

CHALLENGES FACING THE AU'S PEACE AND SECURITY COUNCIL

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Introduction

The ambitious design of the African Union (AU), set out in the Constitutive Act of 2000, is taking shape at a remarkable pace. Less than two years after the inauguration of the AU in Durban, South Africa, member states are ready to move from the paperwork and ratification process, to the launch of two key organs: the Peace and Security Council (PSC) and the Pan-African Parliament (PAP). Although it took longer to enter into force, the Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human and Peoples' Rights has finally been ratified by enough countries in order for judges to be appointed and to begin their work this year. The statutes for the Economic, Social and Cultural Council (ECOSOCC) are expected to gain the Executive Council's approval shortly, allowing this civil society forum to meet before the end of 2004.

What these new institutions have in common is that they are each intended to ensure a greater degree of enforcement and oversight of the AU's decisions. In the past, commitments made by heads of state and government to peace and security, respect for democracy, human rights and the rule of law, were often broken with impunity. The perceived weakness of the Organisation of African Unity (OAU) was that it lacked both the will and the means to uphold its decisions.

The legal architects of the AU provided plans for a number of mechanisms to change this tradition, including the groundbreaking intervention clause of the AU Act: Article 4(h) and Article 23(2) on sanctions.¹ While the Protocol establishing the PSC was added later, the Parliament and ECOSOCC were included in the AU Act to allow for greater popular participation in AU affairs. The African Court on Human and Peoples' Rights was adopted in 1998 to supplement the role played by the under-resourced and ineffectual African Commission on Human and Peoples' Rights.

With the design phase complete, the human and financial resources used to build these new institutions will now determine their future success. The practical considerations for setting up each of these AU organs will be examined, focusing on the most ambitious and costly: the Peace and Security Council.

Africa's own Security Council

The Protocol on the PSC of the AU entered into force on 26 December 2003, after ratification by the required 27 of the AU's 53 member countries. African ministers of foreign affairs will now elect the 15 countries that are to serve on the Council during their meeting in Addis Ababa in mid-March, although there are bound to be continued rumblings around the disparity in the composition of the five regions that will

each nominate three members for election. Following the election process, the PSC itself will be launched in May. The Council will have considerable powers, serving as the standing decision-making vehicle for the prevention, management and resolution of conflicts. Included in its powers (Article 7) the PSC, in conjunction with the chairperson of the Commission, may:

- authorise the mounting and deployment of peace support missions;
- recommend to the Assembly intervention in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- institute sanctions whenever an unconstitutional change of government takes place;
- implement the common defence policy of the AU;
- follow-up the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by member states; and
- support and facilitate humanitarian action in situations of armed conflicts or major natural disasters.

Other structures of the PSC, all at advanced stages of preparation, include a panel of five eminent African personalities (the Panel of the Wise) to engage in conflict prevention diplomacy, a Continental Early Warning System (CEWS) to warn of impending threats to state security and an African Standby Force of peacekeepers to intervene when mediation fails. The AU has a ready funding mechanism in the form of the Peace Fund that it inherited from the OAU. With the Commission of the AU now chaired by former President Alpha Konaré of Mali, the authority of the chairman and his role in conflict prevention has also been augmented. A final piece in this new structure is a Military Staff Committee to advise and assist in all questions relating to military and security requirements for the promotion and maintenance of peace and security in Africa.

In theory the CEWS will be linked to situation rooms in each of Africa's five regions, to share information on impending conflicts

with the PSC. Should preventive diplomacy through either the chairman of the Commission or the Panel of the Wise fail, this system should trigger the deployment of peacekeepers to prevent or reduce bloodletting. Much work has therefore gone into the establishment of the African Standby Force, composed of a brigade on standby for peacekeeping duties in each of Africa's five regions and a complement of observers, military police and civilian personnel on standby at the continental level. Ideally the African Standby Force would be deployed under a mandate from the UN, but the PSC can authorise the deployment of peacekeepers as a regional organisation in terms of Chapter VIII of the UN Charter.

