



AUCIL Journal of International Law

A Journal of The African Union Commission on International Law

1. The African Union Commission on International Law (AUCIL): An Elaboration of its Mandate and Functions of Codification and Progressive Development of International Law
Adelardus KILANGI
2. Regional Child Rights Instruments on the African Continent: The African Charter on the Rights and Welfare of the Child
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3. La Traite des Africains fut-elle Licite?
Une Problématique des Réparations de la Traite
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Current Members of the African Union Commission on International Law (May 2013)

Mr. Rafaà Ben ACHOUR, *Tunisia*

Mr. Daniel Makiese MWANAWANZAMBI, *Democratic Republic of the Congo*

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Mr. Kholisan SOLO, *Botswana*

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Mr. Filali KAMEL, *Algeria*

Mr. Adelardus KILANGI, *Tanzania*

Mr. Blaise TCHIKAYA, *Congo*

Mr. Cheikh Tidiane THIAM, *Senegal*

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Foreword

It gives me great pleasure and appreciation to introduce to you the **AUCIL Journal of International Law**, a journal of international law published by the African Union Commission on International Law (AUCIL). The AUCIL was established to be an independent advisory organ of the African Union on matters of international law, charged with the responsibility of facilitating the codification and progressive development of international law in the African continent. One of its functions in this regard is to promote the teaching, study, research and dissemination of international law and African Union law in the continent. Therefore, the publication of a scholarly journal like this is seen as one of the positive efforts towards the implementation of its functions.

It is particularly satisfying to note that, the publication and launch of the first issue of this Journal coincide with the 50th Anniversary celebrations of the OAU/AU, which are governed by the spirit of '**Pan-Africanism and African Renaissance**'. Indeed, a retrospection into the past fifty years in the continent of Africa have shown determination, resolve and sense of purpose as the continent struggled to address the numerous challenges that it, and its people, have faced. In these struggles, the relevancy and centrality of international law has been vivid, because right from the establishment of the OAU, and later the transformation into the AU, the continent has experienced many challenges requiring the invocation of international law. These include: colonialism and denial of the right to self-determination; apartheid in South Africa; border and boundary disputes; the problem of refugees and internal displacement; interference in the internal matters of African states, especially by

former colonial powers; the problem of unconstitutional change of government; intra-state and inter-state armed conflicts; violation of human rights including gender inequity; and the problem of unequal terms of trade between Africa and the developed world, among others. On the positive side, however, Africa is envisaging more integration and positive engagement with the rest of the world. In this paradigm, Africa is seen as a continent with greater opportunities for growth, given its vast resources and a young population, and driven by the vision of an '**Integrated, Prosperous, and Peaceful Africa**'. Again, in this endeavour the role of international law remains pertinent and well defined.

Therefore, the decision to publish this Journal is highly welcome, and it is my expectation that the Journal will serve as a forum for African scholars to publish scholarly articles and engage in scholarly discourses on matters of international law for the continent of Africa. It is further expected that these discourses will contribute to promoting the teaching, study, research, and wider appreciation of international law in Africa. However, while this initiative is welcome, it is understood that any such pioneer work has challenges. Therefore, the challenges that have been faced by the AUCIL in making this endeavour a reality are appreciated, and improvements are envisaged in the future. But, with determination, focus, and commitment, the Journal will become one of the major ways of contributing to the development of international law in Africa.

Dr. Nkosazana Dlamini-Zuma
Chairperson
African Union Commission
May 2013

The African Union Commission on International Law (AUCIL): An Elaboration of its Mandate and Functions of Codification and Progressive Development of International Law

Adelardus KILANGI¹

Abstract

The African Union Commission on International Law (AUCIL) was established as the chief advisory organ of the African Union on matters of international law, and its main functions are to deal with the codification and progressive development of international law in the continent of Africa. These functions appear similar to those of the International Law Commission (ILC), hence creating a confusion regarding what the AUCIL is actually supposed to do vis-à-vis what the ILC is supposed to do. But, it is also a fact that initiatives towards codification and progressive development of international law have been in existence in the world for more than 1,000 years. This fact also creates questions on what concept of codification and progressive development is the AUCIL going to subscribe, and what inspiration is it going to draw from. This paper, therefore, attempts to respond to some of these questions by attempting to elaborate on the mandate and functions of the AUCIL.

¹ Adelardus Kilangi is a Member (and currently the President) of the African Union Commission on International Law (AUCIL). He is also currently the Dean of the School of Law at St. Augustine University of Tanzania in Tanzania, and an Advocate of the High Court of Tanzania. He is also Member of the East African Law Society, the Pan African Lawyers Union, and the International Law Association.

1. Introduction

1.1 Background to the Establishment of the AUCIL: A Desire to Have a Consultative Body on Matters of International Law

One of the key pre-cursors to the aspirations in Africa of having a consultative body on matters of international law is the initiative to establish, in 1956, the Asian-African Legal Consultative Committee, currently known as the Asian-African Legal Consultative Organization (AALCO). It was established at a time when most the African countries had not yet attained independence. It was established by seven states, where Africa was represented by one state only and which was also part of a larger entity comprising of one state from Africa and one state from Middle East, in the form of the then United Arab Republic. The United Arab Republic was made up of Egypt and Syria. In the current membership, there are sixteen African Member States, which are: Egypt, Botswana, Cameroon, Gambia, Ghana, Kenya, Libya, Mauritius, Nigeria, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, and Uganda.²

The AALCO, since its inception, has worked on a wide range of area of international law issues including: law of diplomatic relations, extradition law, treatment of foreign nationals, state immunity and commercial transactions, issues of the law of the sea, Indian Ocean as a zone of peace, dual citizenship, ionosphere sovereignty, divorce laws, free legal aid, ILC's continuing agenda items, legality of nuclear tests, conflict of laws in international sales, double tax avoidance, law of treaties, Afro-Asian view of the UN Charter, Vienna Conventions of diplomatic and consular relations, Convention on Civil Liability for Nuclear Damage, law of outer space, principles of peaceful coexistence, law of international rivers, South West Africa cases, uniform transport law, legal advisory services in foreign offices, environmental law, territorial asylum, succession of States in respect of treaties, reciprocal assistance in respect of economic offences, issues of international trade law, regional cooperation and New International Economic Order, legal framework for joint ventures in industrial sector, mutual assistance in criminal matters, and debt relief.³

2 For more details consult the website of the ALCO at: <http://www.aalco.int>, accessed in April 2013.

3 Ibid.

In 1964, the period after the formation of the Organization of African Unity (OAU),⁴ there was another significant milestone where the very First Ordinary Session of the Assembly of Heads of State and Government of the OAU meeting in Cairo, Egypt from 17th to 21st July decided, among other things, to establish a Commission of Jurists as a Specialized Commission of the OAU, in accordance with Article XX of the Charter of the OAU.⁵ However, the Decision was not accompanied by any detailed elaboration of what the Commission would do. At best, the Commission was appointed and performed its work on *ad hoc* basis. One such occasion is when the OAU appointed five Jurists and tasked them to examine the proceedings of the Lockerbie case. Its main task therefore was to follow up on all aspects related to the legal proceedings of the case, in line with the decision of the Fifth Extraordinary Session of the OAU Assembly of Heads of State that took place at Sirte, Libya on 2nd March 2001,⁶ which was reiterated at the 37th Ordinary Session of the Assembly in Lusaka, Zambia, from 9th–11th July, 2001.⁷ The Commission started its work on 8th December 2001, and released its findings in July 2002.

In any case, from history of the continent of Africa, and especially immediately after the establishment of the OAU, the continent was already faced with many problems, most of which required the invocation of international law. These include, but not limited to: effects of slavery; colonialism and its effects; apartheid and its effects; refugees; privileges and immunities of the OAU, now that it was established as an international organization; relations between the OAU and other international organizations; and territorial and boundary disputes and conflicts. Others are: armed conflicts between countries and within countries; coup d'états and other unconstitutional changes of government; the problem of interference in the internal affairs of African states by big powers, especially former colonial powers; the need for economic cooperation, development and integration among African countries; concerns over the prevailing patterns in international trade and investment; massive violations of human rights within the African countries; and problems relating to democratic governance, among others.

4 Formed in 1963, the time when most of the African countries had attained independence.

5 Vide Decision AHG/Res. 3 (I).

6 Vide Decision EAQHG Dec 3 (v).

7 Vide Decision AHG/Dec.168 XXXVII.

That is why forty years after the idea of establishing a Commission of Jurists, the Executive Council of the African Union, at its Fifth Ordinary Session in July 2004, recommended to the Assembly of the Union, the need to establish a commission of international law as a permanent body of the AU.⁸ Indeed, the Assembly of the Union in its Session in January 2005 adopted a decision to establish an international law commission, which was to assume the name 'African Union Commission on International Law' (AUCIL).⁹ This was followed by development and finally adoption of the Statute of the AUCIL in 2009, through the Decision of the Assembly of Heads of State of the African Union in February 2009, during its 12th Ordinary Session.¹⁰ In July the same year (2009), eleven Commissioners were elected as members of the AUCIL.

1.2 Members of the AUCIL

Based on the election that was conducted in July 2009, in Sirte, Libya, the following is the first list of members of the AUCIL:

NO	NAME	COUNTRY
1.	Mr. Rafaâ Ben ACHOUR	Tunisia
2.	Mr. Nkurunziza DONATIEN	Burundi
3.	Mrs. Lillian B. MAHIRI-ZAJA	Kenya
4.	Mr. Kholisani SOLO	Botswana
5.	Mr. Atanazio K. TEMBO	Malawi
6.	Mr. Ebenezer APPREKU	Ghana
7.	Mr. Minelik Alemu GETAHUN	Ethiopia
8.	Mr. Filali KAMEL	Algeria
9.	Mr. Adelardus KILANGI	Tanzania
10.	Mr. Blaise TCHIKAYA	Congo
11.	Mr. Cheikh Tidiane THIAM	Senegal

8 Vide Decision EX.CL/Dec.129 (V).

9 Vide Decision Assembly/AU/Dec. 66(IV).

10 Vide Decision Assembly/AU/Dec. 209 (XII).

Based on the election that was conducted in January 2012 in Addis Ababa Ethiopia, the following is the second list of members of the AUCIL:

NO	NAME	COUNTRY
1.	Mr. Rafaâ Ben ACHOUR	Tunisia
2.	Mr. Daniel Makiese MWANAWANZAMBI	Democratic Republic of the Congo
3.	Mrs. Lillian B. MAHIRI-ZAJA	Kenya
4.	Mr. Kholisan SOLO	Botswana
5.	Mr. Atanzio K. TEMBO	Malawi
6.	Mr. Ebenezer APPREKU	Ghana
7.	Mr. Minelik Alemu GETAHUN	Ethiopia
8.	Mr. Filali KAMEL	Algeria
9.	Mr. Adelardus KILANGI	Tanzania
10.	Mr. Blaise TCHIKAYA	Congo
11.	Mr. Cheikh Tidiane THIAM	Senegal

Based on the election that was conducted recently in January 2013 in Addis Ababa Ethiopia, the following is the third and current list of members of the AUCIL:

NO	NAME	COUNTRY
1.	Mr. Rafaâ Ben ACHOUR	Tunisia
2.	Mr. Daniel Makiese MWANAWANZAMBI	Democratic Republic of the Congo
3.	Mr. Boniface Obina OKERE	Nigeria
4.	Mr. Kholisan SOLO	Botswana
5.	Mrs Nacesay SALLA-WADDA	Gambia
6.	Mr. Ebenezer APPREKU	Ghana
7.	Mr. Minelik Alemu GETAHUN	Ethiopia
8.	Mr. Filali KAMEL	Algeria
9.	Mr. Adelardus KILANGI	Tanzania
10.	Mr. Blaise TCHIKAYA	Congo
11.	Mr. Cheikh Tidiane THIAM	Senegal

1.3 The Rationale behind the Decision to Establish the AUCIL

According to Article 2(1) of its Statute, the AUCIL was established to function as an independent advisory organ of the African Union in accordance with Article 5(2) of the Constitutive Act of the African Union.¹¹ This is the main objective. The Preamble to the Statute and Article 4 of the same together disclose further the specific objectives of establishing the AUCIL, which includes the necessity of having a body that works on: reviewing treaties; consolidating the principles of international law in order to remain at the forefront in the development of international law, which goes hand in hand with maintaining standards in important areas of international law; taking stock of the contribution of the African Union, including the Regional Economic Communities (RECs), in advancing the codification of international law in Africa; promoting universal values and principles of international law in Africa, taking into consideration the historical and cultural conditions of the continent; promoting the culture of respect for international norms and rules; promoting peaceful settlement of disputes; promoting the value of research and dissemination of international law; and generally working to bring about the codification and development of international law in the continent of Africa.

However, also at the bottom-line of the decision to establish the AUCIL is the fact that the continent of Africa is increasingly becoming aware of the role and importance of international law in most of its endeavours and engagements, including the need to: improve relations among states within the continent by promoting peace and security and peaceful resolution of disputes relating to demarcation and delineation of borders and boundaries in the continent, as well as facilitating the political and socio-economic integration of the continent. Externally, international law is deemed necessary in efforts to improve relations between the continent of Africa and the outside world, by covering all engagements between Africa and the rest of the world. So far, the experience in these two paradigms, namely the intra-Africa and the extra-Africa relations, has shown clearly the need to take a legal approach, alongside the political one in these relations, which means the need to put international law in the forefront.

¹¹ Article 5(1) of the Constitutive Act of the African Union established the organs of the Union as at the time of its establishment, while Article 5(2) of the same envisages other organs of the AU which could be established in the future. The AUCIL is one of such organs.

1.4 Mandate and Functions of the AUCIL

The mandate of the AUCIL is to act as an independent advisory organ of the African Union, in accordance with Article 5(2) of the Constitutive Act of the African Union.¹² However, although the mandate of AUCIL is generically to be ‘an independent advisory organ of the African Union’, a further elaboration of its functions shows that this advisory role pertains to matters of international law. Therefore, the AUCIL is an independent advisory organ of the African Union on matters of international law. The five functional areas of this mandate are: 1) to undertake activities relating to codification of international law in the continent of Africa; 2) to undertake activities relating to progressive development of international law in the continent of Africa; 3) to work on revision of OAU/AU treaties; 4) to contribute to the objectives and principles of the African Union, and; 5) to work on encouraging and promoting the teaching, study, publication, and dissemination of literature on international law, in particular the laws of the African Union.

Once again, an elaboration and critical analysis of the five functional areas listed above shows that the main functions of the AUCIL are basically two, namely codification and progressive development of international law in the continent of Africa. This is because all the other three functions¹³ are part of the processes for either codification or progressive development of international law.

1.5 Tools for Implementing the Mandate and Functions of the AUCIL

In implementing its mandate and functions, the AUCIL has a number of tools at its disposal. These tools, whose usage depends on the matter being considered, are as follows: carrying out research works and studies and producing reports; preparing draft framework agreements, draft instruments, model regulations, formulations and analyses; preparing legal advisory opinions; organizing seminars, conferences, fora and training programmes; producing publications; forging cooperation and collaborative initiatives with teaching and research institutions, including universities.

¹² Article 2(1), Statute of the African Union Commission on International Law.

¹³ Namely: working on revision of treaties; contributing to the objectives and principles of the African Union, and; working on encouraging and promoting the teaching, study, publication, and dissemination of literature on international law, in particular the laws of the African Union

2. Concept and History of Codification and Progressive Development of International Law

2.1 Concept, History and Essence of Codification of International Law

2.1.1 Concept of Codification of Law

The concept of codification emanates from the concept 'code', whereby the former is a process and the later is the product of the process. A code is understood as a body of laws (in Latin: *corpus juris*) or a collection of laws, carefully arranged and officially promulgated. A code is also understood as a systematic collection or revision of laws, rules, or regulations; a compilation not just of existing statutes, but also of much of the unwritten law on the subject, which is newly enacted as a complete system of law. A code is understood as a consolidation of laws. Therefore, a code is not only a collection of the existing statutory law, but also of much of the unwritten law on any subject, and is composed partly of such materials as might be at hand from all sources, namely statutes, cases, and customs, and supplemented by such amendments, alterations, and additions as are deemed necessary by the codifiers in order to harmonize and perfect the existing system. In fact, in making a code, new laws may be added and old laws repealed in order to perfect a legal system.¹⁴ On the other side, codification is the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code. Some of the known famous codes include the Code of Hammurabi, the Justinian Code, and the Gregorian Code, among others.

2.1.2 History of Codification of International Law

The practice of codification of international law is traceable far back to the time of development of the Maritime Codes, especially the 'Rhodian Sea Law' and the 'Basilika', which are believed to have been compiled between 600 and 800 A.D. The two codes were some of the most famous sea codes of the Medieval Period, a period which is considered as the first notable era of codification of principles of international law. The 'Rhodian Sea Law' (in Latin: *Lex Rhodia*), was a body of regulations governing commercial trade and navigation in the Byzantine Empire

14 Black's Law Dictionary

from the 7th century.¹⁵ It is important to note that, in that empire there were city states, and therefore this law is considered to have been international law as it dealt with several states. Subsequently, this law exerted great influence in the Mediterranean area up to the 12th Century. On the other hand ‘the Basilika’, which was named after the Roman Emperor Basil, was a ninth century Roman Law Code, compiled for the Eastern Roman Empire in the 9th century. Its purpose was to end the uncertainty which had prevailed in the interpretation of the Justinian Code, especially regarding the sources of law.¹⁶

The second notable era of codifications was a series of international conferences especially in Europe, most of which were postwar in the sense that they were prompted by a war that had occurred before them. These include: the Treaty of Westphalia (1648); the Congress of Vienna (1814–1815); the Congress of Paris (1856); the Congress of Berlin (1878); the Hague Peace Conferences (1899 and 1907); and the London Conference (1909).

The Treaty of Westphalia brought to an end the religious wars of Europe that had been waged for more than 100 years, and was the birthplace of the modern concept of sovereignty and statehood. It also entrenched the principles of freedom of worship in Europe and the secularization of the state.¹⁷

The congress of Vienna re-drew and re-established the political and territorial map of Europe the time after the defeat of Napoleon, who had initially waged wars and conquered many territories in Europe. Therefore, the aims of the conference were: to prevent the extensive expansion of any one great power in Europe; creating a balance of power among the powerful nations of Europe; reinstating the conservative regimes and European monarchies; containing France; and reaching an agreement to cooperate with each other, the overall purpose of which was to prevent the occurrence of future expansionist conflicts in Europe.¹⁸

15 For more information on ‘the Rhodian Sea Law’, see: ASHBURNER, Walter, (1911), ‘Rhodian Sea Law’, *The American Political Science Review*, Vol. 5, No. 4, November 1911.

16 For more information about ‘the Basilika’ see: SHERMAN, Charles (1918), *The Basilika: A Ninth Century Roman Law Code Which Became the First Civil Code of Modern Greece a Thousand Years Later*, University of Pennsylvania Law Review and American Law Register, Vol. 66, No. 7/8, Jun., 1918.

17 For details see: ONNEKIN, David (2009), *War and Religion after Westphalia 1648–1713*, Ashgate Publishing Ltd.

18 For more details about the Congress of Vienna, see: WEBSTER, Charles Kingsley (1969), *The Congress of Vienna: 1814–1815*, Great Britain Foreign Office Historical Section, Barnes

The Congress of Paris was convened in 1856, and it resulted into the conclusion of the Treaty of Paris of 30th March 1856. In that conference, rules of maritime warfare were codified. Prior to that, conflicting methods which had been used in dealing with property at sea had clearly shown the need for uniformity. Thus, four principles were recognized, namely: privateering would no longer be considered legal; a neutral flag would protect the goods of an enemy, except for contraband of war; neutral goods, with the exception of contraband of war, would not be liable to capture when under the enemy's flag; and a blockade would be binding only if it prevented access to the coast of the enemy.¹⁹

The Congress of Berlin of 1878 solved a European territorial claims crisis caused by the San Stefano Treaty by revising the peace settlement to satisfy the interests of certain powers such as Great Britain and Austria-Hungary. Interests of Britain were satisfied through denying Russia the means to extend its naval power, and by maintaining the Ottoman Empire as a European power. Interests of Austria-Hungary were satisfied through allowing it to occupy Bosnia and Herzegovina and thereby increase its influence in the Balkans. The impact of the Congress of Berlin of 1878 is that, independent Balkan areas were reduced in size; Macedonia was handed back to Turkey; and Bulgaria had no longer access to the Aegean Sea.²⁰

The Hague Peace Conferences of 1899 and 1907 were mostly preoccupied with the following: the law and usage of war on land; application of the principles of the Geneva Convention of 22nd August 1864 to maritime warfare; and the peaceful settlement of international disputes. The Hague Conference of 1899 came up with a Final Act, which had in it a set of three conventions, three declarations, one resolution and six wishes.

The three conventions covered the following subjects: pacific settlement of international disputes, which also established the Permanent Court of International Arbitration; the laws and customs of war on land, and adaptation to maritime warfare of the principles of the Geneva Convention of 22nd August, 1864. The three declarations covered the following areas: prohibition of discharge of projectiles and

& Noble; CHAPMAN, Tim (1998), *The Congress of Vienna: Origins, Processes, Results*, Routledge.

19 For detail see: RUSSELL, Jesse & COHN, Ronald (2012), *Congress of Paris*, Tbilisi State University.

20 For details see: WOODWARD, Ernest Llewellyn (1920), *The Congress of Berlin, 1878*, The Historical Section of the Foreign Office, Great Britain, Foreign Office No. 154.

explosives from balloons or by other similar new methods; prohibition of the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases; and prohibition of the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions. The Resolution affirmed the desirability to restrict military budgets which at that time were deemed to be placing a heavy burden on the world, and that such restrictions were expected to result into an increase in the material and moral welfare of mankind. The six wishes were: that, a special conference be summoned by the Swiss Government for the revision of the Geneva Convention; that, the questions of the rights and duties of neutral states be inserted in the programme of a conference in the near future; that, questions regarding rifles and naval guns as considered by the Conference, be studied by governments with the object of coming to an agreement respecting the employment of new types and calibers; that, the governments, taking into consideration the proposals made at the Conference, examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets; that the proposal for the exemption of private property from capture in naval warfare be referred to a subsequent conference for consideration; and that, the question of the bombardment of ports, towns and villages by a naval force be referred to a subsequent conference for consideration.²¹

The Hague Peace Conference of 1907 was largely meant to realize the wishes expressed in the Conference of 1899. Thus, this conference was intended to make a follow up to the humanitarian principles which had been developed in the 1899 Conference. The following is the summary of the main undertakings of the 1907 Conference: making improvements to the provisions of the Convention relative to the Pacific Settlement of International Disputes, as far as the Permanent Court of Arbitration and the International Commission of Inquiry are concerned; making additions to the provisions of the Convention of 1899 relative to the Laws and Customs of War on Land, among others, concerning the opening of hostilities, the rights of neutrals on land, and the renewal of the Declarations of 1899; development of a Convention relative to the Laws and Usages of Naval Warfare concerning special operations

21 For details see: ROSENNE, Shabtai (2001), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press; SCOTT, James Brown (2010), *The Hague Peace Conferences of 1899 and 1907: A Series of Lectures Delivered Before the Johns Hopkins University in the Year 1908*, Volume 1, Kessinger Publishing.

in naval warfare; and additions to be made in the Convention of 1899 for applying to naval warfare the principles of the Geneva Convention of 1864.²²

The London Conference of 1908–1909, which is also known as the International Naval Conference of 1908–1909, had as its main objective, the laying down of the generally recognized principles of international law in accordance with Article VII of the Convention that had been signed earlier on at the Hague Conference on the 18th October, 1907, for the establishment of an International Prize Court. The conference ended up with the London Declaration concerning the Laws of Naval War. The Declaration mostly reiterated the then existing laws of naval warfare. However, it never took effect because it was not signed by many powers.²³

The third era of codification of international law consists of a series of codification conferences where the pertinent ones are those of 1930, 1958, 1960, 1961, 1963, and 1968–69.²⁴ These were conferences that were specifically convoked for purposes of codifying international law.

The codification conference of 1930, which is also formally known as The Hague Codification Conference of 1930, because it was convened at The Hague from 13th March to 12th April 1930, was the first international conference to be convened specifically for purposes of codification of international law. This was pursuant to the setting up of a committee by the League of Nations, earlier on in 1924, for the purpose of progressive codification of international law. The main task of the Committee was to select topics for consideration, and it chose three topics, namely: nationality, territorial waters, and the responsibility of states for damage caused in their territory to the person or property of foreigners. The methodology used was to prepare questionnaires which were circulated to states, on the basis of which broad areas of agreement and those that needed discussion were mapped out. However, due to disagreements on most of the issues on the agenda, only the ‘Convention on Certain Questions Relating to the Conflict of Nationality Laws’ could be agreed upon by the states that took part in the conference.²⁵

22 Ibid.

23 For details see: COHEN, Arthur (1911), ‘International Naval Conference (1908–1909)’, in: *The Declaration of London; a Lecture Delivered at University College, London, England*, Hodder & Stoughton, University of London Press.

24 RAMCHALAN, B.G (1977), *The International Law Commission: Its Approach to Codification and Progressive Development of International Law*, Martinus Nijhoff Publishers, pp. 9–12.

25 For more discussion see: MILLER, Hunter (1930), ‘The Hague Codification Conference 1930’, *The American Journal of International Law*, Vol. 24, No. 4, of October 1930.

The codification conference of 1958, which is also formally known as the United Nations Conference on the Law of the Sea of 1958, considered matters relating to the regime of territorial waters and of the high seas as topics for codification, following proposals by the International Law Commission (ILC) in its first session in 1949. Subsequent to that, the ILC made studies and consulted states and organizations, after which it prepared a report. Following the discussion on the report of the ILC, the General Assembly adopted Resolution 1105 (XI) of 21 February 1957, by which it decided to convene the United Nations Conference on the Law of the Sea in Geneva, from 24 February to 27 April of 1958.²⁶ As a result of this Conference, four separate conventions were adopted by the Conference on 29 April 1958. These are: the Convention on the Territorial Sea and the Contiguous Zone, which entered into force on 10th September 1964; the Convention on the High Seas, which entered into force on 30th September 1962; the Convention on Fishing and Conservation of the Living Resources of the High Seas, which entered into force on 20th March 1966; and the Convention on the Continental Shelf, which entered into force on 10th June 1964. In addition, an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes was adopted, which entered into force on 30th September 1962.²⁷

The codification conference of 1960, which is also formally known as the Second United Nations Conference on the Law of the Sea, was convened from 17 March to 26 April 1960 in order to consider and discuss the question of territorial sea and fishery limits, which had not been agreed upon in the First Conference of 1958. The Conference adopted two resolutions in its Final Act.²⁸ However, substantive decisions on the two topics were deferred to a later stage.

The codification conference of 1961 in Vienna, which is also formally known as the United Nations Conference on Diplomatic Intercourse

26 See: United Nations Conference on the Law of the Sea Geneva, 24 February – 27 April 1958, Volume I: Preparatory Documents; Volume II: Plenary Meetings, Summary records of meetings and Annexes; Volume III: First Committee (Territorial Sea and Contiguous Zone); Volume IV: Second Committee (High Seas: General Regime); Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources; Volume VI: Fourth Committee (Continental Shelf; and Volume VII: Fifth Committee (Question of Free Access to the Sea of Land-locked Countries; UN Documentation.

27 MALANCZUK, Peter (Ed.)(1997), *Akehurst's Modern Introduction to International Law*, Routledge, pp. 173–174.

28 Second United Nations Conference on the Law of the Sea, Geneva, 17 March – 26 April 1960, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act (Doc. A/CONF.19/L.15), UN Documentation.

and Immunities of 1961, focused on matters of diplomatic relations and immunities as a subject for codification, following proposals and recommendations by the ILC. Like the preceding codification conferences, this one was also preceded by work of experts, namely the ILC who did a study and circulated to Member States questionnaires for input and later the draft for comments. The conference ended with the adoption of the Vienna Convention on Diplomatic Relations, and an Optional Protocol concerning Acquisition of Nationality) and an Optional Protocol concerning the Compulsory Settlement of Disputes.²⁹

The codification conference of 1963 in Vienna, which is also called the United Nations Conference on Consular Relations of 1963, codified some of the rules that guide consular relations between states. The Conference did so by providing an international legal framework for consular relations, privileges and immunities, and the Convention aims to ensure the efficient performance of functions by consular posts on behalf of their respective states. This was pursuant to a proposal and study by the ILC, followed by comments on the study by Member States.³⁰

The codification conference of 1968–69, which is also known as the United Nations Conference on the Law of Treaties of 1968–69, focused on the codification of rules that guide treaty relations between states,³¹ in written form and governed by international law. Again, this was after the ILC had done ground work and seeking comments from governments and transmitting the report to the General Assembly. The main outcome of the Conference was the adoption of the Vienna Convention on the Law of Treaties, and adoption of two declarations, namely the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, and the Declaration on Universal Participation in the Vienna Convention on the Law of

29 For detailed discussion see: DHOKALIA, Ramaa Prasad (1970), *The Codification of Public International Law*, Manchester University Press, pp. 311–321. See also: United Nations Conference on Consular Relations Vienna, 4 March – 22 April 1963, Volume I: Summary Records of Plenary Meetings and of Meetings of the First and Second Committees, UN Documentation.

30 See: United Nations Conference on Consular Relations, Vienna, 4 March – 22 April 1963, Volume I: Summary Records of Plenary Meetings and of Meetings of the First and Second Committees; Volume II: Annexes, Vienna Convention on Consular Relations: Final Act, Optional Protocols & Resolutions, UN Documentation.

31 Note that, a separate convention governing treaty relations between states and international organizations or between international organizations was concluded in 1986.

Treaties, as well as adoption of five Resolutions which were annexed to the Final Act of the Conference.³²

2.1.3 Essence of Codification of International Law

So far, an analysis of the many codification initiatives shows that, they were preoccupied with the development of written international law through either the restatement of principles of existing law as embodied in custom, or through the formulation of new law as prompted by gaps, deficiencies or weaknesses in existing custom, whereby these two methods have sometimes been undistinguishable. This means, the task of codification of international law, according to the many initiatives in history, consists of restating the existing rules of custom or reviewing rules existing in treaties.

According to the Statute of the ILC, codification of international law means: “the formulation and systematization of rules of international law in fields where there has already been *extensive State practice, precedent and doctrine*”.³³

State practice is understood as consisting of the actual exercise of sovereign powers by the state, and these powers are executive, legislative and judicial, and can be gathered from primary and secondary sources. The primary sources include policy position papers of governments, state laws in different types and sources, and judicial decisions of national courts tribunals. Secondary sources, on the other hand, include official statements of government spokespersons in parliament, official correspondences with other states, digests of practice of states, and documentary sources produced by the United Nations, as well as writings of international lawyers.³⁴

Precedent, according to the Black’s Law Dictionary, is understood to be:

“... an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only

32 See: United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole; Second Session Vienna, 9 April – 22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Documentation.

33 Article 15, Statute of the International Law Commission, 1947.

34 MALANCZUK, Peter (Ed.)(1997), *Akehurst’s Modern Introduction to International Law*, Routledge, p. 39.

theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.”³⁵

Precedent is also understood, according to the same Dictionary, as:

“...a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi* (reason for the decision). The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.”³⁶ [Emphasis added]

Doctrine, or specifically legal doctrine, is understood as the law as it comes from courts, and it consists of rules or standards emanating from judicial opinions, which set the terms for future resolution of cases in an area. Rules are strict requirements that define the answer to a dispute, once the predicate facts are established, while standards are general guides to resolving disputes, often listing a set of factors to be considered and balanced when faced with a case or a legal question.³⁷ In many respects, doctrine is equated with precedent. The difference in the terminology is caused by differences that exist in various legal systems in terms of both theory and practice, whereby ‘precedent’ is associated more with the Common Law system, while doctrine is associated more with the Civil Law system. However, since doctrine consists of rules and standards it cannot be wholly a product of judicial work, especially on the aspect of standards. Standards can be developed in an extra-judicial process such as when they are simply part of the culture of a certain legal tradition whose origin is not legislation or judicial decisions.

In any case, this understanding of codification of international law by the ILC shows that, the primary object of codification is customary law as embodied in state practice. Even precedent and doctrine are part of state practice, because they emanate from one of the branches of the state, namely the judiciary. Therefore, judicial practice is part of state practice. This means therefore that codification of international law, according to the Statute of the ILC, consists of restating the existing rules of custom, while the task of reviewing rules existing in treaties, or formulating new

35 Quoting: LILE, William (*et al.*) (1914), *Brief Making and the Use of Law Books*, (3rd Ed.), p. 288.

36 Quoting: SALMOND, John, *Jurisprudence*; and WILLIAMS, Glanville (1947), *Learning the Law*, 10th Ed.

37 TILLER, Emerson & CROSS, Frank, (2006), ‘What is Legal Doctrine?’ *Northwestern University Law Review*, Vol. 100, No. 1, U.S.A., Northwestern University School of Law.

rules that never existed before are part of progressive development of international law.

2.2 Concept, History and Essence of Progressive Development of International Law

The concept 'progressive development' of international law, on the other hand, appears to have developed mainly in the 20th century. The concept first appeared in the United Nations Charter where it is provided that: "the General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encourage the progressive development of international law and its codification".³⁸ The concept was later incorporated into the Statute of the ILC in the stipulation of its functions.³⁹

According to the Statute of the ILC, progressive development means: "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".⁴⁰ Based on the discussion above, it appears that work on progressive development of international law is associated more with situations where there is no existing codes, general principles or custom. Therefore, progressive development of international law consists of formulating new rules.

