

CHAPTER 3

THE AFRICAN UNION AND THE RESPONSIBILITY TO PROTECT

The AU's emerging peace and security structures

The OAU became engaged in conflict resolution in Africa almost from its inception in 1963, but restricted its efforts to settling border disputes and adjudicating ideological differences resulting from the Cold War.⁴ The creation of a more robust response on the part of the OAU to different forms and phases of conflict was initiated in 1993 when African heads of state made a declaration leading to the establishment of the Mechanism for Conflict Prevention, Management and Resolution.⁵ The functions given to the mechanism were:

- to anticipate and prevent situations of potential conflict from developing into full-blown wars;
- to undertake peacemaking and peacebuilding efforts if full-blown conflicts should arise; and
- to carry out peacemaking and peacebuilding activities in post-conflict situations.

Although the establishment of the OAU conflict resolution mechanism should have moved the organisation to the centre of conflict management in Africa, the performance of the mechanism was not impressive.⁶ As Ambassador Sam Ibok, then director of the OAU's Political Affairs department, noted in 1999:

“Even though the OAU and its Charter came into existence as a continental framework for the promotion of the African collective will to ensure collective security and collective development, we have been unable in over thirty years to craft a comprehensive security architecture to drive the peace and security agenda of the Continent. This is in spite of the establishment in Cairo in 1993 of a Continental Mechanism for Conflict Prevention, Management and Resolution.”⁷

There are a number of reasons why the OAU's conflict resolution mechanisms were rendered ineffective.⁸ Foremost among these was the organisation's nearly unequivocal commitment to the principles of sovereignty and non-interference, and respect for established borders and territorial integrity. These overriding norms ensured that, with few exceptions,⁹ the OAU was not legally or operationally equipped to intervene in either inter- or intra-state conflicts. The creation of the mechanism in 1993 was an attempt to provide the OAU with the capacity for conflict management and resolution, including interference in the internal affairs of member states, if necessary. However, its establishment did not serve to change dominant views within the organisation and among African leaders of the sanctity of sovereignty and the centrality of non-intervention. Ibok noted that:

“... a strong view pervaded the OAU that conflicts within States fell within the exclusive competence of the States concerned. Arising from that basic assertion, was the equally strong view that it was not the business of the OAU, to pronounce itself on those conflicts and that the Organization certainly had no mandate to involve itself in the resolution of problems of that nature.¹⁰

As a response to the ineffectiveness of the OAU's mechanism, African leaders decided in May 2001 to devise a new security regime to operate within the framework of the nascent AU.¹¹ The AU's emerging security regime is mandated to perform a wide-range of peace and security functions. Specifically, the central tasks that have been assigned to AU's security mechanisms include:

- promoting peace, security and stability in Africa;
- anticipating and preventing conflicts;
- promoting and implementing peace-building and post-conflict reconstruction;
- coordinating and harmonising continental efforts in the prevention and combating of international terrorism;
- developing a common defence policy that can be operationalised;
- promoting and encouraging democratic practices, good governance and the rule of law, through the protection of human rights and fundamental freedoms, the sanctity of human life, and international humanitarian law.¹²

The AU has replaced the OAU's Central Organ for the Mechanism for Conflict Prevention, Management and Resolution with the Peace and Security Council (PSC), which came into being in December 2003.¹³ The PSC is made up of 15 member states, ten of which are elected to serve for two years¹⁴ and five elected to serve for three years.¹⁵ All countries serving on the PSC have equal voting rights and there are no veto rights or permanent memberships.

The PSC serves as "a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa".¹⁶ It meets regularly and recommends action to the Assembly of the Union, which is composed of heads of state and government and stands as the supreme organ of the AU, although the Assembly can provide the PSC with the authority to make decisions on its behalf.¹⁷ The PSC is supported by the chairperson of the commission, who also has official oversight of a number of key peace and security structures meant to contribute to operational conflict prevention, mediation and management. These include a Continental Early Warning System (CEWS), a Panel of the Wise, a Peace Fund, and an African Standby Force (ASF).¹⁸ The day-to-day operations of these structures will be the responsibility of the Peace and Security Department of the AU and the Conflict Management Department, formally the Conflict Management Centre. (See Annex 1 for a description of the CEWS, the Panel of the Wise and the Peace Fund.)

