AFRICA WATCH

# AMENDMENT TO THE AFRICAN UNION'S RIGHT TO INTERVENE

## *A shift from human security to regime security?*

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Heads of State and Government passed the first amendments to the Constitutive Act of the African Union within seven months of the launch of the organization. This article provides a legal analysis of the broadening of Article 4(h) of the Act, the right of intervention, to prevent a "serious threat to legitimate order". It argues that this clause is inconsistent with the other grounds for intervention, which aim to protect African peoples from grave violations of human rights when their governments are unable or unwilling to do so. The amendment, by contrast, aims to uphold state security, rather than human security. The context in which this and other amendments were adapted from proposals by Libya in Durban 2002 is considered in terms of political implications for the African Union.

## Introduction

The Heads of State and Government of the African Union (AU) meeting in their first extraordinary session on 3 February 2003 adopted without any debate a number of changes to the Constitutive Act (the Act). The changes followed the recommendations of the AU Executive Council.[1] The amendments enter into force thirty days after deposit of the instruments of ratification by a two third majority of the AU member states. The large number of states that participated in the extraordinary session[2] and the fact that the amendments were adopted without debate[3] appears to indicate widespread support and prompt entry into force of such amendments is to be expected.

The changes to the Act include the addition of three new objectives aimed at ensuring more effective participation of women in decision-making, development and promotion of common policies and encouraging participation of the African Diaspora in the AU. There are also three novel principles related to the right of the union to intervene in situations where legitimate order is under threat, restraint of member states to enter into agreements which are incompatible with the principles of the African Union as well as prohibition of the use of the territory of member state to subvert other

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states. Other amendments include the elevation of Kiswahili as an official language of the Union and proscription of a member state to renounce its membership to the AU. The other changes are mostly institutional in nature. Particularly worthy of mention is the addition of a new article providing for the Peace and Security Council (PSC).[4]

This article will focus on the amendment to article 4 (h) which extends the right of the Union to intervene in a member state to include situations where there is a serious threat to legitimate order for the purpose of restoring peace and stability in that member state. It will first examine the political context in which this amendment was introduced, in order to explain the apparent shift in emphasis of the AU's grounds to intervene, from humanitarian justifications to the rationale of preserving "order".

## Keeping Libya on board?

The reasons for convening the First Extraordinary Summit of the African Union lie in the conception and birth of the AU itself. It began with the acceptance of a proposal which Colonel Muamar Gaddafi made to the OAU's Algiers Summit in July 1999, to hold an extraordinary session "to discuss ways and means of making the OAU effective"[5]. Thereafter, he presented the African Heads of State gathered in Sirte on 9 September 1999 with his grandiose (and patently unrealistic) vision for a "United States of Africa", with a single army, currency and powerful leadership.

Member States agreed to a more appropriate revamping of the OAU into an 'African Union', with a new Constitutive Act to strengthen and update the organization's scope and mandate[6]. They planned to launch the new institution at another extraordinary summit in Libya in 2001, however, the Lusaka Summit of 2001 decided that South Africa would host the inauguration at the ordinary session of July 2002.

South Africa had a firm hand in the drafting of the Constitutive Act, which placed emphasis on the advancement of human rights, democracy and good governance. Ironically this focus was the antithesis of the terms on which Col. Gaddafi had ruled his own country for three decades. Nevertheless, his desire to take credit for the African Union was revealed by the number of Libyan envoys lobbying at the Lusaka Summit of 2001 for the launch to be held in Sirte. It undoubtedly also accounts for promises by Libya to pay the outstanding membership fees of eleven member states, to restore their voting rights at the Lusaka Summit.[7]

Libya's influence among Member States more generally was evident from the position taken by the OAU to lobby the UN Security Council on Libya's behalf. Resolutions calling for sanctions against Libya to be lifted were passed at every OAU Summit from 1997 onwards. As the newest member of the OAU, South African President Thabo Mbeki had to obtain Col. Gaddafi's 'blessing' for the AU launch in Durban, in a visit to Libya in June 2002. Informed speculation was that Gaddafi only agreed to this on condition that Libya be accepted into NEPAD.

Libya surprised the Assembly in Durban with a range of proposed amendments to the Constitutive Act, including a single army for Africa, an AU Chairman with presidential status and greater powers of intervention in Member States – in other words, for an institution that came closer to a "United States of Africa". Col. Gadaffi argued that since the Assembly was the supreme organ of the AU it could simply adopt these amendments and refer them to parliaments for subsequent approval. In his position as chairman, President Mbeki made the procedural argument that according to Rule 8 of the Rules of Procedure of the Assembly, items proposed by a Member State must be submitted 60 days and supporting documents and draft decisions communicated to the Chairperson of the Commission 30 days before the session.