2.3 Relationship between Codification and Progressive Development of International Law

There are divergent views on the relationship between codification and progressive development of international law. One of the views holds that, codification and progressive development of international law are mutually inclusive. To illustrate this, one can point to the fact that the process of codifying international law in itself signifies progress being made in the field of international law. Therefore, codification of international is an integral aspect of progressive development of the same.⁴¹ On this argument the ILC itself has once observed that, although its statute envisages the two functions as separate, but they cannot be

38 Article 13(b), The United Nations Charter, 1945.

39 Article 1(1), Statute of the International Law Commission, 1947.

40 Article 15, *Ibid.*

41 DHOKALIA, R.P (1970), *The Codification of Public International Law*, Manchester University Press, pp. 203–204.

kept apart. It further observed that, in some cases it would be difficult to limit itself to one of the two functions as there are clear overlaps.⁴²

Another view holds that, while it would be difficult (for the ILC) to confine to one functional area, the differences between the two must always be borne in mind. Otherwise, being confined to codification only without regard for the need to transform the law based on rapid transformation of the world community is to be unrealistic. Likewise, seeking to formulate new rules and principles to cater for the current needs without consideration to existing practice and custom will lead to crisis.⁴³

In any event, there are four key elements to note in codification and progressive development of international law.⁴⁴ The first element to note is the object of both codification and progressive development, which is either the restatement or reform of the law. Restatement is affirming and systematizing principles of existing law as embodied in existing custom. Reform is the formulation of new law or review of old law as prompted by gaps, deficiencies or weaknesses in existing custom or codified law.

The second element to note is the technique used. We take note here that, regardless of the object of codification and progressive development, which is either to restate or to reform the law, the technique used is either that of codification, which again is more associated with the civil law system, or the Common Law technique which is associated more with the Common Law system. Codification, as elaborated already in this paper, consists of compiling, arranging, and systematizing the laws of a given jurisdiction or of a discrete branch of the law, from custom into an ordered code. The Common Law technique, on the other side, emphasizes on the role of judicial bodies in developing the law through judicial decisions. These decisions would either affirm or interpret and elaborate the existing law, or fill in legal lacunae or gaps in the same, if any. In so doing, these judicial decisions are considered as laying down binding principles of law that could be applied in future cases. The Common Law technique therefore consists of analyzing the logic of judicial decisions in order to ascertain and assert principles of law, that

42 Y.B.I.L.C, 1953, Vol. II, UN Doc A/2456, Report of the Commission, Pg. 202, Para 15, as quoted in: DHOKALIA, R.P (1970), *The Codification of Public International Law*, Manchester University Press, pp. 210 & 211.

43 DHOKALIA, R.P (1970), *The Codification of Public International Law*, Manchester University Press, pp. 211.

44 RAMCHALAN, B.G (1977), *The International Law Commission: Its Approach to Codification and Progressive Development of International Law*, Op.cit., p. 12.

could be considered as binding and which could be applied in similar future situations.

The third element to note is the question of scope of such codification and progressive development activities, which can be universal or non-universal. A codification initiative which is universal scope is based on global initiatives, while a non-universal scope is based on regional or sub-regional initiatives.

The fourth element to note is the nature of agencies involved in codification and progressive development initiatives. These could either be official or unofficial.⁴⁵

2.4 The Concept of Codification and Progressive Development of International Law in the Statute of AUCIL

According to the Statute of AUCIL, the function and task of codification of international law consists of:

“...making a systematic and precise formulation of rules of international law in areas where there has already been extensive state practice, precedent, and doctrine in the African continent with the view to establish an authoritative statement of international law”.⁴⁶

Since the AUCIL is also charged with the function of reviewing treaties, it can be asserted that its function of codification of international law essentially consists of restating the rules of international custom existing in Africa and create a treaty, or reviewing the rules existing in current treaties in order to update them. It is important to note that, the task of the AUCIL of formulating and systematizing the rules of international law in fields where there has already been extensive state practice, precedent, and doctrine in the continent of Africa can take different dimensions between Africa and the rest of the world. Whereas a practice may have been extensive in Africa, it may not have been the same for the rest of the world, and whereas a practice may have been extensive in the rest of the world, it may not have been extensive in Africa. That means, Africa has the potential to develop African customary international law, or have customary law developed in the continent, and can have that custom codified.

45 SCHWAZERNBERGER, G (1967), *Manual of Public International Law*, pp. 380–388, as quoted in: RAMCHARAN, B.G (1977), *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law*, Martinus Nijhoff Publishers pp. 12–13.

46 Article 6(1).

Further, according to the Statute of AUCIL the function of progressive development of international law consists of:

“...identifying and preparing draft instruments and studies in areas which have not been regulated by international law in the African continent, or not been sufficiently developed in the practice of member states”⁴⁷

This understanding of progressive development of international law in the Statute of the AUCIL subscribes to the essence of progressive development as essentially consisting of formulating new rules, either in the form of treaties or any other form. However, when speaking of areas which have not yet been regulated by international law in the African continent, likewise, it does not only mean areas which have not been regulated by established principles of international law, including international customary law, but also areas that have not been touched with African Union law, or African customary international law, or customary international law developed in Africa. This is due to the fact that, what appears to be a need in Africa hence requiring international law might not be equally felt as a need in the rest of the globe. At the same time, it must be acknowledged that Africa has the potential to contribute to the development of international law, and has in fact contributed to that development in the past.

3. The Process of Codification and Progressive Development of International Law

3.1 The Process Used in the International Conferences

The conferences referred to here include both those that were called upon to discuss various matters of international law and resulted into treaties, and those that were specifically called upon for purposes of codification. A close examination of these conferences indicates that a number of methods were employed in the process of codification and progressive development of international law. These methods could be clustered into about three stages.

The first stage consists of making a proposal for an agenda or items to be subsequently considered. Usually the agenda would be initiated by a government or state, followed by some diplomatic exchanges. The example is the Russian Circular Note of 30th December 1898 and April

47 Article 5(1).

1906 which proposed the agenda for the Hague Peace Conferences.⁴⁸ The second stage is that of preparing for the actual conference where two approaches are noted, namely that either a government takes charge of preparing the conference, or some sort of an international preparatory committee is put in place for preparatory purposes.

In the first approach the agenda-initiating country would, in many situations, also proceeded to organize and convene the conference in question. Examples include the initiative of the Government of the Netherlands regarding the conferences on the unification of private international law held successively at The Hague since 1893. In this case, the Government of the Netherlands created the Royal Commission for the Codification of Private International Law for this preparatory purpose, and it used questionnaires to gather information. Other examples are the initiatives by the British Government to convene conferences on the safety of life at sea, and the Government of Belgium to convene conferences on the unification of maritime law.⁴⁹

In the second approach, a number of strategies have been used. The first strategy is the use of a Scientific Committee to prepare the ground work for the conference in question. An example is The Hague Codification conference of 1930, where the preparatory scientific work was done by the following institutions jointly: Institute of International Law, International Law Association, International Maritime Association, International Shipping Conference, and Harvard Research in International Law.⁵⁰ The second strategy is the use of a Preparatory Committee charged with the following tasks: collecting the various proposals to be submitted to the Conference; ascertaining the subjects for consideration; preparing a programme of work; and proposing a system of organization and procedure for the Conference itself. Examples are the series of the postal conferences, such as that of 1874.⁵¹ The third strategy is the use of a Research Committee or Commission to study and prepare the documents which are going to be considered in the subsequent conference. Examples are the committees created for the Universal Postal Congress of the 1920s.⁵² The fourth strategy is the use of a Committee of Experts charged with the task of making scientific

48 UNITED NATIONS (1947), "Documents on the Development and Codification of International Law", Supplement to: *American Journal of International Law*, Vol. 41, No. 4, October 1947, p. 36.

49 *Ibid.*, p. 35.

50 *Ibid.*

51 *Ibid.*, p. 36.

52 *Ibid.*, p. 37.

investigation and giving due advice. An example is the approach adopted by the Assembly of the League of Nations in 1929 on matters relating to signatures and ratifications or accessions to conventions, on the basis of which the Assembly adopted a resolution which was based on the recommendations of the Committee.⁵³

The Third stage was the formulation of draft instruments, which were then discussed extensively at the conferences, and upon agreement they were adopted as treaties.

3.2 The Process Used by the ILC

In accordance with the Statute of the ILC, matters for codification could be proposed from a variety of sources, including the Commission itself. Then the ILC would commence studies and issue draft reports. These would be commented on by Member States and other relevant organizations. The ILC will then incorporate the comments and the new draft will be discussed in the 6th Legal Committee of the general Assembly. The results would be manifold, as the General Assembly might decide to make a declaration or specifically organize a codification conference. When a codification conference is called for, the ILC will have to prepare draft articles.⁵⁴

Matters for progressive development by the ILC are to be based on proposals made by the General Assembly and a particular procedure has to be followed by the Commission culminating in a draft with explanatory report for the General Assembly.⁵⁵ The rest of the process will be the same up to the discussions in the 6th Legal Committee of the General Assembly.

3.3 The Process which is Supposed to be Used by the AUCIL

In activities relating to the mandate of codification of international law, the AUCIL will follow the following procedures: appointment of one of the Members to be Special Rapporteur;⁵⁶ preparation of proposal by Special Rapporteur stipulating the methodology, specifically to indicate the problem statement, objectives of the study, research design, data collection methods, sampling approach, expected end results, and the resources required including human and financial, which means the

53 Ibid., pp 49–51.

54 Article 20, Statute of the ILC.

55 Article 16, Statute of the ILC.

56 Article 5(2)(a), Statute of the AUCIL, 2009.

budget. The financial aspect will be presented in terms of a detailed budget.⁵⁷ This will be followed by: discussion on the proposal in the Plenary of the AUCIL, where comments will be made followed by review of the proposal by the Special Rapporteur;⁵⁸ requesting member states, through its chairperson, to make available all documents relevant to the topic being studied;⁵⁹ commencement of study and preparation of drafts in the form of articles;⁶⁰ Sharing the draft with all members of the AUCIL for comments and critique;⁶¹ conducting exhaustive discussions on the draft in the plenary of the AUCIL in order to be satisfied about its quality;⁶² effecting necessary changes by the Special Rapporteur in order to fulfil the quality requirements;⁶³ submission of the draft(s) to the Assembly, through the Executive Council, accompanied by relevant commentaries;⁶⁴ and upon endorsement of the Assembly, requesting the Chairperson of AUCIL to issue it as an AUCIL document, after which the AUCIL shall publicize the document.⁶⁵ After this, Member States shall be requested to submit their comments on the AUCIL documents within 90 days.⁶⁶ This will be followed by review of the document by the Special Rapporteur, considering the comments made from member states and prepare a final draft.⁶⁷ The final stages include the deliberations by the AUCIL, in its plenary, on the final draft and recommendations to the Assembly through the Executive Council.⁶⁸ The Assembly is expected to take the final decision, including referring back the document to the AUCIL for redrafting if the need be.⁶⁹

In activities relating to progressive development of international law, the AUCIL will follow the following procedures: appointment of one of the Members to be Special Rapporteur;⁷⁰ doing preliminary study and preparation of proposal by the Special Rapporteur, stipulating the

57 This is an internal arrangement by AUCIL, in order to provide a detailed account of the study to be undertaken for purposes of informing other Members of the AUCIL and potential funders of the study as to how the study will be undertaken, and other necessary details pertinent to the study.

58 This step is undertaken for purposes of quality assurance.

59 Article 6(6), Statute of the AUCIL, 2009.

60 Article 6(7), Statute of the AUCIL, 2009.

61 Internal AUCIL procedure for purposes of quality assurance.

62 Ibid.

63 Ibid.

64 Article 6(7), Statute of the AUCIL, 2009.

65 Article 6(8), Statute of the AUCIL, 2009.

66 Article 6(9), Statute of the AUCIL, 2009.

67 Article 6(10), Statute of the AUCIL, 2009.

68 Article 6(11), Statute of the AUCIL, 2009.

69 Article 6(12), Statute of the AUCIL, 2009.

70 Article 5(2)(a), Statute of the AUCIL, 2009.

methodology, specifically indicating: problem statement, objectives of the study, research design, data collection methods, sampling approach, expected end results, and the resources required including human and financial. The financial aspect will be presented in terms of a detailed budget. This will be followed by discussion on the preliminary report and the accompanying proposal in the Plenary of the AUCIL, where comments will be made followed by review of the proposal by the Special Rapporteur.⁷¹ Using questionnaire or other methods, the Special Rapporteur will move on to collect information,⁷² and consult with institutions and experts, and doing other relevant studies as appropriate.⁷³ This will be followed by: preparing a draft report and sharing with all members of the AUCIL for comments and critique;⁷⁴ conducting exhaustive discussions on the draft report in the plenary of the AUCIL in order to be satisfied about its quality;⁷⁵ effecting necessary changes by the Special Rapporteur in order to fulfil the quality requirements;⁷⁶ carry out second discussion and adoption of the report by the plenary of the AUCIL, subject to making further amendments if required;⁷⁷ issuing of the draft report as an AUCIL document by the Chairperson of the AUCL,⁷⁸ followed by publicizing the report together with such explanatory and supporting materials as the AUCIL considers appropriate.⁷⁹ This stage will be followed by invitation to all Member States, organs and institutions of the African Union to submit their comments within specified time.⁸⁰ After that, the Special Rapporteur will review the draft report on the basis of comments received and submit it to AUCIL for finalization.⁸¹ This will be followed by submission of final draft together with recommendations to the Assembly of the African Union through the Executive Council.⁸² Otherwise, the AUCIL, on its own motion or at the request of an organ or institution may make an

71 This step is undertaken for purposes of quality assurance.

72 Article 5(2)(b), Statute of the AUCIL, 2009.

73 Article 5(2)(c), Statute of the AUCIL, 2009.

74 According to internal methods of work developed by the AUCIL

75 According to internal methods of work developed by the AUCIL, in order to fulfil the quality requirements envisaged under Article 5(2)(d) of the Statute of the AUCIL, 2009.

76 Ibid.

77 With the view to request the Chairperson of the AUCIL to issue it as an AUCIL document as per Article 5(2)(d) of the Statute of the AUCIL, 2009.

78 Article 5(2)(d), Statute of the AUCIL, 2009.

79 Article 5(2)(d), Statute of the AUCIL, 2009.

80 Article 5(2)(e), Statute of the AUCIL, 2009.

81 Article 5(3), Statute of the AUCIL, 2009.

82 Article 5(4), Statute of the AUCIL, 2009.

interim report to the organ or institution that submitted the request for that report.⁸³

4. Codification and Progressive Development of International Law by the AUCIL and the Possibility of Furthering Fragmentation of International Law

There is a rhetorical question being asked in many quarters as to whether the establishment of the AUCIL and its mandate and functions of codification and progressive developments not going to aggravate the challenge of fragmentation of international law.

It is important to understand right from the onset of this segment that, international law is a legal system, and in any legal system, there are: laws emanating from various sources; institutions dealing with the law, such as courts and tribunals; and general principles and concepts governing the administration of that law. However, in any legal system there must be coherence. Coherence in a legal system signifies unity, harmony, holding together, and lack of conflict. Coherence can be brought about in many ways. One of the ways is through having a hierarchy of rules, whereby a rule which is higher in the ladder prevails over the rule which is lower in that ladder. Further, coherence can also be brought about through the use of principles of interpretation and harmonization in that system. Coherence can also be brought about by having principles of resolving conflict of laws. Therefore, possibility of having conflicting positions within the legal system is minimized.

In the case of fragmentation, on the other hand, there is possibility of having: conflicting positions; conflicting interpretations; lack of unity; and a situation where the legal system does not hold as a whole.

So far, fragmentation in international law is caused by expansion of scope of international law by subject matter and by geographical configuration, hence leading to the formation of mini-regimes of international law. Usually, mini-regimes of international law constitute special law, which will be pitted against the general law. But there is a principle of international law which provides that, special law keeps in abeyance general law as contained in the Latin maxim: *lex specialis derogate lex generalis*. Therefore, it is the specific law generated in a mini-regime which will keep in abeyance the general law. International

83 Article 5(4), Statute of the AUCIL, 2009.

law developed in Africa is supposed to be considered as *lex specialis vis-à-vis* general international law.

The second possible reason is the question of succession of norms and hierarchy of norms in international law. The succession of norms concerns a situation where a norm has been established, but it is succeeded by a new norm. If a new norm is generated in a regional context, then for that region that norm will keep in abeyance the old norm. On the other ground, a new norm may displace or explain the old norm. On the question of hierarchy of norms, even though no instrument states that there is hierarchy in the norms of international law; general practice has shown some kind of hierarchy where for example treaties and general principles of law are considered as having higher force than writings of publicists or decisions of courts and tribunals. If an existing norm is part of international law and Africa decides to have a treaty in the same matter, which in a way contradicts existing customary principles or principles of treaty law, then the new treaty will be assumed to have higher force. This will lead to fragmentation.

The answer to the question is that, every continent is some kind of a legal system with courts and tribunals, hence developing new concepts, principles, and jurisprudence. Secondly, and as it has been stated already, there are matters of regional concern which need a regional response, and matters of global concern which need global response. That is why Europe, America, Africa and Asia have consultative Legal Committees.

However, a more pertinent response to that question comes from the rationale behind the establishment of AUCIL. The AU needs the AUCIL because it needs advisory services on matters of international law. There is also the need to review OAU/AU treaties, a task which can better be carried out by an African-based body. Then, there is the need to promote universal values and principles of international law in Africa, which go hand in hand with dissemination of international law in the continent. This can be better carried out by a continent-based body. Finally, there is the need to explain principles of customary international law emanating from the continent of Africa, or the dynamics of applying some global principles of international law and international customary law in the continent of Africa, a task which can likewise be better carried out by a continent-based body.

5. Conclusion

Although the functions of the AUCIL appear to be modelled along those of the ILC, the AUCIL has more functions to carry out as

compared to the ILC and some procedures in the process of codification and progressive development of international law may differ between the two.

In terms of functions, apart from the generic task of codification and progressive development of international law, the AUCIL has other distinct tasks of reviewing treaties, providing legal advisory opinions, and promoting international law. In reviewing treaties, the AUCIL can simply pick a treaty and make proposals for its review without being asked to do so by the Assembly. The AUCIL can also provide advisory opinions, whereas for the ILC that task is reserved to the International Court of Justice, and the task of promoting international law is rather left to the Codification Division of the UN Office for Legal Affairs.

In terms of procedures, discussions on draft reports of the ILC take place in a specialized forum of the UN General Assembly, namely the 6th Legal Committee, even though this is in effect a committee of the whole. But the delegations are expected to be made up of legal minds. On the part of the AUCIL, the discussions in the Assembly do not have a special forum. Further, the practice of convening a specific codification conference to further discuss a matter that has been considered by the Assembly is not mentioned in the procedures of the AUCIL as one of the possibilities, even though it cannot be completely ruled out if the Assembly deems it to be the right approach to take in that matter.

Regional Child Rights Instruments on the African Continent: The African Charter on the Rights and Welfare of the Child

Kamel FILALI¹

1. Introduction

In Africa children are victims of violence and multiple abuses as part of a particular economic, socio cultural and political context. Physical, sexual and psychological aggressions affecting African children in times of peace or war, in their family or community environment are obstacles to their survival, their life and their harmonious development.

In the African context the child is at the heart of poverty and continuous insecurity which erodes and dramatically reduces their human dignity. In addition inadequate Schooling and health conditions, inappropriate housing conditions, the high level of violence, forced internal displacement, female genital mutilation, economic and sexual exploitation, slavery and negative traditional practices are among the contributors to extremely reducing the status of the child in African society and illustrate that indeed the child is vulnerable and ought to benefit from more legal protection. A change in the African child protection culture should occur according to which children would enjoy similar rights and protection just like adults.

An answer to such concerns came when the General Assembly of the United Nations adopted the Convention on the Rights of the Child (UNCRC) on the 20 of November 1989¹. This human rights instrument was quickly ratified by States including African states. These States committed themselves to respecting their conventional obligations and to reporting to the United Nations Committee on the Rights of the Child² which monitors the application of the Convention by State parties.

The African States in their continuous efforts to join the International human rights order, and with the will to go beyond the rights provided

¹ Vice Chair of AUCIL, Member of the International Board of Trustees of ACPF, International & Human Rights Law Lecturer at the University Of Constantine, Algeria.

for in the International Convention on the Rights of the Child adopted the African Charter on the Rights and Welfare of Children (ACRWC) on July 1990³.

Before turning to the examination of the African Charter on the Rights and Welfare of Children, I would like to draw your attention to the fact that there are many other legal instruments aimed at the protection of human rights including on the African continent. Indeed the protection of human rights in Africa is secured by a dense and complex network of legal instruments adopted at the universal level before the sixties at which time most African states were under colonization. To mention some for examples:

- The Universal Declaration of Human Rights (UDHR)⁴;
- The Convention on the Prevention and the Punishment of the Crime of Genocide⁵;
- The Convention relating to the status of Refugees⁶;
- the Convention against torture and other cruel, inhuman or degrading treatment or punishment⁷;
- The Convention on the Rights of the Child (UNCRC).

To complete this picture I would add the whole corpus of international humanitarian law,⁸ which is applicable during armed conflicts that are the Geneva Conventions⁷ and their Protocols⁹. The African Charter on Human and People's rights and the African Charter on the Rights and Welfare of Child (ACRWC) are among the numerous corner stone's of the outstanding legal construction designed for the protection of human rights in Africa.

The initiative by the organization of African unity (OAU which became legally the AU in 2001)¹⁰ to adopt a charter to promote and safeguard the rights and welfare of the child in Africa is a unique regional development .It is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children.

2. The African Charter on the Rights and Welfare of the Child

The ACRWC originated because the member states of the African Union believed that the UNCRC missed important socio-cultural and economic realities particular to Africa. It emphasizes the need to include African cultural values and experiences when dealing with the rights of the child.¹¹

The ACRWC was adopted less than one year after the adoption of the United Nations Convention on the Rights of the Child. It was adopted by the 26th OAU Conference of Head and Governments held in July 1990 in Addis Ababa (Ethiopia). As of April 2012, 46 States out of the 54 members of the African Union have ratified the ACRWC¹¹. It entered into force on 29 November 1999 after its ratification by 15 Member States¹².

One may say that the slow ratifications of the ACRWC by African states informs us on the contradictory attitude which is expressed by the fast ratification and adhesion by African states to the United Nations convention on the rights of the child. It is worth to recall that all African states are members of the United Nations convention on the rights of children except Somalia¹³. The Democratic Republic of the Congo (DRC) and the islands of São Tomé and Príncipe have not signed or ratified the charter and eight (8) countries have not ratified it¹⁴.

The main reliance on the African charter on the rights and welfare of children and the United Nations convention on the rights of the child is the respect for the dignity and the rights of the child. This implies that respect for human rights in general particularly extends to the recognition of the human rights of the child.

A child must be conferred with human rights to which any human being is entitled. While both children and adults are of equal value, many countries still refuse to recognize the rights of children. Commonly a child is viewed as an integral part of his or her family, and as such the property of his or her parents. And if the interest of the child is not identical to those of his or her parents, conflicts are unavoidable. The right of the child starts by redefining the place of the child both in the family and within society. A child should no longer be seen as a vulnerable person being in a need of protection and assistance but as an autonomous person, capable of expressing his or her views and participating in social life and enjoying protected rights.

The ACRWC structure embodies four parts dealing with:

- Rights and Duties (31 Articles of ACRWC);
- Creation of a Committee of Experts on the rights and welfare of children (Article 32 to 41 ACRWC);
- Committee of Experts Mandate and Procedures (Article 42 to 45 ACRWC);
- Other matters related to the work of the Committee (Article 46 to 48 ACRWC).

3. Content of the African Charter on the Rights and Welfare of the Child

The ACRWC has been modelled after the UNCRC¹⁵ and the two instruments share the main basic principles for the implementation of the recognized right such as:

- Non discrimination Article 3 and 26 of the ACRWC (Article 2 of UNCRC);
- Best interest of the child (Article 3 of the ACRWC and a Article 3 of UNCRC);
- Right to life survival and development, Article 5 of the ACRWC, (Article 6 of UNCRC);
- Respect of the views of the child, Article 7 of the ACRWC, (Article 12 of UNCRC);

In addition to these rights several rights are common to both international instruments such as:

- The prohibition of the death penalty against children (Article 5 ACRWC);
- The right to a name, birth registration and nationality (Article 6 ACRWC);
- Freedom of expression (Article 7 ACRWC);
- Freedom of association and peaceful assembly (Article 8 ACRWC);
- Freedom of thought, conscience and religion (Article 9 ACRWC);
- The protection of privacy (Article 10 ACRWC);
- The right to education (article 11 ACRWC);
- The right to leisure, recreation and culture (Article 12 ACRWC);
- Protection of disabled children (Article 13 ACRWC);
- The right to health and health related public facilities (Article 14 ACRWC);
- Rights to have a family and responsibility of the parents (Article 18, 19, 20 of ACRWC);
- The rights of refugees children (Article 23 ACRWC);
- Children protection in adoption proceeding (Article 24 ACRWC);
- Children protection in family separation proceeding (Article 25 ACRWC),
- Protection against economic exploitation (Article 15 ACRWC);
- Protection against ill-treatment and abuses (Article 16 ACRWC);
- Protection against sexual exploitation (Article 27 ACRWC);
- Drug abuse (Article 28 ACRWC);

- Prevention of abduction, sale and trafficking of children (Article 29 ACRWC);
- Rights of children of a mother detainee (Article 30 ACRWC);
- Protection of children during armed conflict (Article 22 ACRWC).

Besides all the various rights enumerated above and which are very close to those contained in the UNCRC, the ACRWC provides for new protection of rights which can be considered as progress in the international protection of children.

4. The Progress Made in the Regional Protection of Human Rights

Some of the provisions of UNCRC have not been debated sufficiently, that was due to the objectives that were set by the UN law making Conference then, and owing to the fact that only four African states participated actively in the Preparatory work for UNCRC (Algeria, Egypt, Morocco and Senegal)¹⁶.

The search for a consensus made the participants with different cultural, religious and social background avoid misunderstanding for the benefit of compromise. That compromise led to the problem of defining the child during the Preparatory work of the UNCRC. The definition of the child divided delegates from various religion, and philosophical conceptions on the subject of the beginning of childhood likewise for its end¹⁷. These debates and conflicting views have not taken place in the framework of the African charter on the rights and welfare of children and on the very sensitive issue which is the definition of the child Article 2 of the ACRWC clearly and unequivocally providing that “a child is any human being below the age of 18 year old”¹⁸.

Another progress made in the protection of children is in relation with the age of participation in armed conflicts. The United Nations Convention completed later by the Additional Protocol on Armed Conflict ¹⁹didn't prohibit participation in armed conflict of children above the age of 15. (Article 38 UNCRC).In the African Charter on the Rights and Welfare of the Child – it is expressly specified that States parties will take all necessary measures to make sure that no child meaning a person under 18 of age will participate directly in hostilities (Article 22 ACRWC).

In addition to that and alongside these two examples, the ACRWC provides for a reinforcement of the protection of the rights of children on the continent. This is the case of Article 21 of the ACRWC which

prohibits social and cultural practices that are harmful to the welfare, dignity, the growth and the normal development of the child. This includes early marriage of the children.

Other rights protection is provided for:

- Displaced children within the territory of a state (Article 23 ACRWC);
- Against discrimination of children (Article 26 ACRWC);
- Children subjected to vagrancy (Article 29 ACRWC);
- Pregnant women and children of women deprived of their liberty (Article 30 ACRWC).

The children charter on the Rights and Welfare of Child has also taken into consideration the social realities on the continent with special measures mainly those related to:

- Education and favourable conditions to the situation of pregnant girl in the schools (Article 11 to 16 ACRWC).

Like the African charter on the rights and duties of people which enunciates the rights and duties of individuals, the African Charter on the rights and Welfare of the Child provides for duties that every African child should respect vis-à-vis his family, society, the State and the international community (Article 31 of ACRWC).

5. Limitations of the African Charter on the Rights and Welfare of the Child

The limitations are related to the articles concerned with children in conflict with the law and particularly children deprived of their liberty.

The African Children Charter doesn't make express mention on the fact that no child should be deprived of his freedom in an illegal or arbitrary way, or that arrest and detention or imprisonment of a child should be done in conformity with the law and should be a measure of last resort (like Article 37 of UNCRC).

No mention is made in Article 17 ACRWC (administration of juvenile justice) to the principle of the legality and non-retroactivity of sanctions and the principle of avoiding judicial trials. No mention is made on social security or the right to information. It is worth to point out that the African Charter on the Rights and Welfare of the Child does not provide for reservation which makes the text of the Charter stronger and avoid fragmentation of the rights included.

6. The Implementation Machinery of the African Children Charter: The African Committee of Experts.

General Presentation of the African Committee of Experts

6.1 Composition and Mandate

Article 32 of the African charter on the Rights and Welfare of the Child provides for the creation of an organ for surveillance of the implementation of the convention: the African Committee of Experts (ACE). This organ is composed of eleven experts. The African Committee of Expert is an organ of the African Union; it has a classical statute being a quasi jurisdictional institution of human rights. The Committee was formed in July 2001; one and half year after the ACRWC came into force. The members are elected by the Assembly of Heads of State and Government of the African Union. The criteria for the selection of members are:

- Members must be nationals of a State Party to the ACRWC;
- They must be individuals of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child;
- Members are nominated by signatory countries and elected by the Assembly of Heads of State of the African Union;
- Members are elected for a term of five years and serve voluntarily in their individual capacity. They may not be re-elected (Article XXXX of the ACRWC).

The Committee of Experts meets twice each year, usually in May and November in Addis Ababa, Ethiopia. The exact dates depend on other items on the AU agenda around these times. They are empowered to receive and examine the country (“state”) reports on the measures they have adopted to implement the provisions of the ACRWC as well as the progress achieved regarding how the rights are being protected. The final protective function of the Committee of Experts is relates to the procedure of investigations procedure. They are empowered to resort to any appropriate method of investigation in respect of any issue covered in the ACRWC²⁰.

African Charter on the Rights and Welfare of the Child and the rules of procedures are silent as to the geographical and gender balance of Committee member. The original composition of the African committee had an equal gender balance: five male members and six

female members, thereby not encountering the gender imbalance prevalent within the African Commission then. It can be said that as of today, the African Committee of Experts follows this constant tradition of equal gender balance. One issue potentially threatening the merits of the African Committee is the length of the mandate of elected members, Article 37 states that members shall be elected for a term of five years and may not be re-elected.

According to rule 14(2) of the Rules of Procedures, if a member resigns the Chairperson shall declare the position vacant and pursuant to rule 14(4) of the same Rules, the Chairperson of the Commission of the African Union shall request the state party, which has nominated the resigning member to appoint another expert from among its nationals within two months to serve his or her predecessor's term.

6.2 Reporting to the African Committees of Experts

The African committee of Experts shall promote and protect the rights enshrined in the African Charter on the Rights and Welfare of the Child. This function will be executed by collecting and documenting information commissioning interdisciplinary assessments of the situation and problems in Africa regarding the area of children's rights and welfare, organizing meetings and encouraging appropriate national and local institutions and when it is found necessary giving its views and make recommendation to governments by formulating and laying down principles and rules aimed at protecting the rights and welfare of children in Africa based on the rules aimed at protecting the rights and welfare of children in Africa²¹. It cooperates with African international and regional institutions and organizations concerned with the promotion and protection of children in Africa²².

The African Committee of Experts monitors the implementation to ensure the protection of the rights enshrined in the ACRWC. This will be carried out by interpreting its provision at the request of a state party, an institution of the African union or any other persons or institutions recognized by the African union. Furthermore, the African Committee of Experts performs any other task as may be entrusted to it by the Assembly of the Union and other organs of the African Union or the United Nations.²³

Article 43 of the Charter enunciates the steps to be followed by reporting States, countries which have ratified the ACRWC. State parties must submit initial reports within two years of ratification or the entry into force of the Charter and every three years thereafter. The state

party report must contain specific information pertaining to children in their country. This includes political, legal, administrative issues that are linked to the requirements of the structure supplied by the Committee of Experts.

Ideally it should be a comprehensive report that includes input from the state, civil society and other recognized bodies at the regional, continental, international levels. But usually, the state report doesn't include much information from civil society. Consequently, Civil Society Organizations (CSOs) can submit an "alternative" or "shadow report" that contains the information that they have collected. National institutions for the protection of human rights which are created within the framework of the Paris principles are very active on the continent and should be also presenting an alternative report to assist experts in understanding the protection of children rights in a given state and give a real illustration on the scope and effectiveness of implementation of these rights.

The ratifying States agree to make regular reports on national implementation of the ACRWC. The report must include, in particular:

- a description of the methodology and consultation process followed to prepare the national report;
- a description of the normative and institutional framework of human rights: constitution, legislation, practices, institutions, etc...;
- information about the implementation of international obligations relating to human rights;
- information on national institutions on human rights,
- the awareness to human rights and cooperation with the defence mechanisms of these rights;
- information on the progress and best practices, as well as the difficulties and constraints;
- the key national priorities and initiatives to overcome these difficulties and constraints and improve the situation of human rights;
- expectations for capacity building and technical assistance requests.

The African committee of Experts reviews the reports and makes recommendations. They are generally as follows:

- Short Preamble sets out the positive factors concerning the implementation of the Treaty;
- The factors that impede the implementation of the Treaty, and
- areas of concern are reviewed;

On the basis of constructive dialogue with the State and any other information received, the ACE adopts what is generally called its concluding observations²⁴. Finally, recommendations are made concerning both the positive aspects of the treaty implementation by the State and in areas where it recommends that the State party take further action.

The recommendations allow committees to announce their interpretations of various provisions of the ACRWC that achieved a significant degree of acceptance by States parties. In the context of Article 43 relating to the submission of Reports, it is important to note that 15 initial reports have been submitted and examined recently (from 2009 to 2012)²⁵. To assist States in implementing their recommendations, the African Committee on the Rights and Welfare of Child established procedures to ensure effective monitoring of their concluding observations²⁶. It would also be advisable that in its concluding observations, the ACE recommends to States parties to report to the country Rapporteur or the Rapporteur for follow up within agreed on measures taken to give effect to such recommendations or such and such “priority concerns”. The Rapporteur then reports to the committee. Efforts should be made to improve the structure of the Concluding observations of the ACE and reduce their length. The changes that have occurred in the Reporting guidelines of the UNCRC should be an excellent source of inspiration. In accordance with rule 64 of the Rules of Procedure of the African Committee of Experts submits report of each of its sessions and activities undertaken in the implementation of the ACRWC to the Assembly of heads of state and government (assembly of the union) through the Council of ministers (executive council) 27.

6.3 General Comments

In accordance with Rule 72(1) of the Rules of Procedures of the ACRWC, the ACE may prepare general comments on the basis of the articles and provisions of the Children’s Charter with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations.

