Stephen Lewis (former Ambassador and Permanent Representative of Canada to the UN, former Deputy Executive Director of UNICEF). For more details see: *Rwanda:The Preventable Genocide*, IPEP, OAU, Addis Ababa, 2000.

14 President Museveni of Uganda, 22nd Ordinary Session of the OAU Assembly of Heads of State and Government, Addis Abada, Ethiopia, July 1986.

15 As fate would have it, the peace agreement between Ethiopia and Eritrea was negotiated and facilitated by the OAU.

State parties to conflicts. There are consequently a number of low-intensity internal conflicts in which the Central Organ of the OAU Mechanism for Conflict Prevention and Management never discussed the issue or became engaged in any way because the member State concerned indicated that the matter was being handled satisfactorily and therefore did not need to be discussed at the regional level. In any event the consent of the parties to conflict, which was prerequisite for engagement by the OAU, was not always forthcoming. In one particular case a team was dispatched to Somalia for discussions with the warlords there, but had to be called back whilst in transit in Nairobi, because one of the powerful warlords woke up to the fact that an Assistant Secretary General at the OAU was a Somali national who had served in a senior capacity in the government of that country.[16]

Another problem of the OAU was that heads of State avoided criticizing each other, which led not only to disappointment but to accusations of the OAU Assembly being a "Heads of State Club". In response to such allegations, the leaders collectively adopted a number of forward-looking initiatives towards greater democratization of their societies, respect for human rights, popular participation and transparency in the management of public affairs. These initiatives include the 1990 Declaration of Heads of State and Government of the OAU on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World[17] and the

16 Abdullahi Osman, OAU Assistant Secretary General from 1995 to 2000, had previously served his government in various capacities ranging from Solicitor General to Attorney General, Permanent Representative to the UN in Geneva and subsequently Permanent Representative to the UN in New York.

17 The 1990 Declaration was adopted by the 29th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, 9-11 July 1990. It took into account the proposals contained in the Report of the Secretary General on the Fundamental Changes Taking Place in the World and their Implications for Africa: Proposals for an African Response. In the 1990 Declaration, the leaders, noting that the socio-economic situation remained precarious, expressed their determination, *inter alia*, to lay a solid foundation for a self-reliant, human-centred and sustainable development on the basis of social justice and collective self-reliance. They noted that the process of socio-economic transformation and integration could not be realized without promoting popular participation of the peoples in the processes of government and development guaranteeing human rights and the rule of law and ensuring the involvement of all, including in particular women and youth in the development efforts. They accordingly recommitted themselves to the further democratization of their societies and to the consolidation of democratic institutions in their countries, as well as to working together towards the speedy resolution of all conflicts on the continent and to making renewed efforts to eradicate the root causes of the refugee problems in Africa. The leaders also reaffirmed their commitment to reviving the ideals of Pan-Africanism and committed themselves on behalf of their governments and peoples to strengthening unity and solidarity among their countries and peoples (paras. 5, 8, 10, 11 and 12).

1994 Cairo Agenda for Action on Re-launching Africa's Economic and Social Development. Both instruments underscored the centrality of democracy, good governance, respect for human rights, popular participation, peace, security, stability and justice in Africa's socio-economic development.[18]

When setting up the African Union, the heads of State thus intended to endow their continental organization with the necessary powers to intervene if ever the spectre of another Rwandan genocide loomed on the horizon.

The reasons for intervention and the organs responsible for deciding on intervention

The Assembly of the Union, which is composed of heads of State and government or their duly accredited representatives, is the supreme organ of the Union.[19] It is that organ that decides on intervention as provided for in Article 4 (h) of the Constitutive Act in respect of war crimes, genocide and crimes against humanity. Once the Protocol on Amendments to the Constitutive Act comes into force, this list will also include the notion of a "serious threat to legitimate order or to restore peace and security to the Member State of the Union upon the recommendation of the Peace and Security Council." The clause added to the Protocol allows the Peace and Security Council — which will be in continuous session — at its three operational levels of permanent representatives, ministers, and heads of State or government to recommend that the Assembly of the Union 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. The Protocol or the proposed Rules of Procedure have not defined what these situations could be, but a number of theoretical issues could be raised. Would the Assembly decide on intervention where a total breakdown of law and order leading to massive population displacement was imminent? Would the situation be different if the

18 The Cairo Agenda for Action (AHG/Res. 236 (XXXI) was adopted by a Special Session of the Council of Ministers on Economic and Social Issues in African Development held in Cairo in 1994 and was endorsed by the 31st Ordinary Session of the Assembly of Heads of Sate and Government, Addis Ababa, 26-28 June 1995. The leaders recognized and resolved that democracy, good governance, peace and security, stability and justice are among the most essential factors in African socio-economic development. The leaders undertook to ensure, *inter alia*, the speedy promotion of good governance, characterized by accountability, probity, transparency, equal application of the rule of law and a clear separation of powers, as an objective and a condition for rapid and sustainable development in Africa (p. 6, para. 10).

