

# The African Union and the Protection of Civilians

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## I. Introduction

The African Union (AU) has taken an increasingly important role in protecting civilians in conflict situations. It has placed the protection of civilians as a central strategic priority of its agenda, in part as a reaction to the widespread and, in some instances, systematic gross violations of international human rights law (IHRL) and serious violations of international humanitarian law (IHL) in several of its Member States. The AU has also developed guidelines for the protection of civilians that comprehensively address all aspects of peace support operations, including confidence-building measures among the population, provision of security to civilians and businesses, and humanitarian aid. While this framework is relatively new and still in a nascent stage of implementation, it is being utilized in the AU Mission in Somalia (AMISOM), where it has shown great promise and been well received by the Somali citizenry. However, many challenges remain, not least a lack of political will among AU Member States and difficulties ensuring adequate resources for effective implementation. In addition, while the AU has put in place a normative framework and mechanisms that could support efforts towards effective civilian protection, they have not worked as a coherent whole and require better co-ordination to enhance effectiveness and delivery.

This chapter seeks to examine the legal and political aspects of recent developments in African conflicts, regional responses, and future challenges. It provides an overview of the AU framework for the protection of civilians, based on an examination of relevant AU organs and actual regional responses. It also addresses the intervention in Libya in 2011 and concludes with reflections on how the AU framework for the protection of civilians may be effectively operationalized. The chapter proceeds from the assumption that the protection of civilians is achieved through the legal protection of human rights and the implementation of IHL. Nonetheless, it should be acknowledged that there are other factors at play including, *inter alia*, *enforcement actions* by peacekeeping operations, the delivery of humanitarian aid,

<sup>1</sup> The views expressed in this chapter are those of the authors and do not necessarily represent the views of the institutions with which the authors are affiliated.

and the development of national security sectors, as demonstrated by AMISOM in Somalia.

## II. The African Union Framework for the Protection of Civilians

Protection against violations of IHRL and IHL is not only a matter of great importance but also a right that civilians are entitled to expect under international law. The process of negotiating a treaty to replace the Charter of the Organization of African Unity (OAU) of 1963 presented an opportunity to rethink and re-engineer the norms, values, and standards at the core of inter-State relations within Africa. It allowed for reflection on the atrocities and gross violations of human rights across the continent, ranging from Uganda in the 1970s<sup>2</sup> to the Central African Republic in the 1980s,<sup>3</sup> Mozambique in the 1980s<sup>4</sup> to Sierra Leone in the 1990s,<sup>5</sup> as well as the genocide in Rwanda in 1994.<sup>6</sup> Despite the OAU's attempts to address the challenges of governance and human rights violations, the lack of democratic rule, and the prevalence of impunity on the continent, it was heavily criticized for having failed in all of these areas.

The legitimacy of collective intervention in circumstances of genocide, war crimes, and crimes against humanity was first enshrined by the AU in the year 2000, in its founding document, the Constitutive Act, which embodies principles that address the shortcomings of the OAU, most notably in the area of international crimes, human rights, the rule of law, and democratic values.<sup>7</sup> The adoption of the Constitutive Act was preceded by a number of declarations, decisions, and treaties relating to human rights, peace and security, and good governance.<sup>8</sup> As

<sup>2</sup> See Daniel Chirot, *Modern Tyrants: The Power and Prevalence of Evil in Our Age* (Princeton, USA: Princeton University Press, 1996) 375.

<sup>3</sup> Ibid.

<sup>4</sup> See generally Hilary Andersson, *Mozambique: A War against the People* (New York: St Martin's Press 1992).

<sup>5</sup> Ibrahim Abdullah, 'Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone' (1998) 36 *J Modern African Studies* 203, 203–35; Yusuf Bangura, 'The Political and Cultural Dynamics of the Sierra Leone War', in Ibrahim Abdullah (ed.), *Between Democracy and Terror: the Sierra Leone Civil War* (Pretoria: UNISA Press, 2004).

<sup>6</sup> See generally Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995).

<sup>7</sup> Constitutive Act of the African Union (adopted 1 July 2000, entered into force on 26 May 2001) OAU Doc CAB/LEG/23.15. Article 4 (h), (m), and 4(o) of the African Union (AU) Constitutive Act lists among its founding principles: (h) The right of the AU to intervene in a member State in grave circumstances such as genocide, war crimes and crimes against humanity; (m) Respect for democratic principles, human rights, the rule of law and good governance; and (o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

<sup>8</sup> It should be recalled that the Organisation of African Unity (OAU)/AU had previously adopted a number of legal instruments aimed at deepening and consolidating democracy and respect for human rights on the continent, including the Solemn Declaration of the Conference on Security, Stability, Cooperation and Development (2000) OAU Doc AHG/Decl.4 (XXXVI); the Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (2002) AU Doc OAU/CIVIL SOCIETY.3 (II); the various instruments adopted within the framework of the New Economic Partnership for Africa's Development (NEPAD), including the African Peer Review Mechanism (see

such, the framework for the protection of civilians in Africa is underpinned by a body of mechanisms and legal instruments, including: (a) the Constitutive Act of the AU; (b) the African Peace and Security Architecture, described later in the chapter; (c) the African human rights system, centred on the African Charter on Human and Peoples' Rights and comprising more than twenty-five legal instruments;<sup>9</sup> and (d) the African Governance Architecture, established to serve as a co-ordination framework among AU bodies (and subsequently with other African organizations), and designed to complement the African Peace and Security Architecture.<sup>10</sup> The common thread that runs through these instruments, with differing emphasis and nuances, is that Africa needed to look within itself to find home-grown solutions to the many challenges confronting the continent. In this regard, there is a need to address the internal issues that negatively impact on socio-economic development such as conflict, human rights violations, and democracy and governance deficits.

Article 4(h) of the Constitutive Act empowers the Union to intervene militarily in a Member State, pursuant to a decision of the Assembly of Heads of State and Government, in grave circumstances such as where war crimes, genocide, and crimes against humanity are occurring.<sup>11</sup> In addition, a Member State is entitled to request intervention in order to restore peace and security under Article 4(j). Member States are required, under Article 4(o), to respect democratic principles, human rights, rule of law, and good governance, and to ensure respect for the sanctity of human life and condemn and reject impunity, political assassination, acts of terrorism, and subversive activities. Further, in accordance with Article 7 of the 2002 Protocol relating to the Peace and Security Council of the AU, the Council can recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention in a Member State in grave circumstances such as war crimes, genocide, and crimes against humanity, as defined in relevant conventions and instruments.<sup>12</sup> According to Article 4(h) of the Constitutive Act, where diplomacy and other peaceful means have failed, the AU may use force to protect populations at risk of mass atrocities. It should be noted that since resort to Article 4(h) requires coercive

'About the APRM' (*African Peer Review Mechanism*, undated) <[aprm-au.org/about-aprm](http://aprm-au.org/about-aprm)>); as well as the Declaration on the Principles Governing Democratic Elections in Africa (2002) AU Doc AHG/Decl. 1 (XXXVIII).