For the NGO’s Group for the Convention on the rights of the child “General comments are valuable contributions to the development and application of international law. They are a useful analysis and explanation of treaty obligations and can provide guidance with respect to particular issues. They can also draw the attention of States parties

to inadequacies brought out in a large number of reports and make suggestions on improving reporting procedures. General comments can also reinforce links with other international instruments which are often referenced in the general comments”²⁸ General comments provide an authoritative interpretation of the rights contained in the articles and provisions of the African Charter on the rights and welfare of the Child. The main purpose of a general comment is to promote implementation of the ACRWC and assist States parties in fulfilling their reporting obligations.

The recommendation that can be made at this level would be that the ACE establishes a working group on a specific theme of the African Charter on the Rights and Welfare of the Child to get the work started .It can also assign the writing of the General comment to a recognized Expert. For logistical reasons this should be done with the assistance of UNICEF, Save the Children or other partners working in the field of the African children rights. The ACE should also rely on the Expertise available at the African Union and recommend that such assignment be attributed to the African Union Commission of International Law (AUCIL).

6.4 Individual Communications (Article 44 ACRWC)

According to Article 44 of the ACRWC the Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by the African Charter on the Rights and Welfare of Children .This task was not prescribed to the United Nation Committee on the Rights of the Child until the adoption of the Third Additional Protocol to the Convention on the rights of the child in 2011. Within the framework of Article 44 and 45 relating to individual communications and investigations, two communications have been received one on the Nubian children of Kenya who are victims of statelessness and for whom a decision has been rendered by the African Committee of Experts and the other concerns the war victims of the Sudanese conflict²⁹.

A communication is a complaint submitted to the Committee of Experts regarding a violation of the rights of children under the ACRWC.

The following are some guidelines for submitting a communication under Article 44 of the ACRWC to the Committee of Experts:

- The alleged violating state must have ratified the convention invoked by the individual;

- The rights allegedly violated must be covered by the convention concerned;
- Proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted;
- A communication may be submitted by individuals, groups, associations, NGOs with an AU accreditation, a State member or the United Nations ;
- These individuals or groups must be recognized by the state, AU or an international body;
- Any violation of child rights may be considered and,
- The country where the violation has occurred must be a signatory of the Children's Charter.

A communication must also meet the following criteria:

- It cannot not be anonymous;
- It must be written;
- It must be submitted within a reasonable deadline or timeframe, depending on the nature of the complaint;
- It must written in a reasonable and non-defamatory tone;
- It must be compatible with the AU rules and laws or the Children's Charter;
- It must not be exclusively based on information in the media;
- Issues must not have been already decided by another investigation, procedure or international regulation;
- It must only be submitted when all local / domestic remedies have been exhausted or when the author of the communication is not satisfied with the solution provided at the local / domestic level;
- The Committee of Experts can also review its own decision in a communication where the complainant can provide additional information to support his/her case;
- The Committee of Experts can receive a communication from a non-State Party (e.g. CSO, individual, group of people) if it is in the best interest of the child.

If the communication meets the above requirements, then it may be considered by the Committee of Experts. When a complaint reaches the committee, a group will be assigned to work on it to decide if it is acceptable. If it is acceptable then they will give feedback both to the country where the problem is located and the complainant. If there are gaps, then the committee will ask the country to take measures to protect the complainant while it is being investigated further³⁰.

The work on the complaint is confidential and is held in closed session debates. Once a decision has been taken, a communication is sent to the country's state department. A member on the Committee of Experts is designated to follow up and coordinate the process. Once the process has been completed, a report is sent to the Committee of the Heads of State and Government. Children who are the authors or who are the victims in the communication process have an opportunity to express their opinions to the Committee of Experts. This provision guarantees the cardinal principle that children should participate in issues concerning them.

Challenged by threats and gross violations of children's rights on the continent, the Committee issued a statement on punishment against children and additional "communiqués" on the situation of children in Côte d'Ivoire, Libya and the Horn of Africa. From the perspective of vigilance in monitoring and implementation of the ACRWC, the Committee intends to undertake agreement with Member States regarding monitoring missions to establish follow up on the Committee recommendations to Nigeria, Togo, Burkina Faso and Mali. Advocacy Missions for the ratification of the charter have to be undertaken in Tunisia, Swaziland and DRC. Other monitoring on the field operation have to take place in Kenya and Uganda³¹.

6.5 Investigation (Article 45 ACRWC)

The Committee resort to any appropriate method of investigating any matter falling within the ambit of the ACRWC. It may request from state parties any information relevant to the implementation of the charter and may also resort to any appropriate method of investigating the measures the state party has adopted to implement the charter. Investigations may be initiated because the Committee of Experts has received a communication indicating a serious violation. Investigation missions can be initiated either by a state referring a matter to the Committee of Experts, or the committee can undertake its own investigations, although the Committee may only visit a State Party if invited to do so by the government.

To ensure the investigative mission team has background knowledge of the situation, a preliminary report according to certain guidelines and based on available information is prepared before each investigation. The mission will meet with available state and non-state organizations and people in the country where the investigation will take place. Once the mission has finished its investigation, it has to release a preliminary

result to the government and the media in the country of investigation. A final report is then prepared which incorporates the mission's recommendations. This mission report must be attached to the progress report of the Committee to the African Heads of State and Government.

The country that has been investigated has up to 6 months after the adoption of a decision by the Committee of Experts to submit a written reply on what they have done regarding the requirements or measures requested in the mission report. The country's response should also include information on any measures in reaction to the recommendations made by the Committee after the mission. CSOs and 'specialized institutions' like children's CSOs could also be requested to provide information on the situation of children in that state.

7. Cooperation of ACE with other AU Institutions

7.1 Cooperation with the African Court of Human and Peoples Rights

Taking into consideration Article 30 of the new Protocol establishing the African Court of justice and human rights adopted in may 2008 by the AU Assembly of Heads of States and Governments. The ACE and The African Union Commission can submit cases to the Court. Both organs of the AU have a mandate of interpretation of the provisions as regard to human rights The Committee of Experts is a specialized institution and should have priority when matters are related to the interpretation regarding children's rights and welfare.

7.2 Cooperation with the African Commission of Human and Peoples Rights

It can be said that complementarities exist between the ACE and the ACHPR because of the similarity in the human rights they protect. Both organs have already started cooperation and reciprocal attendance to their respective sessions. In the 45th session of the African Commission on Human and Peoples' Rights held in Banjul in 2009, the Commission came up with a resolution to serve as a framework for cooperation between the two AU organs.

7.3 Relations with the United Nations Committee on the Rights of the Child (UNCRC)

Rules 70(b) of The Rules of procedures of the ACE stipulates that:

“If a State Party’s initial report has been reviewed by the UN Committee on the Rights of the Child, the concluding observations and the recommendations may be considered by the Committee when preparing the list of issues for the governments and adopting its own concluding observations and recommendations”. Besides this legal proximity the UNCRC and the ACE members met for the first time in Ouagadougou (Burkina Faso) and debated on ways of cooperation between the two Committees .It was decided that there will be reciprocal exchange of experience and members from the ACE would attend sessions of UNCRC and vice versa. The Cooperation is continuing through a working group composed of members from both committees and with the objective to harmonize the legal children terminology of what a child means, and to seek common interpretation of the main principles and other common rules³²

7.4 Possible Cooperation with the African Union Commission on International Law (AUCIL)

The ACE needs to improve its concluding observations by producing General Comments that will have direct consequence on State Reports mainly on their quality. The AUCIL can be an excellent think tank for the African Children Committee of Experts by providing General comments on specific topic covered by the ACRWC such as traditional prejudicial practices on Children, Internally displaced children, Protection against violence and other forms of abuses etc... AUCIL and ACE could explore other activities were cooperation is possible especially in the field of progressive development where current trends in contemporary Africa would be translated into new legal approach avoiding for example negative traditional practices .

8. Conclusion

The impact of the African Charter on the rights and welfare of children is important especially after 2005 when States started submitting initial reports for consideration by the ACE. They initially, acknowledged that Children and youth are entitled to human rights. Following this states acknowledgement many have changed their national law to make them compatible with the rights of the child and its welfare.

The legal prohibition of all forms of violence against children in the family, schools and other settings is constant and this shows the

positive impact of international human rights instruments such as the ACRWC which are necessary for the protection of the rights of children. Measures taken by African States to combat sexual exploitation, children trafficking, Drug abuses are also another illustration of the implementation of the African Charter on the Rights and Welfare of the Child.

At the international level the ACRWC has influence on Governments, the African Union and on Non Governmental organization programs. It is true that durable development, the strengthening of democracy and peace will systematically take into consideration norms of international human rights law of which the ACRWC is part and parcel of.

ENDNOTES

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3. African Charter on the rights and welfare of children see Website www.africa-union.org.
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7. Ibid Volume I (Second Part) p 629, United Nations 2002.
8. Ibid Volume I (Second Part) pp 763–825 United Nations 2002.
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11. Jean Didier Boukangou, Le système Africain de protection des droits de l'enfant : Exigence universelle et préention africaine, publication online
12. The ACRWC as of April 2012, 46 States on the 53 members of the African union have ratified the Children charter in a speech delivered in Banjul, Gambia April 18, 2012 “for an Africa fit for children” by Mister Cyprien Adebayo Yanklo First Vice Chair of The African Committee of Experts .
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14. All African states are members of the United Nations on the rights of children except Somalia in www.unicef.org/crc/.
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16. The ACRWC has been modeled after the UNCRC see Article 46 of the ACRWC.
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21. Article 45(i) ACRWC Website www.africa-union.org.
22. Article 42 ACRWC Website www.africa-union.org.
23. Article 42(iii) ACRWC Website www.africa-union.org.
24. Article 42(d) ACRWC Website www.africa-union.org.
25. Article 42(I) ACRWC Website www.africa-union.org.
26. in a speech delivered in Banjul, Gambia April 18, 2012 “for an Africa fit for children” by Mister Cyprien Adebayo Yanklo First Vice Chair of The African Committee of Experts
27. In Cmttee/ACRWC/2II.Rev2, Guidelines for initial Reports of States Parties, ACRWC Website www.africa-union.org.
28. Article 72(3)of the Rules of Procedures in In Cmttee/ACRWC/2II.Rev2, Guidelines for initial Reports of States Parties, ACRWC Website www.africa-union.org .
29. See NGO goup for the Convention on the rights of the child, secretariat@childrightsnet.org
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31. ACERWC/8/4, Guidelines for the consideration of communications provided for in Article 44 in the African Charter on the rights and welfare of children.
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La Traite des Africains fut-elle Licite? Une Problématique des Réparations de la Traite

Blaise TCHIKAYA¹

1. L'article 118 de l'Acte final du congrès de Vienne² prévoit en annexe une déclaration par laquelle les puissances européennes se prononcent contre la traite. On note que « Les plénipotentiaires des puissances qui ont signé le traité de Paris du 30 mai 1814, réunis en conférence, ayant pris en considération que le commerce connu sous le nom de *traite des nègres d'Afrique* (...) au nom de leurs souverains, en déclarent le vœu de mettre un terme à un fléau qui a si longtemps désolé l'Afrique, dégradé l'Europe, et affligé l'humanité »³. Sur son principe, l'originalité n'en revient à ce Congrès de Vienne, le Danemark abolit la traite 1802 et les États-Unis en 1807⁴. Toutefois, le congrès de Vienne apporte un élément décisif pour le droit international en la matière : l'illicéité conventionnelle de tout acte de telle nature. Pourtant, le but escompté ne sera pas atteint : 1) Contrairement aux dispositions de la déclaration, la traite des africains ne sera pas « glorieusement terminée » et continuera à courir jusqu'au début du 20^{ème} Siècle. Et, 2) si l'on considère l'intégralité du sujet, se pose la question de savoir si l'on prévoit la

1 Blaise Tchikaya, MCF-HDR à l'Université de Paris XIII et à celle de Fort-de-France est, Membre et premier Président de la Commission de droit international de l'Union africain. Il est le Rapporteur spécial sur la question des réparations des dommages subis par l'Afrique du fait de la traite.

2 Les traités, conventions, déclarations, règlements et autres actes particuliers qui se trouvent annexés au présent acte, et nommément, une Déclaration des Puissances sur l'abolition de la traite des nègres, 8 février 1815.

3 v. Déclaration des puissances sur l'abolition de la traite des Nègres, 8 février 1815, texte joint.

4 En France, le décret du 30 floréal an X de Bonaparte, premier consul, avait rétabli l'esclavage en ces termes « Dans les colonies restituées à la France, en exécution du traité d'Amiens, du 6 germinal an X, l'esclavage sera maintenu, conformément aux lois et règlements antérieurs à 178 ». C'est la révolution de 1848 qui proclama cette mesure. Le 27 avril, un décret du gouvernement provisoire prononça l'abolition immédiate de l'esclavage dans toutes les colonies françaises, et 260.000 noirs environ furent rendus à la liberté. Ceci après que la Convention ait voté le décret d'abolition de l'esclavage du 16 pluviôse an II (4 février 1794). v. Dacet (S.), L'abolition de la traite des Noirs en France de 1814 à 1831, *Cahiers d'études africaines*, 1971, pp. 14-58.

réaction de la principale concernée, l'Afrique, dont la déclaration dit avoir « longtemps été désolée » ?

2. Les Etats d'Afrique ne méritent-elle pas réparation du fait esclavagiste ou sur les méfaits de l'esclavage transatlantique⁵ qui dura quatre (4) siècle ? Ce problème de l'illicite ainsi posée est l'une des séquences théoriques de la vaste question, aujourd'hui pendante, de la formulation en droit de la réparation des méfaits de l'esclavage des noirs. Cette recherche est contenue dans la première question posée à la Commission de droit international de l'Union africaine⁶ par la Conférence des Chefs d'Etats de l'Union africaine. Il s'agissait d'examiner les contours juridiques qu'elle pourrait prendre et de dire comment pouvait-elle s'exprimer en droit international. La décision du Conseil exécutif [EX.CL/604 (XVII)] de l'Union africaine invitait sa Commission sur le droit international à inclure dans ses activités, la recherche et les études appropriées sur *une base juridique pour la réparation de l'esclavage et autres dommages causés au continent africain*. Or, on sait du droit international qu'une réparation ne peut découler que d'une responsabilité préalablement établie. Cette dernière étant la résultante d'un « manquement au droit international » ou d'une illicéité⁷. C'est donc naturellement que la question posée entraîne celle de l'illicéité perpétrée par les esclavagistes⁸.
3. Cette initiative aurait pu être celle de la *Sous-commission à la question de l'impunité des violations des droits de l'homme* qui avait demandé « à tous les pays concernés de prendre des initiatives permettant, notamment à travers un débat fondé sur des informations fidèles

5 Les historiens établissent que cette traite possède des particularités que les autres n'eurent pas : élaboration idéologique ; déportations massives des populations noirs (11 millions) ; le caractère permanent et systématique ; approbation manifeste des entités politiques ; différenciation lieu de production et lieu de capture ; enfin, unité de la finalité qui vise principalement le profit économique.

6 Commission créée le 4 février 2009 par le Conseil exécutif de l'Union africaine (UA).

7 Article premier du Projet d'articles sur la responsabilité internationale des Etats précise en effet que : « Tout *fait internationalement illicite* de l'Etat engage sa responsabilité internationale ». Il est la condition de la responsabilité. V. Documents officiels de l'Assemblée générale, 56^{ème} session, Supplément n° 10 (A/56/10), Annexe à la résolution 56/83 de l'Assemblée générale en date du 12 décembre 2001.

8 Juridiquement, l'autre régime connu de la responsabilité en droit international – la responsabilité pour dommage – n'est pas non plus moins exigeant. Les Etats répondraient de leurs actes esclavagistes dommageables tels que commis sur leur territoire. La non interdiction n'exclut pas la responsabilité, v. Caubet (C.-G.), *Le droit international en quête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas*, A.F.D.I., 1983, p. 99-120.

à la vérité, la prise de conscience dans l'opinion publique des conséquences néfastes des périodes d'esclavage du colonialisme »⁹. Par cette même Résolution 2002/5 du 12 août 2002, elle estimait que « les crimes contre l'humanité et autres violations flagrantes et massives des droits de l'homme qui sont imprescriptibles devraient être poursuivis devant les juridictions compétentes »¹⁰. La Sous-commission souhaitait ainsi faire sortir cette traite de la Chape de silence sous laquelle elle était placée depuis un siècle et demi. Or, la réparation n'est juridiquement que le corollaire de la responsabilité. Cette dernière, en plus d'une jurisprudence éparses, ayant entraîné des travaux forts abondants, à peine terminés, de la Commission de droit international des Nations Unies.

Figures et actualité du problème

4. Ce sujet est attractif d'approches passionnelles. Cela en constitue aussi l'intérêt. Dans les différentes approches, les deux extrémités y sont conviées, on y condamne aussi facilement que l'on absout. La recherche de l'illicéité commise dans la période visée peut paraître, d'un côté, superfétatoire à qui ne s'en tiendrait qu'à une vue globale de l'ampleur du dommage¹¹. Et, de l'autre, on est frappé par la ruse

9 E/CN.4/2005/102 et Add.1.

10 Résolution du HNUDH, 2002/5, Sous-commission des droits de l'homme : *La reconnaissance de la responsabilité et les réparations pour les violations flagrantes et massives des droits de l'homme en tant que crimes contre l'humanité qui se sont produits durant la période de l'esclavage, du colonialisme et des guerres de conquête*, 12 août 2002.

11 L'historien Congolais Elikia M'Bokolo : « Même habitué au spectacle des crimes qui jalonnent l'histoire de l'humanité, l'historien ne peut s'empêcher d'éprouver un mélange d'effroi, d'indignation et de dégoût à remuer les matériaux relatifs à l'esclavage des Africains. Comment cela a-t-il été possible ? Et si longtemps, et à une telle échelle ? Nulle part ailleurs dans le monde ne se rencontre en effet une tragédie d'une telle ampleur... Plus de quatre siècles (de la fin du XV^e au XIX^e – 1441 à 1848) de commerce régulier pour construire les Amériques et pour la prospérité des États chrétiens d'Europe. Ajoutez à cela des chiffres, même très controversés, qui donnent le vertige. Quatre millions d'esclaves exportés par la mer Rouge, quatre millions encore par les ports swahilis de l'océan Indien, neuf millions peut-être par les caravanes transsahariennes, onze à vingt millions, selon les auteurs, à travers l'océan Atlantique » (*Le monde diplomatique*, juin 1998, p. 2). v. aussi l'étude sur certaines captures ou certains raptus qui furent accomplis avec violence et déracinement. v. Latour Da Veiga Pinto, *La participation du Portugal à la Traite négrière, La Traite négrière au XV^e et XVI^e siècles*, Unesco, 1985. Noutépé Tagodoé, *Les victimisations et les conséquences de la traite et l'esclavage*, École de criminologie, Université de Montréal, 2011, p. 3 : « L'analyse des entretiens réalisés démontre clairement que la traite et l'esclavage négriers transatlantique n'appartiennent pas seulement au passé ». Il poursuit en disant qu'« Au contraire, la traite et l'esclavage négriers transatlantique restent présents dans les esprits et les cœurs. Ils sont surtout perçus comme une source de victimisations actuelles touchant la communauté africaine et antillaise tels que la faible confiance en soi, la faible estime de soi, la hiérarchie de la couleur, le racisme interne... Aussi, tous les répondants plaident pour au moins une forme de réparation (pécuniaire et monétaire, éthique ou politique, historique,

quasi-courante qui vise à dire de la traite des noirs qu'elle demeure une forme contemporaine d'esclavage¹². La question n'est pas non plus clarifiée par la jurisprudence en la matière. Les sentences sont variables à la fois sur la violation du droit ou l'illicéité commise et sur l'acuité de la sanction à prononcer en cas d'infraction. Aussi, certaines sentences indemnisent couramment des esclavagistes, en dépit de l'atteinte au droit international. Si dans une des espèces bien connue, la réclamation d'indemnisation fut déclarée irrecevable, dans bien d'autres elle fut accordée. Il s'agit de *l'affaire du Lawrence*¹³, ce brick américain, aménagé pour la traite des noirs et se rendant en 1848 de la Havane en Afrique, fut obligé de faire escale pour des réparations à Freetown (colonie britannique de Sierra-Leone). Le propriétaire du navire fut arrêté et condamné pour s'être équipé en vue de la traite des esclaves et le navire fut saisi. Cette affaire, comme bien d'autres, montre que le niveau de condamnation et sa fermeté découle de la gravité de l'illicite et de son expression.

5. L'actualité de la question est mondiale. En 1988, le Congrès américain – En les États-Unis avait aboli l'esclavage en 1865 – présenta des excuses officielles aux Américains d'origine japonaise internés dans des camps pendant la Seconde Guerre mondiale, et versa 20 000 dollars de compensation par prisonnier encore vivants. C'est cet exemple qui est notamment invoqué par l'écrivain et avocat afro-américain Randall Robinson dans un livre paru en 2001, intitulé *The Debt: what America owes to blacks*, qui va relancer le débat autour des réparations dues aux victimes de l'esclavage. Au demeurant, certains pays comme le Sénégal, le Ghana et le Bénin ont mené des actions et

éducative, psychologique, diplomatique) des conséquences de la traite et l'esclavage négriers transatlantique ».

- 12 Decaux (E.), *Les formes contemporaines de l'esclavage*, Martinus Nijhoff, Collection Académie de Droit International de La Haye, 2009, 258 p.; Fischer (G.), *Esclavage et droit international*, *RGDIP*, 1957, pp.71 ; Goudal (J.), *La lutte internationale contre l'esclavage*, *RGDIP*, 1928, pp. 591.
- 13 L'Arbitre indiquait les précisions suivantes : « Le commerce africain des esclaves étant, à l'époque de la condamnation du navire, prohibé par toutes les nations civilisées, était contraire à la loi des nations ; comme il est en même temps prohibé par les lois des États-Unis, les propriétaires du Lawrence ne peuvent réclamer la protection de leur propre gouvernement et par conséquent à mon avis ne peuvent élever aucune réclamation devant cette Commission ». v. Commission mixte États-Unis-Grande-Bretagne en vertu de la convention du 8 février 1853, sentence du 4 janvier 1855 ; Moore, *Arbitrations*, II, p. 2824; *R.A.L.*, I, p. 741. Dans même sens, les affaires de la *Barque Jones*, le *Brick Créole*, le *Brick Douglas*, le *Brick Enterprise* et le *Schooner Hermosa* furent jugées recevables et des indemnités furent allouées, v. Moore, *Arbitrations*, I, p. 409, p. 416 et s; p. 410 et p. 417; IV, p. 4375.

pris des initiatives au plan national. Une Conférence internationale a été organisée par le Ghana en 2006. En 2007, la Libye a formulé une demande contre l'Italie ; La France en 2001 a proclamé l'esclavage comme crime contre l'humanité. En 2006, l'Assemblée générale conférait la même qualification pénale au Commerce triangulaire et disait que les territoires et pays d'Afrique méritaient réparation. Du 2 au 9 septembre 2001 à Durban en Afrique du Sud, est la troisième session des Conférences mondiales contre le racisme organisées par l'UNESCO qui traite aussi de la même question. (Résolution AG ONU, 61/19 : Bicentenaire de l'abolition de la traite transatlantique des esclaves, 29 janvier 2007). Toutes ces demandes, du seul fait de viser les réparations, induisent en droit, la responsabilité et la recherche sur l'illicite qui en est le socle.

6. Outre ses incidences pratiques, au plan théorique, la question peut permettre notamment de comprendre comment s'applique le régime d'historicité en droit international, son intertemporalité, la transcription des modèles des réparations des dommages collectifs, l'intemporalité nécessaire de certains principes de droit, les différences de régimes juridiques dans les injustices historiques ; Shoa, Apartheid, génocide, minorités...
7. Il n'est pas si certain que la qualification de crime contre l'humanité, en supprimant la prescription¹⁴, suffise à établir et faire accepter le caractère illicite qu'aurait revêtu ce phénomène. Tout au moins le débat ne semble pas totalement clos. Car, l'objection faite est que cette qualification est actuelle et ne présume pas du régime juridique de la barbarie de l'esclavage lors de sa commission.
8. Les débats ont déjà été abondants et, tant d'aspects ont été considérés. Il est cependant utile de susciter la réflexion sur un point de controverse – si pas le principal – qui divise la doctrine : où résiderait le fait internationalement illicite ou la violation d'une obligation internationale dans la traite des esclaves transatlantique au sens du droit international. Cette interrogation seule permet de discuter l'idée que l'esclavage des noirs n'aurait pas été à l'époque de sa commission une activité proscrite ou interdite.
9. La question du caractère illicite de la traite est donc posée à l'effet d'établir une responsabilité des personnes, voire des Etats

14 Schreiber (M.) et Fisher (G.), Convention supplémentaire relative à l'abolition de l'esclavage, *AFDI*, 1956, pp. 547.

dont les territoires connaissaient l'esclavage. L'évolution du droit international a permis la formulation d'une obligation générale de « due diligence » opposable aux Etats¹⁵. Cela d'autant plus que la Commission de droit international des Nations-Unies dans son Projet d'articles sur la responsabilité de l'Etat dit qu' : « *Il y a fait internationalement illicite de l'Etat lorsqu'un comportement consistant en une action ou une omission : a) Est attribuable à l'Etat en vertu du droit international; et b) Constitue une violation d'une obligation internationale de l'Etat* ». Toutefois, demeure encore soutenue l'idée d'une certaine licéité de la traite des noirs à l'époque de sa commission. Cette idée a son ancrage dans la primauté accordée à l'ordre sociale récusant manifestement pas le fait esclavagiste. Elle apprécie comme anachronique ou trop rétroactives des thèses actuelles sanctionnant ces faits du passé.

10. On examinera d'abord la prétendue licéité de la traite des noirs (I), ensuite, on mettra en évidence l'affirmation actuelle du caractère illicite de la traite (II).

I. *La prétendue licéité internationale de la traite des noirs*

11. La Déclaration de Vienne posait une interdiction de principe de la traite des noirs. L'acte de la Conférence de Berlin de 26 février 1885 en son article 6 revient sur l'interdiction et l'organise : « Toutes les Puissances exerçant des droits de souveraineté ou une influence dans lesdits territoires s'engagent à veiller à la conservation des populations indigènes et à l'amélioration de leurs conditions morales et matérielles d'existence et à concourir à la suppression de l'esclavage et surtout la traite des noirs ». Cette interdiction contient des éléments permissifs à la condition de « *concourir à la suppression de l'esclavage et surtout la traite des noirs* ». Cette formulation tend à affaiblir l'illicéité pleine et entière constitué par les actes de Vienne.
12. Une argumentation vise à périodiser et à séquencer les dommages afin d'en affaiblir les éléments générateurs de responsabilité. Ne peuvent être reconnus comme relevant de la responsabilité des esclavagistes que certains dommages identifiés comme tels. Le raisonnement de la CDI, tel qu'exprimé par l'alinéa premier de l'article 14 du Projet d'articles pourrait en donner matière. On note : « La violation d'une

15 v. C.I.J., *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, Iran c. Etats-Unis, 15 décembre 1979 et 24 mai 1980 ; Le principe de l'utilisation non-dommageable de son territoire remonte aux années trente avec la les sentences *Fonderie du Trail*, Etats-Unis c. Canada, 16 avril 1938 et 11 mars 1941 ; v. Handl, *A.J.I.L.*, 1975 p. 50.

obligation internationale par le fait de l'Etat n'ayant pas un caractère continu a lieu au moment où le fait se produit, même si ses effets perdurent ». Sont évacués de l'illicite, tous les effets ou dommages qui se sont produits postérieurement à la violation. Le professeur Jean Salmon¹⁶, critiquant cette position du Rapporteur spécial de la Commission de droit international (le Professeur Roberto Ago)¹⁷, indiquait le crime international et l'évaluation d'un préjudice international comme des contre exemples. Bien des dommages de la traite des noirs dépasseront la période d'infraction ou ont eu lieu bien avant que le droit international n'en formule les proscriptions. L'appréciation devrait le prendre en compte.

13. Peut-on formuler sous le droit actuel, dans les conditions déjà évoquées, l'illicéité des actes qui ont eu lieu hier. L'hypothèse semble être écartée. Elle semble avoir été éloignée du droit de la responsabilité actuelle. A quelques exceptions près (Comme pour *l'uti possidetis juris*), le droit international n'est essentiellement pas intertemporel. On n'applique pas, sauf dispositions expresses, des vieilles conventions, fussent-elles internationales. Le juriste Suisse, Max Huber dans sa célèbre sentence, *Iles de Palmas*¹⁸, a martelé qu' « un acte juridique doit être apprécié à la lumière du droit de l'époque, et non à celle du droit en vigueur au moment où s'élève ou doit être réglé le différend relatif à cet acte ».
14. Le Projet d'articles de la CDI de 2001 en article 13 ajoutait que pour les Etats, l'obligation doit être en vigueur : « Le fait de l'Etat ne constitue pas une violation d'une obligation internationale à moins que *l'Etat ne soit lié par ladite obligation au moment où le fait se produit* ». Ce principe a nourri le refus français à la demande haïtienne faite par Jean-Bertrand Aristide de rembourser les 21 milliards de dollars des Etats-Unis correspondant à 90 millions de francs or versés à la France en guise d'indemnisation des Colons français.
15. Toute réclamation serait infondée, car aucune atteinte sérieuse n'était portée par l'esclavage des noirs qui avait plutôt un contenu humaniste. Comme le dit avec condescendance l'Acte de Berlin (1885) : Il faut veiller à « la conservation des populations indigènes et à l'amélioration de leur condition morale et matérielle d'existence

16 Salmon (J.), Le fait étatique complexe - une notion contestable, *A.F.D.I.*, 1982, pp. 709.

17 Rapport de la Commission, *A.C.D.I.*, 1978, p. 106.

18 S.A., Max Huber, C.P.A., *Iles de Palmas*, Etats-Unis c. Pays-Bas, 4 avril 1928, *R.S.A.*, II, 839 ; v. Khan (D.-Erasmus), *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations*, *European Journal of International Law*, 2007, Vol. n° 18, p. 145-170.

et concourir à la suppression de l'esclavage et surtout de la traite des noirs ». L'esclavage fut humain pour les esclaves. Il n'y avait aucune inhumanité. Le Code noir français en serait l'illustration. Sa version originelle élaborée par le ministre Jean-Baptiste Colbert (1616–1683) et promulguée en mars 1685 par Louis XIV précise en son article 26 que : « Les esclaves qui ne seront point nourris, vêtus et entretenus par leurs maîtres, selon que nous l'avons ordonné par ces présentes, pourront en donner avis à notre procureur général et mettre leurs mémoires entre ses mains, sur lesquels et même d'office, si les avis viennent d'ailleurs, les maîtres seront poursuivis à sa requête et sans frais; ce que nous voulons être observé pour les crimes et traitements barbares et inhumains des maîtres envers leurs esclaves ». Les traitements éventuellement inhumains des maîtres étaient réprimés.

16. Il y a Le crime contre l'humanité est constitué lorsque « l'humanité de la victime est niée, en clair, et sans appel », Frossard (A.), *Le crime contre l'humanité*, Robert Laffont, Paris, 1987, p. 72. Comme le souligne par ailleurs Castillo (M.) dit que « le crime contre l'humanité est celui qui va refuser à l'homme sa singularité et son égale appartenance à la communauté humaine », Le Tribunal pour l'Ex-Yougoslavie, *R.G.D.I.P.*, 1994, p. 73. La condition d'esclaves ne supprimait pas l'humanité inhérente aux sujets. La Convention du 26 novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité ne pourrait trouver à s'appliquer que s'il était démontré la grave infraction contre l'humanité.
17. L'un des arguments ajoute le fait que les notables africains auraient contribué au dommage de l'esclavage du fait d'avoir participé aux trafics. Une sorte d'application de la « théorie des mains propres ». On ne peut se prévaloir de sa propre turpitude. Cette position a de solides adeptes, Ce point paraît essentiel aux yeux de l'historien Roger Botte qui qualifie l'Etat du Futa (actuel Guinée) d' « État prédateur et non victime malheureuse de la traite » dans une étude qu'il diffuse en 1991¹⁹. Parlant du circuit du trafic, il note que « la demande, ses rythmes et sa densité furent imposés de l'extérieur ; certes, la distribution des tâches dans le système économique atlantique profita surtout aux Européens mais, quelle qu'en fût la manière, il revenait au producteur local d'assurer l'offre. Il rappelle

19 Botte (R.), Les rapports Nord-Sud, la traite négrière et le Futa Jalo à la fin du XVIII^e siècle, *Annales. Économies, Sociétés, Civilisations*, 1991, pp. 1411 et s.

le rôle qu'a joué l'Etat du Futa dans les échanges Nord-Sud dans l'évolution de traite. Il pose ensuite les questions nécessaires : « Dès lors, quelle était dans ce contexte la marge d'initiative des « entrepreneurs » africains ? Sur quelles bases commerciales se fondaient des relations entre des sociétés (européennes d'un côté, africaines de l'autre) qui ignoraient le coût de production chez l'autre des biens qu'elles s'échangeaient ? Dans ce commerce fondé sur le troc, le captif était-il payé à son « juste prix » ? Bref, la traite négrière était-elle un échange inégal et qui, en définitive, dictait les termes de l'échange ? ». Mais les réponses restent factuelles et ne semblent pas s'appuyer sur des principes généralement admis sur le terrain de la sanction juridique. Il concluait notamment que « En réalité, le régime islamique avait besoin que se maintienne en permanence, à sa périphérie, un « domaine de la guerre » : posséder à portée de sabre. Une « garenne à esclaves » était même une des conditions de sa survie. Sinon, comment alimenter les circuits de la traite négrière avec les Européens ? ». Sans en examiner toute la pertinence, toute la question de l'illicéité reste posée. Les peuples africains ne perdent pas leurs droits fondamentaux à la réclamation, contrairement à la position d'Ibrahim Thioub (*Le Monde*, 31 mai 2010).

