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Shared Responsibility for African Union Operations

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Shared Responsibility for African Union Operations

Ademola Abass[*]

1. Introduction

The Africa Union (AU or Union) often conducts its military operations in collaboration with other actors, such as African subregional organisations, and the United Nations. Participation by several parties in AU operations enhances the nominal and operational legitimacy of the mission, but it also expands the scope for committing internationally wrongful acts. The responsibility of the AU vis-à-vis joint actors in these operations will vary according to the extent and nature of involvement, and according to whether an operation is carried out by the AU and other organisations, or by member states of the AU in their own rights.

Central to the determination of shared responsibility[1] for AU operations is the legal personality of each participant, which enables them to act independently and be capable of attracting legal consequences in their own right. Whereas the legal personality of AU member states is implied in their statehood under international law, international organisations' legal personality is not inherent. It is therefore important to first determine the legal personality of the AU (section 2), in order to assess whether it is able to attract responsibility in its own right. This is followed by a discussion of some factual circumstances that have given rise to, or which could hypothetically give rise to, the responsibility of the AU jointly or/and severally with other actors (section 3). Section 4 discusses the relevant primary rules, the breach of which engages responsibility, while section 5 examines the applicable secondary rules. Section 6

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[1] The term 'shared responsibility' as used in this contribution refers to situations whereby multiple actors are responsible for their contribution to a single harmful outcome, See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359; and Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1.

discusses the processes, if any, for determining measures to be taken in respect of the responsibility by the concerned parties.

It is important to bear in mind at the outset that the discussion in many parts of this contribution is largely hypothetical. No 'factual situation' in any of the AU-led operations has so far actually been legally challenged, or has otherwise been determined to give rise to the organisation's or any of its joint actors' responsibility. Legal challenges of AU-led operations are currently nonexistent. The discussion of the primary and secondary rules as applicable to the AU is complicated by the fact that the Union rarely engages in any legal rationalisation of its actions under, for instance, *jus ad bellum* or *jus in bello* rules. Nor does it publicly express its stand on several secondary rules governing the attribution of responsibility. The AU has also not categorically expressed any view about the international rules concerning the apportioning of responsibility for international wrongful acts. Thus, while the primary rules governing AU-led operations, such as the *ad bellum* regime of its Constitutive Act,[2] are capable of objective appreciation, given that these rules merely prescribe obligations which warrant international wrongful acts, analysis of the rules governing the responsibility of the AU in its operations, is inevitably anecdotal absent real scenarios.

2. The legal personality of the African Union

The Constitutive Act of the Africa Union (AU Act or Constitutive Act)[3] is silent on the legal personality of the organisation. Writers have often assumed the organisation's legal personality[4] or have simply implied it from the fact that the AU succeeded to the Organization of African Unity (OAU).[5] The OAU Charter,[6] however, does not provide

[2] See n. 3.
[3] Constitutive Act of the African Union, Lomé, 11 July 2000, in force 26 May 2001, 2158 UNTS 3 (AU Act or Constitutive Act).
[4] I. Brownlie, *Principles of Public International Law*, 7th edn (Oxford University Press, 2008), 678; T. Murithi, *The African Union: Pan Africanism, Peacebuilding and Development* (Aldershot: Ashgate Publishing, 2005).
[5] K.D. Magliveras and G.J. Naldi, 'The African Union?A New Dawn for Africa?' (2002) 51 ICLQ 415, 415.
[6] Charter of the Organization of African Unity, Addis Ababa, 25 May 1963, in force 13 September 1963, 479 UNTS 39 (OAU Charter).

for the legal personality of the latter, making it somewhat misleading to perfunctorily derive the AU's personality merely from its succeeding to the OAU.

That said, there are two legal authorities for establishing the international legal personality of the AU. First, the General Convention on the Privileges and Immunities of the Organization of African Unity (General Convention), adopted two years after the OAU Charter entered into force, provides explicitly for the organisation's legal personality.[7] According to Article 1 of the General Convention, '[t]he Organization of African Unity shall possess juridical personality and shall have the capacity: (a) To enter into contracts including rights to acquire and dispose of movable and immovable property; (b) To institute legal proceedings.'