<sup>9</sup> Others include the OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 22 October 2009, entered into force 6 December 2012) 52 IM 397; the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49; the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (signed 11 July 2003, entered into force 5 November 2005) AU Doc CAB/LEG/66.6, reprinted in (2001) 1 African Hum Rts LJ 40; the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (signed 9 July 2002, entered into force 26 December 2003) <[www.au.int/en/treaties](http://www.au.int/en/treaties)>; and the Constitutive Act of the African Union, see n 7.

<sup>10</sup> George Mukundi Wachira, 'Consolidating the African Governance Architecture' (Johannesburg: South African Institute of International Affairs, 2014) <[www.saiia.org.za/policy-briefings/consolidating-the-african-governance-architecture](http://www.saiia.org.za/policy-briefings/consolidating-the-african-governance-architecture)>.

<sup>11</sup> Constitutive Act of the African Union, see n 7, Article 4(h).

<sup>12</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, see n 9, Article 7(1)(e), 7(1)(f).

measures, in particular the use of military force, a decision of the Assembly is required.<sup>13</sup>

Since the adoption of the Constitutive Act, no intervention by the Union has been undertaken under the provisions of Articles 4(h) and (j), nor has any specific reference been made to these provisions in the mandating decisions setting up AU peace support missions.<sup>14</sup> This has been so even though there have been references in the mandating decisions to the need to protect civilians, such as in Darfur<sup>15</sup> and Somalia.<sup>16</sup> The AU has also not adopted any implementing guidelines detailing how these provisions would be applied, leaving a number of procedural issues unresolved, including who in the Union has standing to suggest the need for intervention. The Rules of Procedure of the Assembly of the AU stipulate that 'the Assembly shall decide on intervention in a Member State in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity',<sup>17</sup> and may also do so 'at the request of that Member State in order to restore peace and security'.<sup>18</sup> However, neither of these instruments provide any guidance on the factors that may be considered in application of this provision.

The African Peace and Security Architecture was designed to provide the AU with the necessary tools for conflict prevention, early warning, promoting democratic practices, intervention, humanitarian action, and disaster management.<sup>19</sup> It is based largely on the Protocol relating to the Peace and Security Council of the AU and envisages a number of co-ordinated activities between the Council and the

<sup>13</sup> Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-indifference' (2003) 85 IRRC 807, 812.

<sup>14</sup> Perhaps the reason for this is to avoid attracting unnecessary debates on whether Article 4(h) was applicable or not. AU peace support missions since 2003 include the African Union Mission in Burundi (AMIB) (African Union Central Organ for Conflict Prevention, Management and Resolution at the Ambassadorial Level Communiqué (Comm) XCI (2003) AU Doc Central Organ/MEC/AMB/Comm. (XCI)); the African Union Mission in Sudan (AMIS) (African Union Peace and Security Council (AUPSC) Comm XVII (2004) AU Doc PSC/PR/Comm.(XVII)); the Africa Union Mission in Somalia (AUPSC Comm LXIX (2007) AU Doc PSC/PR/Comm(LXIX)); the African Union Electoral Assistance Mission to the Comoros (AUPSC Comm XLVII (2006) AU Doc PSC/PR/Comm.1(XLVII)); and the African-led International Support Mission to the Central African Republic (AUPSC Comm CCCXLI (2012) AU Doc PSC/PR/COMM.2(CCCXLI)). The African Union also co-leads the AU-UN Hybrid Operation in Darfur (AUPSC Comm LXXIX (2007) AU Doc PSC/PR/Comm(LXXIX), United Nations Security Council (UNSC) Resolution (Res) 1769 (2007) UN Doc S/RES/1769).

<sup>15</sup> AUPSC Comm XVII (2004) AU Doc PSC/PR/Comm. (XVII), para. 6, which requires AMIS to 'protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the [Government of Sudan]'

<sup>16</sup> AUPSC Comm CXC (2009) AU Doc PSC/PR/Comm. (CXC), paras Comm 3, 5; UNSC Res 2010 (2011) UN Doc S/RES/2010, paras 5, 6, 16, 22.

<sup>17</sup> Assembly of the African Union, Rules of Procedure of the Assembly of the Union (2002) AU Doc ASS/AU/2(I)—a, Rule 13(3)(f) (Rules of Procedure of the Assembly of the Union).

<sup>18</sup> *Ibid.*, Rule 4(1)(f).

<sup>19</sup> African Union, *Moving Africa Forward: African Peace and Security Architecture, 2010 Assessment Study* (Addis Ababa: African Union, 2010) (adopted by the Third Meeting of the Chief Executives and Senior Officials of the African Union, Regional Economic Communities and Regional Mechanisms for Conflict Prevention, Management and Resolution, 4–10 November 2010, Zanzibar, Tanzania), para. 46.

Regional Economic Communities, as well as with other critical actors on the continent. Its key components, in the context of the protection of civilians, are: (a) the Peace and Security Council; (b) the AU Commission; (c) the Continental Early Warning System; (d) the African Standby Force; (e) the Panel of the Wise; and (f) the Peace Fund. The vertical co-ordination between the Council and the Regional Economic Communities through the Continental Early Warning System and the African Standby Force is fairly well developed and has worked well, perhaps due to the fact that there are clear timelines for implementation.<sup>20</sup> Nonetheless, the horizontal co-ordination that was envisaged between the various components of the African Peace and Security Architecture, in terms of information exchange, has achieved limited success due to lack of effective co-ordination and communication.<sup>21</sup>

The African Standby Force has the capacity to protect populations at risks of mass atrocities and to deter potential perpetrators of mass atrocities. Article 13 3(f) of the Protocol relating to the Peace and Security Council of the AU<sup>22</sup> provides that the functions of the African Standby Force, which constitute its *raison d'être* as an organ of the African Peace and Security Architecture, include providing humanitarian assistance to alleviate the suffering of civilian populations in conflict areas and supporting efforts to address major natural disasters.