Despite protestations to the contrary by Libya, the proposed amendments to the Constitutive Act were not received and distributed ahead of the Summit in conformance with this requirement. The subsequent decision by the Assembly was that proposals for amendment first be examined by the Executive Council (in accordance with Article 32 of the

Act) and submitted for consideration by an Extraordinary Session of the Assembly to be held in 6 months' time. Speculation at the time was that this session would be held in Libya.

It transpired that Libya hosted the Extraordinary Executive Council meeting in December 2002, but that the Extraordinary Heads of State and Government Assembly was held in Addis Ababa two months' later. By all accounts the Tripoli Executive Council meeting conceded little more than the opportunity for Col. Gaddafi to reiterate his case, while the substance of the proposals was referred to an ad hoc ministerial group that subsequently met in Sun City, South Africa in January 2002. It was here that Libya's more controversial proposals were watered down, for example, the amendment to article 4(h):

> "… crimes against humanity *as well as in cases of unrest or external aggression in order to restore peace and stability to the Member of the Union;*"

became:

> "… crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability in the Member State of the Union upon the recommendation of the Peace and Security Council.*"

Against this background, one could interpret the forty minute session of the AU Heads of State and Government in February 2003 as an expensive attempt to avoid conceding to controversial or regressive amendments to the Constitutive Act while keeping an influential and potentially troublesome Member State "inside the AU tent". That Col. Gaddafi did literally pitch his tent in Addis Ababa for the Extraordinary Summit is a sign that this face-saving diplomacy succeeded. Whether the resulting amendments can be considered a 'success', however, depends on their legal significance and future political ramifications. We turn now to a legal analysis and political consideration of the expanded right of intervention contained in article 4(h) of the Constitutive Act.

## Historical and legal synopsis

The first pan-African intergovernmental organisation, the Organization of African Unity (OAU) was established at the time when state sovereignty was very high in the agenda of many—then newly independent—states in Africa.[8] Not surprisingly, no reference was made in the OAU Charter on the protection of human rights and instead sovereignty was emphasized. The OAU Charter clearly stated that the Organisation had the objective of defending sovereignty, territorial integrity and independence of member states.[9] Furthermore, OAU member states committed themselves to respect the sovereignty and territorial integrity of other member states and their inalienable right to independent existence[10] and to refrain from interfering in the internal affairs of other member states[11] or engaging in subversive activities against other states.[12] The sovereignty-related provisions in the OAU Charter were further buttressed in the 1964 Cairo Declaration which African states pledged to respect the borders existing on their achievement of national independence.[13]

The subsequent practice by the OAU member states especially in the first twenty years of its existence was largely in conformity with rigid interpretation of the sovereignty principle. With such strict interpretation at the back of their mind, African states viewed international concern for human rights and democratic governance as pretext for undermining their sovereignty.[14] With the exception of only a few states, African states refrained from commenting on let alone intervening, to stop grave violations of human rights in other countries.

The severe violations of human rights in various African states particularly by three most infamous African dictators of 1970s, Idi Amin of Uganda, Jean-Bedel Bokassa of Central African Republic and Macias Nguema of Equatorial Guinea helped to highlight the dangers of strict adherence to the sovereignty principle. The Tanzanian intervention in Uganda in 1978 got the organisation to question its rigid interpretation of the notion of sovereignty. The OAU Summit of Heads of State and Government held after successful toppling of Idi Amin's regime by Tanzanian military forces set in motion a process that culminated in the adoption of the African Charter on Human and Peoples' Rights by the OAU

Assembly in June 1981. The entry into force of the African Charter in 1986 made a significant contribution in eroding African states' rigid conception of sovereignty.

The end of the Cold War in late 1980s saw the surge of internal armed conflicts in various parts of the continent. In response to this emerging challenge, the OAU established the Mechanism for Conflict Prevention, Management and Resolution in 1993 which, however, failed to live up to its promise. At the same time, subregional bodies in the continent, notably the ECOWAS, provided a framework for collective intervention by states in a subregion in another states in order to stop grave violations of human rights. In this context, the OAU, like the prehistoric dinosaurs, was facing the threat of extinction for failing to adapt itself to changed global and regional political, social and economic settings and raising up to the new challenges faced by the continent in the post Cold War era. Following the decision to establish the AU made in Sirte, the OAU Secretariat drafted the constitutive legal text of the Union. The draft AU Act was adopted by the OAU Assembly of Heads of State and Government meeting in Lomé, Togo in July 2000. The AU Act entered into force on 26 May 2001.