Support from the AU Commission

In its role in conflict prevention, management and mitigation, the PSC will be supported by the restructured Commission of the AU of which the Peace and Security Department is the largest of the eight substantive divisions. The core function of the department is the maintenance of peace, security and stability through the co-ordination and promotion of African and other initiatives on conflict prevention, management and resolution within the context of the UN. The fact that the Peace and Security Department will have four times as much staff as the Political Affairs Department reflects the inevitable focus of the AU on (more expensive) conflict management as opposed to (much cheaper) conflict prevention. An appropriate focus on conflict prevention would have seen a much expanded role for the Political Affairs Department. It is responsible for human rights, the emergence of democratic institutions, transparency and accountability, refugees, humanitarian crises and the monitoring of elections, all of which are true early warning indicators of a developing crisis.

There are a number of reasons for the obvious imbalance between the size and resources of the Peace and Security Department with its focus on conflict management on the one hand, and that of the Political Affairs Department with its focus on conflict prevention, on the other. Leaving the inevitable role

of strong personalities aside for the moment, the most important is member state concerns regarding an intrusive role for what is a new, and bold, institutional area for engagement by the Commission, namely that of internal political governance. The establishment of the Department of Political Affairs, although small in number, therefore reflects an important development in the institutional focus of the Commission beyond its size.

Composition of the PSC

The 15-country PSC will inevitably regulate much of Africa's engagement with the UN Security Council. In the interests of regional representivity the Council, like its predecessor, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution that was established by the OAU in 1993, will probably be composed of three countries from each of Africa's five sub-regions—north, south, central, west and east—although a region such as West Africa with its greater number of countries is pushing for four, as apposed to three, candidates to serve on the Council at the expense of North Africa. Five of the countries will serve for a term of three years and 10 countries for a term of two years. As it stands at the moment, however, each sub-region will therefore have one three-year and two two-year members.

The countries comprising each of Africa's five regions

Western Africa — 16 members

Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo

Central Africa — 9 members

Burundi, Cameroon, Central African Republic, Chad, DRC, Equatorial Guinea, Gabon, Republic of Congo and Sao Tomé et Príncipe

Eastern Africa — 13 members

Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Seychelles, Somalia, Sudan, Tanzania, Uganda, Rwanda

Northern Africa — 5 members

Algeria, Egypt, Libya, Saharawi Arab Democratic Republic, Tunisia

Southern Africa — 10 members

Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe

Should the most recent drafts on the process of electing the members of the PSC emanating from Addis Ababa see the light of day, there are important innovations in the composition of the Council. The previous principle of rotation saw countries in each sub-region succeed one another as members on the Central Organ in automatic alphabetical sequence. Given its history of slavery, colonialism, donor conditionality and globalisation, Africa has a strong tradition of adherence to nominal equality—a principle most evident in the extent to which OAU practice was to support unquestioned rotation. This is often the only criteria for African candidature within the various structures of the continental organisation as well as in the selection of African candidates, both individuals and countries, for vacancies in non-African positions. In this manner today's solidarity protected a leader from sanction by his peers tomorrow. It was, for example, adherence to the principle of rotation that saw Zimbabwe become a member of the Central Organ of the Mechanism during the 2003 AU Summit meeting in Maputo—despite widespread African concern about developments in that country. The same principle saw Libya being endorsed by the AU Executive Council for membership of the UN Human Rights Commission in 2001.

Members of the PSC will now have to receive a majority of two-thirds votes in a secret ballot. By implication if the southern sub-region of Africa (roughly corresponding with SADC) wishes, for example, to propose Angola as a candidate, that country would also have to achieve significant support in the other four sub-regions to gain sufficient votes to get on to the Council. This is because all countries that are not under sanctions for

being in substantive arrears with their annual membership contributions to the AU will be able to vote during the elections for the members of the Council; but obviously only those countries that have actually ratified the Protocol to establish the Council will be able to stand for election. One can therefore expect that those countries that see themselves as potential candidates for the Council will hurry to ratify the Protocol in the next few weeks, as Zimbabwe has already done.