Guidelines for the protection of civilians in AU peace support operations were developed between 2009 and 2012.<sup>23</sup> They provide guidance on missions' obligations regarding the civilian population, highlighting the need to ensure respect for IHL and integrate key humanitarian rules and principles into the mission operational orders, procedures, and training.<sup>24</sup> The experience of implementing the protection of civilians guidelines in Somalia has shown that while military operations are important, the confidence-building measures that accompany the provision of humanitarian aid, medical care, educational facilities, and security for business activities enhance prospects for long-term stability and socio-economic recovery. However, obtaining the requisite capacity to deal with issues such as child protection and gender-based violence remains challenging. In Mali and the Central African Republic, while AU missions did not have protection of civilians mandates in the same way as the UN, both played important protection roles before the arrival of UN peacekeepers.<sup>25</sup>

<sup>20</sup> Ibid., para. 3.                      <sup>21</sup> Ibid., para. 5.

<sup>22</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, see n 9, Article 13(3)(f).

<sup>23</sup> African Union, 'Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations' (Addis Ababa: Africa Union, 2012) <[www.apsta-africa.org/documentation/resources/key%20resources/Draft%20AU%20PoC%20Guidelines%20-%20English.pdf](http://www.apsta-africa.org/documentation/resources/key%20resources/Draft%20AU%20PoC%20Guidelines%20-%20English.pdf)>. See also AUPSC, 'Progress Report of the Chairperson of the Commission on the Development of Guidelines for the Protection of Civilians in African Union Peace Support Operations' (2011) AU Doc PSC/PR/2(CCLXXIX) and <[www.operationspaix.net/DATA/DOCUMENTTEXTE/8763.pdf](http://www.operationspaix.net/DATA/DOCUMENTTEXTE/8763.pdf)>.

<sup>24</sup> Ibid., para. 22.

<sup>25</sup> For further discussion on the protection of civilians in AU peace support operations see Stian Kjeksrud, Jacob Aasland Ravndal, Andreas Øien Stensland, Cedric de Coning, and Walter Lotze, Chapter 4, in this volume.

### III. African Union Organs and Regional Responses

This section discusses the leverage achieved by the combined capacities of the AU's constituent organs as required by the Protocol relating to the Peace and Security Council of the AU, in terms of regional responses. It considers how these have enhanced or have the potential to enable the AU to meet its responsibility under the Constitutive Act and other relevant instruments and, in doing so, to centralize the protection of civilians on the AU's agenda by identifying and responding to situations in which people are at risk of or subject to serious violations of IHRL and IHL. An examination of the various AU mechanisms indicates, unfortunately, that they have not been co-ordinated effectively towards addressing emerging issues in peace and security, including the protection of civilians. As already indicated, the only existing effective co-ordination among AU organs has been in the area of the African Governance Architecture, and perhaps only there because the African Charter on Democracy, Elections and Governance<sup>26</sup> prescribes such co-ordination.

#### A. African Union Peace and Security Council

The AU Peace and Security Council is the central pillar of the African Peace and Security Architecture, and is the standing decision-making organ for the prevention, management, and resolution of conflicts.<sup>27</sup> It is a collective security and early warning arrangement intended to facilitate timely and efficient response to conflict and crisis situations in Africa, and to promote peace, security, and stability, in order to guarantee the protection and preservation of life and property.

The Council is key to the work of the AU in ensuring peace and stability, and in particular the protection of civilians on the continent. In exercise of its mandate, the Council is entitled to request the assistance and support of other AU organs as well as the regional mechanisms, including, for example, requesting studies from the AU Commission on International Law or an expert or advisory opinion from the judicial organs of the Union. In December 2013, responding to reports of serious violations in South Sudan, the Council mandated the establishment of a commission of inquiry.<sup>28</sup> The Commission of Inquiry, chaired by former President Olesgun Obasanjo of Nigeria, observed the devastation of the armed conflict, confirmed that there were violations of IHRL and IHL, investigated mass graves,

<sup>26</sup> African Charter on Democracy, Elections and Governance, <[http://www.au.int/en/sites/default/files/AFRICAN\\_CHARTER\\_ON\\_DEMOCRACY\\_ELECTIONS\\_AND\\_GOVERNANCE.pdf](http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf)>.

<sup>27</sup> See Articles 2 and 7 of the PSC Protocol at <[http://www.au.int/en/sites/default/files/Protocol\\_peace\\_and\\_security.pdf](http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf)>.

<sup>28</sup> See AUPSC Comm CDXI (2013) AU Doc PSC/AHG/COMM.1(CDXI), para. 8, where the Peace and Security Council requested 'the Chairperson of the African Union Commission (AUC) in consultation with the Chairperson of the African Commission on Human and Peoples' Rights (ACHPR) and other relevant AU structures to urgently establish a Commission to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities'.

and noted that it had encountered many individuals who alleged having suffered or witnessed crimes, including sexual and gender-based violence.<sup>29</sup> In January 2015, the Commission submitted its report to the AU Peace and Security Council.<sup>30</sup> The report presented findings on human rights violations and other abuses committed during the armed conflict in South Sudan and made recommendations on ways and means to ensure accountability, reconciliation, and healing among South Sudanese communities, as requested in the relevant Assembly decision. It identified State and non-State actors considered to bear criminal accountability for the crimes that took place and which were considered to amount to international crimes.<sup>31</sup> The Peace and Security Council took note of the report and deferred its consideration to a future date<sup>32</sup>—a decision subsequently endorsed by the Assembly.<sup>33</sup> The Report of the Commission of Inquiry on South Sudan (AUCISS) was finally released on 27 October 2015 by the Chairperson of the African Union Commission following a decision by the Peace and Security Council (PSC) at its 547th meeting at Heads of State and government level. The AUCISS recommended the establishment of ‘an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account’.<sup>34</sup>

Since the Commission made the assessment of the impact of the conflict on civilians central to its work, it is hoped that the recommendations in the report will inform AU work elsewhere, and that the protection of civilians will be highlighted when the report is finally considered and acted upon.

## **B. Assembly of Heads of State and Government**

The Assembly is the supreme organ of the AU, comprising representatives of all Member States. While the fifteen-member Peace and Security Council holds

<sup>29</sup> See Assembly of the African Union, ‘Interim Report of the African Union Commission of Inquiry on South Sudan (CISS)’ (2014) AU Doc Assembly/AU/19(XXIII).

<sup>30</sup> See <<http://peaceau.org/en/article/communique-of-the-484th-meeting-of-the-psc-on-the-situation-in-south-sudan>>.

<sup>31</sup> In May 2014, for example, the Commission of Inquiry stated that it was ‘leaning towards the creation of a hybrid court along the lines of the Extraordinary African Chambers in Senegal (Hissène Habré Tribunal), to be established jointly by the AU UN, should evidence disclose commission of international crimes’. See <<http://www.au.int/en/content/commission-inquiry-south-sudan-undertakes-consultations-nairobi>>. In addition, the Chair, in his address to the UN Human Rights Council in September 2014, stated: ‘There was no doubt that gross violations of human rights were being committed, and that no political leader in South Sudan could claim innocence.’ See <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15098&LangID=E#sthash.l1Php0AE.dpuf>>.