The succession of one international organisation to another implies not only the subrogation of the former to the latter's powers and functions, but also the transfer to the subsequent organisation of the legal personality of its predecessor. Article 33 of the AU Act preserves the validity of the OAU Charter for a period of one year in order to enable the defunct organisation to devolve its assets on the AU. Following the dissolution of the OAU, several of its member states deposited instruments of ratification of the General Convention with the AU Secretariat. This step manifests that those members regard that the AU has succeeded to the OAU's legal personality after the official dissolution of the OAU.[8]

Secondly, aside from the constituent authority of the General Convention, certain objective criteria exist under general international law, which, when fulfilled by an organisation, evidence international legal personality. Ascertaining the legal personality of the United Nations (UN) in the *Reparation* case, the International Court of Justice (ICJ or Court) said that the UN Charter[9]

> has given it [the UN] special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it … and to accept and carry out the decisions of the Security Council; by authorizing the general

[7] General Convention on the Privileges and Immunities of the Organization of African Unity, Accra, 25 October 1965, in force 25 October 1965, 1000 UNTS 393 (General Convention).
[8] Those ratifications are Mozambique (2003); Comoros (2004); and Gambia (2009). The OAU was officially replaced by the AU with the Durban Declaration; AU (Assembly), 'The Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union', Durban, South-Africa, 9-10 July 2002, 1st Extraordinary Session, AU Doc. ASS/AU/Decl. 2(1).
[9] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).

> Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusions of agreements between the Organization and its Members. Practice – in particular the conclusion of conventions to which the Organization is a party – has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations.[10]

The AU possesses all the attributes enumerated in this statement. It is an organisation set up by a treaty, which endows it with specific powers and tasks.

It is particularly noteworthy that the Court emphasises that the UN (and by necessary implication all comparable international organisations), occupies a position in certain respects *in detachment* from its members. This implies that international organisations possess a separate legal personality from their member states. In *Femi Falana* v. *African Union*,[11] the complainant, a Nigerian human rights lawyer, argued before the African Court on Human and Peoples' Rights (ACtHPR or Court), that the failure of the Nigerian government to deposit the declaration required under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol)[12] denied him access to the ACtHPR. He brought an action against the African Union on the ground that the Union 'enacted and adopted the Charter and the Protocol' and can therefore be 'sued as a corporate community on behalf of its Member States'.[13] In issue here was whether the AU, by adopting the concerned Protocol, acted on behalf of its member states so that the responsibility of those member states under the Protocol can be imputed to the organisation.

The Court rejected Falana's argument, holding, instead, that while treaties, including the Protocol, are formally adopted by the Assembly of the Heads of State and Government of the AU 'their signature and ratification is still the exclusive prerogative of its Member States … [T]he mere fact that the Protocol has been adopted by the Assembly of Heads of State and Government does not establish that the African Union is a party to the Protocol and therefore can be sued under it'.[14] In paragraph 68 of its judgment,

[10] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 178-179 (*Reparation*).
[11] *Femi Falana* v. *African Union*, Application No. 001/2011 (ACtHPR, 26 June 2012).
[12] See n. 59.
[13] *Femi Falana*, n. 11.
[14] Ibid., para. 67.

the Court said that 'the African union has a legal personality separate from its Member States'.

3. Factual scenarios

Questions concerning the responsibility of the AU for international unlawful acts can arise from a wide range of activities that the Union engages in as an international organisation. As a collective security organisation, interventions by the AU in its member states, either through deployment of military operations or the imposition of sanctions, will most likely constitute the bulk of cases attracting responsibility, incurred individually or severally with other actors, for internationally unlawful acts. However, the non taking of measures prescribed by the AU legal instruments and/or other international instruments that members of the Union may be party to may equally raise issues of shared responsibility.