The AU Act is the first international treaty to recognize the right to intervene for a humanitarian purpose (humanitarian intervention). The Act provides in article 4(h) that the AU has the right to intervene in a member state pursuant to a decision of the Assembly in respect of 'grave circumstances', namely war crimes, genocide and crimes against humanity.[15] The Act does not indicate whether the definition of intervention is to be restricted to the use of force or it is to be viewed broadly as including mediation, peacekeeping missions, sanctions and any other non-forcible measures.[16] In this paper, the term is used in the restrictive sense of intervention by means of military force.[17]

The recognition of the right to intervene in the AU Act has been hailed as reflective of the sensitivity of the new African intergovernmental organisation to 'contemporary demands and aspirations of the ordinary people of Africa'.[18] Maluwa notes in this regard:[19]

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

At first glance, it might appear that the right to intervene is in contradiction with the principle prohibiting interference by any member state in the internal affairs of another reflected in article 4(g) of the Act.[20] However, on closer examination it is clear that what article 4 (g) prohibits is intervention by a 'member state' and not intervention by the AU. Thus the two articles are not contradictory as they may seem to.

Kindiki has proffered the view that the couching of intervention by the AU as a 'right' is unfortunate since it could be viewed as giving the AU a discretion to decide whether or not to intervene.[21] In his opinion, the provision should have required the AU to intervene as a matter of 'duty' since, in his words, 'the sense of obligation to intervene is more likely to move the AU into action'. This may make legal sense, however, it is doubtful whether African states pay attention to such details as to whether they have a right or a duty to act in a certain way. At the end of the day what matters is whether states have the political will to undertake what they committed themselves to do. The couching of intervention as a right might, however, strengthen the legal arguments of those seeking to influence state practice in relation to intervention since a duty to act makes a stronger case than a mere right to act.

Abass and Baderin have criticized the omission of violations of human rights as a ground for intervention by the UN.[22] While the issue of human rights is important, given the state of human rights in the continent, very few, if any, African states would have been exempted from intervention since human rights violations remains a challenge in all states in Africa. It was thus proper to restrict grounds of intervention to situations of grave violations of human

rights–genocide, war crimes and crimes against humanity–as the founders of the African Union did.

## Amendment to the Act: Extending the grounds to intervene

The AU Act had initially provided for a right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. The recent amendments introduce a new ground of intervention by recognizing the rights of the AU to intervene upon the recommendation of the Peace and Security Council when there is a serious threat to legitimate order for the purpose of restoring peace and stability in a member state of the AU.

The following section will analyse the import of this amendment focusing on four aspects: the meaning of 'serious threat to legitimate order'; consistency of this ground with other grounds under article 4(h) of the AU Act; the new ground and legitimacy of intervention under the UN Charter and finally whether intervention on the new ground protects regimes or the people.

### *'Serious threat to legitimate order'*

The first limb of the question is: what constitutes legitimate order? Unlike the grounds of war crimes, crimes against humanity and genocide whose definitions are provided for in the statutes of the international criminal tribunals for Rwanda and Yugoslavia and have been further clarified by the jurisprudence of these two tribunals, the ground of serious threat to legitimate order is not defined anywhere.[23] It is thus unclear what criteria the African Union will use to determine whether the regime in power in an African state, being considered for intervention, is legitimate.

The closest possible interpretation of this clause may be found in the OAU's definition of an "unconstitutional change of government", namely:

i) military coup d'etat against a democratically elected Government;
ii) intervention by mercenaries to replace a democratically elected Government;
iii) replacement of democratically elected Governments by armed dissident groups and rebel movements;
iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.[24]

One may therefore assume that a *legitimate order* can only result from a free and fair election which allows the majority to determine whom they wish to govern them. However, what constitutes a free and fair election is itself a highly contentious issue. At the Durban Summit in 2002, Heads of State agreed on a Declaration Governing Democratic Elections in Africa[25] following the Report of the Secretary-General on Strengthening the Role of the OAU/AU in Elections, Observations and Monitoring and the Advancement of the Democratization Process in Africa.[26] A Declaration is not, however, binding on Member States and intended to guide and harmonise viewpoints.[27]

In practice, election observers have failed to reach consensus about the freeness and fairness of the election in certain African states. The outcome of the Zimbabwean election is but one example where many Western governments and NGOs concluded that the elections were neither free nor fair, while the OAU and SADC observers as well as observers from African countries such as South Africa and Tanzania were prepared to conclude that even if there were not free and fair they were at least legitimate. The uncertainty about whether a particular election has resulted in the imposition of legitimate order coupled with the fact that many African states and even the AU itself adopt a very low threshold of what constitutes a legitimate election, makes the question of determining the circumstances where the AU could intervene on grounds of threat to legitimate order very complex and controversial.