<sup>32</sup> Communiqué of the 484th Meeting of the PSC on the Situation in South Sudan; see <<http://allafrica.com/stories/201501310485.html>>

<sup>33</sup> Assembly/AU/Dec.559 (XXIV) Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa (Doc. Assembly/AU/7(XXIV). For further reading see <[http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20546%20-%20568%20\(XXIV\)%20\\_E.pdf](http://summits.au.int/en/sites/default/files/Assembly%20AU%20Dec%20546%20-%20568%20(XXIV)%20_E.pdf)>

<sup>34</sup> See more on the Press Release of the Chairperson at <<http://www.peaceau.org/en/article/abc>>, and the Report at <<http://www.peaceau.org/en/article/abc#sthash.SIDBw7Sl.dpuf>>, page 300, para. 1148.

primary responsibility for the promotion of peace, security, and stability in Africa, and for the deployment of peacekeeping and intervention forces,<sup>35</sup> importantly, the Assembly retains the power to direct the Council on the management of conflicts, war, acts of terrorism, and emergency situations and decide on intervention in a Member State.<sup>36</sup> In reality, the Council makes decisions in between sessions of the Assembly, which are acted upon immediately and subsequently reported to the Assembly for endorsement. Whenever the Assembly is in session, the Council, as the specialized organ of the AU, meets first and adopts decisions that are then reported to the Assembly. It is the Assembly that is mandated to make decisions relating to intervention under Article 4(h) of the Constitutive Act.

### C. Pan-African Parliament

The Pan-African Parliament was established by Article 17 of the Constitutive Act, as one of the nine organs provided for in the Treaty Establishing the African Economic Community adopted in Abuja in 1991.<sup>37</sup> Its creation was informed by a vision to provide a common platform for African peoples and their grass-roots organizations to be more involved in discussions and decision-making on the problems and challenges facing the continent. It is intended to encourage good governance, human rights, democracy, transparency, and accountability in Member States and to promote peace, security, and stability.<sup>38</sup> The Parliament has, through its committees and in plenary, held debates on peace and security issues and undertaken missions to conflict areas such as Darfur, Somalia, and the Central African Republic.<sup>39</sup>

### D. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights, as presently constituted, has jurisdiction over violations of the African Charter on Human and Peoples' Rights and other human rights instruments ratified by African States.<sup>40</sup> While in theory

<sup>35</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, see Article 6(a) and (d).

<sup>36</sup> Constitutive Act of the African Union, see n 8, Article 4(h) and (j), and Article 9(g).

<sup>37</sup> AU Constitutive Act, see n 8, Article 17; Treaty Establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) 30 ILM 1241, Article 7(1)(c).

<sup>38</sup> The ultimate aim of the Pan-African Parliament is to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage. See Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (adopted 2 March 2001, adopted 14 December 2003) AU Doc CM/2198(LXXIII), Article 2(3).

<sup>39</sup> For example, the Pan-African Parliament (PAP) Committee on Cooperation, International Relations and Conflict Resolution has undertaken peace missions to conflict areas including Darfur, Sudan. The PAP has also held plenary debates on conflict situations on the continent including Darfur, Somalia, Central African Republic, and Mali. See AFP, 'Pan-African Team Heads to Darfur', *Aljazeera* (Doha, 30 September 2004) <[www.aljazeera.com/archive/2004/09/20084101095775317.html](http://www.aljazeera.com/archive/2004/09/20084101095775317.html)>; Pan-African Parliament, 'Press Release, PAP Debates Peace and Security in Africa' (Johannesburg, 16 October 2012) <[www.pan-africanparliament.org](http://www.pan-africanparliament.org)>.

<sup>40</sup> 'The African Court In Brief' (*African Court on Human and Peoples' Rights*, undated) <[www.african-court.org/en/index.php/about-the-court/brief-history](http://www.african-court.org/en/index.php/about-the-court/brief-history)>.

the decisions of the Court are binding, the machinery for execution of its judgments and orders largely relies on the Executive Council of the AU<sup>41</sup> and the system has not yet been fully tested in a situation where a State has been unwilling to implement the Court's decision.<sup>42</sup> The only case in which the Court has addressed the protection of civilians relates to Libya, discussed in greater detail in section IV.

In the coming years, the Court is likely to be seized with matters falling under the provisions of the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). These may include matters relating to interpretation and application of the Kampala Convention, which in the view of the authors is both a human rights convention as well as a humanitarian law instrument.<sup>43</sup> Presently, the reach of the Court is limited by the fact that only twenty-eight States have ratified the Protocol establishing the African Court on Human and Peoples' Rights and only seven have filed the necessary declaration under Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive cases directly from individuals and non-governmental organizations. Thus, interpretation and implementation of the Kampala Convention is presently limited to cases concerning the twenty-eight States that have ratified the Protocol and to individuals and NGOs from the seven States that have filed the requisite declaration.

In 2008, the AU adopted a protocol agreeing to merge the African Court on Human and Peoples' Rights and the not-yet-existent African Court of Justice. In 2014, the Union agreed that the merged court, the African Court of Justice and Human Rights,<sup>44</sup> would have international criminal jurisdiction. However, the expanded Court will only come into existence once the statute has received fifteen ratifications, which may take a number of years given the average time it takes for an AU legal instrument to enter into force.<sup>45</sup> The crimes over which the Court

<sup>41</sup> The Executive Council is composed of Ministers of Foreign Affairs, as per Article 10 of the Constitutive Act, and it is mandated under Article 30 of the Protocol to ensure execution of the court's judgments. See Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 24 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), Article 30; see also Ben Kioko, 'The African Union and implementation of Decisions of the African Court on Human and Peoples' Rights' (2005) 15 *Interights Bulletin* 7.

<sup>42</sup> At the time of writing, the Court has not been able to establish that its order in the matter of *African Commission vs. Libya*, App No 002/2013 (ACtHPR, 2013), directing access by Seif El Islam to family and a lawyer and or doctor of his choice, has been implemented. See Assembly of the African Union, 'Executive Council Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights' (2014) AU Doc EX.CL/Dec.806 (XXIV), para. 1.

<sup>43</sup> The Kampala Convention, as the only legally binding instrument for the prevention and protection of internal displacement and assistance to internally displaced persons, provides for the rights of internally displaced persons (IDPs) and the obligations of States to protect and assist them. See and compare Articles 6, 7, and 9, which are strongly influenced by international humanitarian law, with Articles 11–13, which have a strong influence from international human rights law, and with Articles 2–4, which explicitly reference both legal regimes. See Kampala Convention, see n 9, Article 2–4, 6, 7, 9, 11–13.