19 Constitutive Act of the African Union, Art. 6.

government's refusal to hand over power after losing an election led to chaos and anarchy in the member State? Would the Assembly decide on intervention to protect a regime, whether democratically elected or not, from the wrath of its own people, or rather to protect the people from the regime? Sturman and Baimu have argued that this amendment is inconsistent with the other grounds for intervention that aim to protect the African peoples from gross violations of human rights, whereas by contrast, in their view, the amendment aims to protect State security rather than human security.[20] My own view is that in deciding on intervention, the fundamental values and standards set out in 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 (CSSDCA) will be taken into account. This would necessarily mean that intervention would be justified only where, in the opinion of the leaders supported by popular public opinion as may be expressed by the Pan African Parliament[21] and the Economic Social and Cultural Council,[22] such intervention would conform to the hopes and aspirations of the African peoples. Clearly, intervening to keep in power a regime that practises bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the values and standards that the Union has set for itself. Indeed, considering the trend that has emerged over the last decade in the discussions of the OAU/AU's policy organs, any unpopular intervention or the possibility of a decision to intervene without a clear mission and purpose of restoring the values and standards referred to above could be ruled out. Furthermore, decision-making by the Assembly is by consensus or, failing which, by a two-thirds majority of member States eligible to vote.[23]

20 K. Sturman and E. Baimu, "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, p. 5.

21 The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament, adopted in Sirte, Libya, in March 2001, has received the required number of ratifications and will enter into force on 14 December 2003. The inaugural session of the Pan African Parliament is planned for March 2004. During the first five years the Parliament will have a consultative and advisory role and its members (five per Member State) will be elected or designated by the national parliaments. Thereafter, its members will be elected by universal adult suffrage and it will have full legislative powers (Articles 2-4).

22 The Economic Social and Cultural Council is an organ of the African Union established by Article 5 of the Constitutive Act. It is composed of social and professional groups in Member States (civil society) and has an advisory role to all organs of the Union (Art. 22).

23 Art. 7 of the Constitutive Act and Rule 18 of the Rules of Procedure of the Assembly.

The addition to Article 4 (h) was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of member States. It should be borne in mind that the Peace and Security Council was intended, and should be able, to revolutionize the way conflicts are addressed on the continent.

The Peace and Security Council (PSC), a new organ, is intended to provide a more robust mechanism than its predecessor, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution. The PSC was established by a Protocol adopted in Durban in July 2002, which at the time of writing this article has not yet come in force but is expected to do so within the next few months.[24] It will be responsible for dealing with the scourge of conflicts that has forced millions of Africans, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. The PSC, which operates at the levels of ambassadors, ministers, and heads of State and government, is composed of fifteen members, five elected for two years and five others for three years. It is expected to consider the right to intervene when a situation so warrants and make appropriate recommendations to the Assembly of the Union for possible intervention.

In accordance with the provisions of the Constitutive Act, the Assembly will decide on intervention at two levels: on its own initiative (Article 4 (h)) and at the request of a member State (Article 4 (j)). This approach will facilitate decisions on intervention, since the Assembly is not obliged to wait for the consent of the member State concerned, as is now the case with the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of Conflicts. Article 4 (j) refers, unlike Article 4 (h), to member States and not to a member State, and therefore does not expressly restrict the right to request intervention of the Union to the member State concerned.

24 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, held in Durban, South Africa on 9 July 2002, available at <www.africa-union.org>. The Preamble to the Protocol notes that no single internal factor has contributed more to the social economic decline of the continent and the suffering of the civilian population than the scourge of conflicts within and between States. The Protocol, which requires ratification by a simple majority of Member States (27), has been ratified by twenty-three Member States as at 10 December 2003. The additional four ratifications will, it is hoped, be received within the next few months, to facilitate election of the members by the Executive Council in March 2004 upon delegation of power by the Assembly of the Union.