The Protocol goes even further in two respects. Each of the five sub-regions now also has to submit a list of five candidate countries for its three slots on the Council. In other words, West Africa may decide that it wants Nigeria, Ghana and Senegal as its three candidates, but must submit a list that includes an additional two countries.

A second innovation is that the Protocol lists 10 substantive criteria that candidate countries have to fulfil to be eligible for election, including recent contributions to peacekeeping and capacity to shoulder the responsibilities entailed in membership of the Council. The modalities for election of members of the PSC—still in draft form—to be considered by the Executive Council during their meeting in Addis Ababa on 22 March 2004 envisage that member states will submit a form indicating how they satisfy the criteria set out in the Protocol and what their vision is for the Council.

The 28 countries that have ratified the PSC Protocol

(Algeria, Burkina Faso, Burundi, Cameroon, Comoros, Equatorial Guinea, Ethiopia, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Senegal, Sierra Leone, Sao-Tome and Principe, Sudan, Tanzania, Zambia, Zimbabwe.

A quick scan of the most prominent African contributors to UN peacekeeping operations reveals that Nigeria, Ghana, Kenya, South Africa, Ethiopia, Zambia, Senegal, Morocco (not a member of the AU), Guinea-Bissau and Tunisia all fall within the top 25 troop contributors to the UN. Of this list only Guinea-

Bissau and Tunisia have not ratified the PSC Protocol. Should contributions to African missions such as the African Mission in Burundi be included (as indeed it should), other countries such as Mozambique (current chair of the AU) and possibly even Namibia (on the basis of its relative contribution to UNMIL in Liberia) could also argue significant contributions. Notably absent from this list is Egypt, also nominally a member of NEPAD.

Other criteria include financial contributions to the AU and the Peace Fund—a requirement that may see the Union significantly reduce the odd US\$40 million in membership arrears that it habitually has to contend with. But the most important and contentious requirement is that the 15 PSC members should reflect a respect for constitutional governance, rule of law and human rights. Depending on how this requirement is interpreted, of the 28 known ratifications of the PSC, probably only Ghana, Kenya, Lesotho, Mali, Malawi, Mozambique, Mauritius, Namibia, Niger, Rwanda, South Africa, Senegal, Sierra Leone, Tanzania and Zambia would qualify. Key African states such as Algeria, Ethiopia, Libya, Nigeria and Zimbabwe could all fail the test in respect for human rights—although the relative size or contribution to peacekeeping for some such as Nigeria would probably ensure their candidature.

Should membership of the PSC include countries with self-imposed leadership, where democracy is absent and human rights and the rule of law are violated on a regular basis, the AU and its most important institution, the Council, would suffer an inevitable loss of domestic legitimacy and international confidence. And confidence means resources. The March elections will therefore be interesting and inevitably controversial as 'objective' assessments of criteria on commitments to human rights will have to be married with power-politics on the continent and the diplomatic requirements of inching all of Africa along the path to stability and democracy.

Continental Early Warning System

Once established, the heart of the CEWS will consist of a Situation Room that will be part

of the Peace and Security Department. The Situation Room will, in turn, be linked to the observation and monitoring units of sub-regional organisations, such as those being established within the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) in the Horn of Africa and SADC. These are to collect and process data at their respective levels and to transmit the same to the continental Situation Room.

The CEWS is specifically mandated to collaborate with the UN, its agencies, other relevant international organisations, research centres, academic institutions and non-governmental organisations (NGOs). The information gathered through the CEWS will then be used:

timeously to advise the Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action. The Chairperson of the Commission shall also use this information for the execution of the responsibilities and functions entrusted to him/her under the present Protocol [on the Peace and Security Council].