<sup>44</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (signed 27 June 2014, not yet in force) <[www.au.int/en/treaties](http://www.au.int/en/treaties)>.

<sup>45</sup> African Union instruments take on average about five years to enter into force, particularly for those where the number of ratifications required is fifteen signatories from Member States. The major examples of treaties that came into force much earlier than that are the Constitutive Act of the African Union, see n 8, which came into force in about one year, and the Protocol to the African Charter on

would have jurisdiction include genocide; crimes against humanity; war crimes; unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons, drugs, and hazardous wastes; illicit exploitation of natural resources; and the crime of aggression. While the Prosecutor may decide to initiate investigations on any matter in exercise of his *proprio motu* powers in respect of the above crimes, a situation in which one or more of the crimes appears to have been committed may also be referred to the Prosecutor by a State party, the Assembly, or the Council.<sup>46</sup> The Draft Statute of the African Court of Justice and Human Rights also introduces corporate responsibility, which is new to international criminal tribunals around the world.<sup>47</sup> The proposed Court's development of jurisprudence regarding protecting IHRL and IHL, particularly in respect of crimes that have never been litigated before an international tribunal, will be of interest.

### E. African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is mandated to promote and protect human rights and has the power to interpret its own mandate, allowing it considerable flexibility, including to undertake advocacy campaigns. The Commission is empowered by Article 61 of the African Charter on Human and Peoples' Rights to draw inspiration from outside sources,<sup>48</sup> which in effect allows it to apply IHL. It is also specifically allowed to bring cases to the African Court on Human and Peoples' Rights against State parties in relation to situations constituting mass atrocities.<sup>49</sup> The Commission has referred one case relating to the protection of civilians to the Court in exercise of this mandate.<sup>50</sup> It has among its mechanisms a Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally

Human and Peoples' Rights on the Rights of Women in Africa, see n 10, which took about two years to come into force. For both of them there were major advocacy and mobilizing forces that ensured early entry into force. See African Union, 'OAU/AU Treaties, Conventions, Protocols, and Charters', <[www.au.int/en/treaties](http://www.au.int/en/treaties)>. For a comprehensive assessment of the processes and patterns of ratification of OAU/AU instruments, see Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2009) 13 *Melbourne J Intl L* 1.

<sup>46</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, see n 42, Article 46(F).

<sup>47</sup> *Ibid.*, Article 46(C).

<sup>48</sup> Article 61 of the African Charter on Human and Peoples' Rights provides that 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organization of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.' African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 *ILM* 58, Article 61.

<sup>49</sup> Rule 118 (3) of the African Court on Human and Peoples' Rights, Rules of Court (adopted 2 June 2010, entered into force 2 June 2010) <[http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_English\\_7\\_sept\\_1\\_.pdf](http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf)>.

<sup>50</sup> See *African Commission on Human and Peoples' Rights v The Great Socialist Libyan Arab Jamahir-iyah* [2011] AHRLR 175 (AfCtHPR, 2011); but also see *African Commission on Human and Peoples' Rights v The Republic of Kenya*, App No 006/2012 (ACtHPR, 2012).

Displaced Persons, who has focused on protection of these categories of civilians affected by conflict on the continent.<sup>51</sup>

#### F. African Union Commission on International Law

The AU Commission on International Law is established as an independent advisory organ of the Union in accordance with Article 5(2) of the Constitutive Act. Its purposes include: (a) undertaking activities relating to codification and the progressive development of international law on the African continent; (b) conducting studies on legal matters of interest to the Union and its Member States; and (c) encouraging the teaching, study, publication, and dissemination of literature on international law with a view to promoting acceptance of and respect for the principles of international law, and the peaceful resolution of conflicts. The Commission on International Law has undertaken a number of research studies, including the preparation of a draft model national law for implementation of the Kampala Convention, which would be useful to Member States in the process of domesticating and implementing the Convention at the national level.<sup>52</sup>

#### G. African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child is a treaty organ established under the 1989 African Charter on the Rights and Welfare of the Child, with a mandate to protect the rights of children.<sup>53</sup> Under the Charter, State parties undertake the following: (a) to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child; (b) to ensure that no child takes a direct part in hostilities; (c) to refrain from recruiting any child; and (d) to protect the civilian population in armed conflicts and ensure the protection and care of children who are affected by armed conflicts or in situations of internal armed conflicts, tension, and strife.<sup>54</sup> The Committee of Experts may undertake missions, comment on the reports of AU Member States, and access the African Commission on Human Rights. The African Court on Human and Peoples' Rights has recently decided that the Committee of Experts' access is limited to advisory opinions and does not include bringing substantive matters before

<sup>51</sup> See African Commission on Human and Peoples' Rights, 'Final Communiqué of the 54th Ordinary Session' (Banjul, 2013) paras 28(v), 32(iii) <[www.achpr.org/files/sessions/54th/info/communique54/achpr54\\_fincom\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/54th/info/communique54/achpr54_fincom_2013_eng.pdf)>; see also 'Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons' (*African Commission on Human and Peoples' Rights*, undated) <[www.achpr.org/mechanisms/refugees-and-internally-displaced-persons](http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons)>.

<sup>52</sup> For further reading see AUCIL Yearbook 2013, 64–5, paragraphs 42–8, reference AUCIL/Legal/Rpt (V) for discussions on the Draft Model Law.

<sup>53</sup> African Charter on the Rights and Welfare of the Child, see n 10, Article 32.

<sup>54</sup> See Lydia Wambugu and Getachew Adem, *Rights of Children in Conflict: An Evaluation of Japanese Official Development Assistance in Acholiland Northern Uganda* (Pretoria: Institute for Security Studies, 2008) 16.

the Court.<sup>55</sup> However, the Court recommended that necessary action be taken by the competent organs of the AU to ensure that the Committee has unfettered access to the Court in order to ensure effective protection of the rights and welfare of children.

#### H. Economic, Social and Cultural Council

The Economic, Social and Cultural Council is a representative organ for civil society in the AU. Its mandate includes the following: (a) carrying out studies and submitting recommendations, as appropriate; (b) contributing to the promotion of human rights, the rule of law, good governance, democratic principles, gender equality, and child rights; and (c) fostering and consolidating partnerships between the Union and civil society organizations through effective public enlightenment, mobilization, and feedback on the activities of the Union.<sup>56</sup> However, the Economic, Social and Cultural Council has failed to be the mobilizing force that was intended.<sup>57</sup> Moreover, although it does have *locus standi* to request advisory opinions before the African Court on Human and Peoples' Rights, which can be utilized for the purposes of advocacy to enforce IHRL and IHL and to protect civilians, it has not yet exercised its rights under this framework.