The AU is not party to some international legal instruments, that may however apply to its member states, for example the UN Charter, and so therefore will not individually incur any responsibility deriving therefrom. But the fact that the Union may act jointly with its member states, or with another juristic personality , such as the United Nations (UN) or a Regional Economic Community (REC), implies that the avoidance of individual liability in such circumstances does not necessarily foreclose its joint or several liability with its member states or the juristic person. Such responsibility can arise from legal regimes that apply to international organisations in their own right, such as the Articles on Responsibility of International Organizations (ARIO).[15]

Contestations about the shared responsibility of the AU-led operations can thus arise from: a) situations where member states of the Union *inter se* or the Union itself actively takes a military operation or other forms of action which result in a harmful outcome for the target state; b) instances where the AU and/or its co-actors fail to take prescribed measures towards preventing disasters; and c) instances where an organisation jointly acting with the AU takes action which may engage the responsibility of that party and the AU as well.

[15] See n. 42, and generally section 5.

3.1. Instances where the member states of the AU inter se or the AU take actions with harmful outcomes

The AU was established primarily to maintain peace and security amongst its member states. Since its inauguration in 2002, the organisation has been involved in several military operations, in Comoros, Burundi, Darfur, Somalia, and in the Democratic Republic of the Congo (DRC). Although the AU has not formally or informally been charged by any of its member states against which it has acted as having committed internationally wrongful acts, it could hypothetically be liable in respect of actions taken by some of the joint actors, especially its member states. Where individual member states of the AU participating in AU-led military operations are found to engage in practices that occasion harmful outcomes, the AU may share that responsibility. The question that will arise is whether the responsibility of the AU for such obligations can be separated from that of its member states.

One specific example concerns the relations between Kenya and the AU. In February 2012, Kenya joined the African Union Mission in Somalia (AMISOM), although prior to this date its forces had operated in that country on a national basis.[16] While the Kenyan air and naval forces' 'indiscriminate' bombing and shelling of populated areas, leading to the death and wounding of civilians and livestock in Kismayo in August 2011, does not ipso facto engage the AU's responsibility, the explicit adoption of that action by the AU following Kenya becoming part of AMISOM in 2012 raises the possibility of the AU sharing the responsibility for the Kenyan action.[17]

3.2 Instances where the AU's omission contributed to a harmful outcome

The failure of the AU to take decisive action in response to the mass violation of human rights in Darfur at the outbreak of a fresh crisis in 2004/2005 could potentially engage the responsibility of the Union. The massacre of thousands of civilians by the government-backed Janjaweed rebels, as well as the rebels of the Justice and Equality Movement (JEM), fighting against the Government of the Sudan (GoS) in Darfur arguably could have been prevented, had the AU taken action. Similarly, the non-

[16] See 'KDF Denies Committing Atrocities on Ethnic Somalis', *The New Times Rwanda*, 7 May 2012.
[17] Human Rights Watch, 'World Report 2013 – Somalia', available at www.hrw.org.

response of the Union to the civil unrest in Kenya in 2008, following the disputed electoral results, and to the situation in Ivory Coast in 2010/2011 in similar circumstances, both fall under the category of omissions that could lead to the responsibility of the AU. However, this scenario does raise the questions, first, whether the AU is bound to a positive obligation to provide protection and; second, whether such responsibility would rest only with the AU or could be shared with member states. Both questions are discussed below, in respectively section 4 and 5.

3.3 Instances where the action or omission in a joint operation involving AU and other organisations lead to a harmful outcome

The AU operates often with other international organisations, such as African RECs or the UN. Examples of such joint operations include the African Union/United Nations Hybrid Operation in Darfur (UNAMID), authorised by the UN Security Council as a peacekeeping mission in Darfur.[18] The scenarios under this category differ from that dealt with in section 3.1, which concerns situations involving the AU and its member states, or in section 3.2, which pertains to situations involving the AU's sole operations.

In the current situation, whereby the AU and other organisations engage in a joint operation such as UNAMID, it is possible for shared responsibility to arise in cases of breaches of international obligations by UNAMID, given that the operation is composed by the AU and foreign partners under UN auspices, with the mission having a unified command and control. As will be seen in section 4 below, however, a shared responsibility of the AU when acting with another organisation, such as the UN, will not be automatic but depends on a range of circumstances. Similarly, the AU may share responsibility for breaches of international obligations arising from activities of subregional organisations, such as the Economic Community of West African States (ECOWAS), in respect of a conflict or situation in which the AU is involved. While decisions for such harmful actions often originate from the concerned subregional organisation, the fact that the latter collaborate with the AU and acts jointly with it can make it difficult to separate the conduct of one organisation form the other. An example

[18] UN Doc. S/RES/1769 (2007).

of this was the AU/ECOWAS involvement in Cote d' Ivoire which will be discussed later.