The Protocol on the PSC provides that meetings of the Council are to be closed, but that the Council may decide to hold open meetings during which:

... civil society organisations involved and/or interested in a conflict or a situation under consideration by the Peace and Security Council may be invited to participate, without the right to vote, in the discussion relating to that conflict or situation.

Perhaps more important than participation in open meetings of the PSC, the Council may also hold informal 'consultations' with civil society organisations "... as may be needed for the discharge of its responsibilities".

The PSC Protocol determines that the CEWS is to collect and analyse country data on the basis of an appropriate 'early warning indicators module'. This module must be based on political, economic, social, military and humanitarian indicators. In theory this requirement sets the stage for an 'objective'

process according to which the CEWS tracks the situation in its 53 member states, and alerts the PSC when there are indications of rising tensions. Beyond the implied investment in software and data processing, the module would somehow have to quantify what 'standard deviation' from the norm would trigger reports to the PSC.

Although simple in theory, this is a massively ambitious undertaking—technically (given the amount of data coding and modelling that would be required), in terms of social theory (since there is an implied modelling of 53 very different countries involved, or at least the identification of common indicators of crisis), financially and politically. Given sufficient resources it is not, however, an impossible task. The main obstacle to the realisation of an effective early warning system in Africa is, however, political rather than technical, sociological or financial.

Good governance and conflict prevention in Africa are two sides of the same coin. The key early indicators of intra-state conflict and regional instability have repeatedly proven to be an abuse of power and transgression of human rights, bad governance and circumvention of democracy—soon resulting in substantial refugee flows and the internal displacement of people. No African country has been prepared to recommend the intervention of the AU in circumstances such as these; current events in Zimbabwe presenting the most obvious example. The 'objective' modelling of the CEWS indicators will inevitably run into the same obstacle. The linkage between governance, early warning and conflict prevention—issues theoretically falling within the domain of the much smaller Department of Political Affairs, not within that of the Peace and Security Department where the CEWS will be located—needs to be central to the AU if it is to be different from the OAU.

The AU is an intergovernmental organisation and the CEWS will be composed of officials seconded from member states for a limited duration. The real ability of the early warning function to confront the PSC on an issue such as systemic corruption, manipulation of elections or suppression of media free-

dom will therefore constitute a crucial test for the AU—particularly in the case of developments affecting influential countries such as Libya, Nigeria, Algeria, Egypt and Ethiopia, all of which have troubled internal and regional situations to contend with.

Moving from rhetoric to action in early warning on governance abuse is one of the many critical challenges facing the AU. It is probably an area where success will eventually be determined by the actions of African civil society rather than those of governments.

It is here that the AU certainly has the potential to be different from the OAU. Not only does the Constitutive Act and the Protocol on the PSC provide for more robust engagement and much greater scope in instances of both inter- and intra-state conflict and signs thereof, but the growth in the number of elected democrats seated around summit tables has softened adherence to the sacred principle of respect for national sovereignty that previously impeded effective intervention. Africa's spiral of underdevelopment and conflict has also served to focus the minds of African leadership who are not only turning to a greater degree of introspection but also providing greater space for civil society engagement.

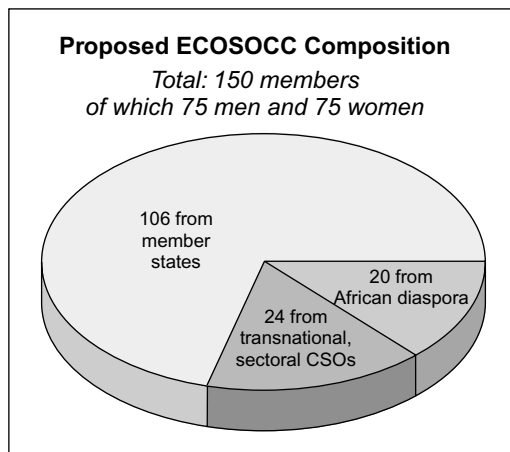
The Constitutive Act of the AU lists as one of its objectives:

... to build a partnership between governments and all segments of civil society ... promote democratic principles and institutions, popular participation and good governance ... [and] participation of the African peoples in the activities of the Union.