18. Le discours abolitionniste achèverait la légitimation du phénomène. Et, essayant désespérément de le rendre licite, dans sa commission. Alors qu'il assure le passage de l'esclavage des noirs à la condition encore plus complexe de servitude. En France, par exemple, les débats abolitionnistes tournent sur la question de la préparation de l'esclave à la liberté²⁰. L'ensemble est plutôt réformateur²¹ tant les questions sur le fondement, la licéité et la condamnation du phénomène sont absentes. On mettait fin à une pratique sociale que la société souhaitait simplement dépasser, on passait – en quelque sorte - du « du charbon à l'électricité ».

II. *L'affirmation actuelle de l'illicéité de la traite des noirs*

19. Par l'absurde, on peut considérer les idées du criminologue italien Cesare Lombroso. Elles remontent au XIXème siècle. Dans son ouvrage remarqué, *L'homme criminel*, Lombroso dit que « le crime

20 Schmidt (Nelly), *Abolitionnistes de l'esclavage et réformateurs des colonies. Analyse et documents*, Paris, Karthala, 2000.

21 Garrier (Cl.), *L'abolition de l'esclavage : du mythe de 1848...*, *Sociétés africaines et diaspora*, n° 11, septembre 1998, p. 165-172.

chez les sauvages, n'est pas une exception, mais la règle »²². On sait que l'esclavage, comme le montre le moindre de ses récits, est truffé d'actes criminels²³. Est-ce à admettre qu'elle en fut la règle et en définissait ainsi le cadre social ?

20. L'illicéité internationale a été en premier prononcée par Pie II, écrivant en 1462 à un Evêque qui se rendait en Guinée. Il qualifiait l'esclavage « d'énorme crime ».
21. La traite des esclaves fut rejetée par le droit des gens depuis fort longtemps et, bien plus que certaines approches tendent à faire croire. Les arbitres condamnaient fréquemment les réclamations provenant des propriétaires des navires qui, paradoxalement, estimaient avoir des droits du fait de la montée l'interdiction de cette pratique²⁴. En ce sens, la réclamation à fin d'indemnité de Sieur Pelletier sera une illustration. Sieur Pelletier, capitaine de navire fut arrêté à Port-Liberté alors qu'il tentait de s'emparer des africains pour les vendre comme esclaves. Il fut condamné à 5 ans de prison ; son vaisseau et sa cargaison furent vendus. Toutefois, comme la juridiction qui l'avait condamné était en fait incompétente et qu'on avait fait subir à Sieur Pelletier un traitement insultant et cruel, l'arbitre crut bon de lui allouer une indemnité de 57.250 dollars sur les deux millions et demi qu'il réclamait. Ce fut le gouvernement américain lui-même, à la demande du secrétaire d'Etat, M. Bayard, qui refusa de demander l'exécution de cette sentence au gouvernement haïtien, conformément au principe du droit romain : « *ex dolo malo non oritur actio* » (Nulle action judiciaire ne peut résulter d'un fait frauduleux)²⁵. *Cette affaire montre l'ambiguïté de la formulation d'une illicéité clairement répréhensible en droit.*
22. Jean-Paul 2, lors de ses nombreux voyages en Afrique, dans le cadre du jubilé 2000, eut l'occasion de dénoncer ce qu'il appelle « l'esclavage de l'homme par l'homme » en se rendant à la Maison des esclaves à Gorée. Il soulignait « Comment oublier les énormes souffrances infligées au mépris des droits humains les plus élémentaires, aux

22 Lombroso, *L'homme criminel*, Ed. Alcan, Paris, 1888, p. 36. v. aussi, Joly (H.), *Le crime : Etude social*, Librairie Léopold Cerf, Paris, 1825, p. 5.

23 M'Bokolo (E.), *Op. cit.*, p. 2.

24 Commission mixte Etats-Unis-France en vertu de la convention du 15 janvier 1880, Moore, *Arbitrations*, III, p. 2574. V. Affaires Pierre Noguès, David de Lauréal et Ladmirault devant la même commission (Moore, *Arbitrations*, p. 2578).

25 Sentence, W. Strong, arbitre unique, Protocole du 24 mai 1884, Etats- Unis c. Haïti, 13 juin 1885, Moore, *Arbitrations*, II, 1749; P.I., p. 245.

populations déportées du contiennent africain ? Comment oublier les vies anéanties par l'esclavage ? Il convient que soit confessé en toute vérité et humanité ce péché de l'homme contre l'homme, ce péché contre Dieu... Dans ce sanctuaire africain de la douleur noire, nous implorons le pardon du ciel ».

23. En 1639, une bulle papale excommunait tous les catholiques qui se livraient au trafic des esclaves avec les indiens. Latour Da Veiga Pinto informe que, les jésuites encourageant la traite négrière ou se livrant à cette pratique furent frappés d'excommunication. La question est de savoir sur quelle base juridique cela fut fait.

24. Il semble en ressortir de ces trois éléments :

Il n'est pas certain que toutes les pratiques d'asservissement de la Traite aient pu être portées par l'église sur le plan juridique. Il y a eu des excès. Ce qui explique en partie au moins, l'adoption du Code noir (Edit du Roi, mars 1685)²⁶.

Il y a enfin les diverses contestations. Dès la fin du XVII^e siècle, les quakers de Pennsylvanie, se fondant sur la morale divine, excluent de leur communauté tous ceux qui pratiquent l'esclavage. En 1688, un groupe de quakers et de mennonites allemands réunis à Germantown (Pennsylvanie) a publié une pétition expliquant « pourquoi nous sommes contre la traite des corps humains ». « Amener des hommes ici ou leur voler leur liberté et les vendre contre leur gré : nous sommes contre » disait le document. Le mouvement, qui s'étend à d'autres Etats américains, touche l'Angleterre un siècle plus tard. En 1783, les quakers anglais pétitionnent pour que le Parlement abolisse la traite. Bientôt, les Eglises réformées et la presse viennent à la rescousse. Une dynamique est lancée, qui ne va plus cesser pour aboutir à l'abolition en Angleterre en 1839²⁷.

25. Pour les juristes, un acte est licite lorsque la norme fondamentale qu'elle implique le consacre. Il n'est pas acquis que la norme fondamentale (La pensée religieuse et l'autorité papale) de la période esclavagiste fut « constitutionnellement » favorable aux pratiques de la Traite.

26 Le préambule peut se lire de la manière suivante : « LOUIS, par la grâce de Dieu, Roi de France & de Navarre : A tous présents & à venir, SALUT. Comme nous devons également nos soins à tous les peuples que la Divine Providence a mis sous notre obéissance ». Aussi, la thèse qui affirme que les autres peuples sont « choses » pour l'église à l'époque n'est pas si évidente.

27 *Hamm (Th. D.), Quaker Writings: An Anthology, 1650-1920, Ed. Penguin Classic, 400 p.*

26. La Convention de Saint-Germain-en-Laye de 1919²⁸, ayant pour objet la révision de l'Acte général de Berlin de 1885²⁹ et de l'Acte général de la Déclaration de Bruxelles de 1890, s'est de nouveau positionnée en affirmant l'intention de réaliser la suppression complète de l'esclavage, sous toutes ses formes, et de la traite des esclaves par terre et par mer.
27. L'observation à faire semble être la même pour la Conférence de Berlin de Février 1885. L'article 6 dit que : « Toutes les Puissances exerçant des droits de souveraineté ou une influence dans lesdits territoires s'engagent à veiller à la conservation des populations indigènes et à l'amélioration de leurs conditions morales et matérielles d'existence et à « concourir à la suppression de l'esclavage et surtout la traite des noirs ». On ménage donc « la chèvre et le chou ». Le régime de servitude est maintenu, tout en parlant de l'espoir d'une suppression.
28. L'article Article 9 souligne que « Conformément aux principes du droit des gens, tels qu'ils sont reconnus par les Puissances signataires, la traite des esclaves étant interdite, et les opérations qui, sur terre ou sur mer, fournissent des esclaves à la traite devant être également considérées comme interdites... ».
29. L'un des actes désapprouvés reste la Convention internationale contre la torture et le traitement inhumain³⁰. Ce n'est qu'en 1987 que le droit international universel consacre un texte spécifique sur l'horreur de l'asservissement humain et la torture. Et, la critique est identique : par ce biais, la proscription et le rejet de l'esclavage est indirecte. Elle passe par la torture.

28 Le traité de Saint-Germain-en-Laye est signé le 10 septembre 1919.

29 Il s'agit bien de la conférence de Berlin qui organise le partage et la division de l'Afrique. Elle commence le 15 novembre 1884 à Berlin et finit le 26 février 1885. Il semble qu'elle ait été à l'initiative du Portugal et organisée par Bismarck. L'Allemagne, l'Autriche-Hongrie, la Belgique, le Danemark, l'Espagne, la France, le Royaume-Uni, l'Italie, les Pays-Bas, le Portugal, la Russie, la Suède-Norvège et la Turquie ainsi que les États-Unis y participèrent. Elle s'ouvre par la question du partage du Congo. Lutttes coloniales et pratiques esclavagistes y trouvèrent une base juridique, alors même que dans certains pays l'esclavage était déjà déclaré illégal.

30 Article premier de la Convention des Nations-Unies sur la torture : « le terme "torture" désigne tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit... », adoptée et ouverte à la signature, à la ratification et à l'adhésion par l'Assemblée générale dans sa résolution 39/46 du 10 décembre 1984, entrée en vigueur le 26 juin 1987.

30. La Cour pénale internationale créée en 1998 a une compétence juridictionnelle fondée sur la notion de « crimes graves de droit international ». Ces crimes font, de fait, l'objet d'une sanction spéciale de la part de la Cour. Cela fut une prise de position historique. Article 7 de la Convention Rome sur le Statut de la Cour pénale internationale : « Aux fins du présent Statut, on entend par crime contre l'humanité l'un quelconque des actes ci-après lorsqu'il est commis dans le cadre d'une attaque généralisée ou systématique lancée contre toute population civile et en connaissance de cette attaque : a) Meurtre; b) Extermination; c) Réduction en esclavage; d) Déportation ou transfert forcé de population... ».
31. Pour ceux qui s'en tiendraient à la l'article 13 du Projet d'Articles de la CDI. Il est utile de noter que *James Crawford* dans un ouvrage publié chez Pédone en 2003 (157 p.) rappelait que nonobstant le sens de cet article « n'était pas écarté la possibilité qu'un Etat consente à réparer les dommages résultant d'un fait qui n'était pas à l'époque d'une obligation internationale en vigueur ».
32. La décision bien connue, *Barcelona Traction* de 1970 est riche d'enseignements. On peut lire au § 34 de l'Arrêt : « Une distinction essentielle doit en particulier être établie entre les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agit sont des obligations *erga omnes*.
33. Ces obligations découlent par exemple, dans le droit international contemporain, de la mise hors la loi des actes d'agression et du génocide mais *aussi des principes et des règles concernant les droits fondamentaux de la personne humaine, y compris la protection contre la pratique de l'esclavage et la discrimination raciale. Certains droits de protection correspondants se sont intégrés au droit international général (Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951, p. 23); d'autres sont conférés par des instruments internationaux de caractère universel ou quasi universel. Il n'est pas certain qu'il soit attentatoire au droit international de considérer sur cette base l'esclavage de l'époque comme non conforme à l'ordre international de l'époque.*

34. Le 20^{ème} Siècle a construit le principe de l'imprescriptibilité des faits de la nature de l'esclavage, du fait de l'aberration morale que constitué la Shoa. C'est le dernier attribut à accoler à l'illicéité de l'esclavage transatlantique.
35. Cette illicéité fut reconnue par l'Assemblée générale de façon assez précise. Elle a déclaré « *la traite des esclaves constituent des crimes contre l'humanité et auraient toujours dû être considérés comme tels* »³¹. Même à considérer que les notables africains aient contribué au dommage de l'esclavage, cela ne change en rien ce principe à l'existence et la pertinence de l'illicite en l'espèce. Les peuples africains ne perdent pas leurs droits fondamentaux à la réclamation, contrairement à la position d'Ibrahima Thioub (*Le Monde*, 31 mai 2010).
36. Pour le droit international, le principe applicable qui en résulte est évident et la question du régime de la traite aurait été close depuis 1815. La déclaration du Congrès de Vienne de 1815 et la déclaration de Vérone de 1822 ayant conclu que la traite des esclaves était un acte répugnant aux principes d'humanité et de morale universelle. La collectivité internationale était engagée à prendre des mesures propres à réprimer tout acte lié à la traite. La déclaration de Vienne et celle de Vérone ont-ils proclamé une évidence et dit ce que l'esclavage était déjà : un acte répugnant pour la morale universelle ?
37. En somme, quel est en définitive le régime juridique de l'esclavage avant le Congrès de Vienne de 1815 ? Les pratiques esclavagistes sont-elles pratiquées contre le droit international ou non ? A la vérité, les textes nationaux, on le sait, sont permissifs. Mais, il faut reconnaître que la morale humanitaire et humaine dit de cette pratique qu'elle a *toujours* constitué une illicéité. Ne serait-il pas là le sens de la déclaration des Nations-Unies en 2007 lorsqu'elles affirment que : « *la traite des esclaves constituent des crimes contre l'humanité et auraient toujours dû être considérés comme tels* »³².
38. En 1976, dans le cadre des débats sur la responsabilité, la Commission de droit international des Nations-Unies s'est préoccupé de cette question à partir de la sentence³³ rendue par l'arbitre J. Bates sur la libération d'esclaves appartenant à des ressortissants américains,

31 Résolution de l'A.G. ONU, 61/19 : Bicentenaire de l'abolition de la traite transatlantique des esclaves, 29 janvier 2007.

32 *Op. cit.*, Résolution de l'A.G. ONU, 61/19, 29 janvier 2007.

33 Commission mixte, Etats-Unis c. Grande-Bretagne instituée par le traité du 8 février 1853.

opérées par les autorités britanniques. L'arbitre a établi une distinction selon le moment où les faits ont été commis, antérieurement puis postérieurement à l'abolition de l'esclavage pour retenir puis exclure la responsabilité de la Grande-Bretagne. La C.D.I. observe à cet égard que l'interdiction de l'esclavage est une « règle considérée comme impérative par la communauté internationale dans son ensemble » et en déduit que si un Tribunal avait aujourd'hui à juger l'affaire qui fait l'objet de la sentence de J. Bates, il semblerait « impensable que ce tribunal persiste à considérer ces agissements (libération d'esclaves) comme des faits internationalement illicites ». La traite, durant toute sa commission et son histoire, fut illicite.

Annexe:

Déclaration des Puissances sur l'abolition de la traite des Nègres du 8 février 1815

Les plénipotentiaires des puissances qui ont signé le traité de Paris du 30 mai 1814, réunis en conférence, ayant pris en considération que le commerce connu sous le nom de *traite des nègres d'Afrique* a été envisagé, par les hommes justes et éclairés de tous les temps, comme répugnant aux principes d'humanité et de morale universelle;

Que les circonstances particulières auxquelles ce commerce a dû sa naissance, et la difficulté d'en interrompre brusquement le cours, ont pu couvrir jusqu'à un certain point ce qu'il y avait d'odieux dans sa conservation, mais qu'enfin la voix publique s'est élevée dans tous les pays civilisés pour demander qu'il soit supprimé le plus tôt possible;

Que depuis que le caractère et les détails de ce commerce ont été mieux connus, et les maux de toute espèce qui l'accompagnent, complètement dévoilés, plusieurs des gouvernements européens ont pris en effet la résolution de le faire cesser, et que successivement toutes les puissances possédant des colonies dans les différentes parties du monde ont reconnu, soit par des actes législatifs, soit par des traités et autres engagements formels, l'obligation et la nécessité de l'abolir ;

Que, par un article séparé du dernier traité de Paris, la Grande – Bretagne et la France se sont engagées à réunir leurs efforts au congrès de Vienne pour faire prononcer, par toutes les puissances de la chrétienté, l'abolition universelle et définitive de la traite des Nègres ;

Que les plénipotentiaires rassemblés dans ce congrès ne sauraient mieux honorer leur mission, remplir leur devoir, et manifester les principes qui guident leurs augustes souverains, qu'en travaillant à réaliser cet engagement ; et en proclamant, au nom de leurs souverains,

le vœu de mettre un terme à un fléau qui a si longtemps désolé l'Afrique, dégradé l'Europe, et affligé l'humanité ;

Les dits plénipotentiaires sont convenus d'ouvrir leurs délibérations sur les moyens d'accomplir un objet aussi salubre, par une déclaration solennelle des principes qui les ont dirigés dans ce travail.

En conséquence, et dûment autorisés à cet acte par l'adhésion unanime de leurs cours respectives, au principe énoncé dans ledit article séparé du traité de Paris, ils déclarent à la face de l'Europe, que, regardant l'abolition universelle de la traite des Nègres comme une mesure particulièrement digne de leur attention, conforme à l'esprit du siècle et aux principes généreux de leurs augustes souverains, ils se sont animés du désir sincère de concourir à l'exécution la plus prompte et la plus efficace de cette mesure, par tous les moyens à leur disposition, et d'agir, dans l'emploi de ces moyens, avec tout le zèle et toute la persévérance qu'ils doivent à une aussi grande et belle cause.

Trop instruits toutefois des sentiments de leurs souverains, pour ne pas prévoir que, quelque honorable que soit leur but, ils ne le poursuivront pas sans de justes ménagements pour les intérêts, les habitudes et les préventions mêmes de leurs sujets, lesdits plénipotentiaires reconnaissent en même temps que cette déclaration générale ne saurait préjuger le terme que chaque puissance en particulier pourrait envisager comme le plus convenable pour l'abolition définitive du commerce des Nègres : Par conséquent, la détermination de l'époque où ce commerce doit universellement cesser, sera un objet de négociation entre les puissances ; bien entendu que l'on ne négligera aucun moyen propre à assurer et à accélérer la marche ; et que l'engagement réciproque contracté par la présente déclaration entre les Souverains qui y ont pris part, ne sera considéré comme rempli qu'au moment où un succès complet aura couronné leurs efforts réunis

En portant cette Déclaration à la connaissance de l'Europe et de toutes les Nations civilisées de la terre, lesdits plénipotentiaires se flattent d'engager tous les autres gouvernements et notamment ceux qui, en abolissant la traite des Nègres ont manifesté déjà les mêmes sentiments, à les appuyer de leur suffrage dans une cause, dont le triomphe final sera un des plus beaux monuments du siècle qui l'a embrassée et qui l'aura glorieusement terminée.

Vienne, le huit février mil huit-cent quinze.

African Union's Principles on Peace and Security

Minelik Alemu GETAHUN¹

Abstract

The Constitutive Act of African Union ('AU') has enshrined principles of democracy, human rights, the rejection of unconstitutional changes of Government, the right of the AU to intervene to arrest the commission war crimes, crimes against humanity and genocide. It has included the right of the Members States of the Union to seek intervention from the AU to restore law and order. The AU has also established organs to advance and implement these principles and added treaties elaborating the general principles of the Constitutive Act on human rights and democracy. The article discusses the context for the development some of these principles and the challenges of their realisation as well as reviews their compatibility with the UN Charter. Starting from the OAU times, it also highlights the salient features of the institutional and procedural aspects of AU's mandate to maintain peace and security in Africa.

¹ Ambassador and Member of AUCIL.

1. Introduction

The role of regional organisations in the maintenance of peace and security particularly in the area of peacekeeping has become increasingly important. In Africa, the establishment of the African Union in 2002 has introduced a new impetus for regional efforts in the maintenance of peace and security. The African Union has raised hopes for a robust regional peace and security architecture.

This article discusses the salient features of the institutional and procedural aspects of AU's peace and security mandate. At the heart of this evolving structure is AU's Peace and Security Council. The article argues that the peace and security mandate is an integral part of the organization's drive for democratization and assisting States to avert crisis and alleviating suffering and rebuilding governance with the support of international community.² The article will also discuss interactions with the Charter of the United Nations, which covers broad areas of dispute settlement, adjustment of disputes and situations, collective security measures and regulation of armaments.³ The article will discuss AU's regional structures for peace and security as they relate to the innovative principles and the role they play in the maintenance of peace and security.⁴ The article will start to chart the way from the post independence period to the current situation where advanced norms of democracy and human rights are articulated. The main focus would remain the innovative principles dealing with peace and security.

2. Lessons from the OAU

The discussion of the African Union's mandate on peace and security should be premised on the background of the lessons learned from the Organization of African Unity (OAU). It is fitting that we should recall that the tenets of the Charter of the OAU of 25 May 1963, and the achievements and challenges of the OAU which have contributed in shaping the current regional mechanisms.

In fact, the debate surrounding the founding of the African Union itself could be compared with the period preceding the establishment

2 Peter Mutharika, *The Role of the United Nations Security Council in African Peace Management: Some Proposals*, 17 Mich. J Int'l L. 559–561, 537–562 (1995–1996).

3 Leland M. Goodrich and Anne P. Simons, *The United Nations and the Maintenance of International Peace and Security* 597 (Greenwood Press Publishers 1955).

4 See Timothy Murithi, *The African Union: pan-Africanism, peace and development*, GB, Tyne & Wear, 2005: For extensive discussion on the structure of the African Union including the peace and security structures.

of the OAU. At the time, there were post independence debates between what was called the Casablanca group and what was called the Monrovia group of African leaders. The former advocated for an immediate unification of the continent with an African High Command with power to “intervene” in troubled situations,⁵ while the latter group called for gradualist integration.⁶ In 1963, the OAU Charter was born out of this debate at the Conference of Independent African States in Addis Ababa, Ethiopia. The Charter was underpinned by an emphasis on respect to sovereignty of Member States, decolonisation, and non-interference in the internal affairs.⁷ The principle of peaceful settlement of disputes is also incorporated as one of the core principles of the new organisation. It appeared that the drafters of the Charter wanted the OAU to handle matters of peace and security mainly through a specialised agency: a mediation commission. The OAU Charter provided for the establishment of an institutional mechanism on mediation as one of the principal organs of the OAU incorporating provisions on the Commission on Mediation, Conciliation and Arbitration which will have the competence of assisting States to settle their disputes amicably.⁸ A specific legal instrument was adopted with the view to determining the composition and condition of service of member of the Commission⁹ with comparable stature as with the secretariat, the Council of Ministers, and the Assembly of Heads of State and Government.¹⁰

The mandate of the Commission was not compulsory. States enjoyed the discretion to refer their disputes to the Commission or avail themselves of alternative channels. Despite the importance attached to it, the Commission was never fully operational and African States, as clearly shown in conflicts between Morocco and Algeria; Ethiopia and Somalia; Western Sahrawi and Chad, largely shunned this mechanism and instead preferred to bring inter-state disputes to *ad hoc* arrangements. In addition to the non-compulsory nature of the Commission’s competence, its role was further limited by the fact that

5 Norman J. Padelford, *The Organization of African Unity*, 18(3) International Organization, 522, 521–545 (Summer, 1964).

6 Boutros Boutros-Ghali, *The Addis Ababa Charter*, International Conciliation, 546 (Carnegie Endowment For International Peace 1964).

7 Gino J. Naldi, *The Organization of African Unity: An Analysis of its Role*, 2nd ed., 5–12 (Mansell 1999).

8 Article XIX of the OAU Charter, http://www.au.int/en/sites/default/files/OAU_Charter_1963.pdf

9 The Cairo Protocol was adopted in 21 July 1964.

10 T.O. Elias, *Africa and the Development of International Law*, pp. 143–144.

its jurisdiction was also limited to inter-state conflicts.¹¹ For most that period, considerations of intra-state conflicts, which were far important in many conflict scenarios in Africa, were considered as internal matters left to discretion of members states.

It is suggested that OAU Member States conceived their new organisation and its mandate well within Chapter VIII of the United Nations Charter.¹² Others noted that the drafters of the OAU Charter considered their Organisation as an equal partner with the UN.¹³ The latter view, however, was inconsistent with the consensus that emerged from the San Francisco meeting that adopted the UN Charter wherein the primacy of the United Nations in the maintenance of peace and security has been reaffirmed. Article 53 of the UN Charter clearly states that no enforcement action may be taken by regional organisations without the authorisation of the Security Council. It is also stated that the Council may utilise regional organisations for the purpose of its enforcement action under its authority. Though what looks similar to such level of cooperation occurred in the Council's decision on a UN-AU hybrid peacekeeping force for the Sudan, similar approach was not used during the period of the OAU.

Another development during the time of OAU with particular relevance to the understanding of AU's structures is OAU's response to unconstitutional changes of government in Africa. The resurgence of *coup d'états* and other unconstitutional changes of governments is a matter of rule of law and is also central to the maintenance of peace and security in Africa. The OAU condemned military coups, and moved on to also rejecting the use of mercenaries, military or rebel movements, and the refusal by incumbent movements to relinquish power after losing elections.¹⁴

Early in its history, it is not evident if the OAU deliberated upon many of the real contents of the unconstitutional changes of government and the implications for leaders endorsing those measures. Leaders who captured State power through successful *coups d'état* were effectively participating in the assemblies of the OAU.¹⁵ This

11 Samuel G. Amoo, *The OAU and African Conflicts: Past Successes, Present Paralysis and Future Perspective*, Working Paper, Institute of Conflict Analysis and Resolution, 1992, p. 9.

12 T.O. Elias, *Africa and the Development of International Law*, 1972, 125.

13 Cervenka, *The Organization of African Unity and its Charter*, 112 (1969).

14 See Declaration on the framework for an OAU response to unconstitutional changes of government, AHG/Dec.5?(XXVI) 2000

15 T.O. Elias and R. Akinjide, *Africa and the Development of International Law* (1988), at 110, n. 11.

issue continued to attract interests of the OAU and its Member States specially when competing delegations attempted to participate in meetings and when Member States 'sponsoring' competing groups took often conflicting positions.

A significant political milestone was achieved when the OAU adopted the Algiers Declaration on Unconstitutional Changes of Government in Africa in 1999. In 2000, an additional measure was taken when the OAU adopted the Lome Declaration for OAU Response to Unconstitutional Changes of Government in Africa.¹⁶

A number of measures were envisaged under the Lome Declaration against perpetrators of unconstitutional changes of government. Firstly, the Lome Declaration authorizes the OAU Chairman and the organisation's Secretary General to publicly condemn coups, and call for a swift return to constitutional rule. The Chairman or the Secretary General or any State Members of the OAU can request the Central Organ to consider the situation. Secondly, within a period of six months, perpetrators of the coup are expected to restore constitutionality. During this period, that particular government will be suspended from participating in any meetings of the policy organs of the OAU. It is clearly stated in the Algiers or Lome? Declaration that such suspension does not amount to a interruption or termination of membership to the Organisation. The legal relationships between the government of the country and the OAU with respect to other entitlements and obligations of Member States will remain intact. Thirdly, a non-exhaustive series of 'limited and targeted' sanctions such as visa restrictions, bans on government to government contacts and trade may be imposed. Fourthly, the OAU can also request other governments not to recognise the perpetrators of the coup.

As already noted, these regional normative standards, though laudable, do not have analogous rules under international law. Under international customary law, the nature of a government or its constitutionality does not necessarily affect its recognition by other States or its status under international law. The Charter of the United Nations does not have provisions outlawing or suspending governments which seize power through unconstitutional means. Lauterpacht make this point more explicit when he notes:

16 http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/10HoGAssembly2000.pdf

A victorious revolution or a successful coup d'états does not destroy the identity of the legal order which it changes. The order established by the revolution or coup d'état has to be considered as a modification of the old order, not as a new order, if this order is valid for the same territory. The government brought into permanent power by a revolution or coup d'état is, according to international law, the legitimate government of the state, whose identity is not affected by these events.¹⁷

One can hardly speak with any level of certainty to what extent OAU's standards and decisions on constitutionality of governmental changes facilitated the Organisation's role in the maintenance of peace and security in Africa. Moreover, the OAU has not taken firm decisions when it comes to 'peace and security' issues related to rigging of elections and flawed political systems. In fact OAU response to unconstitutional change of governments heavily depended on the issues and interests at stake.¹⁸ However, it can safely be argued that these measures were progressive on their own terms.¹⁹ It is often cited that the institutional efficacy of responding to unconstitutional changes of government is partly related to OAU's adherence to the principle of non-intervention.²⁰ The 1992 Algiers Declaration on Unconstitutional Change of Governments, Declaration on a Mechanism for Conflict Prevention, Management and Resolution (MCPMR), the New Partnership for Africa's Development (NEPAD) with its programme for peace and security and the African Peer Review Mechanism, and the Conference on Security, Stability, Development, and Cooperation in Africa (CSSDCA) with its civil society initiative as well as the Eminent Persons Contact Group and the Economic Community of West African States (ECOWAS) Democracy and Good Governance Protocols have introduced far-reaching standards for governance and accountability in Africa.²¹

17 Elihu Lauterpacht, *International Law Reports*, 1970, at 29.

18 see J. Shola Omotola: *Unconstitutional Change of Government in Africa: What Implications for Democratic Consolidation?* Discussion Paper 70, Nordiska Afrikainstitutet, Uppsala 2011 at 32.

19 Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, 5th ed., 245 (Sweet and Maxwell Limited 2001)

20 P. Mweti Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. Third World L. J. 578, 537-592 (1998-1999).

21 The Strategic Plan of The African Union Commission Volume 1: Vision and Mission of the African Union, May 2004, OAU/ AU documents, resolutions, and treaties are available at <http://www.africa-nion.org/home/Welcome.htm>, or Http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oa/hog/bHoGAssembly1964.pdf. 17-02-05.

Hence, for most of its existence, the OAU focused its efforts on preventive diplomacy and attempts at mediating disputes than direct enforcement action. The adoption of the Cairo Declaration establishing the OAU mechanism on conflict prevention, management and resolution²² with its own Central Organ for implementation provided an important opportunity for formalising the role of the OAU in engaging in an institutional setup for peaceful settlement of disputes in the continent. It undertook preventive diplomacy, few peace support mission operations and military observer missions, with some failures due to institutional shortcomings, financial problems and at times being undermined by the role of non-African actors.²³

Ensuring the independence of African States and ridding the continent of colonialism and apartheid are some of the lasting legacies of the OAU. In fact, the Heads of State and Government of the Assembly of the African Union, at their inaugural session in Durban, South Africa, in July 2002, adopted the Declaration in tribute to the OAU lauding it:

“...became a dynamic force at the service of the African people in the pursuit of the struggle for the total emancipation of the African Continent in the political, economic and social fields. Nowhere has that dynamic force proved more decisive than in the African struggle for decolonisation. Through the OAU Coordinating Committee for the Liberation of Africa, the Continent worked and spoke as one with undivided determination in forging an international consensus in support of the liberation struggle. Today, we celebrate a fully decolonised Africa and Apartheid has been consigned to the ignominy of history.”²⁴

Indeed these were principal objectives and purposes of the Organisation enshrined in the OAU Charter. The OAU was also heavily criticised for its legal, institutional, financial and political shortcomings and its failure to protect civilians or prevent or manage conflicts. These legitimate criticisms are irrespective of some recognition what it secured in terms of setting the foundation regional mechanism for pacific

22 Declaration on the establishment, within the Organization of African Unity (OAU), of a Mechanism for Conflict Prevention, Management and Resolution, adopted by the 29th Ordinary Session of the Assembly of Heads of State and Government of the OAU, held in Cairo, Egypt, from 28 to 30 June 1993.

23 *Africa's First Peacekeeping Operation: The OAU in Chad, 1981–1982*. By Terry M. Mays. Westport, Conn.: Praeger, 2002. ISBN 0-275-97606-8. Photographs. Appendixes. Notes. Bibliography. Index. Pp. xiv, 192. \$64.95; See also Roy May and Simon Messey, ‘OAU Intervention in Chad: Mission Impossible or Mission Evaded’ *International Peacekeeping*, Vol. 5, Issue 1, Spring 1998, pp. 46–65.

24 ASS/AU/Decl. 2 (http://www.au.int/en/sites/default/files/ASSEMBLY_EN_10_12_July_2003_AUC_%20THE_FIRST_ORDINARY_SESSION.pdf)

settlement of disputes among Member States, and solve the myriads of inter-state conflicts.²⁵

A number of important lessons can be drawn from the OAU's experience in handling peace and security issues. The important doctrines of non-interference and non-intervention have made OAU Member States to look at the prospect of the Organisation's involvement in peacekeeping missions with suspicion and ambivalence. This, however, started to change as Member States come to fully appreciate how conflicts in neighbouring countries can also have devastating effects across boundaries. The understanding that conflicts in far too many instances are underpinned by lack of democracy, unconstitutional changes of government and electoral standoffs, encouraged the OAU and its Member States to develop certain norms and institutions to address such challenges.

OAU's peacekeeping experiences have shown that norms and decisions cannot easily translate into outcomes. Peacekeeping missions are too expensive.²⁶ Regional initiatives in this regard can only be successful if they are robustly supported by international community or regional powerful countries whose interest in the peace and security of the particular country will be sufficient incentive for involvement. It is notable that OAU's increased regional role in peacekeeping and peace support operations has coincided with a greater appreciation by the international community particularly by the UN regarding the important role regional organisations can play.

3. African Union principles on peace and security

The need for establishing a new pan-African organisation replacing the OAU was discussed in the OAU Summit in Sirte, Libya in 1999. The following year, the Constitutive Act of the new organisation was signed in Lome. The AU was officially inaugurated in Durban, South Africa in July 2002. This transformation was quite a significant development. Both international and regional factors underpinned the transformation of the much-criticised OAU into the African Union. OAU's once overriding agenda of decolonisation and anti-apartheid waned as African countries achieved independence and South African

25 Charles Riziki Majinge, *Regional Arrangements and the maintenance of international peace and security: the role of the African Union Peace and Security Council*, annuaire canadien de droit international (2010) p. 100–101.

26 Salim Ahmed Salim, *The OAU Role in the Management of Conflict* in Olara A. Ottunnu and Micheal W. Doyle (Eds.) *Peacemaking and Peacekeeping for the New Century*, pp. 45–55, 248.

apartheid regime was dismantled in 1994. The 1990s presented new and profound changes both at the international and regional level. The end of the Cold War, the ever-increasing proliferation of conflicts in the continent, the complex web of challenges presented by globalisation and international community's abysmal failure in responding to Africa's tragedies such as the 1994 Rwandan genocide underwrote the urgency of establishing greater political and economic integration in Africa, and the need to enhance Africa's own capacity to respond to its security needs.²⁷ Particularly Africa's new peace and security structures came as a response for a long felt need in Africa of developing such multilateral framework for conflicts prevention, peaceful resolution of disputes, and intervention to find durable solutions.²⁸ The launching of the New Partnership for Africa's Development in 2001 was premised on the idea that Africa's integration and its institutional capacity to address the challenges of peace and security can only be addressed through a comprehensive socio- economic development.