The other limb of the question is: what would constitute a *threat* to legitimate order? Are peaceful demonstrations by people demanding political changes to be considered a threat to legitimate order to justify intervention by the AU? The definition of unconstitutional changes of government excludes this eventuality, but it is not specifically excluded

from the amendment to Article 4(h). Could this provision have helped President Didier Ratsiraka of Madagascar get the assistance of the AU in order to crush popular uprisings against his attempts to hold on to power despite his apparent electoral defeat?

Regarding coup attempts, would this provision have helped Ivory Coast's military leader, General Robert Guei, to suppress the rebellion against his government? Or could President Angé Felix Patasse of the Central African Republic have drawn again on Libyan support, this time under the legitimate auspices of the AU, to stave off the tenth coup attempt on his leadership? The answer would appear to depend on the political will of the Peace and Security Council to go beyond the formal requirement to condemn an unconstitutional change of government, and implement diplomatic or trade sanctions if constitutional order has not been restored within six months[28]. Military intervention at this stage is an option, but not an obligation.

In the absence of the African Court of Justice, the issue of interpretation of what would constitute a serious threat to legitimate order will fall upon the Assembly of the Union.[29] How the African Union will go about in its determination will be borne out of its subsequent practice. However given the tendency of the African leadership to stick together, it is doubtful whether progressive interpretation of such provision can be expected from the Assembly in relation to the matter.

*Consistency with other grounds of intervention*

A common thread uniting the three grounds of intervention that the AU Act restricted itself initially—war crimes, crime against humanity and genocide—is that they constitute international crimes as defined in the Rome Statute as well as the Statutes of the international criminal tribunals for Rwanda and Yugoslavia. These are all crimes related to gross violations of human rights law and international humanitarian law as stated in the definition of humanitarian intervention by the Danish Institute of Foreign Affairs.[30] They have further been designated in the Rome Statute as crimes of 'greatest concern to the international community'.[31]

The new ground of intervention brought about by the amendment to the AU Act—threats to legitimate order—has little in common with the three grounds identified above. It is not an international crime as defined in international conventions and instruments. Nor is it an issue which could be considered of 'greatest concern to the international community'. While threats to legitimate order are often associated with violations of human rights (though not always of grave scale as envisaged by the AU Act) such violations are more often than not outcomes of the response of the regime in power to perceived or real threats to its hold of power.

There is another cause of concern for the inclusion of threat of legitimate order as a ground of intervention. In many instances, the perceived or authentic threat to legitimate order is used as a pretext to violate human rights. In this sense its inclusion as one of the grounds for intervention could be viewed a step backward in the efforts to secure better protection of individual rights in Africa.

*Intervention and legitimacy under the UN Charter*

It is pertinent to consider the implications of the amendments for the obligations of the AU member states under the UN Charter since all AU members, except Western Sahara, are UN members.[32] Furthermore, according to article 103 of the UN Charter, obligations of the UN member states under the UN Charter prevail over their obligations under any other international agreement in the event of a conflict.[33]

The UN Charter obliges the UN member states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. It is doubtful whether intervention in a situation where legitimate order is under threat could pass the test of consistency with purposes of the UN or could be deemed as not constituting an interference in the political independence. In any case, although the UN Security Council has shown willingness to consider incidents concerning a single country as a threat to international peace and security warranting the UN

intervention, as in the case of Somalia, its practice in this regard has been only in exceptional cases. Thus, extending the grounds of intervention to include serious threat to legitimate order would hardly pass the test of the criteria required for the UN intervention.