The AU's normative commitments to a protection agenda

The norms underpinning the AU's emerging peace and security regime resonate closely with elements of the protection framework found in *The Responsibility to Protect*. Like *The Responsibility to Protect*, the AU's Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council (herein the PSC Protocol) are pro-sovereignty doctrines: they assign high priority to the sovereignty and territorial integrity of its member states. For example, Article 4 (f) of the PSC Protocol advocates "non-interference in the internal affairs of another". In addition, Article 3 (b) of the Constitutive Act states that a core objective of the AU is to "[d]efend the sovereignty, territorial integrity and independence of its Member States".¹⁹

However, the AU's Constitutive Act, like *The Responsibility to Protect*, places important limitations on state sovereignty. It is based on the premise that sovereignty is conditional and is defined in terms of a state's willingness and capacity to provide protection to its citizens; the Constitutive Act acknowledges that the state has the principal responsibility for protecting its

citizens. If a state fails to live up to these commitments, the AU has a right to intervene for human protection purposes through multilateral military force, if necessary. Article 4 (h) of the Constitutive Act declares that the Union 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”. Like *The Responsibility to Protect*, the AU stresses that military intervention should be considered a last resort and suggests a range of non-military measures to respond to crises before calling for intervention.²⁰

In February 2003, the AU Heads of State and Government added an amendment to Article 4 (h) that extends the right to intervene to situations that pose “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”. Article 4 (j) of the Constitutive Act also indicates that a member state has the right to request intervention from the Union for the restoration of peace and security. In addition, consistent with the protection mandate and in contrast to the OAU, the AU does not require the consent of a state to intervene in its internal affairs in situations where populations are at risk. That is, the OAU's system of consensus has been abandoned. Under the AU, a collective decision on the part of a two-thirds majority of the Assembly of the Union is required for intervention purposes. Ben Kioko, Legal Advisor to the African Union, remarks:

“The addition of Article 4 (h) was adopted with the sole purpose of enabling the African Union to resolve conflicts more effectively on the continent, without ever having to sit back and do nothing because of the notion of non-interference in the internal affairs of Member States. It should be borne in mind that the Peace and Security Council was intended, and should be able to revolutionize the way conflicts are addressed on the continent.”²¹

In March 2005, the AU's Executive Council lent further credence to the AU's endorsement of *The Responsibility to Protect* principles. “The Ezulwini Consensus” constitutes *the* common African position on the UN reform. The document endorses the incorporation of *The Responsibility to Protect* principles in accordance with the report of the UN Secretary General's High Level Panel on Threats, Challenges and Change, but further stresses that the conditions and criteria proposed by the panel “should not undermine the responsibility of the international community to protect”.²²

While review of national and regional perspectives on *The Responsibility to Protect* principles in Africa is beyond the scope of this monograph and has

been competently conducted by others,²³ it is worth noting that during an informal thematic consultation of the General Assembly in April 2005, South Africa acknowledged that the UN Security Council had a responsibility to take action to protect civilians when a state is unwilling or unable to do so. The statement further endorsed the UN Secretary General's criteria for the use of force, which are closely aligned with *The Responsibility to Protect* principles. Although it is not clear how South Africa will push this thinking internationally, such a public declaration may suggest a proliferation of support for *The Responsibility to Protect* principles, at least among some key AU member states.²⁴

One important distinction between the protection mandate and the AU's emerging peace and security architecture is that the Constitutive Act and the PSC Protocol still use the language of a "right" to intervene rather than adopting the commission's language of "responsibility". However, in an important way, the norms of state sovereignty and intervention endorsed by the AU actually advance the protection mandate. The AU's provisions for intervention – "war crimes, genocide, and crimes against humanity" – have existing definitions in international law, thereby providing a clearer set of criteria governing intervention than those articulated in *The Responsibility to Protect*. It is important to note that the AU has not yet agreed on the definitions it will use for "war crimes", "crimes against humanity" and "genocide", although it is likely to adopt the definitions enshrined in the Statute of the International Criminal Court (ICC).²⁵ In addition, the AU has not yet identified the processes that will guide decision-making surrounding Articles 4 (j) and 4 (h). As Wafula Okumu notes, the AU's founding documents are not clear on the form a decision on intervention will take:

"If a [decision on intervention] is issued as a regulation or directive then it will be binding to the Member States and all measures will be taken to ensure that it is implemented within 30 days. However, if a decision is taken as a 'recommendation, resolution or opinion' then it will not be binding."²⁶