Africa's encounter with a new wave of democratisation also created hopeful signs that its multilateral institutions can actively support this positive development. Though Chapter VIII of the United Nations identifies the role of the regional organization specifically in the pacific settlement of disputes,²⁹ it was in the aftermath of the end of the Cold War that regional organisations assumed a prominent role in the maintenance of peace and security. NATO's role in the former Yugoslavia and in particular its endorsement of its actions taken by the Security Council signalled a new era.³⁰ The General Assembly also adopted several resolutions encouraging the early initiative taken by regional organisations.³¹

In the following pages, the article will trace on the founding the AU, in particular the nature of the Constitutive Act establishing the new organization, and proceed to elaborate on the principles and policy of the rejection of the unconstitutional change of governments, the

27 See Salim Ahmed Salim, *The OAU in Conflict Management, Peacemaking and Peacekeeping For the New Century*, in Peacemaking and peacekeeping in the New Century, Olara A. Otunnu and Micheal W. Doyle eds., 252(Rowman & Littlefield Publishers, Inc.1998).

28 Stephen F. Burgess, *African Security in the Twenty-First Century: The Challenges of Indigenization and Multilateralism*, 41(2) African Studies Review, 38, 37–61 (September 1998).

29 Article 53 of the Charter of the United Nations mandates the SC to utilise regional organisation for enforcement action within the bounds of the SC's own mandate under Chapter VII.

30 Resolution 770 (1992).

31 resolution 48/42, and resolution 48/42,

common defence policy of the AU, the right of the AU to intervene in situations of war crimes, crimes against humanity and Genocide and the right of Members States to request intervention from the AU to restore law and order.

3.1 The Constitutive Act of the African Union

The transformation of the OAU into the AU is one of the most significant institutional developments in Africa since the establishment of the OAU itself 50 years ago. It was a culmination of various initiatives taken during the 1990s. The 4th Extraordinary Session of the OAU Assembly held in Libya in 1999 presented an opportune moment to consolidate these initiatives as the session focused on the complete reorganization or immediate creation of the 'United States of Africa' with a continental presidency and a single army as proposed by the Libyan host.³² Rejecting Libyan alternative proposals of adopting integrationist models of either the United States of America or the former Soviet Union models as a radical approach,³³ the OAU Assembly instead adopted the historic the Sirte Declaration deciding to "[e]stablish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the provisions of the Treaty establishing the African Economic Community..."³⁴

As the long-winded controversy on the Union Government clearly showed, this debate did not come to an end at this particular point in time. Even after the establishment of the African Union, the issue, in particular, the pace and nature of the continent's move towards unification continues to trigger a lively interaction among Member States. In 2000, the OAU Assembly adopted the AU Constitutive Act, which came into force on 26 May 2001,³⁵ not as a brainchild of any single country but as a successful outcome of an intensive negotiating process.³⁶ This was similar to the manner in which the OAU was established. AU's creation was inspired by a 'top down' approach by African political

32 Thomas Kwasi Tiekou, *Explaining the Clash of and Accommodation of Major Actors in the Creation of the African Union*, *African Affairs*, 261, 249–267 (2004).

33 Ben Kioko, *The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention*, 85 *International Review of the Red Cross*, 811, 807–825 (December 2003); Tiekou, *supra* note 11, at 12.

34 EAHG/Dec.1(V), adopted on 9 September 1999. at: http://www.au2002.gov.za/docs/key_oau/sirte.htm, 20-02-05.

35 The 36th Ordinary Session of the OAU Assembly (2000). (hereinafter the Constitutive Act).

36 Rachel Murray (a), *Human Rights in Africa: from the OAU to the African Union*, 32 (Cambridge University Press 2004).

leaders. Visibly lacking in this process was proper public participation.³⁷ However, unlike the OAU Charter, the Constitutive Act of the African Union incorporates principles which encourage greater participation of civic society in its activities. The ECOSOCC is established specifically for the purpose of encouraging the participation of CSOs. Given the nature of powers the Constitutive Act grants to the new Organisations, one would have naturally expected States to call for a robust domestic vetting process. It should also be noted that only few countries in Africa have provided for constitutional authorizations allowing the granting of such a wide mandate to the new continental body.³⁸

The Constitutive Act, in its preamble, underscores the need to promote peace and security as a means of consolidating and encouraging the integration agenda. Article 3 of the founding instrument clearly identifies the promotion of peace, security and stability as an objective of the Union. It also, under its Article 5, lists the institutions that make up the African Union. These include the Assembly of the Union, the Executive Council, the Pan-African Parliament, the African Court of Justice and Human Rights, the African Union Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions.³⁹

Even though the Constitutive Act provides that the Assembly may establish additional institutions on its own discretion, the original version of the Constitutive Act did not incorporate the Peace and Security Council and the regional human rights institution such as the African Commission on Human and Peoples' Rights. That the central body of the new organisation on peace and security was not incorporated in the original text of the Constitutive Act was rather curious given that the Constitutive Act has given so much emphasis to the issue of resolution of conflicts. Some have also criticised this lack of reference to these institutions.⁴⁰

The implication of this lacuna, however, should not be exaggerated. The Assembly of the OAU rather quickly acted to rectify the problem by taking the decision in July 2001 to incorporate the Central Organ of the OAU Mechanism on Conflict Prevention, Management and

37 Dejo Olowu, *Regional Integration, Development, and the African Union Agenda: Challenges, Gaps, and Opportunities*, 13 *Transnat'l L. & Contemp. Probs.* 211, 211–253 (2003).

38 Magdalena M. Martin Martinez, *National Sovereignty and International Organizations*, 26–57 (Kluwer Law International 1996).

39 Assembly/AU/Dec.33 (III).

40 Tiyanjana Maluwa (a), *Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendment to the Constitutive Act of the African Union*, NILR, 198, 195–236 (2004).

Resolution as an organ of the Union, and requested the OAU Secretariat to review the structure, procedure and mandate of the working method of the Central Organ.⁴¹ Finally the Protocol on the Establishment of Peace and Security Council (PSC)⁴² and the Protocol on Amendments to the Constitutive Act that included the PSC as one of the organ of the Union were adopted.⁴³ According its constitutive protocol, the PSC will have the primary responsibility of considering peace and security issues including the establishment of peacekeeping and peace building efforts. This represented the first time where these concepts were captured in a binding regional legal instrument.

The Constitutive Act presents a break from the Charter of the OAU in numerous ways. It incorporates explicit principles on human rights, democracy, resolutions of conflicts and principles relating to the defence of sovereignty, sanctity of colonial boundaries, non-use of force, non-interference into internal affairs of Member States and peaceful resolution of conflicts, which are also easily recognizable rules of international law.⁴⁴ It has also principles such as the participation of the African peoples in the activities of the Union and the establishment of a common defence policy for the African Continent; the right of Member States to request intervention from the Union in order to restore peace and security; and condemnation and rejection of unconstitutional changes of governments.⁴⁵ It is said that the OAU's doctrine of non-interference is replaced with that of 'non-indifference'.⁴⁶ Some of the most innovative aspects of the new peace and security regime flow from the Constitutive Act such as the right of the AU to intervene in Member States in cases of genocide, war crimes and crimes against humanity. It also has the right of Member States to request intervention from the AU to restore peace and security.⁴⁷ The Assembly is also empowered to impose sanctions.⁴⁸ The PSC is established as a body specifically charged with the maintenance of peace and security in the continent.⁴⁹

41 Decision AHG/Dec.160 (XXXVII) adopted by the 37th Ordinary Session of the Assembly of Heads of State and Government of the OAU, held in Lusaka, Zambia, from 9 to 11 July 200.

42 ASS/AU/Dec. 3 (I), The Protocol entered into force on 26 December 2003. (hereinafter the PSC Protocol.)

43 Assembly/AU/Dec.26 (II)

44 Tiyanjana Malwa (b), *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 *Leiden Journal of International Law*, 163, 157–170 (2003).

45 Article 4, the Constitutive Act.

46 Audit of the African Union, Report of the High Level Panel, at 8.

47 Articles 4(h) and (j), the Constitutive Act and Article 7(e), the PSC Protocol.

48 Article 23, the Constitutive Act.

49 Article 2, the PSC Protocol.

The AU Commission as the Secretariat of the Union,⁵⁰ is empowered with significant peace and security related powers.⁵¹ The Court of Justice⁵² and the Court on Human and Peoples' Rights,⁵³ which have been merged as the judicial arm of the Union; the incorporation of the Pan-African Parliament, as an organ of the Union with an advisory role;⁵⁴ and the establishment of the ECOSOCC as "... an advisory organ composed of different social and professional groups of the Member States of the Union"⁵⁵ are equally groundbreaking steps in the setting of the new architecture. The adoption of the AU Non-Aggression and Common Defence Pact and the establishment of an African Union Commission on International Law with a responsibility of studying all legal matters related to peace and security in Africa, including boundary delimitation and demarcation⁵⁶ is another addition to the peace and security structure of the AU.

3.2

3.2.1 Unconstitutional Changes of Government Principle

The incorporation of the principle of condemnation and rejection of unconstitutional changes of governments under Article 4(p) and its elaboration under Article 30 of the AU Constitutive Act that governments which acceded to power unconstitutionally will be suspended from participation in the activities of the Organization,⁵⁷ codifies the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government and the practice of the OAU in denying representation in its organs of governments that acceded to power unconstitutionally.⁵⁸ The observance of this principle would surely contribute to the maintenance of peace and security in the

50 Article 20, the Constitutive Act.

51 Article 3, ASS/AU/2(I) – d, Statutes of the Commission of the African Union (2002)

52 Article 19 of the Protocol of the Court of Justice of the African Union. (not yet en force).

53 Articles 4 & 5, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.(en force since January 2004).

54 Article 2(3), Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament. (en force since 11 December 2003)

55 Article 22, the Constitutive Act.

56 Article 14(1), The AU Non-Aggression and Common Defence Pact, adopted by the Fourth Ordinary Session of the Assembly (2005). (not yet entered enforce.)

57 Article 30, the Constitutive Act

58 AHG/Decl.5 (XXXVI) Declaration on the Framework for an OAU Response To Unconstitutional Changes of Government (2000) (hereinafter the Declaration on Unconstitutional Change). Malwa(b), supra note 39, at 165.

continent, as forceful usurpation of power is one of the several sources of conflict and instability in the continent.⁵⁹

The definition of unconstitutional change, which includes the replacement of a democratically elected government either by a coup d'état or armed rebellion or intervention of mercenaries or a refusal by an incumbent government to relinquish power to the winning party after free and fair elections⁶⁰ makes it clear that the principle is adopted to protect democratically elected governments. In one case, the AU passed a decision to impose sanctions on a regime forcing the *de facto* authorities to reverse the illegal installation of the new personality by the military and attempts to modify the Constitution to suit this manipulation,⁶¹ in the process enlarging the definition of unconstitutional change of government to include 'constitutional legality'⁶² since the previous regime is not considered democratic. Observance of this principle, apart from deepening democracy in Africa, would increase legitimacy of African governments as they would get additional validation under regional norms, thus contributing to the development of the concept of international validations of governments, eventually under agreed international standards.⁶³

The African Union took additional steps in the codification of norms regulating unconstitutional changes of government when its Assembly adopted, on 30 January 2007, in Addis Ababa, Ethiopia, the African Charter on Democracy, Elections and Governance. The Charter entered into force on 15 February 2012.⁶⁴ In many respects, the Charter represents comprehensive norms that were already incorporated in previous soft-laws and decisions. There were also numerous areas of innovations. It is a clear attempt to create a strong linkage among human rights, rule of law and democratic governance which, though laudable, will in most likelihood be besieged by challenges of enforcement.

The Charter on Democracy, Elections and Governance obligates States to respect the right of people to full participation in public life and to create national normative and institutional frameworks

59 Nsongura J. Udombana, *The Unfinished Business: Conflict, the African Union and the New Partnership for the Africa's Development*, 35 Geo. Wash. Int'l. L. Rev., 68, 55–106 (2003).

60 Declaration on Unconstitutional Change, supra note 43, paragraph 11 (i–iv).

61 PSC/PR/Comm. (XXIV) 2005.

62 PSC/PR/Comm.(XXX), 27 MAY 2005.

63 Thomas M. Frank (a), *Legitimacy and the democratic entitlement*, in *Democracy Governance and International Law*, eds., Gregory H. Fox and Brad R. Roth, 29 (Cambridge University Press 2002).

64 http://www.au.int/en/sites/default/files/Charter%20on%20Democracy%20and%20Governance_0.pdf

that guarantee the promotion of democracy and good governance. Accordingly, it is stated that States' commitment to the principles enshrined in the Charter on Democracy, Elections and Governance should be reflected in holding free, fair and regular elections. It is also provided that states shall establish independent national institutions which will run elections, settle electoral disputes and entrench democratic values. Moreover, States are required to ensure civilian control of the military and security forces.⁶⁵ The Charter on Democracy, Elections and Governance also underscores their obligation to ensure constitutional means of power transfer and it enjoins States to criminalise any act of unconstitutional transfer of power. A number of additional provisions are also included in the Charter on Democracy, Elections and Governance whose effect will be an innovative construction of a supra-national criminalisation of what can be considered 'act of constitutional changes of government.' Not only does the Charter on Democracy, Elections and Governance requires States to penalise such actions, but also suggest in clearest terms that perpetrators of such criminal acts shall be subjected to courts of the Africa Union. In an apparent attempt to address the problem associated with constitutional amendments which are aimed at renewing tenure of incumbents in many African countries, Article 10 of the Charter on Democracy, Elections and Governance provides that constitutional amendments should be undertaken on the basis of national consensus.

Under the Charter on Democracy, Elections and Governance, States are also required to cooperate with the view to addressing the problem of immunity.⁶⁶ The Charter on Democracy, Elections and Governance prevents 'perpetrators of unconstitutional change of government' from participating in elections.⁶⁷ States are also required to refrain from providing sanctuaries for individuals who perpetrated crimes of unconstitutional changes. Moreover, it envisages a situation whereby such individuals will be brought before the African Courts. Given the fact that the African Court of Human and Peoples' Rights does not have specific competence to deal with cases of this nature, it not yet clear how this provision will be implemented. Moreover, the Charter on Democracy, Elections and Governance incorporates provisions dealing with electoral assistance and the running of elections

65 See Arts. 5 and 10 of the Charter, http://www.au.int/en/sites/default/files/AFRICAN_CHARTEER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

66 See art 14(3).

67 See Art. 25.

missions. It formalises and legitimized the practice of the African Union in observing elections including by detailing relevant norms and provisions governing the conduct of election missions by the African Union. A special fund, named Democracy and Election Assistance Fund, is established, which will be used to help assist implement their obligation under the Charter. The responsibility of ensuring democratic governance goes beyond States' responsibility. As such the Charter on Democracy, Elections and Governance enjoins all to accept democratic election outcomes and address grievances only through legal channels.⁶⁸

The responsibility and authority of the Peace and Security Council is also reinforced. Electoral disputes which could not be solved within the domestic institutional framework are expected to be addressed through diplomatic channels, failing which the Council may take additional measures. For example, the Peace and Security Council may decide to suspend the participation of a Member State in the activities of another Member State.⁶⁹ The African Union Commission is obliged to work towards the full implementation of the Charter including by assisting States in the harmonisation of their policies and laws.

3.2.2 The Common Defence Policy

The decision under Article 4(d) to establish a common defence policy for Africa could have been inspired by the historic proposal for an African High Command that was not accepted in the pre OAU debate.⁷⁰ The principle of common defence was developed into the Solemn Declaration on a Common Defence and Security Policy of the Union identifying common security threats to Africa and the peace and security structure.⁷¹ The Principles sets out, in an expansive manner, additional 'non-traditional' security threats such as the HIV/AIDS pandemic, environmental degradation, human trafficking, mercenaries and dumping of chemical and nuclear waste in Africa.⁷² The focus of this Policy is to widen approaches to peace and security similar to the approach taken by the UN Secretary General that threat to peace and security

68 See Art. 17(4)

69 See Art. 24-26.

70 Stephen F. Burgess, *African Security in the Twenty-First Century: The Challenges of Indigenization and Multilateralism*, 41(2) *African Studies Review*, 37-61 (September 1998) at 5.

71 The 2nd Extraordinary Session of the AU Assembly (2004).

72 *Id.*, at 2-5.

“...also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences. All of these threats can cause death or lessen life chances on a large scale. All of them can undermine States as the basic unit of the international system”.⁷³

The Policy as a whole encapsulates the emerging notion of ‘human security’ that transcends the security of the states and encompasses the safety, well-being and dignity of the population.⁷⁴ The concern with such expansive notion of security is a possible duplication of the various functions of the AU organs and with a danger of losing focus on peace and security as a distinct core function.⁷⁵ Moreover, the Policy was adopted as a declaration with no specific enforceable undertaking, coupled with its enumerative nature gives it distinctive soft law status. It would be considered as a critical policy framework that could provide needed direction for the development of the peace and security architecture⁷⁶ even when we might lack clear indication of expression of intent to be bound by any undertaking, therefore assertion of provisional legal status⁷⁷ for the instrument may not yet be substantiated.

3.2.3 Intervention by the AU

The incorporation under Article 4(h) of the Constitutive Act of the right of the Union to intervene in Member States in grave circumstances of genocide, war crimes, and crimes against humanity marks a fundamental departure from the OAU framework, which had as its hallmark the principle of non-intervention in the internal affairs of its Member States. Moreover, it is for the first time the right to intervene has been expressed as a principle in a comparable international instrument,⁷⁸ at least since the so-called ‘Brezhnev doctrine’ providing in a treaty between formerly socialist eastern European countries not

73 A/59/2005, Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, 21 March 2005, at 25.

74 *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, 15 (The International Development Research Centre December 2001). at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

75 Kathryn Sturman, *AU Update: Recent Developments on Peace and Security*, 3(1) Focus on Arms in Africa (2004).

76 Omar A. Touray, *the Common African Defence and Security Policy*, African Affairs, 104/417, 635–656. (2005)

77 Jean Didier Boukongou, *The Draft of the Non-Aggression Pact: A Different Negotiation*, African Geopolitics, 5, (2004).

78 Evarist Baimu and Kathryn Sturman, *Amendment to the African Union’s Right to Intervene, A Shift from human security to regime security?*, 12(2) African Security Review, 40, 38-45 (2002).

only for the right but also the duty to intervene in each other's internal affairs to protect socialist gains.⁷⁹

The most obvious object of this principle is to lay down the legal grounds that would enable the AU to take action in cases of atrocities such as the 1994 genocide in Rwanda.⁸⁰ Inquiry by the UN⁸¹ and the OAU into that gruesome event⁸² and that the international community failed to take action to halt the genocide.⁸³ There was also no will to act in the face of atrocities committed in Sierra Leone, but, around the same period, a large scale bombing campaign was conducted to stop attacks on civilians in Kosovo.⁸⁴ The OAU at the time deplored what it considered to be glaring double standards.⁸⁵ The South African Foreign Minister also captured the general feeling in Africa when she likened the speed of UN response to crisis in Africa to that of an elephant and in other situations to that of a cheetah.⁸⁶ The failures of the UN have created a widely held view among African governments and regional organizations of gross neglect,⁸⁷ despite successes in Mozambique and Namibia.⁸⁸ Even in Somalia, after the initial success in averting humanitarian catastrophe, the UN failed to help the country return to normalcy.⁸⁹

The UN is not alone in facing blame for inaction, the OAU itself had for long been accused of neglecting atrocities in many of its Member States on account of the non-intervention principle of the OAU Charter.⁹⁰ Even after the establishment of the OAU MCPMR, the Organization was still prevented from addressing conflict situations due to lack of consent

79 Albert Randelzhofer, *Introduction, Articles 2, 2(4)*, 51, in Bruno Simma et al eds., *The Charter of the United Nations, A Commentary*, 2nd ed, 129 (Oxford University Press 2000).

80 Vincent O. Nmeihelle, *The African Union and African Renaissance: A new Era for Human Rights Protection in African*, 7 *Sing. J. Int'l & Comp. L.*, 434, 412–416, 2003.

81 S/1999/1257, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, (1999) at 30. at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>, 18-06-05.

82 Rwanda: The Preventable Genocide International panel of eminent personalities, paragraph 13.2. at <http://www.visiontv.ca/RememberRwanda/Report.pdf>. 18-06-05.

83 Yvonne C. Lodico, *The Justification for Humanitarian Intervention: will the Continent Matter?*, 35 *Int'l L.*, 1028, 1027–1050 (2001).

84 *Id.*, at 1029.

85 Lomé Declaration, OAU Assembly 2000, paragraph 6

86 Quoted in Njunga-Micheal Mulikita, *Cooperation Versus Dissonance: the UN Security Council and the Evolving African Union (AU)?* *AfYIL*, 84, 75–99 (2000).

87 Murray, *supra* note 35, at 120.

88 Norrie McQueen, *United Nations Peacekeeping in Africa since 1960*, 258–264 (Pearson Education 2002).

89 Mutharika, *supra* note 1, at 548.

90 Munya, *supra* note 19, at 584.

from the concerned Member State or warring factions.⁹¹ Continued insistence on non-intervention in situations of widespread abuse and suffering was no longer possible nor in the interest of Africa.⁹² Therefore, there existed an obvious need to introduce innovative ways since conflicts in Africa are now deemed to be of continental responsibility, with the support of the international community.⁹³ Members of the AU, accordingly, gave their collective consent for intervention in Member States in cases of atrocities.⁹⁴

Even though one could envisage intervention in a broader context, the right of the Union to intervene in Member States in most cases of genocide, war crimes and crimes against humanity would necessitate some form of enforcement action.⁹⁵ This raises the question of compatibility of AU Act with the UN Charter, in particular with Article 2(4) on the prohibition of the threat or use of force and Article 52 on consistency with the principles of the Charter, and Article 53 on the requirement of prior authorization by the UN Security Council (UNSC) for enforcement action by regional arrangements.

The prohibition of threat or use of force is subject to two exceptions to Article 2(4), the first being the right of self-defence of states under Article 51 and the second, enforcement action by the UNSC under chapter VII of the UN Charter.⁹⁶ Whether there is a third exception in the form of humanitarian intervention is subject to unsettled controversy. The determination by International Court of Justice (ICJ) in *Nicaragua* case that not all aspects of rules on the use of force may fall under the UN Charter and its apparent acceptance of the Charter as a living instrument⁹⁷ could only infuse the continued debate with the introduction of the discussion on *the Responsibility to Protect*.

Many in developing countries do not accept this exception out of the fear of abuse by powerful States since there are no accepted global

91 Kioko, *supra* note 32, at 814.

92 Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 248 (Kluwer International 1999).

93 Francis M. Deng et al eds, *Sovereignty as Responsibility: Conflict Management in Africa*, xix (The Brookings Institution 1996).

94 Ademola Abass & Mashood A. Baderin, *Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union*, XLIX, NILR, 16, 1–38 (2002).

95 Lodico, *supra* note 85, at 1035.

96 Christine Gray(a), *International Law and the Use of Force*, 2nd ed., 38 (Oxford University Press 2004).

97 Military and Paramilitary Activities in and against Nicaragua (herein after Nicaragua case) ICJ Reports (1986) 14 at paragraph 176; see Gray(a), *supra* note 98, at 7, 8.

rules governing such an exception.⁹⁸ Even then, their position could only be justified in as much as powerful states used intervention to advance their ulterior motives.⁹⁹ In reality, however, many states object to humanitarian intervention not because of the lack of universally accepted rules but they are bent on subjugating their people under the guise of sovereignty.¹⁰⁰

The first approach taken to test the legality of AU's right to intervene is based on institutional consent. Writers, who have considered the issue in light of the debate on the status of Article 2(4) of the UN Charter, concluded that Article 2(4) does not prohibit a decision of a group of States to empower an international organization they founded to act on their behalf in their own countries, not anticipated to be used against their territorial integrity. If it is not contrary with their international obligations, the generally agreed *jus cogens* status of Article 2 (4) would not invalidate the right of the Union to use force since the AU Constitutive Act, due to the collective consent of its members would not make it incompatible with Article 103 of the UN Charter, amounting to a possible exception to the principle of non-use of force.¹⁰¹ According to this argument, what the members of the AU have opted out is the non-intervention principle, which does not extend to such collective action.¹⁰² One strong point of this argument is that the AU Constitutive Act in asserting the right to intervene. It has also reiterated the principles of non-use of force and non-interference among Member States,¹⁰³ which should not be considered as 'torpedoing' the right of intervention contrary as asserted by some.¹⁰⁴ This is because the principle of non-interference under Article 4 (g) refers to interference by one member into the internal affairs of another only and does not exclude intervention by the AU. It would not have the effect of preventing the organization from intervention, as it is not analogous to Article 2(7) principle of the UN Charter¹⁰⁵ that was reaffirmed by the UN General Assembly

98 Philippe Sands (a), *The Lawless World: America and the Making and the Breaking of Global Rules*, 178 (Penguin Books 2005).

99 Richard Falk(b), *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 Mich. J. Int'l L., 504, 491–514 (Winter 1996).

100 Must Intervention be Legal? 372 (Issue 8386) *The Economist* at 40 (2/2). (31 July 2004).

101 Ademola Abass & Mashood A. Badrin, *Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union*, XLIX, NILR, 1–38 (2002). at 17–19

102 Id.

103 Articles 4 (f) and (g), the Constitutive Act.

104 Mulikita, *supra* note 88, at 81.

105 Abass and Baderin, *supra* note 103 at 15.

resolutions¹⁰⁶ and recognized as a principle of customary international law by the ICJ.¹⁰⁷ The universal application of this principle would not affect AU's right to intervene since such grave violations of human rights could not be limited to the domestic affairs of the state.¹⁰⁸ The practice of the UN General Assembly in condemning human rights violations has now for long put to rest the argument on domestic jurisdiction.¹⁰⁹

However, the institutional consent argument is in part based on the assertion that the AU has been constituted as a 'supranational organization' by its members¹¹⁰. The AU Constitutive Act does not indicate automatic move towards unification.¹¹¹ Therefore, it would be premature to suggest that the AU has a supranational status *per se* at this stage, only on the account of consent to intervention in cases of international crimes. The argument for exception could also have an adverse impact on the UN collective security system, as regional organizations could only use force through authorization from the UNSC,¹¹² which has its basis in the non-use of force principle, affecting supervisory functions of the UNSC over regional mechanisms.¹¹³

The other approach has been that the AU's right to intervene amounts to humanitarian intervention. Humanitarian intervention has been broadly defined as:

“The threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own

106 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965). at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/218/94/IMG/NR021894.pdf?OpenElement>; 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970). at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>, A/RES/31/91. Non-interference in the internal affairs of States, and A/RES/36/103 Declaration on the Inadmissibility of Intervention (1976) and A/RES/36/103, Interference in the Internal Affairs of States (1981) at <http://www.un.org/documents/ga/res/36/a36r103.htm>.

107 In Nicaragua case, *supra* note 77, at paragraph 202.

108 N. D. White, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, 52 (Manchester University Press 1997).

109 Fernando R Teson, *Collective Humanitarian Intervention*, 17 Mich. J. Int'l. L., 331, 370, 323-371 (1995-1996).

110 Abass and Baderin, *supra* note 103 at 15

111 Olowu, *supra* note 36, at 222.

112 Article 53, the UN Charter.

113 Danesh Sarooshi (a), *The UN System for the Maintenance of International Peace: What Role For Regional Organizations such as NATO?*, 52 Current Legal Problems, 482, 499-501 (1999).

citizens, without the permission of the state within whose territory force is applied¹¹⁴

This definition recognizes that humanitarian intervention may be undertaken by a single state or by group of states. The grounds for intervention are also very broad and open a wider interpretation. The AU Constitutive Act, however, allows intervention not only as a collective act, and only in cases of genocide, war crimes and crimes against humanity.

It is argued that AU's right to intervene codifies humanitarian intervention as a regional customary and treaty norm developed due to the unsatisfactory record of the UN in addressing conflict situations in Africa. As such, it is asserted that Article 103 of the UN Charter on the supremacy of the UN Charter would not apply as the issue was not addressed in the Charter, and that intervention has developed into 'regional and international custom,' citing the practice of the UNSC retroactive authorizations of interventions by Economic Community of West African States (ECOWAS) in Liberia, Sierra Leone, Central African Republic, Guinea-Bissau and Cot d'Ivoire, and SADC's involvement in Lesotho. This is to substantiate the point that AU's right to intervene would not be inconsistent with Articles 2(4) and 103 of the U.N. Charter.¹¹⁵ In as much as the cumulative requirements of state practice and *opinio juris* are proven pursuant to Article 38(1) (b) of the ICJ Statute, this assertion could be valid as the ICJ in *Asylum* case recognized that regional customary law could develop if 'constant and uniform usage' and binding nature could be established.¹¹⁶

On one hand, it has been argued that there was "...no evidence of *opinio juris* to change the Charter by means of customary international law...for humanitarian intervention as an exception to Article 2(4)."¹¹⁷ Nonetheless, Breau's findings after careful assessment of interventions of ECOWAS in Sierra Leone and Liberia, that the decision of the AU to incorporate the intervention provision amounts to codification of

114 J. L. Holzgrefe, *The humanitarian intervention debate*, In *Humanitarian Intervention: ethical, legal and political dilemmas*, 19 (J. L. Holzgrefe and Robert O.Keohane eds., Cambridge University Press2003).

115 Jeremy I. Levitt (a), *The Peace and Security Council of the African Union: The Known Unknowns*, 13 *Transnat'l L. & Contemp. Probs.* 129-132, 109-138 (2003).

116 Colombia-Peruvian asylum case, ICJ Reports 1950 at 276: Philippe Sands (b), *Principles of International Environmental Law*, 2nd ed., 144-149 (Cambridge University Press 2003).

117 Albert Randelzhofer, *Introduction, Articles 2, 2(4), 51*, In Bruno Simma et al, *The Charter of the United Nations, A Commentary*, 2nd ed, Oxford University Press, UAS, (2000)., at 130

regional customary law of humanitarian intervention into a treaty,¹¹⁸ agrees with the previous conclusion.

Moreover, the reaction of the international community to the new AU regime has only been supportive. For instance, the UNSC¹¹⁹ and the UN Secretary General have appreciated AU's peace and security mandate.¹²⁰ The G8 industrialized countries have concluded an agreement with the AU to assist the latter in the maintenance of peace and security in Africa.¹²¹ The Commission for Africa established by the British Prime Minister has also expressly supported AU's peace and security mandate.¹²²

Even when one would accept the crystallization of a regional customary law, it is questioned whether humanitarian intervention could be undertaken without UNSC's authorization¹²³ raising the critical question of whether the AU could or was intended to act without the assent of the UNSC.

AU's right to intervene is vested in the authority of the Assembly. However, Article 53 of the UN Charter prohibits regional arrangements from taking enforcement action without prior UNSC authorization, save for the now defunct enemy state exception.¹²⁴ With regard to the general applicability of the regional arrangement provision, the status of the AU as regional arrangement may no longer be questioned any as the UN General Assembly decided that it has continued the OAU's cooperation arrangement with UN.¹²⁵ Therefore, it may be assumed that by granting the status of a regional arrangement to the AU, the UN General Assembly impliedly approved both the activities of the Union and the principles enshrined in the AU Act pursuant to Article 52 (1).¹²⁶

With regard to the requirement of Article 53 of the UN Charter, the Constitutive Act and the PSC Protocol do not expressly require

118 Susan Carolyn Breau, *An examination of humanitarian intervention in customary international law and under the United Nations Charter*, 115 (2003) (unpublished Ph.D. Thesis on file with Institute of Advanced Legal Studies Library).

119 S/PRST/2004/44, Statement by the President of the Security Council, under the item "Institutional relationship with the African Union" (2004).

120 A/59/2005, Report of the Secretary-General of United Nations, In Larger Freedom: towards development, security and human rights for all, 24 (2005).

121 Communiqué, *Consultation Entre L'UA, Les Pays Membres du G8 Et d'autres Partenaires Et Les Institutions Africaines de Paix et de Sécurité* (2005).

122 Report of the Commission for Africa, *Our Common Interest*, March 2005. at 167.

123 Breau, *supra* note 120, at 247.

124 Article 53(1), second sentence, UN Charter.

125 UN General Assembly A/RES/57/48, (2002).

126 Waldermar Hummer and Michael Schweitzer, Articles 52 and 54, in Simma, *supra* note 78, at 825–826.

the Assembly and the PSC to seek authorization of the UN Security Council before any intervention in a member state. This situation has solicited growing number of commentaries. One author argues that the cumulative reading of the provision of the AU Act and the PSC Protocol which talks of the PSC having primary responsibility in the continent and that it would work with the UN would indicate that while AU recognizes the primary role of the UN, it reserves for itself the right to authorize intervention only involving the UN where necessary.¹²⁷ For these reasons and for the fact that the UNSC authorized interventions in Africa retroactively, it is concluded that the AU treaties prevail over the Article 103 of the UN Charter.¹²⁸ The former AU legal advisor, writing in his personal capacity, also argued that the question of prior authorization was brushed aside at the adoption of the provision. He claimed in his belief, that due to the slow reforms at the international level, international neglect of African crises, and the decision the OAU made at the time to ignore the UN sanction against Libya contributing to the leaders for pushing the rules aside.¹²⁹

Another author also claimed that based on the experiences of interventions by West African troops in Liberia and Sierra Leone without UNSC authorization and the failure of the UNSC to prevent genocide in Rwanda, African States contracted out of the UN collective security system, rejecting a system that was supposed to function on the UNSC being the final arbiter on the use of force.¹³⁰ Article 4(h) of the Constitutive Act is invoked as another proof of important interpretive change of the non-use of force principle.¹³¹ It is even said that the Constitutive Act is the ultimate challenge to the authority of the UNSC and would undermine the whole system.¹³²

These interpretations should, however, be tested in light of the requirements of the Vienna Convention on the Law of Treaties that the ordinary meaning of the terms of a treaty should be sought to ascertain the object and purpose of that treaty.¹³³ Since the Constitutive Act and

127 Levitt (a), *supra* note 117, at 125–126.

128 *Id.*, at 127–128.