Further still, it is also doubtful whether such intervention could be consistent with the modalities put in place by the UN Charter to facilitate the use of force by the UN itself. The UN Charter confers on the UN Security Council the primary responsibility for the maintenance of international peace and security.[34] How the UN Security Council goes about executing its mandate under article 24 is elaborated in chapter seven of the UN Charter which is appropriately titled 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'. The UN Charter provides for a possibility of the Security Council using, where appropriate, regional arrangements or agencies for enforcement action under its authority and prohibits any enforcement action unauthorised by the UN Security Council.[35] However, the amended Article 4(h) now takes the grounds for intervention further than is envisaged by the UN Charter, as "upholding legitimate order" is conceivably a very different objective to maintaining peace and security. In sum, the legitimacy for the AU intervention by military force under the UN Charter rests on shaky grounds and is hardly consistent with the overall purpose of the United Nations which emphasized the centrality of the people and not regimes.[36]

*human security or regime security?*

On first glance, the extension of the grounds of intervention would be seem to be in line with what Naldi and Magliveras call "an obvious trend in the Act towards limiting the sacred sovereignty of member states and moving in the direction permitting the involvement of the Union in the domestic affairs of participating countries".[37] In most instances such a move has had a humanitarian objective. Yet on closer inspection, particularly considering the *raison d'etre* of such moves, it becomes clear that this amendment is not intended to protect the individual rights but to entrench the regimes in power. Three arguments can be advanced in support of this contention.

First, the original idea of the state that proposed this particular amendment which had sought to extend the right of the Union to intervene in the case of unrest and external aggression. This proposal might have been informed by the contemporary developments in the global politics where powerful nations, notably the United States, have given themselves the power to effect 'regime changes' in states which they regard as posing a threat to their economic and security interests. This proposal could thus be seen as a reaction to these developments with the need to assert state sovereignty and create mechanisms to enhance the security of regimes in power in Africa.

Second, there is a tendency of African leaders to act in solidarity when one of their own is under threat from political adversaries. While there are several such examples on the continent of one regime assisting another regime to hold on to power, there are very few examples of African regimes acting without other self-interest to assist people of another state get rid of an oppressive regime. If the state practice described above is indicative of the intervention trends in the continent, the recognition of the right of the AU to intervene is likely to facilitate the interventions aimed at protecting regimes rather than the people.

Apart from the transient political desire to appease Gadaffi, it is not clear why African states had to establish the right of the Union to intervene when legitimate order is under threat. Arguably there is no need for such provision given that the legitimate order could always exercise its right under article 4 (j) of the AU Act to request intervention from the AU in order to restore peace and security. In a sense, the right of the state to intervene in situations of serious threat to legitimate order complements another AU principle giving the AU member states the right to request the Union to intervene in order to restore peace and security. Both have the ultimate aim of restoring peace and stability (or security in the wording of article 4(g) of the Act). But they could offer a useful tool for regimes facing internal or external threats. Writing on the principle giving

the right to member states to request intervention, Packer and Rukare warn of the risk of African governments using the principle to their own advantage as a means of gaining help of the African Union in order to retain power in the face of popular rebellion'.[38]

On the other hand, there are opportunities for giving such provision an interpretation that advances the goal of protecting the rights of individuals. First, the fact that the AU can only intervene where *legitimate* order is under threat suggests that the AU will not intervene where an *illegitimate* order is under threat from popular rebellion. Second, the AU will not have to wait for a request of governments under threat or even to seek consent of that state before it intervenes. In this sense there is window of opportunity for the AU to act even in instances where it is not in the interest of the regime in power to have the AU intervene as noted by absence of invitation. Whether this provision will translate into interventions aimed at protecting human rights and not retaining unpopular regimes in power remains to be seen.

The report by the AU Assembly does not indicate whether and how this amendment relates to another set of amendments to the AU Constitutive Act relating to the establishment of the Peace and Security Council.[39] Perhaps this matter will be sorted out by the Commission while undertaking legal technicalities required to give effect to the agreed amendments.[40] Nevertheless, while amendments to the treaties are unavoidable if such treaties are to keep up with new developments, it is wise to keep them to a minimum. It is difficult to disagree with the view expressed by unnamed African Head of State that 'there should be no more proposals for amendments to the Constitutive Act for a number of years until the Union has taken root and is functioning properly'.[41]

## Conclusion

The original aim of providing for the right to intervene in the AU Act was informed by the desire to protect the individual by allowing intervention in situations of grave violations of human rights including crimes against humanity, genocide and war crimes. The amendment to article 4(h) brings back the idea of protection of regimes and not individuals. In a sense it constitutes a step backward in the quest to enhance the protection of individuals' rights against infringements by the state. While an intergovernmental organization like the African Union is forced by its very nature to operate within the strictures of "lowest common denominator" politics, it should be wary of amending its founding instrument on the basis of diplomatic negotiation rather than sound legal principles.