It is also important to highlight the potential implications of the February 2003 amendment to the Constitutive Act, which includes "serious threats to legitimate order" as grounds for intervention. This amendment actually sets a lower threshold for intervention than those outlined in *The Responsibility to Protect*. Yet, as Sturman and Baimu stress, the amendment is inconsistent with the rest of the Constitutive Act inasmuch as it could be interpreted to prioritise regime security over human security. They write:

“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 as a step backward in the efforts to secure better protection of individual rights in Africa.”²⁷

Unlike the Constitutive Act's other criteria for intervention – war crimes, crimes against humanity, and genocide – there exists no clear definition of what constitutes a “serious threat to legitimate order”. The amendment could be invoked according to the political whims of certain African leaders for regime survival or regime change, rather than as a way to protect the aspirations of the people these regimes (purport to) govern. Moreover, if not properly delimited, the concept of “threats to legitimate order” is sufficiently elastic to encompass even peaceful protests for more accountable government as grounds for intervention on the part of the AU. While this interpretation of the amendment represents the worst-case scenario, it underscores the need for further debate in Africa and internationally regarding the implications of these revised parameters for intervention.

However, despite these ambiguities and uncertainties, the AU's Constitutive Act does stand as the first international treaty to identify a right to intervene in a state for humanitarian objectives in cases other than genocide. The AU's revitalised peace and security commitments are intended to break with the OAU's tradition of “non-interference” to build a new culture of “non-indifference”. Consistent with the continuum of protection articulated in the report, the founding documents of the AU and emerging African-wide frameworks, including the Common Africa Defence and Security Policy (CADSP) of the AU and the New Partnership for African Development (NEPAD), emphasise the relationship between development and security.

In Sirte, Libya, in February 2004, AU member states adopted the Solemn Declaration on a Common Africa Defence and Security Policy (CADSP) of the AU. The CADSP Declaration notes that development is a necessary condition for peace and stability and stresses that intra-state conflict prevention and resolution requires a renewed emphasis on human security on the part of the AU and its member states. The definition of human security adopted in the declaration is a broad one and encompasses a wide range of development priorities. In order to implement the underlying principles of the CADSP, the AU Commission has also taken initial steps to develop a strategy for post-conflict reconstruction.²⁸ The AU has formed a Ministerial Committee on Post-Conflict Reconstruction in Sudan led by South Africa to identify reconstruction priorities following the signing of the Comprehensive

Peace Agreement (CPA). The AU Commission will also host a government expert meeting in June 2005 to devise a strategy for the commission's future engagement in post-conflict reconstruction in Africa.²⁹

The AU has developed various commissions with corresponding departments to deliver on a broad peace, security and development agenda. For instance, the AU's Political Affairs Commission and its Political Affairs Department deal with a range of issues that fit within a conflict prevention mandate, and plan on having consolidated programs on human rights, democracy and election monitoring, humanitarian affairs, refugees and displaced persons. The African Peer Review Mechanism has been designed to promote structural conflict prevention through good governance. In addition, NEPAD, which may eventually become a programme of the AU, sets out a series of peace and security priorities to respond to different stages of conflict that correspond with the report's prevention-reaction-rebuilding framework.³⁰

Implementing a protection agenda: The African Standby Force

In order to implement elements of its invigorated peace and security agenda, the Protocol Relating to the Establishment of the Peace and Security Council of the AU also calls for the development of a rapid reaction capacity, the African Standby Force (ASF), to be developed in two phases by 2010. As Cedric de Coning notes, the use of the term "force" is somewhat inaccurate, given that most of the staff, logistics and equipment for an ASF mission will draw from regionally based resources.³¹ The AU actually envisions creating a standby system that will build on the military capabilities of African regional organisations. According to the AU's Policy Framework for the Establishment of the African Standby Force presented to the third meeting of the African Chiefs of Defence Staff in May 2003, the ASF will consist of a system of five regionally managed multidisciplinary contingents comprising 3,000–4,000 troops, between 300 and 500 military observers, police units, and civilian specialists on standby in their countries of origin.³² These regional brigades will be deployed under AU mandates and placed under AU or UN operational control, as applicable.