How to translate these principles into genuine working partnerships between the AU and African civil society organisations has been taken up by an AU–Civil Society Provisional Working Group, elected by the second of two OAU–Civil Society conferences held in Addis Ababa in June 2001 and 2002. This group has focused its attention on ECOSOCC as the primary vehicle for formal representation of civil society within the AU. The group met in Ghana towards the end of 2002 and again in Addis Ababa during June 2003, where it sought to provide input into the statutes of ECOSOCC.

Adoption of the ECOSOCC statutes

At a subsequent Pre-Summit Civil Society Meeting held on the fringes of the AU Maputo Summit from 27 June to 2 July 2003, participants expressed the feeling that the process had been 'rushed' and that far wider input from civil society should be canvassed. The Executive Council of the AU Summit subsequently decided not to adopt the statutes and requested the chairperson of the AU Commission to widen consultations with civil society before resubmitting the document to the next Executive Council meeting in March 2004. ECOSOCC could be established soon after this adoption of the statutes as, unlike a protocol, they will be effective immediately after adoption and do not require a lengthy process of legal ratification by member states.



The Constitutive Act envisages ECOSOCC as “an advisory organ composed of different social and professional groups of the Member States of the Union”². According to the draft Statutes of ECOSOCC, the Council will be composed of 150 civil society organisations representing social groups such as women, youth, the elderly and disabled persons; professional groups such as doctors, lawyers, media and business organisations; NGOs and community-based organisations; organisations of workers and employers; and traditional leaders, academia, religious and cultural associations.

Of the 150 members, there will be two from each member state; 24 transnational sectoral civil society organisations selected at regional

and continental level; and 20 representing the African diaspora. A 50% gender equality principle applies to this membership. Importantly, the draft protocol provides for a Selection Committee, made up of civil society organisations, to invite candidatures for membership to ECOSOCC and to process applications for membership. This is vital to establishing the independence of ECOSOCC, as there is a danger that if selection of membership is left up to the AU Assembly, as suggested by Article 22(2) of the Constitutive Act, they will select 'sweet-heart' organisations to offer the advice that they find most palatable.

An important consideration for ECOSOCC is the relative weight that is to be attached to the advisory function on the one hand, and that of representivity on the other. The larger the organisation and the greater the focus on representivity, the more difficult the advisory function becomes. Finding the right balance is likely to involve trial and error, and it may be prudent to review ECOSOCC after five years, as is intended with the PAP.

Launch of the Pan-African Parliament

While the establishment of ECOSOCC remains at least six months away, the PAP will be inaugurated in Addis Ababa on 15 March. The Parliament will have advisory and consultative powers only in its first five years. According to Article 2(3) of the Protocol:

The ultimate aim of the Pan-African Parliament shall be to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage. However, until such time as the Member States decide otherwise by an amendment to this Protocol:

- The Pan-African Parliament shall have consultative and advisory powers only; and
- The Members of the Pan-African Parliament shall be appointed ... [i.e. not elected].

Article 2 also states that the parliamentarians shall represent all the people of Africa. In truth, though, most will be representing the ruling parties of their member states and are unlikely to differ markedly from the policies

of their governments. The PAP can only be as democratic, representative and independent as the national parliaments from which its members are drawn. Independence cannot be built at the regional level if it does not exist at the national level.

While there is a stipulation that the five MPs chosen from each country must "reflect the diversity of political opinions in each National Parliament or deliberative organ", there are barriers to the election of opposition political parties to national parliaments in several countries, while many other legislatures are dominated by one party with an overwhelming majority of seats. Even in South Africa, the African National Congress used its majority in the National Assembly to ensure that no representative from the official opposition was elected to the PAP.