### IV. The Libyan Conflict: Political Developments and the Protection of Civilians

From the perspective of the protection of civilians, the Libyan intervention in 2011 presented an interesting case that raised many issues. Most prominently, it highlighted the all-embracing question of what the concept of the protection of civilians really means—whether there is a common understanding of its scope, and what may legitimately be done by interveners seeking to protect.

The crisis in Libya, an AU member, began on 15 February 2011 when the Libyan government armed forces violently suppressed peaceful protests by Libyan citizens demanding political reforms.<sup>58</sup> On 23 February 2011, the AU Peace and Security Council 'expressed deep concern with the situation in Libya, and strongly condemned the indiscriminate and excessive use of force and lethal weapons against peaceful protestors in violation of human rights and international humanitarian

<sup>55</sup> The protocol establishing the Court grants direct access to the African Commission but does not make reference to the African Committee of Experts on the Rights and Welfare of the Child. See Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (2008), see n 39, Article 5.

<sup>56</sup> Constitutive Act of the African Union, see n 8, Article 22. See also the Statutes of Economic, Social, and Cultural Council (adopted by the Assembly of the African Union on 8 July 2004) AU Doc Assembly/AU/Dec.48(III) Rev.1 <pages.au.int/sites/default/files/ECOSOCC%20Statutes.pdf>.

<sup>57</sup> Mohammed Sameh Amr, 'The Economic, Social, and Cultural Council of the African Union', in Abdulqawi A Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2012) 182.

<sup>58</sup> David Cutler, 'Timeline: Libya's Uprising against Muammar Gaddafi', *Reuters* (London, 22 July 2011) <<http://www.reuters.com/article/2011/08/22/us-libya-events-idUSTRE77K2QH20110822>>.

law involving the loss of human life and the destruction of property'.<sup>59</sup> It also underscored that 'the aspirations of the people of Libya for democracy, political reform, justice, and socio-economic development are legitimate, while stressing the need to preserve the territorial integrity and unity of Libya'.<sup>60</sup> Shortly after, the Arab League Secretary-General issued a statement calling for the 'imposition of a no-fly zone on Libyan military aviation' and for the establishment of 'safe areas in places exposed to shelling' as precautionary measures that allowed the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya.<sup>61</sup>

In dealing with an urgent application filed by the African Commission on Human and Peoples' Rights,<sup>62</sup> the African Court on Human and Peoples' Rights decided that the situation in Libya was of 'extreme gravity and urgency posing a risk of irreparable harm'.<sup>63</sup> The Court unanimously ordered provisional measures, and called on Libya to immediately 'refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter or of other international human rights instruments to which Libya is a party'.<sup>64</sup> Responding to the Court on 9 April 2011, the Libyan government denied the claims and expressed its willingness to subject itself to criminal investigations by the Court if deemed necessary.<sup>65</sup>

The United Nations (UN) Security Council adopted resolution 1970 on 26 February 2011, denouncing the 'gross and systematic violations of human rights, including the repression of peaceful demonstrators', noting that the attacks may have amounted to crimes against humanity and referring the situation to the Prosecutor of the International Criminal Court.<sup>66</sup> In March 2011, the UN Security Council adopted resolution 1973, authorizing Member States 'to take all necessary measures, to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory'.<sup>67</sup> It also imposed a 'no-fly

<sup>59</sup> AUPSC Comm CCLXI (2011) AU Doc PSC/PR/COMM (CCLXI), para. 17(a).

<sup>60</sup> See the AUPSC Comm CCLXI (2011) AU Doc PSC/PR/COMM (CCLXI), paras 17(a), 17(b), 17(d). The Peace and Security Council called on the Libyan authorities to ensure the protection and security of the citizens of Libya, as well as the delivery and provision of humanitarian assistance to the injured and other persons in need.

<sup>61</sup> On 21 February 2011, prior to the PSC statement, the Arab League Secretary-General, Amr Moussa, called for an end to violence in Libya, asserting that the demands of the Arab people for change were legitimate and that the Arab League had suspended Libya. See 'Arab League to Reject Intervention in Libya', *Reuters* (London, 2 March 2011) <<http://af.reuters.com/article/libyaNews/idAFLDE7210EO20110302>>. This position was supported by the Council of the League of Arab States Meeting at the Ministerial Level. See UNSC, 'Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council' (2011) UN Doc S/2011/137, Annex.

<sup>62</sup> *African Commission on Human and Peoples' Rights v The Great Socialist Libyan Arab Jamahiriya* [2011] AHRLR 175 (AfChPR, 2011).

<sup>63</sup> *Ibid.*, para. 22. <sup>64</sup> *Ibid.*, para. 25(1).

<sup>65</sup> See Dan Juma, 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' (2012) 30 *Wisconsin J Intl L* 344, 371.

<sup>66</sup> United Nations, 'Meetings Coverage: In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters' (26 February 2011) UN Doc SC/10187/Rev.1.

<sup>67</sup> UNSC Res 1973 (2011) UN Doc S/RES/1973.

zone' in response to threats of attacks against the civilian population and the failure of the Libyan authorities to heed the demand under resolution 1970 to end violence against civilians, and out of concern that the Libyan authorities had used threatening statements designed to incite massacre of the people of Benghazi.<sup>68</sup>

In implementation of resolution 1973, the North Atlantic Treaty Organization (NATO) intervened militarily, relying on air power rather than deploying ground troops. It targeted government installations, such as air defences and troop concentrations, and carried out airstrikes that supported the opposition militias.<sup>69</sup> At the time that resolution 1973 was adopted and the bombing immediately commenced, the AU High-Level Ad Hoc Committee on Libya, meeting at the level of Heads of State and Government, was concluding its meeting in Nouakchott, Mauritania, and was scheduled to travel to Tripoli and Benghazi to meet the parties to the conflict and deliver the AU's five-point mediation plan.<sup>70</sup> However, the Committee was forced to cancel the trip when the UN Secretariat indicated that no exemption to the no-fly ban had been secured, even though the authorizing resolution had also encouraged the AU Committee to promote dialogue between the parties.<sup>71</sup> At the time that the bombing of Libya's air defences started, Libya had already announced a ceasefire. One cannot know for certain whether Libya would have observed its own ceasefire or not, but what is known is that no attempt was made to test this.