In deciding on intervention, the competent organs of the Union will have to either establish threshold criteria along the lines proposed in *The Responsibility to Protect*,[25] or deal with the matters arising on a case-by-case basis. The ICISS had proposed the following "conscience-shocking situations" as justifying military intervention for humanitarian protection: acts defined by the provisions of the 1948 Genocide Convention, the threat or occurrence of large-scale loss of life, diverse manifestations of ethnic cleansing, crimes against humanity and violations of the laws of war, and situations of State collapse and the resultant exposure of the population to mass starvation and/or civil war. Then there will be issues of evidence, last resort, proportional means and reasonable prospects of success.[26]

The intervention dilemma: obstacles and problems with implementation

Legal, procedural and practical problems for implementation

The ICISS has characterized humanitarian intervention as "controversial both when it has happened — as in Somalia, Bosnia and Kosovo — and when it has failed to happen, as in Rwanda",[27] indicating that several points of criticism have been raised with regard to the actual implementation of this concept.

Deyra argues that humanitarian intervention has been inconsistently applied, and says that the cases in which the indignation of the outside world has led to intervention have been selective and carefully chosen, namely Iraq, Somalia, and ex-Yugoslavia. He notes that there are many more cases where the humanitarian cry has not arisen, such as Myanmar (Burma), Tibet, Burundi, Sudan, Chechnya, Liberia, Sierra Leone, Mozambique, Colombia and Algeria, and so many others that the media were not able, or willing, to bring to public attention.[28]

A number of commentators have contended that intervention is an unacceptable assault on State sovereignty. Portella has argued that NATO's

25 *The Responsibility to Protect, op. cit.* (note 5), p. 32, paras. 4.18 and 4.20.

26 *Ibid*., pp. 34-36, paras. 4.32 - 4.43.

27 *Ibid*., p. 1, paras. 1.1 to 1.4.

28 M. Deyra, "Droit d'ingérence", in R. Gutman and D. Reiff, *Crimes de Guerre*, Editions autrement, 1999, translated into English by F. Hodgson from the original French edition. See <www.crimesofwar.org/thebook/intervention-right-of.html>.

29 C. Portella, "Humanitarian intervention, NATO and international law: Can the institution of humanitarian intervention justify unauthorized action?", research paper published by the Berlin Information Centre for Transatlantic Security, December 2000, p. 3.

action in Kosovo, without authorization by the UN Security Council, breached international law.[29] In his 2000 Millennium Report to the UN General Assembly, Secretary-General Kofi Annan put some of these concerns in a proper perspective:

> "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?"[30]

The ICIS report posited that by joining the United Nations, member countries were assuming an international obligation to respect the fundamental values on which the organization is based and to conduct themselves as a responsible member of the community of nations: "in signing the Charter [the State] accepts the responsibilities of membership flowing from the signature. There is no transfer or dilution of sovereignty. But there is a necessary re-characterisation involved: from sovereignty as control to sovereignty as a responsibility in both internal functions and external duties."[31]

In the case of failed States accompanied by chaos and consequent loss of life as in Somalia, intervention becomes a necessity and not an academic issue. However, the African Union will have to bear in mind the high costs involved in such an intervention and the prospects that it may be a long-haul affair. Furthermore, intervening in one failed State could set a precedent that may have to be replicated in other countries more often than the capacities of the AU and its member States would allow. As Cilliers and Sturman have argued:

> "The concept of State 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."[32]

In providing for a right of intervention, the African Union has moved away from non-interference or non-intervention — which is a cardinal principle in both the United Nations Charter and the Constitutive Act of the African Union — to what could be referred to as the doctrine of "non-indifference". This

30 Quoted in *The Responsibility to Protect*, *op. cit.* (note 5), p. 2, para. 1.6.

31 *Ibid.*, pp. 13-14, paragraphs 2.14 to 2.20.

32 J. Cilliers and K. Sturman, "The right of intervention: Enforcement challenges for the African Union", *African Security Review*, Vol. 11, No. 3, 2002, p. 3.

would conform to the idiom in most African cultures that you do not fold your hands and just look on when your neighbour's house is on fire. As Maluwa noted:

> "in an era in which post-independent Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes and crimes against humanity".[33]

The relation with and the role of the United Nations

The United Nations is the only international organization with the right to decide on enforcement action.[34] Chapter VII of its Charter allows the Security Council to take enforcement action in cases of a threat to or breach of international peace and security. Some commentators have therefore questioned the right conferred on the African Union by its Constitutive Act to decide on intervention outside the UN framework and have raised the issue of what would be the role of the United Nations in such interventions. Article 2(4) of the UN Charter states that: "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." As Penelope C. Simons has observed, this general prohibition on the use of force has been confirmed by the International Court of Justice in the *Corfu Channel Case* (1949) and the case concerning *Military and Paramilitary Activities in and against Nicaragua* (1986) and is considered to be a rule of *jus cogens*, i.e. a peremptory norm of international law from which no derogation is permitted.[35]

The African Union is classified by the United Nations as a regional organization within the meaning of Chapter VII of the Charter of the United Nations, whilst the regional mechanisms, such as ECOWAS, are recognized as sub-regional organizations. However, the African Union will also lead to political and socio-economic integration as member States progressively cede their sovereignty. The issue of common values and standards

33 T. Maluwa: "Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union (2002)", *African Yearbook of International Law*, Vol. 9, 2001, p. 38.