129 Kioko, *supra* note 32, at 821.

130 Jean Allain, *The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union*, 8 Max Planck UNYB, 238, 260, 237–289 (2004).

131 Thomas M. Frank (b), *Agora: Future Implication Of The Iraq Conflict: What Happens Now? The United Nations after Iraq*, 97 AJIL, 615, 607–620 (July 2003)

132 Carsten Stahn Carsten Stahn, *Agora (Continued): Future Implication Of The Iraq Conflict: Enforcement of the Collective Will after Iraq*, 97 AJIL, 812, 804–922 (October, 2003).

133 8 ILM, 691, 679–735 (1969).

the PSC Protocol do not expressly refer to prior authorization, one needs to examine the section and the preamble of the PSC Protocol that refers to UNSC, other instruments adopted by the political organs of the AU and drawing on their subsequent practice would shed light on the intention of AU members.¹³⁴

Accordingly, the OAU Assembly, at the session when it adopted the Constitutive Act, calling attention to conflicts in Africa reiterated that the UNSC has the primary responsibility for the maintenance of international peace.¹³⁵ More specifically, the PSC Protocol provides that the PSC, "...shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security".¹³⁶ (The recent framework created between the African Union and the UNSC and regular meetings between the two bodies is also an important consideration)

Its preamble also provides that the AU is mindful of the primary responsibility for the maintenance of peace and security lies with the UNSC.¹³⁷ Article 16 of the Protocol that seemingly bestows the primary responsibility on the PSC "...for promoting peace and security in Africa"¹³⁸ appears in the part entitled "Relationship with Regional Mechanisms..."¹³⁹ indicating the fact that in this context, the intention could only be that of primacy over the regional arrangements in Africa and not over the UNSC. Furthermore, Article 17 of the Protocol talks of cooperation and closely working with the UNSC to seek assistance from the UN "...in keeping with the provisions of Chapter VIII of the UN Charter..."¹⁴⁰ Reconfirming this view, at the launching of the PSC, the AU Assembly reminded the PSC that the UNSC has the primary responsibility.¹⁴¹ The former Chairperson of the Commission also reconfirmed this view saying that the PSC must operate in accord with the UNSC.¹⁴² It is therefore clear that the members of the AU were not

134 Id., Articles 31 and 32; see Tetsu Sato, *Evolving Constitutions of International Organizations: A Critical Analysis of the Interpretative Framework of the Constitutive Instruments of International Organizations*, 26 (Kluwer Law International Law 1996).

135 AHG/Decl.2 (XXXVI) Lome Declaration OAU 2000.

136 Article 16, the PSC Protocol.

137 Id., preamble paragraph 5.

138 Id., Article 16.

139 Id., title.

140 Id., Article 17.

141 PSC/AHG/ST.(X), Solemn Launching Of The Peace And Security Council 13 (2004).

142 Alpha Oumar Konare, *Security is Africa Union's Priority*, 13 African Geopolitics, 2 (Winter 2004). See also ABDU YÉRO BA, *LA CONTRIBUTION DE L'UNION AFRICAINE AU MAINTIEN DE LA PAIX*, *Revue de droit international et de droit comparé*, Vol. 83, N^o. 3, 2006, p. 197-231

aiming at usurping the competence of the UNSC. It fact their concern was that the UNSC might continue to abrogate its primary responsibility for maintaining peace and stability when it comes to Africa.¹⁴³

The question of UNSC authorization of use of force goes beyond the AU and touches on the heart of the debate on the question of the legality of use of force as evidenced by a recent surge of cases before the ICJ showing the centrality of the non-use of force principle for peace and security.¹⁴⁴ The debate in Great Britain and the United States on the legality of the Iraq war makes it a matter of wider public concern.¹⁴⁵ The humanitarian aspect of the debate, however, came to the fore as countries and commentators have been divided on the legality of NATO's intervention in Kosovo to protect ethnic Albanians.¹⁴⁶

The legality of AU's enforcement actions should also be considered in light of the UN Charter. With regard to the AU, it is contended that the practice of the UNSC in delegating enforcement functions to regional organizations, including the AU/OAU for addressing regional crises and the fact that the AU/OAU actions in this area enjoyed close support from the UN would mean that these actions have been deemed consistent with the UN Charter.¹⁴⁷

One would also agree with the assessment that when the situation demands, as cases of international crimes would, retroactive endorsement of intervention might be necessary.¹⁴⁸ In addition to the above-mentioned subsequent authorizations in West Africa and Kosovo, the UNSC has also endorsed the deployment of ECOWAS and French forces in Cote D'Ivoire,¹⁴⁹ indicating a possibility of retroactive authorization in exceptional cases. Moreover, the fact that the UNSC did not question the legality of previous instances where regional interventions were considered popular and that they were seen in part because it failed to take action,¹⁵⁰ would strengthen the argument in exceptional cases AU might take action on its own.

143 The South African Foreign Minister cited by Mulikita, *supra* note 88, at 84.

144 Christine Gray (b), *The Use and Abuse of the International Court of Justice: cases concerning the use of force after Nicaragua*, 14(5) EJIL 867–868, 867–905 (2003).

145 *Legality of War*, The Guardian, Friday 29 April 2005.

146 Gray(a), *supra* note 98, at 38–41.

147 Abdulqawi A. Yusuf, *The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?* 9 AfYIL, 3–21 (2005).

148 Yusuf, *supra* note 126, at 12.

149 S/RES/1464 (2003) UNSC,
<http://daccessdds.un.org/doc/UNDOC/GEN/N03/235/84/PDF/N0323584.pdf?OpenElement>, 31-05-05.

150 Kioko, *supra* note 12, at 821.

It is also contended that whether the AU seeks UN's authorization or not, it would not make a difference since the grounds for intervention under the AU are beyond the purview of the UNSC.¹⁵¹ Besides, AU's right to intervention in cases of international crimes is not conditioned on the determination of threats and breaches of international peace and security.¹⁵² In practice however, the UNSC has been taking action in internal conflicts as in Somalia, characterizing situations of humanitarian emergencies and atrocities as threats to international peace and security for the purposes of authorizing enforcement measures.¹⁵³ Further pushing for such an approach, the UN Secretary General of the time has insisted that "...genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"¹⁵⁴

More importantly, the UNSC has specifically issued a presidential statement on institutional relations with the AU, in which it reiterated its own primary responsibility; recognized the need to develop AU's prompt action to crises and welcomed the establishment of the PSC and AU's leading role in efforts to settle crises in the continent.¹⁵⁵ The only caution the UNSC made was on the importance of being kept fully informed of AU's activities in accordance with Article 54 of the UN Charter.¹⁵⁶ This reporting requirement apart from being a legal obligation is essential to realize the various modalities of cooperation between the UN and regional bodies, including consultation, diplomatic support, co-deployment and joint operation.¹⁵⁷

It can then be argued that the AU is simply codifying not only the emerging regional state practice of intervention in cases of atrocities but also the practice of the UNSC in encouraging Africa to cater for its own crises. This could be the continuation of the 'try the OAU first' formula in which the practice developed at the UNSC that the OAU would function as a forum for first consideration of disputes in Africa.¹⁵⁸

151 Allain, *supra* note 132, at 283.

152 Yusuf, *supra* note 149, at 21.

153 Gray(a), *supra* note 98, at 170.

154 Report of the UN Secretary-General; *supra* note 53, at 33.

155 S/PRST/2004/44, Statement by the President of the Security Council, under the item "Institutional relationship with the African Union", 19 November 2004.

156 *Id.*

157 A/50/60-5/1, The UN Secretary General, *Supplement to Agenda For Peace*, 3 June 1995, paragraph 86.

158 Berhanykum Andemiceal, *Regionalism, and the United Nations*, UNITAR, 255 (Oceana Publications Inc, 1979)

Only this time, the AU is armed with a legal regime that seeks to assert a regionally centralized system of use of force in cases of international crimes. This approach is intended to complement and not undermine the UN Charter based collective security system.¹⁵⁹

Therefore, it could be concluded that AU's right to intervene could find acceptable legal basis if implemented in the context of the UN Charter as even those who reject humanitarian intervention concede that "the legal situation may be different in cases where the Security Council or a regional organization takes such action in accordance with the provisions of the Charter."¹⁶⁰

Another aspect of AU's Constitutive Act is that it has relied on the non-derogable status of genocide as *jus cogens*, and war crimes, and crimes against humanity as obligations *erga omnes*,¹⁶¹ to codify intervention as a regional norm. The Constitutive Act does not define these international crimes. Nevertheless, the status of the rules prohibiting these acts as defined in the Genocide Convention, whose provisions have attained customary law status, and in the Statute of the International Criminal Court (ICC), the statutes, and jurisprudence of the ad hoc tribunals,¹⁶² would be the basis for the AU to determine cases of international crimes for the purposes of intervention.

The AU has, however, expanded these grounds for intervention through an amendment to the Constitutive Act, to include an additional ground of "...a serious threat to legitimate order ..."¹⁶³ without defining it. Which situations could be considered serious threats to warrant intervention at par with international crimes and what was meant 'legitimate order' are not clear. Baimu and Sturman have approached these questions by looking at the definition of unconstitutional change to decide what would be considered legitimate order.¹⁶⁴ The previous discussion on unconstitutional changes is also relevant here to ascertain what would be considered legitimate order. The difficulty is justifying

159 Abass and Baderin, *supra* note 103, at. 8. see also Hisashi Owada, *The United Nations and the Maintenance of International Peace and Security, the current debate in light of reform proposals*, The Japanese Annual of International Law, No. 48, 2005. P 10. On the need to not to endanger the collective security system.

160 Ian Brownlie, *Principles of Public International Law*, 6th ed., 711 (Oxford University Press, 2003).

161 Abass and Baderin, *supra* note 103, at 24.

162 Antonio Cassese, *Genocide, In the Rome Statute of the International Criminal Court: A Commentary*, 335–338 (Antonio Cassese, et eds., Oxford University Press 2000).

163 Article 4, the Protocol on Amendments to the AU Constitutive Act of 11 July 2003. (It has not yet entered into force.)

164 Baimu & Sturman, *supra* note 79, at 41.

this ground on the same footing as international crimes, in order to use force. Moreover, the fact that there was resistance during the consideration of this ground¹⁶⁵ and that the amendment protocol has not yet received sufficient ratifications further demonstrates the ambivalent attitude of AU members to the additional ground.

The main conclusion one could draw from this discussion is that the codification of the right to intervene in cases of such international crimes could be taken as clear reaffirmation of AU Member States determination to intervene in a member state to prevent genocide, war crimes and crimes against humanity. This could constitute an *opinio juris sive necessitatis* as a basis for the emergence of a new customary rule¹⁶⁶ if and when it is supported by explicit invocation of the Constitutive Act by the African leaders when they decide to act. One could also add that the '*responsibility to protect* populations from genocide, war crimes, ethnic cleansing and crimes against humanity' as reflected in relevant parts of the 2005 Outcome Document of the UN General Assembly¹⁶⁷ is consistent with the normative development in Africa. The discussion in part of the article on the need to interpret and apply in the Constitutive Act of the African Union would be put to rest if the United Nations would keep its promise in made in the Outcome Document to take action to protect people from mass atrocities, whether they in Africa or elsewhere before it is too late and collectively under the Chapter VII of the Charter of the United Nations. It would be within reason if one would doubt this eventuality.

3.2.4 The Right to Request Intervention

The principle of the right of Member States to request intervention from the Union in order to restore peace and security is yet another addition to the new legal regime. It has been argued that the obligation of non-interference would mean that states would not be allowed to intervene in civil wars except in response to external subversion¹⁶⁸. This is not concerned with the defence of a member state from external aggression, which was deliberately left out of the Constitutive Act.¹⁶⁹ The focus is on the maintenance of legitimate order. It is contended that intervention on behalf of the government in power in a civil war would violate the

165 Maluwa(a), supra note 39, at 215.

166 Nicaragua case, supra note 76, paragraph 207.

167 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>

168 Gray(a), supra note 98, at 57.

169 Malwa (a), supra note 39, at 216.

principle of self-determination and the right of peoples to choose their system of government without outside interference.¹⁷⁰ Therefore, where intervention would have the effect of suppressing popular uprising,¹⁷¹ the AU should decline the invitation, as the principle is not meant to rescue oppressive regimes.

It is therefore imperative for the AU to address what would be considered legitimate authority, whether the request was authentic, and the scope of such intervention. Legitimacy of the regime could not be ascertained simply on effective control of territory since the government might have lost it to the opposing side.¹⁷² Authenticity of the invitation would entail ascertaining whether the invitation was made by a competent representative and was freely made.¹⁷³

Secondly, the AU would need to consider the possibility of intervening in failed state situations. The ICJ in *Nicaragua* case ruled out request for intervention from an opposition group, as that would be contrary to the non-intervention principle, which already allows intervention at the request of the government.¹⁷⁴ When it made this determination in 1986, the ICJ might not have contemplated a situation of failed states involving multitude of factions. Therefore, the AU might need to consider a joint or concurrent or representative request for intervention from such groups where the objective is not to take sides in the civil war but to restore order for the whole country.¹⁷⁵ In cases where the different factions are unable to give consent, the AU has the option of invoking either its right to intervene in cases of international crimes.

Finally, the AU would also need to consider the scope of interventions in these cases in terms of the extent of engagement and when intervention should end.¹⁷⁶ This would depend on situations of individual cases, nevertheless one would assume that if a request for intervention was approved by the Union, it would need to be conducted not only to restore order in the country in the context of the request but

170 Rein Müllerson & David J. Scheffer, *Legal Regulation of the Use of Force, in Beyond Confrontation: International Law for the Post-Cold War Era*, ed Lori Damrosch, et al, 117 (Westview Press 1995).

171 *Id.*

172 David Wippman, *Military Intervention, Regional Organizations, and Host States Consent*, 7 *Duke J. Comp. & Int'l L.* 212, 209–239 (Fall 1996).

173 John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in Lori Fisler Damrosch & David J. Scheffer, *Law and Force in the New International Order*, 121(Westview Press 1991).

174 *Nicaragua case*, supra note 76, paragraph 246.

175 Wippman, supra note 174, at 235.

176 Ruth Wedgewood, *Commentary on Intervention by Invitation*, in Lori Fisler Damrosch & David J. Scheffer, supra note 169, at 137.

also to meet the requirements of other principles of the Union. Still who would determine when an intervention would end? Could the Union decide to stay irrespective of the will of the requesting state? Normally, intervention would be conducted within the bounds of the invitation.¹⁷⁷ Therefore, in the absence of situations of international crimes, the AU would leave the territory as soon as consent is withdrawn. In cases of state failure situation, unless the AU assumes that the joint consent of the factions could only be withdrawn jointly, there would be a danger that one of them would withdraw consent and attempt to disrupt the effort to restore order.¹⁷⁸

The main conclusions one could draw from issues arising in the context of the right to request for intervention is that abusive usage of this principle "...to prop up a beleaguered government would be illegal"¹⁷⁹ as it would violate the principles of self-determination and non-interference into the internal affairs of Member States, in particular the political independence of states.¹⁸⁰

4. Conclusion

The article grappled with the thorny issue of regional intervention, the rejection of unconstitutional and undemocratic assumption public power or undemocratically staying in power and the need to address root causes and achieve policy convergence in the consentient and how some of these regional principles may be reconciled with the competence and authority of the United Nations Charter. As has been clearly underscored, the United Nations has supported the AU arrangements on peace and security. The collaboration between the UN and regional mechanism under Chapter VIII of the Charter should be further developed. Obviously, the UN has legal, institutional and logistic limitations to provide timely guidance and support to regional arrangements. It is in the UN's interest that these shortcomings are addressed effectively.

The maintenance of international peace and security and addressing the myriad of crises around the world remains the primary responsibility of the UN. The fine legal points of discussions and politically wrangling in the UN Security Council would not directly help prevent attacks on

177 Wippman, *supra* note 174, at 234.

178 *Id.*, at 236.

179 Louise Doswald-Beck, *The Legality Validity of Military Intervention by Invitation of the Government*, 56 BYBIL, 251, 189–252(1985).

180 Wippman, *supra* note 174, at 214.

civilians. While it is critical that the collective security system under the Charter is nurtured, it should live up to increasingly demanding times. Regional arrangements could reach the warring factions quickly and effect ceasefire agreements. They would then need the backing of the UN to make the warring faction abide by it. Regional arrangements could also help parties broker settlement, but they would need the UN mobilize resources to address the root causes or rebuild lives. If they the UN could make these things happen, it would remain relevant. Its credibility would be severely tested if it continues to allow mass atrocities and gross human rights violations. The regional arrangement could be the first port of call. They should not become excuse for inaction by global body, however innovative the legal arsenal of the regional body. The bottom line is that *the responsibility to protect populations* is primarily the responsibility of the States themselves, with an unambiguous understanding it is no longer theirs only, particularly when they start to turn against civilians and engage in or fails to arrest the commission war crimes, crimes against humanity and genocide.¹⁸¹

The AU needs to go much further in inculcating the innovative principles discussed in this piece. It is critical that the Assembly cites these principles when condemning unconstitutional changes of governments or deciding to send military missions to crises situations so that they would play the intended dissuasive roles. African needs to intensify its growth and development in an inclusive and sustainable manner. Importantly, the principles of democracy and human rights enshrined in the Constitutive Act and the various treaties would need to be faithful applied nationally and at the regional level to start addressing the root causes of conflicts and human rights violations in Africa.

181 Andrew Clapham, *Brierly's Law of Nations, an introduction to the role of international law in international relations*, 7th Ed., Oxford University Press, 2012 at 446

Legal Personality, Responsibility and Immunity of the African Union: Reflection on the Decision of the African Court on Human and Peoples' Rights in the Femi Falana Case

Adelardus KILANGI¹

Abstract

Principles of international law regarding legal personality, responsibility and immunity of international organizations are still evolving. For that reason, legal quagmires are still experienced in those areas, and this fact was vivid in the case of Femi Falana v. the African Union², which was decided by the African Court on Human and Peoples' Rights in June 2012. The case has raised questions regarding the link or basis upon which an act or omission by a Member State or Member States of the African Union imports responsibility on the part of the Union, on the basis upon which an individual acquires the right to sue it. The second question is about the conditions or situations in which the Union could be held responsible for breaching its treaty obligations, on the basis of which it becomes sueable in its own corporate status. These questions have prompted an examination of theory and developing jurisprudence regarding: the legal personality of the Africa Union; its relations with its Member States; its responsibility, including treaty obligations; and its Immunity. This paper attempts to passionately address these questions by examining the current position at international law.

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- 1 Adelardus Kilangi is a Member (and currently the President) of the African Union Commission on International Law (AUCIL). He is also currently the Dean of the School of Law at St. Augustine University of Tanzania in Tanzania, and an Advocate of the High Court of Tanzania. He is also Member of the East African Law Society, the Pan African Lawyers Union, and the International Law Association.
 - 2 Application No. 001/2011, The African Court on Human and Peoples' Rights.

1. Introduction

The *Femi Falana Case*³ is an application made by Femi Falana, a Nigerian national, to the African Court of Human and Peoples' Rights, against the African Union. He describes himself as a human rights lawyer based in Lagos Nigeria. In his Application, Femi Falana alleged that he had made several attempts, to no avail, to get the Federal Republic of Nigeria (hereinafter 'Nigeria') to deposit the Declaration required under Article 34(6) of the Protocol (hereinafter 'the Protocol') to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (hereinafter 'the African Court'). This Declaration would have made operative Article 5(3) of the same Protocol which grants access to the African Court to individuals. For purposes of clarity, we quote the relevant Articles of the Protocol *in toto*, namely Article 5(3) and 34(6). Article 5(3) provides that:

“The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, *and individuals* to institute cases directly before it, in accordance with article 34(6) of this Protocol”. [Emphasis added]

Further, Article 34(6) provides that:

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration”.

Thus, Femi Falana argued that he was denied access to the African Court because of the failure or refusal of Nigeria to make a declaration to accept the competence of the African Court in line with Article 34(6) of the Protocol. It should be noted that, indeed the African Court had already made a ruling earlier on indicating that, in the absence of such a declaration, an individual cannot have access to the Court.⁴

However, and rather pursuing an unexpected line, Falana submitted that, since his efforts to get Nigeria make the declaration had failed, he therefore decided to file an application against the African Union as a representative of the then 53 states (now 54 states), thereby asking the African Court to make a declaration that Article 34(6) is inconsistent with Articles 1, 2, 7, 13, 26, and 66 of the African Charter on Human

³ *Supra*.

⁴ See: *Michelot Yogogombaye v. The Republic of Senegal*, Application, No. 001/2008, African Court on Human and Peoples' Rights.

and Peoples' Rights, specifically alleging violation of his right to freedom from discrimination, fair hearing and equal treatment, as well as the right to be heard. He further wanted the Court to declare that he is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter on Human and Peoples' Rights. Finally, he sought an order annulling Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights which establishes the African Court on Human and Peoples' Rights. In other words, Femi Falana decided to attack the very Article 34(6) of the Protocol, which supposedly denied him access to the African Court. Since this Article was decided upon by African states, and since for some reasons he could not sue the African States jointly or severally, he decided to sue the African Union as a representative of those states.

The Court, in its decision, was divided in opinion thereby leading to Majority Opinion and Minority Opinion. Obviously, the Majority Opinion carries the judgment of the court, while the Minority Opinion remains the dissenting position. Both positions are being examined in this discourse.

2. The Divided Positions of the Court

2.1 The Majority Decision of the Court

The Majority Decision was carried by seven judges, namely: President Niyungeko (as he then was), Judges Mutsinzi, Guindo, Ouguergouz, Ramadhani, Tambala, and Ore. Basically, the Majority Decision was to the effect that, pursuant to Articles 5(3) and 34(6) of the Protocol, read together, the African Court does not have the jurisdiction to hear the Application filed by Mr. Femi Falana against the African Union.

However, Judges Mutsinzi and Ouguergouz, despite being in favour of the Majority Decision, had their separate opinions. While they subscribed to the general decision of the Court, their separate opinions raise extra issues that are worthy considering, albeit briefly, before delving into the Majority Decision proper.

Judge Mutsinzi, while accepting the conclusion that the Court has no jurisdiction, he disagrees with the legal basis or the legal reasoning used in the Majority Decision to reach to that conclusion.⁵ He argues that Article 5(3) was intended for states only, while the African Union is

5 See: Paragraphs 3 & 4, Separate Opinion of Judge Mutsinzi, *Femi Falana v. The African Union*, Application No. 001/2011.

manifestly not a state.⁶ He is therefore of the view that the basic question should have been whether non-state entities, such as the African Union, can be brought before the Court as respondents.⁷ His conclusion is that, Articles 3, 30 and 34 (1 & 4) of the Protocol in particular show that, the respondent before the Court can only be a State party. Therefore, the Court has no jurisdiction with regard to the African Union.

On his part, Judge Ouguergouz, while also accepting the final verdict, does agree with the reasoning of the Court, based on procedural impropriety. He argues that since the case was manifestly falling outside the jurisdiction of the Court, it ought to have been discharged procedurally through the Office of the Registrar. It should not have been considered judicially to reach to the decision that the African Court did not have have jurisdiction to hear that case.⁸

Coming back to the Majority Decision, and keeping in mind the position of judge Mutsinzi, one of the main contentions of Femi Falana, for which the Majority Opinion of the Court mostly addressed itself to is that, the African Union can be sued as a corporate community on behalf of its member states. Thus, the Majority Decision focused its attention to the examination of jurisdictional issues relating to the capacity of the African Union to be sued in its corporate capacity, and the underlying question was “*whether the African Union, given the circumstances of the case, could be sued in its corporate capacity*”. As stated already, the Majority Decision answered the question in the negative, hence rendering it not necessary to proceed to the merits of the case, namely addressing the question of the alleged inconsistency between Article 34(6) of the Protocol and a number of provisions of the African Charter on Human and Peoples’ Rights. On this central question, the Court reasoned that, the African Union has a legal personality of its own which is separate from the legal personality of the member states.⁹ In this line, while quoting with approval the dictum of the International Court of Justice in the *Reparations Case*,¹⁰ the Majority Decision stated, *inter alia*, that:

6 Paragraph 5 & 6, Ibid.

7 Paragraph 7, Ibid.

8 See: Separate Opinion of Judge Ouguergouz, *Femi Falana v. The African Union*, Application No. 001/2011.

9 Paragraph 68 of the Judgment, Femi Felana case.

10 *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion), ICJ, ICJ Reports, 1949 (hereinafter *Reparations case*). The case was an advisory opinion following the request by the UN General Assembly in its resolution adopted on 3rd December 1948.

“...the members have entrusted the organization [in this case the African Union] with certain functions, with the attendant duties and responsibilities, and have clothed it with the competence required to enable those functions to be discharged effectively. Thus, the organization is an international person, but not in the form of a state. Further, its legal personality, rights and duties are not the same as those of the state. But it is a subject of international law and is capable of possessing rights and duties”.¹¹ [Emphasis added]

We note that this excerpt from the Majority Decision addresses the question of legal personality of the African Union. The Court went on to state that:

“...in principle, international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty, or it is subject to such obligations by any other means recognized under international law.¹² ... In the present case, the African Union is not a party to the Protocol. As a legal person, an international organization like the African Union will have capacity to be party to a treaty between States if such a treaty allows an international organization to become a party. As far as an international organization is not a party to a treaty, it cannot be subject to legal obligations arising out of that treaty. This is in line with Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, or between International organizations¹³...Therefore, in the present case, the African Union cannot be subject to obligations arising out of the Protocol, unless it has been allowed to become party to the Protocol, and it is willing to do so...”.¹⁴...It is therefore the opinion of the Court that, the African Union cannot be sued before the Court on behalf of its member states”.¹⁵

As it can be noted, this excerpt addressed the question of responsibility of the African Union as an international organization.

2.2 The Minority (Dissenting) Opinion of the Court

The Minority Opinion was carried by three judges, namely: Vice President Akufo (as she then was) and Judges Ngoepe and Thomson. The Dissenting Opinion begins by asserting that, although the African Union is not a signatory to the Protocol that establishes the African

11 Paragraph 68 of the Judgment, Femi Felana case.

12 Paragraph 69 of the Judgment, Ibid.

13 Paragraph 70 of the judgment, Ibid. Note that, this latter part of the dictum is also in line with Article 34 of the 1969 Vienna Convention on the Law of Treaties.

14 Paragraph 71 of the Judgment, Femi Felana case.

15 Paragraph 72 of the Judgment, Ibid.

Court on Human and Peoples' Rights, hence a third party to the treaty (the Protocol), who cannot be sued under that treaty, the Femi Falana case appears to be different. The difference is that the African Union is being sued in its own as a legal person, not as representing member states or as party to the treaty.¹⁶

We should, at this juncture, take note of the fact that the Minority Opinion accepts the proposition that the African Union has international legal personality separate from the personality of the Member States. But while that personality entails the right to bring claims against other entities, it also implies the capacity to be sued, based on failure to fulfill its duties and responsibilities as a legal person.¹⁷ So, the Minority Opinion made findings that the African Union could be sued in the current case because there is a traceable causal link between the duties and functions impressed upon it and the Applicant's lack of access to the African Court.¹⁸ These duties are found in the instruments that establish the African Union, which are the OAU Charter and its successor, namely the Constitutive Act of the African Union. Thus, the submission that no case can be brought against the African Union in respect of obligations of Member States is irrelevant.¹⁹

However, we are compelled to pose here a bit and opine that this understanding of the central question of this case by the Minority Opinion was a slight modification of the original contention of Femi Falana. Femi Falana had clearly argued that *he was suing the African Union as a corporate community on behalf of the member states, not as a corporate community that had failed to fulfill its duties and functions impressed upon it by its constitutive instrument*. The two propositions are different in that, suing an organization on behalf of, or as a representative of its member states is a question of causal connection between the failure of the member states to fulfill their functions and responsibilities one hand, and the incurring of responsibility to the organization, on the other. In other words, the failure is occasioned by Member States, but the responsibility is incurred by the organization. But, suing an organization on the basis of failure to discharge its functions is simply the question of failure by the organization to fulfill the obligations impressed upon it by its constitutive act. In other words, the failure is occasioned by the organization and likewise the responsibility is incurred by the same.

16 Paragraph 7 of the Dissenting Opinion.

17 Paragraph 8.1.1 of the Dissenting Opinion.

18 Paragraph 8.3 of the Dissenting Opinion.

19 Paragraph 8.1.1 of the Dissenting Opinion.

2.3 Key Questions Emanating from the Divided Positions of the Court and Determination of the Central Problematique

Looking critically at the position of the Majority Decision, its bottomline is that the African Union cannot be sued for actions of member states because of separateness of personality between itself and its member states, and because it was not made privy to the actions of the said member states by not being made party to the Protocol. Thus, the responsibility of the African Union, if any, should be founded on the Protocol itself, which is the subject of contention, and not on some overarching duty contained in other instruments.

Looking equally critically at the position of the Minority (Dissenting) Opinion, it proposes that, the African Union is not being sued on the basis of obligations existing in the Protocol for which it is not a party, nor in a representative capacity on behalf of the Member States, but based on its own obligations which are contained in other instruments, namely the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights. On this line of thinking the Minority Opinion seems to be based on the logic that: since the Member States have imposed a duty on the African Union through the Constitutive Act and the African Charter on Human and Peoples' Rights, which is to protect human and peoples' rights in the (African) continent, a duty which carries with it the right to intervene in member states in certain circumstances,²⁰ then the African Union is able to carry out the authorized duties and functions independently of member states, including making interventions in such member states in certain circumstances. Therefore, the African Union can be sued in its corporate personality independently of member states, for failure to execute its own duties and obligations as clearly stated in the two instruments.

In order to properly describe the basic premises of the problematique at hand, we examine this matter on the basis of the line of thinking of the Minority Opinion, and we use the following description:

That, on one side we have the African Union which was created by its Member States who gave it a duty and responsibility, through treaties, to protect human rights in the African continent, a duty which carries with it the right to intervene in the same Member States in certain

20 Paragraph 8.1.1 and 8.1.2 of the Dissenting Opinion, which make reference to Article 3(h) of the African Charter on Human and Peoples' Rights, and Article 4 of the Constitutive Act of the African Union.

circumstances. Then, on the other side we have the same Member States who conclude the Protocol which establishes the African Court, and in it they put Article 34(6) which bars access to the Court by individuals, except by consent reserved to themselves (the Member States), a move which is likely to bring inconsistencies with other instruments they have created. Thus, Article 34(6) is considered bad in law. Then we have Femi Falana who, indeed, suffers lack of access to the African Court either because of Article 34(6) of the Protocol which is considered bad in law, or alternatively because of failure of Nigeria to grant consent of access to the Court for individuals. Therefore, the correct logical conclusion emerging from the analysis of this problematique is that, Femi Falana was suing the African Union for its failure to make sure that Article 34(6), being considered bad in law, was not inserted in the Protocol, or alternatively, for its failure to make sure that Nigeria gave consent for allowing individuals' access to the Court as required by Article 34(6), now that it was already inserted in the Protocol.

2.4 Issues Requiring Examination

This case requires an examination of the causal link between the act of Member States to enact Article 34(6) in the Protocol as well as the subsequent failure of Nigeria to deposit the declaration required under the Article on one side, and the incurring of responsibility on the part of the African Union, on the other. The examination has to be done in the context of both the propositions of the Majority Decision, keeping in mind the separate opinion of Judge Mutsinzi, and the Minority Opinion. The key questions are two.

- (i) Firstly, by what link or basis could an act or omission by Member States of the African Union, in the exercise of their sovereign powers, import responsibility on the part of the African Union, hence invoke the right to sue the Union?
- (ii) Secondly, accepting the argument that the African Union has been given the duty to protect human rights in the African continent, which carries with it the right to intervene in the Member States in certain circumstances, could that right have been invoked by the African Union to make an intervention in order to bar the said Member States from enacting Article 34(6) in the Protocol, which is considered bad in law; or alternatively to compel Nigeria to make a declaration to accept the competence of the African Court to hear cases from

individuals in line with Article 34(6) of the Protocol, now that the said Article was already inserted in the Protocol?

In light of the questions posed above, and in any case, the context of this discussion rather revolves around the operations of international organizations and their relations with their member states, than the functioning of the African human rights architecture. In particular, the discussion requires a re-examination of the position at international law regarding: the legal personality of an international organization and its implications; the relationship between an international organization and its member states; the duties and responsibilities of an international organization and the dynamics involved in holding such an organization responsible; the immunity of an international organization and its implications; and the question of treaty obligations for international organizations.

Some of these issues were raised in the Majority Decision and the Minority Opinion, but others were not. This discourse revisits them all.

3. The Concept of International Organization

An international organization is understood as an intergovernmental association of countries, established by and operated according to a multilateral treaty, whose purpose is to pursue the common aims of those countries.²¹ An international organization is also understood as a collectivity of states established by treaty, with a constitution and common organs, having a personality which is distinct from that of its member-States, and being a subject of international law with treaty-making capacity.²² Another source defines an international organization as an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.²³

Essentially, an international organization is created by states through willful conclusion of a treaty. So far each state enjoys sovereignty, by virtue of which it enjoys sovereign powers, and through the exercise of such sovereign powers, the state is able to do such things as entering into treaties with other states for certain purpose or purposes, one of which is to establish an international organization. Through the use of the same sovereign powers, the states that conclude such a treaty

21 See: Black's Law Dictionary, 8th Ed., 2004, p. 2394. See also: FITZMAURICE, Gerald (1956), *Report on the Law of Treaties*, Yearbook of the International Law Commission, Vol. II, p. 108.

22 Ibid.

23 Article 2(a), Draft Articles on the Responsibility of International Organizations.

and establish an international organization and will also determine: the aims and objectives, powers and duties, rights and privileges, and the responsibility of the organization. The states which establish the organization will also determine as to how the organization shall relate with them (the member states), and all is done in the exercise of their sovereign powers.