There is no consensus on the number of casualties arising from the NATO operations in Libya; however, it has been argued by the AU, among others, that the case for intervention was weak, that threats to civilians were exaggerated and manipulated in order to ensure adoption of UN Security Council resolution 1973, and that the intervention resulted in the loss of more lives than it saved and undermined the possibility of a peaceful resolution through dialogue.<sup>72</sup> While one might accept that civilians must be protected at all costs, it is difficult to believe that the UN Security Council, in authorizing 'all necessary measures', intended to exclude diplomatic and political means for resolving the conflict. Nor could it have logically intended that military advisers and lethal and non-lethal weapons could be supplied to one

<sup>68</sup> 'Gaddafi Tells Benghazi His Army Is Coming Tonight', *Reuters* (London, 17 March 2011) <[uk.reuters.com/article/2011/03/17/libya-gaddafi-address-idUKLDE72G2E920110317](http://uk.reuters.com/article/2011/03/17/libya-gaddafi-address-idUKLDE72G2E920110317)>; see also David Kirkpatrick and K Fahim, 'Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears', *New York Times* (New York, 17 March 2011) <[www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all](http://www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all)>.

<sup>69</sup> See Etienne Durand, 'The French Perspective', in Torgeir E. Sæveraas and Vidar Løv Owesen (eds), *Norsk luftmakt over Libya—suksess uten innflytelse?* (Trondheim, Norway: Akademika forlag, 2012) 80; Amnesty International, 'Libya: The Forgotten Victims of NATO Strikes' (London: Amnesty International, 2012) 5–6; see also Tineke Strik, 'Lives Lost in the Mediterranean Sea: Who is Responsible?' (Strasbourg, France: Council of Europe, 2012) paras 14, 125–9, 133–6. <[assembly.coe.int/CommitteeDocs/2012/20120329\\_mig\\_RPT.EN.pdf](http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf)>.

<sup>70</sup> See Anyway Sithole, 'The African Union Peace and Security Mechanism's Crawl from Design to Reality: Was the Libyan Crisis a Depiction of Severe Limitations?' (2011) 12 *African J Conflict Resolution* 111, 116–18; see also African Union, 'Statement of the Chairperson of the African Union Commission, Dr Jean Ping, at the Meeting of the International Contact Group on Libya' (Rome, 5 May 2011) [www.au.int/en/sites/default/files/Final%20version.%20AU%20speech.%20Rome.%2005.05.2011%5D.pdf](http://www.au.int/en/sites/default/files/Final%20version.%20AU%20speech.%20Rome.%2005.05.2011%5D.pdf).

<sup>71</sup> *Ibid.*

<sup>72</sup> See Jean Ping, *Eclipse Sur l'Afrique: Fallait-il tuer Kadhafi?* (Paris: Michelon Editions, 2014).

side of the armed conflict or that the oil wealth of that country could be used to benefit some parts of the population and not others.

The AU, and others, expressed concern about the measures taken and the methods used by NATO to achieve the ends of resolutions 1970 and 1973. The AU Commission on International Law questioned whether the intervention complied with international law in a variety of ways, including the degree of force used, the provision of military and political support to one side, and whether it respected Libya's sovereignty as required by the resolutions.<sup>73</sup> Further concerns with the implementation of resolution 1973 were raised by a cross-section of African society as demonstrated in an open letter entitled 'Libya, Africa and the new world order', signed by over 200 'ordinary citizens' of Africa, including former President of South Africa Thabo Mbeki, academics, and members of civil society.<sup>74</sup> In addition, South Africa, at the time a member of the Security Council that voted in favour of resolution 1973, later became one of the harshest critics of the operations undertaken under the auspices thereof.<sup>75</sup> The immediate former Chairperson of the AU Commission, Jean Ping, has argued that 'the intervention of the great powers led to the destabilisation of the Sahel region, the looting of the vast arms depots of the "Guide of the Revolution", an explosion in all kinds of trafficking and the spread of the Jihadi peril from the Mediterranean to the Horn of Africa'.<sup>76</sup>

In the view of the authors, UN Security Council resolutions 1970 and 1973 did not authorize the litany of actions that were undertaken in Libya in the name of protecting civilians. In undertaking protection missions, account should always be taken of the likely consequences and possible adverse impacts that might result, such as those that have been witnessed in Libya, and indeed the region, since the intervention. The bombing of civilian infrastructure in Libya and arming and resourcing one party to a conflict went beyond the overall objectives of the protective mission. In addition, the military actions taken should not have eclipsed the political and diplomatic initiatives, as this was the only way in which sustainable peace and stability could have been achieved. As it was, a number of political

<sup>73</sup> African Union Commission on International Law, 'Report of the AU Commission on International Law (AUCIL) on Certain Aspects of the Situation in Libya: Scope, Legal Implications and Obligations of Member States of the United Nations, including African Union States, Arising from United Nations Security Council resolutions 1970 and 1973' (12 May 2011) 2nd Extraordinary Session (on file with author).

<sup>74</sup> See 'Libya, Africa and the New World Order: An Open Letter—To the People of Africa and the World from Concerned Africans', in Horace Campbell, *Global NATO and the Catastrophic Failure in Libya: Lessons for Africa in the Forging of African Unity* (New York: Monthly Review Press, 2013), Annex 1.

<sup>75</sup> See 'Zuma Lashes Nato for "Abusing" UN Resolutions on Libya', *Mail and Guardian* (Johannesburg, South Africa, 14 June 2011) <[mg.co.za/article/2011-06-14-zuma-lashes-nato-for-abusing-un-resolutions-on-libya](http://mg.co.za/article/2011-06-14-zuma-lashes-nato-for-abusing-un-resolutions-on-libya)>; Nick Meo, 'Libya: Jacob Zuma Accuses Nato of Not Sticking to UN Resolution', *The Telegraph* (London, 14 June 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8575984/Libya-Jacob-Zuma-accuses-Nato-of-not-sticking-to-UN-resolution.html>>; 'Jacob Zuma Criticizes Military Action in Libya', *BBC News* (London, 18 July 2011) <[www.bbc.com/news/uk-politics-14180863](http://www.bbc.com/news/uk-politics-14180863)>.