The inauguration of the PAP is likely to be a colourful and symbolic event, however, a more significant step for the AU this year will undoubtedly be the establishment of the African Court on Human and Peoples' Rights.

African Court on Human and Peoples' Rights

While civil society may be excited by the PAP and ECOSOCC, the Protocol for the Establishment of the African Court on Human and Peoples' Rights, which entered into force on 25 January 2004, has a greater potential to change state behaviour than consultative bodies. Although the Protocol has taken six long years to be ratified by just 15 member states, it has the potential to establish a powerful mechanism for the enforcement of the human rights commitments contained in the AU Constitutive Act, the African Charter on Human and Peoples' Rights and its additional protocols on the rights of women, children and refugees.

To begin with, the Court will only hear cases from the 15 states party to the Protocol, namely: Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

The AU argues that the Court will complement the role of the existing African

Commission on Human and Peoples' Rights. But the truth is that the Court is intended to make up for the many shortcomings of the Commission, which has had little impact since its establishment in 1987. Situated in the inaccessible Gambian capital of Banjul, the Commission is severely under-funded. Its activities are hardly known to the outside world, let alone to the ordinary Africans it is meant to protect. It owes the little publicity it does receive to the active participation of human rights NGOs at infrequent hearings. The Commission does not make recommendations on the communications it hears. Rather, it submits reports to the Assembly of Heads of State, who act—or more often, do not act—on these findings.

In contrast, the findings of the Human Rights Court will be binding and final. It will have the power to order compensation or reparations to victims of human rights violations. It has a wide jurisdiction over the interpretation and application of the African Charter on Human and Peoples' Rights, and "any other relevant human rights instrument ratified by the States concerned".³ Who will be allowed to bring cases before the African Court on Human and Peoples' Rights? Will ordinary people be able to represent themselves, or will only governments be heard? These questions of access will determine whether the Court will become the principal protector of human rights on the continent or another toy telephone institution.

As it stands, the Protocol establishing the Court allows only African governments and intergovernmental organisations, such as SADC or ECOWAS, as well as the African Commission on Human and Peoples' Rights, to bring cases before the Court. The original draft—written by experts in Cape Town in 1995—gave access to individual victims and enabled NGOs to represent them. This was watered down in the final version adopted by the OAU Heads of State in 1998. Article 34(6) provides for an additional declaration to be signed by a state party when it ratifies the Protocol, "accepting the competence of the court to receive cases" from NGOs and individuals. So far, Burkina Faso is the only country to have made such a declaration. In South Africa, the parliamentary committee dealing with the ratification apparently decided against

granting access to individuals and NGOs.

If the prosecution of human rights cases is left up to African governments, the Court could expect a light workload. Of the 280 cases brought before the African Commission over the years, 279 were made by individuals and NGOs, and only one by a state party against another state party. It is worth remembering, however, that the European Court of Human Rights began just as cautiously in 1959. Recognition of the right of individual (or NGO) applications to the Court was optional and could only be exercised against those states that had accepted it. It was only much later, in 1998, that this acceptance was made compulsory for all states party to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. A similar amendment to the AU protocol should be considered in the future. For now, however, the priority should be on electing independent, impartial judges for the Court, situating them in an accessible country with a free, vibrant media to publicise their activities, and finding sufficient funds for their activities.

Conclusion

The AU has set itself a full programme for 2004, with the scheduled launch of all of these new and costly institutions. There is a danger that the organisation will over-reach its already limited capacity, trying to do too much, too soon. If the PSC, the PAP, the Court on Human and Peoples' Rights and ECOSOCC could each be constituted with strong, independent representatives from the five sub-regions, remarkable progress will have been made. The true test, however, of the effective functioning of each in building peace and security, respect for human rights, democracy and accountability on the continent, may still be some time away.

Notes

1. See J Cilliers & K Sturman, The right intervention: Enforcement challenges for the African Union, *African Security Review* 11(3), 2002.
2. Constitutive Act of the African Union, 2000, Article 22.
3. Ibid, Article 3.