34 Art. 53 of the UN Charter states that: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

35 P.C. Simons, *op. cit.* (note 9), pp. 4-5.

therefore becomes even more relevant. In deciding on intervention, the African Union will have to consider whether it will seek the authorization of the UN Security Council as it is required to do under Article 53 of the UN Charter. When questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand. This decision 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. Furthermore, the process of drawing up the Constitutive Act took place not long after the OAU Assembly of Heads of State and Government had adopted the Ouagadougou decision defying the sanctions imposed by the UN Security Council on Libya in connection with the Lockerbie crisis.[36] As argued elsewhere in this article, the leaders have shown themselves willing to push the frontiers of collective stability and security to the limit without any regard for legal niceties such as the authorization of the Security Council.

Some commentators have held that the intervention by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999 was not authorized by the UN Security Council and was thus illegal, to which United States Secretary of State Madeleine Albright responded that the behaviour of the Serb forces in Kosovo was a breach of the Geneva Conventions, the human rights conventions and, if the genocide continued, the Genocide Convention of 1948, all of which in her opinion provided an alternative source of legitimization for NATO action.[37] Similarly, when the Economic Community of West African States (ECOWAS) organized peacekeeping forces for Sierra Leone and Liberia, it took the decision and put it into effect without consulting the United Nations until later on. This was also the case when the countries of the Eastern Africa Region imposed trade and economic sanctions against Burundi in 1996, a measure subsequently endorsed and supported by the OAU.[38] It would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at that time.

36 Maluwa, *op. cit.* (note 33), pp. 7-8.

37 Portella, *op. cit.* (note 29), p. 3.

38 The sanctions were imposed following the *coup d'état* against the democratically elected government in that country and the assassination of its President Ndadaye.

The Protocol relating to the Establishment of the Peace and Security Council has mandated that organ to perform functions in the area, inter alia, of peace support operations and intervention, pursuant to Article 4 (h) and (j) of the Constitutive Act. In respect of Article 4 (h) it makes recommendations to the Assembly, whilst in relation to Article 4 (j) it approves the modalities for intervention following a decision by the Assembly.[39] The Protocol also stipulates with regard to the management of intervention that the PSC shall cooperate with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security, and that, where necessary, recourse shall be had to the United Nations to provide the necessary financial, logistical and military support.

In the case of the ECOWAS peace-enforcement operations in Sierra Leone and Liberia, the greater part of the cost was picked up by the regional superpower Nigeria, which allegedly spent approximately 1 million US dollars a day in Sierra Leone alone.[40] The cost of interventions will no doubt be quite high, and the African Union, not being a very well endowed organization financially, will find that it will of necessity have to involve and work with the international community at large and the United Nations in particular for its operations to succeed. The average cost of sustaining peacekeepers is estimated at US$ 130 per day, excluding ordnance, equipment and transportation. This means that there will be an enormous financial burden attendant on any decision taken to intervene, which possibly will compel the African Union to call upon the United Nations to carry out its responsibility for the maintenance of international peace and security. There is also the problem of incompatible equipment, as has been observed with regard to the Ethiopian, Mozambican and South African contingents recently deployed in Burundi (AMIB — expected to be a brigade-size force of three battalions as well as a headquarters, air wing and support element, consisting all in all of approximately 2,500 personnel).

Quite apart from financial and logistical difficulties, there will no doubt be major political and other factors to be taken into account. For one thing, there is the basic challenge of political will at the Assembly level as well as at the level of the regions. It should be borne in mind that the situations requiring a decision to intervene or not will necessarily be those that

39 Articles 6 and 7 of the Protocol.

40 A. Adebajo, "From Cape to Cairo: Some perspectives on peace and security in Africa", Seminar paper delivered during the AU Brainstorming Session, held in Addis Ababa, Ethiopia, 25-28 October 2003, p. 5.

have shocked the psyche of the leaders, ordinary Africans, Pan African parliamentarians and the international community at large. The appreciation of the need for intervention may not be shared at all levels. There may also be instances in which the one country is protective of the interests of another and is opposed to intervention for that reason. There may also be instances when it is generally agreed that some form of intervention is necessary, but there is no agreement on its form or objective, its mandate and duration.