It is so far noted that the emergence of international institutions was facilitated by a realization by national states that, diplomatic contacts among themselves were unable to cope up completely with the complexities of the constantly evolving international system. The first step in the course of developments in this realm was to move from merely diplomatic representation to international conferencing, exemplified by the Peace of Westphalia Conference in 1648.²⁴ After World War II, tremendous developments took place with the formation of the United Nations, although even before the war, some international institutions like the League of Nations had already been formed. But most of them were weak, and were rather congresses of states than international institutions proper. Otherwise, among the remarkable developments after the Second World War include the establishment of permanent organizations with executive and administrative organs.²⁵ Modern organizations go further to have legislative functions and have dispute settlement or judicial mechanisms.²⁶

4. The Legal Personality of International Organizations

4.1 Legal Personality

Legal personality is usually accorded to entities which possess the capacity to have, and to maintain certain rights, and subject to performing specific duties.²⁷ Legal personality is crucial because, without it, institutions and organizations cannot operate, as they need to be able to maintain and enforce claims. Further, it is the law which forms the foundation of legal personality for institutions and groups, as it determines the scope and nature of that personality.²⁸ It is vital for an international organization, just like any other entity such as a company, to possess a legal personality of its own in order to be able to become

24 SHAW, Malcolm (2008), *International Law*, Op. cit., p. 887.

25 BROWNIE, I., *Principles of Public International Law*, Op. cit., p. 677.

26 SANDS, P., and KLEIN, P., (eds.), *Bowett's Law of International Institutions*, Op. cit., p. 15.

27 SHAW, Malcolm (2008), *International Law*, Op. cit., p. 137.

28 Ibid.

a subject of law and enforce its rights and duties, and for this kind of organizations this personality is called international legal personality.²⁹

4.2 International Legal Personality

4.2.1 Three Qualifications for International Legal Personality

International organizations are not only considered as legal persons, but also international legal persons, because they can perform specific duties, and have the capacity to have, and to maintain certain rights at the international level. Traditionally, only states were considered as international legal persons, but developments in international law consider international organizations as international legal persons also.³⁰

International legal personality therefore denotes the following three qualifications vis-à-vis an organization: firstly, the legal personality is of an international character, which is separate from the personalities of the member states; secondly, there are international rights and duties accorded to the organization; and thirdly, there is capacity to enforce claims at international level.³¹ In this sense, international law is capable of defining the international legal personality of entities regardless of whether or not the said personality is defined in the constitutive instrument of that organization, by looking at the three things above. Each of these elements is discussed at length here-below.

4.2.2 First Qualification: Possession of Legal Personality which is Separate from the Personality of the Member States

i) *An International Organization is a Legal Person*

Before determining whether a certain entity is an international legal person, it must first be established that, indeed it is a legal person. It is only after doing this one can ascertain that, that legal person is international in character. For an entity to be considered a legal person, two things must be established:

Firstly, the entity must have been created by law, because legal personality is a quality created by law. International organizations are usually created through some kind of constitutive instrument, which can take the form of a treaty or any other form recognized and acceptable in international law. The status of the entity created is usually that of a body corporate, although an international organization becomes a body

29 SHAW, Malcolm (2008), *International Law*, Op. cit., p. 1296.

30 Ibid.

31 Ibid., p. 138.

corporate of a different nature as compared to other bodies corporate such as companies.

Secondly, the entity must have been created either by natural or other legal persons, where in the case of an international organization the creators are either states or other international organizations, or a combination of the two. Thus, an international organization is expected, in most cases, to be a permanent association of states. In determining if an organization is a permanent association of states, one needs to simply look at its membership. The membership should constitute at least two states. States create international organizations in the exercise of their sovereign powers.

ii) *The Legal Personality is of an International Character*

An organization will be considered to have an international character if it operates on the international sphere, and in order to find out if an organization operates on the international sphere, one has to look at its functions and duties. These functions and duties would extend across and beyond a number of nations. Therefore, such an organization is operating on the international plane, because it operates on more than one state and beyond, and also because anything 'international' designates something that occurs 'between' or 'among' a number of states. In other words, an international organization is that which operates between or among several states and beyond. The stated functions are usually stipulated in the constituent instrument establishing the organization, and these will tell whether the organization indeed operates on the international sphere.

The International Court of Justice (ICJ) in its Advisory Opinion in the *Reparations Case*³² determined, among other issues, the legal capacity of the United Nations (UN) to bring a claim before it on behalf of an agent of the UN. But, before doing so it was compelled to consider the functions and duties of the UN. Therefore, the Court had to start by examining the functions and duties of the UN for which it examined the UN Charter, focusing on Principles and Purposes of the Charter. On this point, the ICJ was of the view that the UN is an international legal person by virtue of its principles and purposes which are exercisable at the international sphere, and that it was intended to exercise functions

32 *Supra*.

which can only be so exercised and enjoyed through possession of an international legal personality.³³ On this point, the Court stated:

“It must be acknowledged that its Members, by entrusting certain functions to the United Nations, with the attendant duties and responsibilities, have clothed it with the competence required (including international legal personality) to enable those functions to be effectively discharged.”³⁴ [Emphasis added]

Based on the ICJ’s decision in the *Reparations Case* and subsequent literature and case law, it can now be argued that under international law, international organizations possess international legal personality by virtue of, among others, their purposes and functions.³⁵

iii) *There is Separateness of Personality between the Organization and its Member States*

An international organization must have a personality that is separate from the personalities of its member states. Separateness of personality can be evidenced by showing a distinction of powers between the entity and its member states, and the instrument which establishes the organization must be able to show this in terms of the aims and objectives or purposes and functions granted to the organization.

Separateness of personality can also be evidenced by showing existence of independent will of the organization vis-à-vis the will of the member states, which is usually expressed through giving it permanent organs³⁶ that are mandated to perform public tasks.³⁷ The functions of these organs usually mimic the three main pillars of the state. Thus, there will be organs performing executive functions; organs performing legislative functions; and organs performing judicial functions.

The separateness of personality can further be evidenced through recognition of the organization in the member states. Recognition of the organization in the domestic setting of member states³⁸ is done for many purposes including for legal proceedings involving states and

33 Ibid.

34 Page 179, *supra*.

35 AUST, Anthony (2005), *Handbook of International Law*, Cambridge, Cambridge University Press, p.198.

36 REINISCH, August (2004), *International Organizations Before National Courts*, Cambridge, Cambridge University Press, p.6

37 BINDSCHEDLER, Rudolf (1995), ‘*International Organizations, General Aspects*’, in Rudolph Bernhardt (ed.), *Encyclopedia of Public International Law*, 2nd edn, vol. II, p. 1289

38 REINISCH, August (2004), *International Organizations Before National Courts*, Op. cit., p.37.

international organizations in national courts.³⁹ This recognition can be provided in three ways: firstly, in the constituent instrument which establishes the organization;⁴⁰ secondly in the domestic legislation that domesticates that instrument in the municipal setting⁴¹; and thirdly, in a domestic legislation that codifies principles of customary international law which give blanket recognition to all international organizations, regardless of whether their legal personalities are stipulated in their instruments or not.⁴²

4.2.3 Second Qualification: Possession of Rights and Duties available at the International System

The question of possession of rights and duties at the international sphere is also technically known as the status of being a subject of international law. International organizations are always created by treaty, and it is the treaty itself which vests the organization with rights and duties which are recognized and are available on the international sphere. Thus the first place to look in, in order to determine the rights and duties of an international organization as well as the nature and extent of those rights and duties, is the treaty or instrument which establishes the organization, specifically the purposes and functions of the organization. In other words, the rights and duties of an organization are discernible from the purposes and functions of the organization. In this situation the ICJ, in interpreting the United Nations Charter in the *Reparations Case*,⁴³ once again observed thus:

39 Ibid. See also: *Manderlier v. Organisation des Nations Unies and Etat Belge (Ministre des Affaires Etrangere's)*, Civil Tribunal of Brussels, 11 May 1966; Brussels Appeals Court, 15 September 1969 (it was stated that the UN was competent to appear in legal proceedings in Belgium because of the legal personality it enjoyed in the territory of each member state under Article 104 of the UN Charter.); *Arab Monetary Fund v. Hashim* (No. 3), House of Lords, 26–28 November 1990, 21 February 1991; *Westland Helicopters Ltd v. Arab Organisation for Industrialization*, High Court, Queen's Bench Division, 3rd August 1994.

40 For example, Article 4(1) of the Treaty for the Establishment of the East African Community, 1999 provides that the Community shall have the capacity, within each of the Partner States, of a *body corporate* with perpetual succession, and shall have power to acquire, hold, manage and dispose of land and other property, and to sue and be sued in its own name. Further, Article 138(1) of the same Treaty states that, the Community shall enjoy international legal personality. See also: Article 105 of the UN Charter, which provides that: "the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes and that, representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization".

41 For example: The East African Development Bank Act, 1984, enacted in Tanzania.

42 See for example: the UK International Organizations Act, 1968.

43 *Supra*.

“The rights and duties of an entity such as the [UN] organization must depend upon its *purpose and functions* as specified or implied in its constitutive documents and developed in practice.”⁴⁴ [Emphasis added]

This excerpt implies that, in order to determine whether an organization enjoys international rights and duties, and to determine the nature and extent of those rights and duties, one does not only look at the explicit stipulation of rights and duties in the constitutive instrument, but also looks at the purpose and functions of the organization and their necessary implications,⁴⁵ since not all international organizations have an explicit stipulation of rights and duties.⁴⁶ That is why such rights and duties should usually be explicitly stipulated in the constituent instrument of an organization in order to avoid controversy.⁴⁷ However, some of the rights and duties are generally provided at international law. Further, consideration must also be made on whether an organization has been granted rights and duties that are real and which can be enjoyable and exercisable on the international plane, and not solely within the national systems of one or more of the member states. This means that it has to be determined if the organization is a subject of rights and duties in the international system, hence a subject of international law, not simply as subject of rights and duties in the member states only.⁴⁸ On top of that, the extent of such rights and duties should also be determined, because international organizations enjoy different extents of rights and duties depending on what the member states intended each organization to have, or depending on the demands emanating from the purposes and functions of the organization.

It is important to note that also that, in principle, the status of ‘subject of international law’ is tied to the fact that an international organization enjoys rights and duties. Traditionally, again, only states were considered to be subjects of international law. However, developments in international law have seen international organizations being recognized also as subjects of international law.⁴⁹ The logic for the

44 ICJ Reports (1949), 174 at p. 180.

45 SHAW, Malcolm (2008), *International Law*, Op. cit., p. 1297; See also: the Reparations Case, *supra*.

46 BROWNLIE, Ian (2008), *Principles of Public International Law*, Oxford, Oxford University Press, p.678.

47 See: *Costa (Flaminio) v. ENEL* [1964], ECR 585; 93 ILR, p. 23; See also: AUST, Anthony (2005), *Handbook of International Law*, Op. cit., p. 199.

48 O'BRIEN, J (2001), *International Law*, Op. cit., p.740; See also: BROWNLIE, p. 677.

49 KLABBERS, Jan (2002), *An Introduction to International Institutional Law*, Cambridge, Cambridge University Press, p. 42.

traditional position seems to have been that, an entity was considered to be a subject of international law because it is regulated by international law,⁵⁰ and international law was primarily known to regulate relations among nations. But, it is now asserted that international law regulates international organizations, and it safeguards rights as well as creating duties for individuals through human rights and criminal responsibility, respectively. However, taking the argument from another angle, a regional organization is also one of the manifestations of relations among nations, and therefore it ought to be regulated by international law too. That is why contemporary authors consider international organizations, including regional ones, as subjects of international law for that reason alone.⁵¹

Some of the rights which are usually enjoyed by international organizations include: in appropriate cases, the right to claim immunity from jurisdiction in particular legal proceedings,⁵² the right to establish diplomatic relations,⁵³ the right to the protection for the organization's agents acting in their official capacity in the territory of a third state; and right to send and receive legations.⁵⁴ The most common privileges of international organizations include tax exemptions, customs, immigration, freedom of communication and inviolability of premises⁵⁵ and archives. There is a number of reasons for granting international organizations the above-mentioned rights and privileges through their constituent treaties. The tax exemptions, for example, are justified based on the fact that if the tax laws of a member state apply, such member state will receive unfair financial gain as funds for the tax expenses come from all the member states.⁵⁶ It should be noted that, the above-stated rights and duties have been stated in generic terms. The specifics of such

50 O'BRIEN, J., *International Law*, Op. cit., p.1.

51 See for instance: BROWNLIE, I., *Principles of Public International Law*, Op. cit., p. 62; O'BRIEN, J., *International Law*, Op. cit., p. 166; SHAW, M. N., *International Law*, Op. cit., p. 190.

52 O'BRIEN, J (2001)., *International Law*, Op. cit., p. 137.

53 REINISCH, August (2004), *International Organizations before National Courts*, Op. cit., p. 76.

54 See: *Reparations Case*, Supra, p. 180 ("it cannot be doubted' that the UN could lodge a claim against a member-state, and that the right to present claims regarding damage done to the UN itself was 'clear'.

55 See for example: Article II, S. 3 of the Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946, providing that: "The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action."

56 Ibid.

rights will be detailed in the framework for recognition of international legal personality by the constitutive instrument in the domestic law of member states, as well as in customary international law.

On the duties side, international organizations generally have the duty to provide compensation for damages caused by the organization or its agents, and they are generally subjected to obligations arising under international law.

4.2.4 Third Qualification: Possession of Capacity and Powers to Enforce Claims

Possession of Capacity and powers means that the organization has the *locus standi* to enforce rights arising under international law before an international or municipal tribunal, and the right to bring international claim to obtain reparations for damages caused by member states or third states to the organization or its officials.⁵⁷ Others are: capacity to enter into agreements by itself, and allowing the organization to sue or to be sued in its own capacity. These qualities are not privileges, but the inherent powers and capacity vested in an organization. In the *Reparations Case*,⁵⁸ the UN General Assembly had specifically asked the ICJ the following question:

“In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view of obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?”⁵⁹

The main issue before the Court therefore was whether the United Nations, as an international organization, had the capacity to bring an international claim against the government responsible for injuries suffered by its agent while performing his duties, and obtain reparation for the damage.⁶⁰ In this issue the Court, in interpreting the United Nations Charter, observed thus:

57 See: *Reparations Case*, *Supra*, p. 180 (“it cannot be doubted’ that the UN could lodge a claim against a member-state, and that the right to present claims regarding damage done to the UN itself was ‘clear”).

58 *Supra*.

59 *Reparations Case*, p. 175.

60 *Ibid.*, p. 178.

“Under international law, the [UN] organization must be deemed to have those powers though not expressly in the charter, are conferred upon it by *necessary implication* as being essential to the performance of its duties”.⁶¹ [Emphasis added]

Looking critically at the dictum of the ICJ in this issue, again it shows that it is the functions and duties which an international organization is entrusted with which clothe it with the capacity to enforce claims at the international level.⁶² In other words, the rights and duties and capacity and powers of an organization depend on the functions and duties of the organization. This implies that, in order to determine whether an organization enjoys international capacity and powers, and to determine whether the nature and extent of the capacity and powers, one does not only look at the explicit stipulation in the constitutive instrument, but also at the purpose and functions of the organization and their necessary implications,⁶³ since not all international organizations have an explicit stipulation of their capacity and powers in their constituent instruments.⁶⁴ That is why it is ideal if such capacity and powers are explicitly stipulated in the constituent instrument of an organization in order to avoid controversy.⁶⁵ For example, the Treaty for the Establishment of the East African Community explicitly provides that the East African Community (EAC) has legal capacity to sue or to be sued.⁶⁶

On top of that, consideration must be had again on whether an organization has capacity and powers that are real and which can be exercisable on the international plane, and not solely within the national systems of one or more of the member states. Further, the extent of the capacity and powers should also be determined, because international organizations enjoy different extents of capacity and powers depending on what the member states intended each organization to have, or the demands emanating from the purposes and functions of the organization.

61 Ibid., p. 182.

62 See Page 179, the Reparation Case, *supra*.

63 SHAW, Malcolm (2008), *International Law*, Op. cit, p. 1297; See also: the Reparations Case, *supra*.

64 BROWNLIE, Ian (2008), *Principles of Public International Law*, Oxford, Oxford University Press, p.678.

65 See: *Costa (Flaminio) v. ENEL* [1964], ECR 585; 93 ILR, p. 23; See also: AUST, Anthony (2005), *Handbook of International Law*, Op. cit., p. 199.

66 Article 4, Treaty for the Establishment of the East African Community, 1999.

5. The Relationship between an International Organization and its Member States: The Concept of Supranationality⁶⁷

5.1 Overview

As indicated already, an international institution or organization is usually vested with a personality of its own, whose existence is beyond the national state, and whose personality is distinct from that of its member states. This personality it is a phenomenon that transcends the national state. This phenomenon has acquired the technical term 'supranationality'. Supranationality is understood as a public philosophy which tries to explain and evaluate an institutional order occurring beyond or above the national state, or which transcends the same. Attempts to define supranationality are many, one of which is contained in the following excerpt, that:

“The term “supranational” signifies that, signatory states have transferred to an international institution, certain decision-making powers normally exercised only by the governmental organs of the sovereign state, powers which include the capability of issuing, under certain specified conditions, binding norms to the states or to their inhabitants”⁶⁸ *Emphasis added.*

Supranationality is also understood as an institutional order characterized by autonomous power, which is placed at the services of the common interests of several states.⁶⁹ This understanding implies that: firstly, there should be existence of common interests; secondly, there should be placement of real powers to the newly created institution or organization; and thirdly, there should be autonomy of this power. Another writer tries to explain supranationality as a platform of negotiation among national governments.⁷⁰ He further argues that, supranationality is an institutionalized mode of problem solving that is not available to a national-state acting alone, because the problems concerned are trans-national in scope.⁷¹

67 For a detailed discussion on supranationality in the context of international organizations formed out of regional integration initiatives see: KILANGI, Adelardus (2011), “The Jurisprudence of Regional Integration: Lessons Drawn from Past Integration Initiatives in East Africa”, *St. Augustine University Law Journal*, Vol. 1., 2011, pp. 5–7.

68 See: GRIEVES F. L (1971), *Supranationalism and International Adjudication*, Urbana, University of Illinois Press, p. 14.

69 Ibid.

70 SOMEKA, A (2001), “On Supranationality”, *European Journal of Politics*, Vol. 5 of 2001, p. 6.

71 Ibid.

5.2 Approaches to Supranationality

Although the concept of supranationality appears to be construed as unified, jurists appear divided on which scenario, among the several, best represents it. This shows the possibility of several approaches to the concept. Thus, some jurists distinguish between supranationality and inter-governmentalism in the sense that, the former denotes real powers placed before the created organization, while the latter only denotes an initiative by governments to do things together. However, an analysis of the latter only shows that it could also be a version of supranationality with a different approach. Thus, there could be several notable approaches to supranationality.

The first approach is called rationalist. This approach sees the world order of states as always moving from simple order towards a more sophisticated type of order.⁷² The approach believes in the transformation of the world society, from smaller entities to bigger ones, and from simpler ones to more complex ones.⁷³ This approach therefore views supranationality as a phenomenon in which entities formed out of integration initiatives are really expected to bring about a complete transformation of communities, and not only to function for administrative convenience. Thus, the rationalists generally see supranationality as a transformation of the world community in which new entities are created which replace the national-state, and are expected to function as active performers upon the world stage.⁷⁴ In fact, the rationalists see supranationality as a phenomenon whose ultimate result is the erosion of national sovereignty and dissolution as well as replacement of the national-state.⁷⁵

The second approach to supranationality is called revolutionary. This approach regards supranationality in terms of creation of supranational bodies for specific policy aims and not transformation of societies.⁷⁶ The revolutionary philosophy views supranationality not as an evolution of the world community of states, but a creation of a platform for implementing specific common objectives and for creating administrative convenience. This approach therefore perceives supranationality as consisting of transfer of some sovereignty to a

72 SHAW, M. N (1997), *International Law*, United Kingdom, Cambridge University Press, 1997, p. 890.

73 Ibid.

74 Ibid.

75 GRIEVES, F. L (1971), *Supranationalism and International Adjudication*, Op. cit., p. 12.

76 Ibid.

supranational institution, but not a total replacement of sovereignty or the national-state. Revolutionaries therefore contend that, by creating a supranational institution, cooperating states envisage a joint exercise or sharing of sovereignty in respect of certain selected matters, but retaining the national-state and protecting its sovereignty.⁷⁷

The third approach to supranationality is called realism. This doctrine centres its attention on the struggle for power and supremacy,⁷⁸ as it sees the world stage as a chaotic platform of contentious state powers.⁷⁹ As a result, supranational institutions are created to try to create a balance of these powers.⁸⁰ However, a critical analysis of realism shows that its scope is limited, and may actually be a variant of either rationalist or revolutionary approaches.

It is important to note that, other jurists⁸¹ have approached the question of approaches to supranationality differently, but in a way that corresponds to the same scenarios as above. According to this approach, there is a three-tiered taxonomy of conferrals of powers on international organizations. These are: transfer of powers, delegation of powers, and agency relationship.

The *transfer of powers* approach is deemed as the conferral of powers of the largest extent, and could be distinguished between 'partial transfer' and 'full transfer'. In this theory of transfer of power, the state retains its power as part of its 'sovereignty' but agrees alongside with other state or states to limit its right to exercise these powers in favor of them being exercised by the organization it creates, and which becomes the sole place for the lawful exercise of the transferred powers. Examples given are the European Union and the World Trade Organization.⁸² This scenario corresponds to the rationalist approach to supranationality.

The *delegation of powers* approach represents a lesser degree of conferral of powers than transfer of powers, but greater degree than an agency relationship. It is a situation where states give certain powers to an organization for purposes of efficiency, effectiveness and convenience. However, states usually cannot exert direct control over the way in which the powers conferred by delegation are exercised by the organization. Examples cited are the United Nations, the World Health Organization,

77 Ibid.

78 SHAW, M. N (1997), *International Law*, Loc. cit.

79 Ibid.

80 Ibid.

81 For Example: SAROOSHI, Danesh (1999), *The United Nations and the Development of Collective Security*, Oxford, Clarendon Press.

82 Ibid., pp. 65-69.

the Universal Postal Union and the International Civil Aviation.⁸³ This scenario corresponds to the revolutionary approach to supranationality.

The *agency relationship* between states and international organizations formed by them occurs in situations where the organization acts on behalf of states as an agent to change certain of their rights and duties, a proposition which requires that the organization is endowed with international legal personality.⁸⁴ In this situation, the state still exercises some degree of control over the actual exercise of powers by the organization. This approach corresponds to the revolutionary approach to supranationality.

5.3 The Impact of the Varied Approaches to Supranationality on the Relationship between an International Organization and its Member States

In some way, supranationality defines the extent of exercise of powers by international organizations and the relationship between them and the member states. Thus, understanding the approach to supranationality adopted by the member states to an international organization helps to interpret the nature and extent of powers that the member states have given to that organization, and the way the organization would relate to its member states. Further, it helps to understand how those powers ought to be exercised, as well as the expected consequences of the exercise of those powers.

Thus, if member states have chosen a rationalist approach to supranationality, which involves the transfer of powers, they are expected to place with little reservations, real powers to the supranational institution they have created, and expect it to exercise real powers on them. But if member states reserve more powers to themselves than to the supranational institution they have created, or if they retain some direct or indirect control on the way matters are being conducted, then they are not pursuing a rationalistic approach, and if member states are not pursuing a rationalistic approach, then the organization they have created will not have real powers vis-à-vis the member states.

If states are pursuing a revolutionary approach to supranationality, which involves delegation of powers, then there will definitely be a limitation in terms of the powers they place to the organization. This

83 Ibid., p. 54.

84 Ibid., pp. 33–34.

organization will have been so established for specific policy aims and operational convenience, and therefore its creation will have been meant to be a platform for specific common objectives, policies and administrative convenience. The member states will have not intended to place real powers to it to the extent of enabling the organization to move motions and action against them, and it is not surprising that they will exercise direct or indirect control on the way matters are handled by the organization.

If states are pursuing a realist approach to supranationality, which involves creation of agency relationship, they are only concerned with the problem of contentious state powers. Therefore, the international organization they create will be for purposes of trying to create a balance of these powers. There is no actual interest in placing real powers before such organizations.

It should be noted that, an approach to supranationality is usually not stipulated in any instrument in explicit terms, but it is mostly inferred and discerned from the practice and decisions of the member states which affect the organization, and the powers they give to the various organs of the organization. An examination of the actual powers given to these organs will provide a clue as to the extent of supranationality the member states are ready to give to these organs, hence determining the supranationality of the whole organization.

Thus, to illustrate this scenario we can give an example that three different institutions that have been created by states could have the same objectives and purposes and could be given the same powers and functions in respect of those objectives and purposes, but the interpretation of what each of these institutions is capable of doing, partly comes from the approach to supranationality adopted by the states which have created those institutions. It is not surprising therefore to note that even though those three institutions appear to have same powers and functions, the nature and extent of exercise of those powers and functions may differ substantially among them.

In essence therefore, supranationality helps to define the relations between an international organization and its member states, and the extent at which such an organization can exercise its powers and functions vis-à-vis those member states.

6. Duties and Responsibility of International Organizations

6.1 A Purview into the Body of Law on Responsibility of International Organizations

International legal scholars have been preoccupied with the question of responsibility of international organizations for a long time, touching on issues of how and in what circumstances could an international organization be held responsible. This led the International Law Commission to start the process of preparing the Draft Articles on the Responsibility of International Organizations.⁸⁵ These Draft Articles⁸⁶ apply in situations of internationally wrongful acts committed by international organizations.⁸⁷

In accordance to these articles, international organizations are held responsible if they commit an ‘internationally wrongful act’⁸⁸ An internationally wrongful act consists of an act or omission which, firstly, it constitutes a breach of an international obligation of that organization, and secondly, it is attributable to that organization.⁸⁹ These two are the main problems, and they constitute the problem of qualification and the problem of attribution as far as the responsibility of international organizations is concerned. Further, the characterization of an act as ‘internationally wrongful’ must be governed by international law.⁹⁰

It is noted that, when rules of international law regarding the responsibility of international organizations were being developed by the International Law Commission, some difficulties were being faced with regard to certain concepts and their precise meanings when considered. These include the concept of ‘internationally wrongful act’ and ‘international obligation.’ Thus, when commenting on the Draft Articles on the Responsibility of International Organizations developed

85 Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, Para. 87). The report appears in the *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.

86 However, note should be taken about the legal force of the Draft Articles on the Responsibility of International Organizations as sources of law in international law. These Articles would not carry the weight of treaties, but at best they reflect developing principles of customary international law by virtue of their acceptance and reference to them by the international community.

87 Article 1, Draft Articles on the Responsibility of International Organizations, 2011.

88 Article 3, *Ibid.*

89 Article 4, *Ibid.*

90 Article 5, *Ibid.*

by the International Law Commission, the International Monetary Fund (IMF) agonized about this difficulty when it remarked that:

“We note that the draft articles on the responsibility of international organizations use terms such as ‘responsibility’ or ‘international obligations’ of international organizations without any explanation or definition in relation to international organizations. These undefined references imply that there is an established body of international law that determines what the terms “responsibility” or “international obligations” mean with regard to an international organization.... *In our view, a body of law explaining the meaning of these critical terms with respect to international organizations does not exist.* Therefore, it is premature for the draft articles on international organizations to use these basic terms and seek comment on provisions that turn on the use of these basic terms without providing guidance as to their intended substantive meaning.”⁹¹ [Emphasis added]

In the same occasion and in the same line of thinking, the IMF went on to express its views on the same question of lack of precise meaning, pleading that:

“The reference to ‘wrongful acts under international law’ needs to be defined and explained. ...*Since there is no existing body of international law on the matter of what constitutes a wrongful act of an international organization* and the evolution of such a body of law would largely rely on general principles of law, the overriding legal effects of the provisions of the charters of international organizations, which have been expressly agreed upon and are primary sources of international law, must be made clear.”⁹² [Emphasis added]

Thus, based on this reality the IMF proposed that, any analysis of the responsibility of international organizations must take into account the provisions of the international agreements by which individual organizations were created.⁹³ In any case, difficulties such as those faced by the IMF shows that there are two main problems in determining the responsibility of international organizations, namely the problem of qualification, namely the need to qualify a breach by an international organization as an internationally wrongful act; and the problem of attribution, namely attributing an internationally wrongful act to some international organization.

91 UNITED NATIONS GENERAL ASSEMBLY, (2004), “Responsibility of International Organizations: Comments and observations received from international organizations”, 56th Session of the International Law Commission, 3 May-4 June and 5 July-6 August 2004, Doc. A/CN.4/545, p. 6.

92 *Ibid.*, p. 9.

93 *Ibid.*, p. 6.

6.2 The Problem of Qualification: Qualifying a Breach by an International Organization as an Internationally Wrongful Act

As stated already, in international law an international organization incurs responsibility only when it commits an internationally wrongful act, which must be qualified as such by international law. This is technically difficult to articulate because of lack of body of law on the same as discussed already. But, at least it means that an internationally wrongful act is committed by an international organization when the organization breaches its international obligations. Thus, there must be existence of an international obligation that applies to the organization in question, and that obligation must be binding on the organization at the time of the purported breach.⁹⁴ Further, a breach of an international obligation by an international organization occurs when an act or omission of the organization in question is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned. This, therefore, includes breach of obligations of the organization towards its member states.⁹⁵

This discourse however, lands us into more trouble, because the pertinent question that arises immediately here is: what is the source of obligations for international organizations? If the same question was asked in respect of states, it would be easier to answer, because international obligations for states have been developed in a number of sources including custom, conventions, decisions of courts and tribunals, general principles of law etc...⁹⁶ The question is difficult for international organizations whose jurisprudence is still developing and where there has been some reluctance to apply the jurisprudence on responsibility of states to international organizations wholesale. In an attempt to resolve this impasse the European Commission, while also commenting on the Draft Articles on the Responsibility of International Organization when they were being developed by the International Law Commission, adopted a position that, its international obligations will only be confined to those stipulated in treaties for which the Commission itself is a party, as observed hereunder:

94 Article 11, *Ibid.*

95 Article 10, Draft Articles on the Responsibility of International Organizations, 2011.

96 TZANAKÓPOULOS, Antónios (2011) *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, Oxford University Press, P. 56.

“...The European Commission has pointed out that, in practice, its international responsibility has arisen only in the context of international obligations *ex contractu* with third parties rather than in a non-treaty context. It therefore limits its observations to the breach of bilateral and multilateral agreements to which the EC, either alone or together with its member States, is a party”.⁹⁷ [Emphasis added]

On the same subject, the International Law Commission, in its internal discussions, also stated that most obligations for international organizations are likely to arise from the rules of the organization which are defining, which means the constituent instrument.⁹⁸ However, the International Court of Justice had earlier on come up with a broader view of the sources of law for obligations of international organizations. This was in its advisory opinion on the *Interpretation of Agreement between World Health Organization and Egypt*, where the Court declared that:

“International Organizations are subjects of international law, and as such, are bound by any obligations incumbent upon them under the general rules of international law, under their constitutions (or constituent instruments), and under international agreements to which they are party”.⁹⁹

From these discourses we can see that, the sources of law for international obligations of international organizations are basically three namely: the constituent instrument of the organization, treaties and agreements to which such organizations are party, and relevant general principles of international law, depending on the case at hand.

6.2.1 The Problem of Attribution: Attributing a Breach of an International Obligation to an International Organization

So far, it is the question of attributing an act or omission to an international organization which brings greater controversies and problems. The Draft Articles on the Responsibility of International Organizations stipulate the various ways in which responsibility can be attributed to an international organization.

The first way is through the conduct of the organs or agents of the organization in the form of an act or omission. In the developing law

97 MAURIZIO, Ragazzi (ed.)(2005), *International Responsibility Today*, Netherlands, Koninklijke Brill NV, p. 407.

98 INTERNATIONAL LAW COMMISSION, (2005), “Report on the Work of its Fifty-Seventh Session”, UN DOC A/60/10 (2005) 88 [4].

99 Interpretation of the Agreement of 25th March 1951 between the World Health Organization and Egypt (Advisory Opinion), 1980, ICJ Reports 73, at pp. 89-90, Para. 73.

and practice of international organizations, the objectives of such organizations are usually realized through the various organs and agents of that organization. Therefore, the conduct of such organs or agents can be attributable to the organization itself. But, these must be the organs or agents lawfully authorized to carry out the work of the organization. In such a situation, the rules of the organization would be applied to determine the functions of the organs or agents of the organization and their lawfulness.¹⁰⁰

The second way is through the conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of an international organization also in the form of an act or omission. This conduct of an organ of a state, or an organ or agent of an international organization shall be considered, under international law, as an act of the organization in question if the organization exercises effective control over that conduct. An example is when a state or an international organization contributes peace keepers and places them at the disposal of another organization, then the responsibility will be attributed to the receiving and controlling organization.¹⁰¹

The third way covers the conduct of an organ or agent of an international organization in the form of an act, which though is deemed to exceed the authority of that organ or agent or contravenes given instructions, provided that the organ or agent in question acts in an official capacity and within the overall functions of that organization. This conduct shall be considered as an act of that organization under international law.¹⁰²

The fourth way concerns a conduct which is not attributable to an international organization as such, but the organization in question acknowledges and adopts the conduct in as its own. This conduct shall be considered as an act of that organization under international law to the extent of acceptance of that conduct by the organization in question.¹⁰³

The fifth way consists of several situations which are traceable back to the international organization in question. The first situation is where an organization assists or aids a state or another organization to commit an internationally wrongful act knowing it to be wrongful. In such a situation, the act will be attributed to the assisting organization.¹⁰⁴ The second

100 Article 6, Draft Articles on the Responsibility of International Organizations, 2011.

101 Article 7, Draft Articles on the Responsibility of International Organizations, 2011.

102 Article 8, *Ibid.*

103 Article 9, *Ibid.*

104 Article 14, *Ibid.*

situation is where an international organization directs or controls a state or another organization to commit an internationally wrongful act, knowing it to be wrongful, then responsibility is attributed to the directing or controlling organization.¹⁰⁵ The third situation is where an organization coerces a state or another organization to commit an internationally wrongful act, knowing it to be wrongful. In such a situation, responsibility will be attributed to the coercing organization.¹⁰⁶

It is noted that, many entities remain concerned with the question of attribution of wrongfulness to international organizations. Once again, when commenting on the Draft Articles on the Responsibility of International Organizations developed by the International Law Commission, the International Monetary Fund (IMF), when expressing concerns, had this to say:

“...the fundamental question of attribution must, for each international organization, be determined with reference to the treaty that established the organization, the decisions of its governing bodies and the established practice of the organization. Therefore, in discussing questions of attribution, particular attention will need to be paid to the differences in the treaty-based laws and practices of the various international organizations.”¹⁰⁷

7. Immunity of International Organizations

7.1 An Overview of Immunity

Immunity from jurisdiction for acts and activities performed by an organization is one of the rights and privileges which an international organization enjoys. The common rights and privileges enjoyed by international organizations include: exemption from legal process,¹⁰⁸ freedom of communication and inviolability of premises and archives,¹⁰⁹

¹⁰⁵ Article 15, *Ibid.*

¹⁰⁶ Article 16, *Ibid.*

¹⁰⁷ UNITED NATIONS GENERAL ASSEMBLY, (2004), “Responsibility of International Organizations: Comments and observations received from international organizations”, 56th Session of the International Law Commission, 3 May-4 June and 5 July-6 August 2004, Doc. A/CN.4/545, p. 7.