## Notes

1. Para 23 'Report of the first extraordinary session of the Assembly of the African Union (3 February 2003)' AU doc EX/ Assembly/ Rpt (I) (Hereafter report of the first AU Assembly extraordinary session)
2. The summit was attended by all 51 AU member states except Seychelles. Guinea Bissau and Madagascar, which are not AU members as they have not ratified the AU Act, did not attend the summit. See para 2 of the report of the first AU Assembly extraordinary session.
3. Para 23 of the report of the first AU Assembly extraordinary session.
4. It should be noted that this amendment is not new in strict sense since a protocol establishing the PSC was adopted by the 1st ordinary session of the AU Assembly meeting from 9–10 July 2002 in Durban, South Africa. As of 10 February 2003 only Algeria had ratified the PSC Protocol. See para 83 'Report of the interim chairperson of the Commission on the status of AU treaties' AU Doc EX/ CL/ 14 (II).
5. AHG/Dec.140(XXXV).
6. Sirte Declaration, 9/9/1999
7. Apparently fees amounting to $2.2 million were only paid in from Libya to the AU Commission by May 2002.
8. F Viljoen 'The realisation of human rights in Africa through sub-regional institutions' (2001) 7 *African Yearbook of International Law* 186.
9. Art 2 (1) (c) OAU Charter.
10. Art 3 (3) OAU Charter.
11. Art 3 (3) OAU Charter.
12. Art 3 (5) OAU Charter.
13. Para 2 'Resolution on border disputes among African states' OAU Doc AHG/ Res 16(I).
14. G Naldi (1999) *The Organisation of African Unity: An analysis of its role* 6.
15. Art 4 (h) AU Act.
16. C Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 372.
17. Art 13(3) c of the PSC Protocol envisages the establishment of African Standby force consisting of

military and civilian components ready for rapid deployment at appropriate notice will be tasked *inter alia* to undertake intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security, in accordance with arts 4(h) and (j) of the Constitutive Act. On this matter, see the argument by Kithure Kindiki that since intervention under article 4(h) of the AU Act will be in response to grave circumstances – specified as war crimes, genocide and crimes against humanity – breaches that are likely to occur in the context of armed conflict, only a proportional use of armed force is likely to address such grave circumstances and hence his conclusion that intervention by the AU is likely to involve the use of armed force. K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 (1) *African Human Rights Law Journal* (forthcoming).

18. T Maluwa 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union' (2002) 8 *African Yearbook of International Law* 28.
19. As above 29.
20. Art 4 (g) AU Act.
21. See Kindiki (n 15 above).
22. A Abass & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 3.
23. See arts 3, 4 & 5 of the Statute of the International Tribunal for Former Yugoslavia and arts 2, 3, & 4 of the Statute of the International Criminal Tribunal for Rwanda.
24. Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI).
25. AHG/Decl. 1 (XXXVIII)
26. CM/2257 (LXXVI)
27. See Rule 33 of the RoP of the Assembly for the differences between regulations, directives, recommendations, declarations, etc.
28. Ibid.
29. Art 26 AU Act.
30. According to the Danish Institute of Foreign Affairs, humanitarian intervention is 'coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law' Quoted by H Corell 'To intervene or not: The dilemma that will not go away' Keynote address to the conference on the future of humanitarian intervention Duke University 19 April 2001.
31. Art 2 Rome Statute establishing the International Criminal Court.
32. According to the principle of *pacta sunt servanda*, which is a principle of customary international law, as well as article 2 (2) of the UN Charter, the UN member states are obliged to fulfil in good faith the obligations assumed by them in accordance with the UN Charter.
33. Art 103 UN Charter.
34. Art 24 UN Charter.
35. Art 53 UN Charter.
36. The Preamble of the UN Charter begins with the words 'We the peoples of the United Nations…' According to Munya, such language emphasizes the centrality of the people in the aims and objectives of the UN. See P Munya 'The Organisation of African Unity and its role in regional conflict resolution and dispute settlement: A critical evaluation' (1999) 19 *Boston College Third World Law Journal* 543.
37. Naldi & Magliveras (n 32 above) 418.
38. Packer & Rukare (n 14 above) 373.
39. It should be noted that the PSC Protocol provides that the PSC shall operate under guidance of the principle that 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act. See Art 4(j) of the PSC Protocol. Further article 6 (d) identifies peace support operations and intervention, pursuant to article 4 (h) and (j) of the Constitutive Act as one of the functions of the PSC.
40. Para 27 of the report of the first AU Assembly extraordinary session.
41. Para 25 of the report of the first AU Assembly extraordinary session.