<sup>76</sup> Marc Miramon, 'Jean Ping: "Western Countries Didn't Let the African Union Play a Role": Marc de Miramon interviews Jean Ping, former chair of the African Union's Commission' *L'Humanité* (Paris, 14 June 2014) [www.humaniteinenglish.com/spip.php?article2486](http://www.humaniteinenglish.com/spip.php?article2486).

initiatives supported by some key Libyan political actors had to be called off due to the bombings in that country.<sup>77</sup>

The perception of the military intervention in Libya could have been different, and perhaps positive, if it had brought about expansion of the democratic space, and peace and stability in the country. However, this was not the case and now Libya has degenerated into chaos. Additionally, neighbouring countries in the Sahel region have been adversely impacted by the trafficking of arms in the region, originating from huge stockpiles of weapons that Gaddafi had established.<sup>78</sup> While many African States had previously strongly supported efforts aimed at intervention to protect civilians, even the continent's strongest supporters have had their belief in the internationalization of intervention shaken by the manner in which the resolutions to intervene in Libya were implemented.<sup>79</sup>

It is still too early to know the full impact that the intervention in Libya may have on future efforts aimed at protecting civilians, but what seems evident is that African States may be cautious of external intervention in an African country in the future.<sup>80</sup> Nevertheless, when the situations in Mali and the Central African Republic escalated, African countries accepted the respective French interventions in order to stop the Islamists from advancing further in Mali and to halt the killings of civilians in the Central African Republic. The AU has always avoided taking a position on situations outside of the continent, although African Member States of the UN may of course take national positions on global issues, such as Russia's annexation of Crimea. Yet the chaos resulting from the Libya intervention, which has spilled over into the Sahel, may make it extremely difficult to build consensus on future missions aimed at protecting civilians in Africa. It has also brought to light the need for consensus on general principles governing how future protection missions should be carried out.

## V. Conclusion

The AU is unique among international organizations in recognizing and supporting a right to intervention to stop mass violations of IHRL and IHL. This is a noble part of the AU's history, one that has been informed by many tragedies across the continent. Yet situations such as the 2011 intervention in Libya have placed this idea under threat. Preserving the possibility of international action for the protection of civilians may thus require a deeper reflection on the actions that may be taken to protect them.

<sup>77</sup> *Ibid.*

<sup>78</sup> UNSC, 'Report of the Assessment Mission on the Impact of the Libya Crisis on the Sahel Region, 7 to 23 December 2011' (2012) UN Doc S/2012/42, paras 4, 15–17, 32–62.

<sup>79</sup> For example, South Africa, a proponent of intervention in many African conflicts, initially voted for the UN Resolution that authorized the Libyan no-fly zone but heavily criticized the implementation of the resolution. See 'Zuma Lashes Nato for "Abusing" UN Resolutions on Libya', n 69; 'Libya: Jacob Zuma Accuses Nato of Not Sticking to UN Resolution', n 69; Jacob Zuma Criticizes Military Action in Libya', n 74.

<sup>80</sup> See Miramon, n 76.

A good starting point would be an inquiry, undertaken by the UN, the AU, or an independent commission, into whether the actions taken by States pursuant to UN Security Council resolutions 1970 and 1973, which authorized the protection of civilians and enforcement of sanctions regimes in Libya, were implemented in accordance with the UN Charter and international law, in particular IHRL and IHL. In this context, it would be useful if definitions of 'all necessary measures' and 'civilian populated areas under threat of attack' were produced. Such an initiative would go some way to reassuring African States that their concerns regarding how the Libyan intervention was carried out would be addressed at the level of the UN Security Council in building consensus for mandating future missions aimed at protecting civilians. At the level of the AU, while the Libyan case may not greatly impact the implementation of Article 4(h) of the Constitutive Act, it ought to inspire the development of guidelines and practices that could be replicated elsewhere.

International or regional intervention for the protection of civilians would be more likely to be embraced by African States if the duties and responsibilities of intervening States were more clearly articulated. Representatives of Brazil have raised this idea in the UN under the rubric of 'Responsibility while Protecting' (completing the 'Responsibility to Protect'),<sup>81</sup> but the AU could develop doctrine of its own. Indeed, because the AU has, in many respects, better defined standards with regard to intervention, it is in a good position to address some of the complex issues involved. While examining the impact of the intervention in Libya is important, the AU would need to move beyond criticism and reservations to develop constructive and concrete proposals on the safeguards to govern future missions for consideration within the framework of the UN. In doing so, such proposals could preserve what might be an important tool in the future.

Perhaps the most effective measure for ensuring civilian protection on the continent would be for the AU to operationalize its unique normative framework for intervention so that it becomes a living instrument for protecting civilians and arresting violations of IHRL, IHL, and refugee law in Africa. Drawing from the successes and challenges in Somalia, where a variety of non-military activities have been shown to be as important as the military operations, the AU's non-military civilian protection efforts also need to be strengthened through additional financial and human resources. Such a process would allow the AU the opportunity to learn from the successes and challenges faced by the UN, which has had more experience dealing with protection of civilians in multidimensional peace operations. It would also allow for a review and improvement of co-ordination among the various AU organs, including to ensure that the protection of civilians is given requisite attention. Turning AU policy into regional practice could have very real benefits for the safety of civilians in Africa.

<sup>81</sup> See UN General Assembly and UNSC, 'Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General' (2011) UN Doc A/66/551-S/2011/701.

# Security Council Diplomacy on the Protection of Civilians

## A Convoluted History

*Bruno Stagno Ugarte*

*'... never send to know for whom the bell tolls; it tolls for thee.'*

John Donne, Meditation XVII,  
*Devotions upon Emergent Occasions* (1624)

### I. Introduction

While low clouds loomed over the United Nations (UN) Headquarters during the grey morning of 22 May 2014, China and Russia cast their fourth joint veto of a Security Council draft resolution addressing the dire situation in Syria. Unlike the previous three vetoes, however, the draft killed that morning was about prosecution of crimes committed against civilians. It was a balanced text, referring both sides of the conflict to the International Criminal Court for prosecution. Yet the inability of the Security Council to abide by its previous pronouncements and commitments regarding the protection of civilians in Syria<sup>1</sup> and beyond<sup>2</sup> was a tragic reminder that, notwithstanding heightened and more sustained attention to civilian casualties, political considerations continued to trump moral or legal obligations. The protection of civilians in situations being dealt with by the Council is still subject to case-by-case consideration, and thereby a political perspective, not a moral or legal imperative. Although a great deal has changed for the better since the dismal failures of the Council in Rwanda in 1994 and Srebrenica in 1995, not to mention others, in the end, the politics within the Council frequently derail the best intentions, preparations, and obligations to reduce harm to civilians.

<sup>1</sup> United Nations Security Council (UNSC) Resolution (Res) 2139 (2014) UN Doc S/RES/2139; UNSC Res 2165 (2014) UN Doc S/RES/2165.

<sup>2</sup> In addition to country-specific resolutions, the Security Council has adopted the following thematic resolutions on the protection of civilians, including the protection of children. See UNSC Res 1265 (1999) UN Doc S/RES/1265; UNSC Res 1296 (2000) UN Doc S/RES/1296; UNSC Res 1674 (2006) UN Doc S/RES/1674; UNSC Res 1738 (2006) UN Doc S/RES/1738; UNSC Res 1894 (2009) UN Doc S/RES/1894; UNSC Res 2068 (2012) UN Doc S/RES/2068; UNSC Res 2106 (2013) UN Doc S/RES/2106; UNSC Res 2122 (2013) UN Doc S/RES/2122.