¹⁰⁸ See: the case of *Manderlier v. United Nations and Belgian State* (1966), cited in: DÍAZ-GONZÁLEZ, Leonardo (Special Rapporteur)(1989), “Status, Privileges And Immunities Of International Organizations, Their Officials, Experts, Etc: Fourth Report On Relations Between States And International Organizations”, *Yearbook of the International Law Commission*, Op. cit.,p. 161, Para 63 (the Court dismissed the proceedings against the United Nations on the ground that the Organization enjoyed immunity from every form of legal process under section 2 of the 1946 Convention on the Privileges and Immunities; of the United Nations.)

¹⁰⁹ See for example: Article II, S. 3 of the Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13

jurisdictional immunity, immunity of assets and properties,¹¹⁰ and immunity from execution or enforcement measures. International organizations are generally immune from jurisdiction such that they enjoy an exemption from the adjudicative and the enforcement procedures of courts.¹¹¹ Detailed provisions on immunities and privileges are usually contained in an agreement concluded separately,¹¹² to supplement the general provisions of the constituent instrument. These privileges and immunities may also be found in domestic legislations enacted specifically for international organizations.¹¹³

There is a number of reasons for granting international organizations the above-mentioned immunities and privileges. As Reinisch¹¹⁴ points out, International organizations do not enjoy such immunity on functional necessity basis only,¹¹⁵ but also are entitled to such privileges and immunities as a matter of entitlement.¹¹⁶ For example, it has been argued that international organizations are immune from jurisdiction of national courts because national courts are not appropriate *fora* to deal with disputes involving such organizations.¹¹⁷ The existence of

February 1946, providing that: “The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.”

- 110 See: Article II, s. 2 of the Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946 providing that: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process...”
- 111 See: *Marvin R. Broadbent et al v. OAS et al*, (1980) U.S Court of Appeals, 628 F. 2d 27
- 112 The UN has its own conventions, apart from its Charter, which provide in detail for its immunities and privileges as well as those of its specialized agencies (Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946 and Convention on the Privileges and Immunities of the Specialized Agencies, Approved by the General Assembly of the United Nations on 21 November 1947); See also Agreement On Privileges And Immunities of The Organization of American States, 1949.
- 113 The United States of America, for example, has enacted the ‘International Organizations Immunities Act, 1945’. The United Kingdom has the ‘International Organizations Act, 1968’.
- 114 REINISCH, August (2011), “Privileges and Immunities”, in KLABBERS, Jan & WALLEND AHL, Asa (eds), *Research Handbook on the Law of International Organizations*, Cheltenham Edward Elgar Publishing Limited, available at www.books.google.co.uk, accessed 25th June, 2012.
- 115 Functional necessity is usually provided in constituent instruments, e.g Article 105(1) of the U.N Charter (“...such privileges and immunities as are necessary for the fulfillment of its purposes”)
- 116 BEKKER, Peter (1994), *The Legal Position of Intergovernmental Organizations*, Dordrecht, p. 5.
- 117 DÍAZ-GONZÁLEZ, Leonardo (1989), *Status, privileges and immunities of international organizations, their officials, experts, etc*, Fourth report on relations between States and international organizations, Special Rapporteur, Yearbook of the International Law

alternative legal redress has also been considered as a reason for granting immunity to an international organization.¹¹⁸

7.2 The Concept of Immunity and its Development

7.2.1 Understanding Immunity

So far, there is no universally agreed definition of immunity, at least in international treaties, although these treaties often employ the term. But, immunity is usually understood to be the exception or exclusion of an entity, individual, or property enjoying it, from some jurisdiction. Otherwise, immunity is an obstacle to the exercise of jurisdiction; or the limitation of jurisdiction; or a defense used to prevent the exercise of jurisdiction over the entity or individual in question, and is considered as an entitlement through which an entity or individual is not to be subjected to jurisdiction.¹¹⁹ Generally, immunity refers to any exemption from a duty, liability, or service of process.¹²⁰ Immunities are also known as exemptions from administrative, adjudicatory or executive powers.¹²¹ Privileges refer to exemptions from substantive laws of states.¹²²

In customary international law, the doctrine of immunity developed through a number of stages. At first it emerged in the context of relations between governments or crowns with their subjects, and is known as sovereign immunity. Then, the concept further developed in the context of relations among states, in which two categories of immunity emerged, namely state immunity and diplomatic immunity. It is noted therefore that, from the development of the concept of immunity in customary international law, various types of immunity have evolved. These include

Commission, vol. II(1), para 24; DE BRABANDERE Eric (2010), Immunity of International Organizations in Post-conflict International Administrations, *International Organizations Law Review*, 7 (1), p. 5, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1993000 by E De Brabandere – 2012, accessed 26th June 2012

- 118 See: *Energies nouvelles et environnement v. Agence spatiale européenne, Civ. Bruxelles* (4e ch.), 1 decembre 2005, *Journal des tribunaux* (2006), 171., cited in REINISCH, August, *The Immunity Of International Organizations And The Jurisdiction Of Their Administrative Tribunals*, IILJ Working Paper 2007/11, (Global Administrative Law Series), p. 11
- 119 INTERNATIONAL LAW COMMISSION (2008), *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, pp. 27–28.
- 120 See: Black's Law Dictionary, 8th Ed, p. 2190.
- 121 Ibid.
- 122 REINISCH, August (2011), "Privileges and Immunities", in: KLABBERS, Jan & WALLEND AHL, Asa (eds), *Research Handbook on the Law of International Organizations*, Cheltenham Edward Elgar Publishing Limited, p. 133, available at www.books.google.co.tz, accessed on 25th June, 2012

sovereign or State immunity,¹²³ diplomatic immunity,¹²⁴ immunity of state officials, and immunity of international organizations.¹²⁵ The last type denotes that, international legal persons, including international organizations, enjoy certain jurisdictional immunities.¹²⁶ These immunities are necessary for the proper functioning of international legal persons.

Within all these concepts of immunity, there are two main categories namely functional immunity and personal immunity. The category of immunity which is applicable to international organizations is functional immunity. This is the one which will be discussed hereunder.

7.2.2 Functional Immunity

Functional immunity emerged in customary law in the context of sovereign and state immunity. Functional immunity is originally meant to protect conducts done on behalf of the state, and is also known as immunity *ratione materiae*, attaching to a certain class of individuals who carry state functions.¹²⁷ Functional immunity is also known as function-based immunity, meaning that it is a kind of immunity that is tied to the functions that an office is supposed to perform.¹²⁸ In other words, this is the kind of immunity given in order to facilitate a certain function to be performed, without which the performance of that function could fall into jeopardy, while it is desirable that the performance of that function should go unhindered.

7.3 Extension of the Concept of (Functional) Immunity to International Organizations

Unlike literature on foreign sovereign immunity which is extensive, literature on immunity of international organizations has not been extensive. Nonetheless, this kind of immunity is now well recognized under international law,¹²⁹ and that international organizations enjoy

123 See: SHAW, Malcolm (2008), *International Law*, 6th Ed., Op. cit., p. 697.

124 See: AUST, Anthony (2005), *Handbook of International Law*, Cambridge, Cambridge University Press, p. 117.

125 See: REINISCH, August (2000), *International Organizations before National Courts*, Cambridge, Cambridge University Press, pp. 273-277.

126 DAMROSCH, Lori, (et al.) (2001), *International Law: Cases and Materials*, Op. cit., p. 1197.

127 CRIER, Robert (et al)(2010), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, p. 533.

128 ELSEA, Jennifer (2011), *Samantar V. Yousef: The Foreign Sovereign Immunities Act and Foreign Officials*, DIANE Publishing, p. 11.

129 REINISCH, August (2006), *Immunity of International Organizations and Alternative Remedies Against the United Nations*, Seminar on State Immunity, Vienna University, p. 2,

certain immunities and privileges with respect to their assets, properties and representatives.¹³⁰ This kind of immunity aims at enabling international organizations to carry out their functions without interference from member states.¹³¹ This concept of ‘immunities and privileges of international organizations’ can be traced back to the League of Nations in its establishment in 1919¹³² and its successor, the United Nations.¹³³ However, some organizations may not require privileges and immunities, even though they have been established through an agreement among states.¹³⁴ For example, intergovernmental international organizations which can function properly under the domestic law of the host state may not need some of the privileges and immunities.¹³⁵

The concept of functional immunity, which originally was attributed to state officials, has, in the course of time, been extended to international organizations. As such, international organizations are accorded functional immunity potentially to enable them to function and to shield them from harassment and prejudice that might jeopardize their smooth operations. Therefore, the basic rationale for giving immunity to international organizations in this way is what is called ‘functional necessity’.¹³⁶ The concept of functional immunity based on functional necessity for international organizations is traceable back to

available at inlaw.univie.ac.at/fileadmin/user_upload/int.../neumann.pdf, accessed on 23rd June 2012.

130 SHAW, Malcolm (2008), *International Law*, Op. cit., p. 1318.

131 REINISCH, August (2011), “Privileges and Immunities”, in KLABBERS, Jan & WALLEND AHL, Asa (eds), *Research Handbook on the Law of International Organizations*, Cheltenham Edward Elgar Publishing Limited, p. 132, available at www.books.google.co.tz, accessed on 25th June, 2012; DE BRABANDERE, Eric (2010), *Immunity of International Organizations in Post-conflict International Administrations*, *International Organizations Law Review*, 7(1), p. 2, available at papers.ssrn.com, accessed 26th June 2012.

132 Ibid.

133 See: The UN Charter, Article 105, providing that: “the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”; See also: The Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946, providing for privileges and immunities that the UN enjoys.

134 DÍAZ-GONZÁLEZ, Leonardo (Special Rapporteur)(1989), “Status, Privileges and Immunities of International Organizations: Their Officials, Experts, Etc”, Fourth Report On Relations Between States And International Organizations, *Yearbook of the International Law Commission*, Vol. II(1), Para 54.

135 Ibid.

136 REINISCH, August (2000), *International Organizations before National Courts*, Cambridge University Press, pp. 331–332.

the establishment of the United Nations as well as the Organizations of American States in the 19470s.¹³⁷

A provision on functional immunity of an international organization is sometimes inserted in its constituent instrument.¹³⁸ For example, at Article 105(1) of the Charter of the United Nations it is stipulated that *the organization shall enjoy, in the territory of each of its member state, such privileges and immunities as are necessary for the fulfillment of its purposes*. This ‘functional necessity’ standard is what came to be affirmed by the International Court of Justice in the *Reparations Case*.¹³⁹ Further, for the United Nations it was necessary to conclude a convention that addresses the immunity of the organization, namely The Convention on Privileges and Immunities of the United Nations, usually referred to as the General Convention, which was adopted on February 13, 1946, by the General Assembly. The purpose of this Convention is to give certain privileges and immunities to the United Nations as an Organization, as well as to the representatives of Member States, officials of the United Nations and experts on mission for the United Nations.

It has been argued that the functional requirements of international organizations are the ones that determine the extent and range of privileges and immunities to be ultimately enjoyed by the organization.¹⁴⁰

7.4 The Scope of Functional Immunity of International Organizations in International Comparative Jurisprudence: Between Absolute and Restricted Immunity

There have been debates among jurists and within judicial practice regarding the scope of immunity of international organizations,¹⁴¹ especially on whether such immunity is absolute or restrictive.¹⁴² In

137 Ibid.

138 See for example, Articles 104 & 105 of the U.N Charter.

139 Supra.

140 DÍAZ-GONZÁLEZ, Leonardo (1989), *Status, privileges and immunities of international organizations, their officials, experts, etc.* Fourth report on relations between States and international organizations, Special Rapporteur, Yearbook of the International Law Commission, vol. II(1), p. 158, paragraph 27.

141 ILLARD, Emmanuegla & NGEL-LENUZ, Isabellpei (2002), *International Organisations And Immunity From Jurisdiction: To Restrict Or To Bypass*, International and Comparative Law Quarterly, Volume 5 1, p. 1, available at www.shearman.com/ia_040308_05/, accessed 23rd January 2012

142 Ibid, p.2; See also REINISCH, August (2006), *Immunity of International Organizations and Alternative Remedies Against the United Nations*, Seminar on State Immunity, Vienna University, p. 2, available at intlaw.univie.ac.at/fileadmin/user_upload/int.../neumann.pdf, accessed 23rd June 2012

some cases, the position has been that international organizations do not have absolute immunity at all. For example, courts in Italy have generally held that customary international law does not provide for absolute immunity of international organizations.¹⁴³ In some other cases, attempts have been made to distinguish between situations in which international organizations have absolute immunity and those in which they have restricted immunity. These attempts have been made in the context of trying to extend the concept of restricted immunity of states to international organizations, by invoking the distinction between acts of the state relating to the exercise of public authority (*acta iure imperii*) which attract absolute immunity, and acts of the state relating to commercial or private business (*acta iure gestionis*) which attract restricted immunity.¹⁴⁴

For example, in the United States in the case of *Dupree Associates v. the Organization of American States (OAS) and the General Secretariat of the OAS* before the District Court of Columbia,¹⁴⁵ while making reference to the case of *Victory Transport Inc. v. Comisaria General*, 35 I.L.R. 110, it held that since foreign sovereigns were only entitled to restricted immunity under the 1945 International Organizations Immunity Act, and under the same Act immunities to international organizations were extended only to the extent enjoyed by foreign sovereigns, it followed that international organizations were entitled only to restricted immunity.¹⁴⁶ Further, in a more recent case, the United States Court of Appeals for the Third Circuit decided in the case of *OSS Nokalva, Inc. v. European Space Agency*¹⁴⁷ that, the immunity of international organizations is subject to the same exceptions as foreign states, hence restricted immunity.¹⁴⁸

However, there has also been a view, sometimes within the same jurisdiction that, the immunity of international organizations is absolute, 'barring any exceptions allowed under specific provisions.'¹⁴⁹

143 See for example *Giovanni Porru v. FAO*, 1969, 71 ILR

144 PETROVIC, Drazen, *Practical Legal Problems of International Organizations: Privileges and immunities of UN Specialized Agencies in field activity*, p. 6 (Preliminary paper), available at www.iilj.org/GAL/documents/GALch.Petrovic.pdf, accessed 25th June 2012

145 *Dupree Associates v. the Organization of American States and the General Secretariat of the Organization of American States, United States*, District Court, District of Columbia, 1977, cited in LAUTERPATCH, Elihu (1982), *International Law Reports*, Cambridge, Cambridge University Press, p. 93, available at www.books.google.co.tz/books, accessed 26th June 2012.

146 Ibid.

147 *OSS Nokalva, Inc. v. European Space Agency (ESA)*, Nos. 09-3602, 3640 (3d Cir. 8/16/10)

148 Ibid

149 See: ILLARD, Emmanuegla & NGEL-LENUZ, Isabellpei (2002), *International Organisations And Immunity From Jurisdiction: To Restrict Or To Bypass*, International and Comparative Law Quarterly, Volume 5 1, p. 3, available at www.shearman.com/ia_040308_05/, accessed

The case of *Marvin Broadbent et al v. OAS et al*¹⁵⁰ filed before the United States Court of Appeals in the District of Columbia Circuit, illustrates this position. This case concerns an appeal from the District Court. Marvin Broadbent and others worked as staff members of the General Secretariat of the Organization of American States (OAS) and were terminated from employment in 1976. Following the dismissal, they filed complaints with the Administrative Tribunal of the OAS, which found the termination to be improper and ordered for reinstatement. The General Secretary, however, denied such reinstatement, thus Marvin Broadbent and others brought an action before the District Court. The District Court dismissed the action based on the doctrine of immunity of international organizations, holding that the Organization of American States (OAS) enjoyed absolute immunity from the suit. The main issue before the Court of Appeals in this case therefore was whether the OAS enjoyed absolute immunity. Although the Court avoided taking a clear position on the issue, it affirmed the decision of the District Court, when it stated:

“We affirm on the ground that even assuming, for discussion purposes, the applicability of the lesser “restrictive” immunity doctrine, which permits a lawsuit based on ‘commercial’ activity to be maintained

23rd January 2012; See also DÍAZ-GONZÁLEZ, Leonardo (1989), *Status, privileges and immunities of international organizations, their officials, experts, etc.*, Fourth report on relations between States and international organizations, Special Rapporteur, Yearbook of the International Law Commission, vol. II(1), p. 161, para 58, (According to most existing texts (conventions on privileges and immunities, headquarters agreements and so forth), international organizations cannot be judged by any court of ordinary law unless they expressly waive that privilege. Even if they do so, their waiver cannot be extended to measures of execution.) implying the absolute character of immunity of international organizations. ; MEMORANDUM OF LAW IN SUPPORT OF THE UNITED NATIONS TO DISMISS AND TO INTERVENE in the case of *Brzak & Ishak v. The United Nations, Kofi Anna, Wendy Chamberlain, Ruud Lubeers, et. al*, by the Attorneys for the United Nations, Donald Donovan and Catherine Amirfar in 2007, available at ijl.org/.../BrzakBrzakv.UnitedNations-, accessed 26th June 2012, p. 10 (arguing the case against the United Nations should be dismissed based on its absolute immunity); DE BRABANDERE Eric (2010), *Immunity of International Organizations in Post-conflict International Administrations*, *International Organizations Law Review*, 7(1), p. 6, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1993000 by E De Brabandere – 2012, accessed 26th June 2012; PETROVIC, Drazen, *Practical Legal Problems of International Organizations: Privileges and immunities of UN Specialized Agencies in field activity*, p. 6 (Preliminary paper), available at www.ijl.org/GAL/documents/GALch.Petrovic.pdf, accessed 25th June 2012

150 *Marvin R. Broadbent et al., Appellants, v. Organization of American States et al.*, United States Court of Appeals, District of Columbia Circuit. - 628 F.2d 27, 1980, available at www.law.justia.com > ... > F.2d > Volume 628, accessed 25th June 2012

against a sovereign without its consent, this case does not present such ‘commercial’ activity possibility”.¹⁵¹ [Emphasis added].

In more explicit terms, the doctrine of absolute immunity of international organizations triumphed in the case of *Brzak & Ishak v. United Nations*.¹⁵² The Brzak case was an appeal from the District Court of New York by Cynthia Brzak and Nasr Ishak, who had filed a case before the District Court against the UN and the individual defendants on sex discrimination and employment retaliation.¹⁵³ The District Court held that there was lack of subject-matter jurisdiction on the grounds that the UN and the individual defendants enjoy absolute and functional immunity, respectively.¹⁵⁴ The Court of Appeals affirmed the decision of the District Court, concluding that ‘the United Nations enjoys absolute immunity and the district court’s decision to dismiss the claims against the United Nations was correct.’¹⁵⁵

Although there is still the quagmire between absolute and restricted immunity, practice in many jurisdictions considers the immunity of international organizations to be of an absolute character.¹⁵⁶ But it should also be noted that all the situations in which the immunity of international organizations was considered was before national courts. No such question has arisen before international courts as it is the case with the Femi Falana case which was before an international court. Further, none of the cases cited above involved human rights issues. These two dynamics therefore could alter the position regarding immunity of international organizations.

151 Ibid, para 1 (See also *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y))

152 *Cynthia BRZAK, Nasr Ishak v. UNITED NATIONS, Kofi Annan, Ruud Lubbers, Wendy Chamberlin*, Docket No. 08-2799-cv., United States Court of Appeals, Second Circuit, 2010., available at www.leagle.com/xmlResult.aspx?xmlDoc...xml, accessed 26th June 2012

153 Ibid.

154 Ibid.

155 Ibid; See also: “The Whistle blogger, UN’s Immunity Upheld in Brzak Case”, March 5, 2010, available at www.whistleblower.org/.../385-uns-immunity-upheld-in-brzak-case, accessed 26th June 2012

156 PETROVIC, Drazen, Practical Legal Problems of International Organizations: Privileges and immunities of UN Specialized Agencies in field activity, p. 6 (Preliminary paper), available at www.iilj.org/GAL/documents/GALch.Petrovic.pdf, accessed 25th June 2012; *Mendaro v. World Bank*, 717 F. 2d 610. U.S. Court of Appeals, D.C. Cir., Sept. 27, 1983.

7.5 Immunity of International Organizations and the Human Right of Access to Courts

The doctrine of immunity of international organizations presents a major problem when it comes to the human right of access to courts, which is also part of a broader right of access to justice. This matter came to the attention of the European Court of Human Rights,¹⁵⁷ where the Court found it necessary to set some criteria to be applied in making sure that the immunity of an international organization did not end up completely barring access to it by an aggrieved individual. On this the Court determined that one of the things to be considered is that the limitations placed by immunity of an international organization should not end up being excessive hence completely shutting down the possibility of access to justice for that individual. Further, there should be a strong and legitimate purpose for maintaining the immunity, and that there should be some proportionality between the limitation of access and possibility of access, specifically if there is another remedy available to the individual seeking access.¹⁵⁸

7.6 Treaty Obligations for International Organizations

The main body of law regulating treaty obligations for international organizations is the ‘Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986’. As its title suggests, the Treaty covers treaties between states and international organizations, and between international organizations. However, the Treaty itself observes that rules of customary international law will continue to govern questions not regulated by the provisions of the Convention.¹⁵⁹ The treaties convassed by the Convention include those which constitute the constitutive act of the organization and those concluded by the organization.¹⁶⁰

So far, the Vienna Convention asserts the right of international organizations to conclude treaties or to be parties to treaties a power which must, however, be established by the constitutive instrument of the organization.¹⁶¹ Generally, treaties cannot create obligations for

157 See: *Waite and Kennedy V. Germany*, Application No. 26083/94 and *Beer and Regan V. Germany*, Application No. 28934/95.

158 See Paragraph 68 and 69, *Waite and Kennedy V. Germany*, Application No. 26083/94; and Paragraph 58 and 59, *Beer and Regan V. Germany*, Application No. 28934/95.

159 Preamble, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

160 Article 5, *Ibid.*

161 Article 6, *Ibid.*

third states or organizations, which means states or organizations which are not parties to the treaty,¹⁶² unless such states or organizations express the consent to be bound by the treaty in question in writing.¹⁶³ However, treaties may bind third states or organizations through international customary law.¹⁶⁴

8. The AU and the Issues Emanating from the Femi Falana Case

8.1 The Legal Personality of the AU

8.1.1 The AU as an International Legal Person in the form of an International Organization

Before asserting the AU to be an international legal person, it must be established that it is, in the first place, a legal person. So far, the AU is a legal person by virtue of being created by law, namely the Constitutive Act of the African Union,¹⁶⁵ as well as its predecessor, the OAU Charter.¹⁶⁶ Further, the Members to the AU are African States.¹⁶⁷ The founding states are 53 and now it has 54 states after the accession to the Act by South Sudan.

Secondly, the AU is an international legal person because it is an intergovernmental association of African states, established by and operated according to a multilateral treaty, namely the OAU Charter and later the Constitutive Act of the African Union. The AU can also be understood as a continental body created by African states, whose purpose is to pursue the common aims of the African countries. It is also intended to operate at the international sphere as well as being able to operate in more than one Member State as evidenced by its aims and objectives.¹⁶⁸ Furthermore, the juridical personality of the AU is explicitly provided in the General Convention on the Privileges and Immunities of the Organization of African Unity, 1965.¹⁶⁹

162 Article 34, *Ibid.*

163 Article 35, *Ibid.*

164 Article 38, *Ibid.*

165 Article 2, The Constitutive Act of the African Union, 2000.

166 Article I(1), The OAU Charter, 1963.

167 Article IV, the OAU Charter, 1963; Preamble & Article 29(1), The Constitutive Act of the African Union, 2000.

168 Article 3, The Constitutive Act of the African Union.

169 Article I(1), General Convention on the Privileges and Immunities of the Organization of African Unity, 1965.

8.1.2 Separateness of Personality and Relationship between the AU and its Member States

8.1.2.1 *Separateness of Personality*

The AU has a separate personality from the personalities of its Member States. The evidence of this separateness of personality between the AU and its Member States is, in the first place, in terms of distinction of power between the two as shown by the aims and objectives of the AU. The aims and objectives of the AU, according to the Constitutive Act, are as follows: to achieve greater unity and solidarity between the African countries and the peoples of Africa; to defend the sovereignty, territorial integrity and independence of its Member States; to accelerate the political and socio-economic integration of the continent; to promote and defend African common positions on issues of interest to the continent and its peoples; to encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights; to promote peace, security, and stability on the continent; to promote democratic principles and institutions, popular participation and good governance; and to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.¹⁷⁰

Others are: to establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations; to promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; to promote co-operation in all fields of human activity to raise the living standards of African peoples; to coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union; to advance the development of the continent by promoting research in all fields, in particular in science and technology; to work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.¹⁷¹

The second evidence of separateness of personality between the AU and its Member States is in terms of existence of independent will of the AU through the creation of organs that have power to carry out various

170 Article 3, The Constitutive Act of the African Union.

171 Ibid.

functions.¹⁷² These organs are: The Assembly; The Executive Council; The Pan African Parliament; The African Court; The Commission; The Permanent Representatives Council; The African Commission on Human and Peoples' Rights; The Specialized Technical Committees; The Economic, Social and Cultural Council (ECOSOC); and the Financial Institutions. Other institutions could be established by the Assembly, and indeed they have been established. They include: The Peace and Security Council; the Advisory Body on Corruption; The African Union Commission on International Law; and the African Committee of Experts on the Rights and Welfare of the Child.

8.1.2.2 *The Relationship between the AU and its Member States: the Question of Supranationality*

There is no doubt that the AU is an institutional order vested with a personality of its own, whose existence is beyond or above the national states of Africa. Therefore, it is a phenomenon that transcends the national states of Africa. Further, the AU has some level of autonomous powers, which are placed at the services of the common interests of its Member States. In principle, the AU Member States have transferred to the AU, certain decision-making powers normally exercised only by the governmental organs of the Member States. These include the powers given to the various organs of the AU, including: The African Court, the Commission on Human and Peoples' Rights, and the Pan African Parliament. Therefore, the African Union is a supranational institution.

However, when it comes to determining the approach to supranationality, the AU has notably taken a varied approach by its organs. For example, there is more transfer of powers to the judicial and quasi-judicial bodies like the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child than to other organs. With regard to executive powers, there is a mix of transfer of powers, delegation of powers, and the agency relationship. The African Union Commission (AUC) enjoys both transferred and delegated powers. The Permanent Representative Council (PRC) also enjoys delegated powers. The Technical Committees only enjoy the agency powers. With regard to the law making functions, the Pan African Parliament only enjoys very limited delegated powers, because most of laws making powers are rather reserved in the Permanent

172 Article 5, The Constitutive Act of the African Union.

Representatives Council, the Executive Council and the Assembly. In fact, the last two also operates highly on an agency basis.

Therefore, due to varied approach to supranationality with regard to the various organs of the AU, it is very difficult to assert a single standard and same level of supranationality for the whole AU as it differs from organ to organ. Hence it is very difficult to articulate the general relationship between the AU as an organization and its Member States.

8.1.3 The Duties, Responsibility and Immunity of the AU in the Context of the Femi Falana Case

8.1.3.1 *Duties and Responsibility of the AU in the Context of the Femi Falana Case*

As it has been articulated already in this paper, an organization incurs responsibility by committing an internationally wrongful act, which consists of breaching the obligation that an organization has. This presupposes the existence of a binding obligation, either in its constitutive act or in a treaty to which it is a party. A breach occurs when the conduct of the organization is not in conformity with that obligation. Further, the wrongful act must be attributed to the organization. This means, the breach must be a result of: the conduct of organs or agents of the organization; the conduct of state agents placed at the disposal of the organization; or assisting other entities in committing wrongful acts.

So far, the binding obligations of the AU which are relevant to the Femi Falana Case are: to encourage international cooperation, taking due account to the Charter of the United Nations and the Universal Declaration of Human Rights,¹⁷³ and to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.¹⁷⁴ The AU is also enjoined to have respect for human rights as one of its guiding principles.¹⁷⁵ However, these obligations can be and are being realized specifically through the three organs which form part of the AU human rights architecture, namely: The African Commission on Human and Peoples Rights; The African Court on Human and Peoples' Rights; and the African Committee of Experts on the Rights and Welfare of the Child.

173 Article 3(e), The Constitutive Act of the African Union, 2000.

174 Article 3(h), Ibid.

175 Article 4(m), The Constitutive Act of the African Union, 2000.

Therefore, a breach of the said obligations by the AU will occur only when its conduct is not in conformity with those obligations. But, in order to hold the AU responsible, the conduct must be attributed to the AU in the sense that the said breach must be a result of: the conduct of the three organs which form part of the AU human rights architecture as described above; or the conduct of the agents of the AU; or the conduct of state agents placed at the disposal of the AU; or a conduct that consists of assisting other entities to commit wrongful acts.

8.1.3.2 *Immunity of the AU in the Context of the Femi Falana Case*

The AU is entitled to functional immunity, meaning that it is supposed to enjoy immunity on the basis of the functions that it performs,¹⁷⁶ because this is the kind of immunity given to an organization in order to facilitate a certain function to be performed. This immunity could also be granted to the AU to shield it from harassment and prejudice that might jeopardize its functional necessity.¹⁷⁷

In the stipulation of capacity and powers for the AU in statutory terms, what is indicated is its capacity to institute legal proceedings only, presumably against other entities, which means its capacity to sue. But it is not stipulated that the AU can equally be sued.¹⁷⁸ This provision is not by accident because the immunity of the AU from prosecution is implicitly provided,¹⁷⁹ in terms of requiring it to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the Organization of African Unity is a party, or disputes involving any official of the Organization of African Unity who by reason of his official position enjoys immunity. The reason for incorporating this provision is to imply that, since the AU enjoys immunity, there is no bar to access to justice in some situations involving the AU due to its immunity. In other words, the requirement to make provisions for settlement of certain types of disputes comes out of the assertion that such an organization enjoys immunity, and therefore, it would be difficult to have recourse to justice if no separate avenue were made in respect of some cases. On the other

176 ELSEA, Jennifer (2011), *Samantar V. Yousef: The Foreign Sovereign Immunities Act and Foreign Officials*, DIANE Publishing, p. 11.

177 REINISCH, August (2000), *International Organizations before National Courts*, Cambridge University Press, pp. 331-332.

178 Article I(1)(a), The General Convention on the Privileges and Immunities of the Organization of African Unity, 1965.

179 Article IX(1), The General Convention on the Privileges and Immunities of the Organization of African Unity, 1965.

side, this provision shows that the AU has restricted immunity in the sense that, the immunity of the AU does not apply in contractual or private law disputes or disputes involving an official of the AU who enjoys immunity. In all other cases, the AU enjoys immunity.

8.1.4 Capacity and Powers of the AU including Treaty Obligations

The AU has capacity to enter into contacts including the rights to acquire and dispose of movable and immovable property and to institute legal proceedings. On top of that, since the AU is an international organization, by virtue of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, it can conclude treaties with states and with other international organizations.¹⁸⁰

9. Conclusion

Having made an analysis of international law in view of issues emanating from the Femi Falana case, we can now revisit the key questions we raised earlier on. The first question is that: “*by what link or basis could an act or omission by Member States of the AU, in the exercise of their sovereign powers, import responsibility on the part of the African Union, hence invoke the right for an individual to sue it?*” The main answer is that, the AU is an international legal person, whose personality is separate from the personality of the Member States, hence enjoying an independent will. Therefore, it cannot be held accountable for actions of its Member States. Further, it is not party to the Protocol in question, so it cannot be held accountable based on the Protocol.

The second question is that: “*accepting the argument that the African Union has been given the duty to protect human rights in the African continent, which carries with it the right to intervene in the Member States in certain circumstances, could have that right been invoked by it to make an intervention in order to bar the said Member States from enacting Article 34(6) in the Protocol; or alternatively to compel Nigeria to make a declaration to accept the competence of the African Court to hear cases from individuals from Nigeria in line with Article 34(6) of the Protocol, now that the said Article was already inserted in the Protocol?*”

¹⁸⁰ Article 6, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

The answer is that, this contention could succeed only if there was established responsibility on the part of the AU, which means the conduct in question must have been attributable to the AU in the sense that, the said breach must have been a result of: the conduct of the organs of the AU, or the conduct of the agents of the AU, or the conduct of state agents placed at the disposal of the AU, or a conduct by the AU that consists of assisting other entities to commit wrongful acts. As we know from this case, the failure of Femi Falana to access the African Court on Human and Peoples' Rights cannot be attributed to the AU because the action of enacting Article 34(6) in the Protocol, which is considered bad in law, or the failure to deposit the instrument of consent as required by the Protocol are not the conduct of the organs of the AU, or the conduct of the agents of the AU, or the conduct of state agents placed at the disposal and control of the AU, or a conduct of the AU that consists of assisting other entities to commit wrongful acts. It is the conduct of Member States generally, and of Nigeria specifically. Therefore no attribution can be made to the AU.

In any event, the AU enjoys functional immunity, and in this line there are other alternative remedies in place, which ensures that access to justice is not absolutely denied due to the immunity of the AU, and these remedies cover contractual or private law cases. Therefore, even if the Protocol had specifically mentioned that other entities than states could appear before the Court as respondents, on the basis of the three reasons given in this conclusion, the AU could still not be capable of being sued.

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