The ASF will be supported by a Military Staff Committee comprising senior military officers of the Members of the Peace and Security Council and will be mandated to perform a variety of functions in responding to various conflict scenarios. In his address to the African Chiefs of Defence Staff in January 2004, the chairperson of the AU Commission, HE President Alpha Oumar Konaré, stressed that the AU must be capable of deploying African

missions not only for peacekeeping but also for peace enforcement and post-conflict activities.³³ Accordingly, the ASF will undertake observation and monitoring, preventive deployment, peacekeeping and multi-dimensional peacekeeping, intervention in grave circumstances like genocide, and engagement in peacebuilding tasks, including post-conflict disarmament and demobilisation. The ASF will also undertake tasks that fit within a protection mandate. Specifically, the force may adopt standard operating procedures relating to “[t]he protection of vulnerable groups, namely women, children and the aged, in armed conflict”.³⁴ (See Annex 2 for a discussion of the ASF development timeline and conflict mission scenarios.)

The initiative to establish the ASF is not the first attempt to set up a continent-wide rapid reaction arrangement. African leaders mooted the possibility of building a continental military capacity to operate within the framework of the OAU's mechanism for conflict prevention, management and resolution when it was inaugurated in 1993.³⁷ At that time, however, member states were not able to agree on the size, structure, mandate and financing of such a force. While a comprehensive overview of the political dynamics

Box 1 The African Union and the regional brigades

The AU has left it to the regional economic communities (RECs) to determine if the regional brigades will map the membership of the communities. Some progress has been made toward the formation of the brigades. ECOWAS has approved a military vision and strategy, and a force structure, and a mission planning and management cell has been developed.³⁵ In February 2004 the East African Chiefs of Defence Staff adopted a policy framework to establish the East African Brigade (EASBRIG) “as part of the African Standby Force (ASF)” and reviewed a draft protocol under the auspices of the Inter-Governmental Authority on Development (IGAD).³⁶ The draft policy framework and budget of US\$2.5 million for EASBRIG was adopted by IGAD (Inter-Governmental Authority on Development) Heads of States and Government on 11 April 2005 in Addis Ababa. The planning headquarters for the 5,500-strong rapid reaction force will be in Kenya while its logistics and brigade headquarters will be in Addis Ababa. A meeting was held in Lesotho in April 2004 of the Southern Africa Development Community's (SADC) Interstate Defence and Security Sub-Committee (ISDSC) operational staffs to provide recommendations for the SADC Chiefs of Defence Staff regarding the creation of a southern African brigade. Since that meeting, military planners have completed the initial planning process for establishing a southern-Africa-based standby force. Between July 2003 and December 2004, the Economic Community of Central African States (ECCAS) held several meetings on developing a Central African standby brigade and reached agreement on the structure of regional headquarters of the PLANELM and an ECCAS standby brigade. Information on the establishment of a brigade in northern Africa was not available at the time of writing.

behind the decision to build an ASF is beyond the scope of this paper, it is worth mentioning that a number of key factors converged to compel African decision-makers to build a pan-African conflict management capacity with rapid reaction capabilities. Central to these was a growing perception of the UN's inability and unwillingness to engage in Africa effectively and impartially. Ambassador Sam B Ibok writes:

“... the UN has a global responsibility for the maintenance of International Peace and Security. In spite of this, genocide took place in Rwanda. It took place in Rwanda because Africans had to wait for more than six months for the deployment of UN peacekeeping forces. The same thing happened in Somalia, in the DRC, in Burundi, in Liberia, and in Côte d'Ivoire.”³⁸

The UN's failures in the face of some of Africa's most profound security challenges reinforced a desire for greater autonomy and an “African solutions to African problems” approach to peace and security on the continent.³⁹ As Bruce Jones writes, “[i]t is not entirely un-coincidental that the two places where we have seen the most development of regional options – Europe and Africa – have been the site of the UN's greatest failures in the 1990s ...”.⁴⁰ Yet at the same time African decision-makers acknowledged the tension between the need to develop indigenous conflict management capacities, and the imperative of not legitimising further retrenchment on the part of the UN in Africa. Accordingly, the peace and security architecture envisioned in the PSC Protocol builds on Africa's own resources, while continuing to acknowledge the UN's responsibilities in Africa. The PSC Protocol places the AU within a robust security scheme comprised of African regional arrangements and mechanisms, the UN and other key members of the international community.