The ICIS had recommended that consideration should always be given to measures short of military action: in the military area, measures such as arms embargoes and ending military cooperation and training; in the economic area, financial sanctions, restrictions on income-generating activities, and restrictions on access to petroleum products and aviation; and, in the political and diplomatic area, the withdrawal of diplomatic representation and restrictions on travel, suspension of membership or expulsion, etc. As for military intervention, the ICIS recommended a criterion with six elements, namely: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. Simons has drawn attention to the argument by some writers that humanitarian intervention should be conducted only by States that do not stand to gain from it either politically or economically. She also refers to the Danish Institute Report's assertion that while complete disinterestedness of the interveners is the ideal, from a practical perspective "States may need more than humanitarian motives to be willing to intervene in a substantial way — be it a desire to avoid cross border refugee flows into the intervening state or even strategic or economic interests in re-establishing order in the target state". She also points out that once intervention has been decided upon it must, to be legitimate, be conducted strictly in accordance with the laws of armed conflict and in particular the principles and rules of international humanitarian law, which stipulate that the use of force must be both necessary and proportionate to the goal to be attained.[41]

It should be noted that the PSC Protocol provides for the establishment of an African Standby Force, composed of multidisciplinary contingents with civilian and military components, to carry out peace support operations under Article 4 (h) and (j) of the Constitutive Act. The Force will operate at three possible levels: as an African Force under the AU; as a Regional Brigade at the level of a Regional Mechanism for conflict prevention,

41 Simons, *op. cit*. (note 35), pp. 20-21.

management and resolution; or at the level of a lead nation intervening on behalf of the African Union. A lack of political will could make itself felt at all three political levels of intervention.

Conclusion

The right of intervention by decision of the African Union, as provided for in the Constitutive Act, was born of the inglorious record of massacres, gross and massive violations of human rights and large population displacements that have made the African continent host to the greatest number of refugees and displaced persons in the world, due to factors ranging from conflicts to bad governance, poverty, failed States and others.

However, the provision on the right of intervention, though well intended, will not be easy to decide upon or implement. It is to be 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 obviate the need for costly interventions. After all, any interventions are likely to be necessitated by failure to observe the values and standards enunciated in the Act, which are the very bedrock of the African Union.

Résumé

Le droit d'intervention en application de l'Acte constitutif de l'Union africaine : de la non-ingérence à la non-intervention

Ben Kioko

Le continent africain a vécu certains des crimes de guerre de masse, crimes contre l'humanité et crimes de génocide les plus odieux, le plus souvent perpétrés dans le contexte d'un conflit armé interne. Ces atrocités ont, pour la plupart, été commises sans que la communauté internationale n'élève la voix ou n'agisse. Face à cette situation, l'article 4 de l'Acte constitutif de l'Union africaine du 11 juillet 2000 reconnaît à l'organisation le droit d'intervenir sur le territoire d'un État membre en cas de crimes de guerre, de génocide et de crimes contre l'humanité, ainsi que le droit des États membres de solliciter une telle intervention. L'Acte constitutif de l'Union africaine est ainsi le premier traité international à énoncer un tel droit. La disposition tranche avec les notions traditionnelles du principe de non-ingérence et de non-intervention dans les affaires intérieures des États-nations.

Cet article examine le droit d'intervention dans le cadre de l'Union africaine. L'auteur se penche sur l'historique de la démarche qui a abouti à l'insertion de cette disposition dans l'Acte constitutif, ainsi que sur les principaux objectifs et les raisons de cette exception majeure au principe de la souveraineté territoriale. En outre, la mise en œuvre de cette disposition ainsi que les difficultés pratiques, juridiques et procédurales prévisibles sont analysées. Les paramètres du droit d'intervention en droit international, de même que les aspects politiques influant sur le débat doctrinal, sont étudiés en vue d'évaluer le fondement juridique de l'article 4 de l'Acte constitutif.

L'auteur fait valoir que, s'il est vrai que la mise en œuvre du droit d'intervention soulèvera très probablement des problèmes considérables, il n'en reste pas moins que la disposition met en évidence les valeurs fondamentales de l'Union africaine et les mesures énergiques que les États membres sont disposés à prendre pour garantir ces protections élémentaires à toute personne vivant en Afrique.