4. Primary rules

Several international legal regimes govern the various factual situations described above. As a regional collective security organisation, the AU is subject to the law on use of force (*jus ad bellum*) under the UN Charter and general international law, just as its conduct during its intervention in a crisis is subject to the customary international law regulating the conduct of war (*jus in bello*). The *jus ad bellum* regime applies to situations in which the AU deploys an enforcement mission (as with Somalia), while *jus in bello* applies to all its interventions, regardless of whether these are enforcement or peacekeeping operations as with Darfur. The *jus ad bellum* and the *jus in bello* applicable to operations involving the AU will be discussed below in section 4.1 and 4.2, in particular from the perspective of whether and how it can provide a basis for shared responsibility.

In addition, the following comments can be made. As a regional organisation, the AU falls under the regulation of Chapter VIII of the UN Charter. As such, its activities are subject to the requirement of Security Council authorisation, where it undertakes enforcement action (Article 53), although where it pursues non-enforcement action in respect of its members' disputes, there is no such requirement (Article 52). In any case, these requirements are unlikely to result in, or are unlikely relevant to, shared responsibility. Examples of the latter situation include where the AU imposes economic sanctions on its member states, or where it suspends the participation of a member state in its processes for violation of AU norms, as the Unconstitutional Change of Government principle prescribed in the African Charter on Democracy, Elections and Governance (ACDEG).[19]

Where the AU operates in the peacekeeping mode, its activities are subjected to the Status of Force Agreement (SOFA) concluded with the host state, as was the case with the UNAMID, in addition to the general international law governing peacekeeping

[19] African Charter on Democracy, Elections and Governance, Addis Ababa, 30 January 2007, in force 15 February 2012 (ACDEG), available at www.achpr.org.

operations.[20] While, for instance, general international law does not govern the prosecution of AU peacekeeping forces which commit crimes on the territory of a member state, such issues are usually dealt with in the SOFA.[21]

Aside from the UN Charter, customary international law, and bilateral agreements such as SOFAs, the AU is also regulated by its own instruments. The Constitutive Act of the African Union contains, in Article 4(h) and 4(j), provisions permitting the Union to take enforcement action, upon the crossing of specified thresholds, and to conduct peacekeeping operations. In 2005, the AU adopted the Non-Aggression and Common Defence Pact (AU NACDP),[22] which is designed to strengthen the Common African Security and Defence Policy adopted in 2004.[23] Although these two instruments, especially the NACDP, are geared more towards securing the AU and its members against external aggression, in the tradition of collective defence alliances such as the North Atlantic Treaty Organization (NATO), they form a crucial part of the law regulating the use of force by the AU. The relevance of these instruments for shared responsibility is discussed below in section 5.1.

4.1 AU Operations and jus ad bellum

The deployment of the AU forces to the majority of operations it has participated in since its inception was done mostly with the consent of the affected member state, with the exception of Somalia, where the organisation deployed forces without such consent due to the absence of an effective government. The legal implication of the AU acting in the peacekeeping mode, either under Article 52 of the UN Charter or under Article 4(j) of its Constitutive Act, is that the Union will not generally be found to have violated the provisions of Article 53(1) of the UN Charter or Article 4(h) of the AU Act,

[20] See Agreement between the United Nations and the African Union and the Government of the Sudan concerning the status of the African Union/United Nations Hybrid Operation in Darfur, 9 February 2008 (Status of Force Agreement), available at http://unamid.unmissions.org/Default.aspx?tabid=11005&language=en-US.
[21] It should be pointed out that SOFAs generally do not deal with matters of shared responsibility. The one governing UNAMID does not, even if it contains some provisions about the prosecution of members of UNAMID who may commit crimes while serving as members of UNAMID. See Status of Force Agreement, ibid.
[22] The African Union Non-Aggression and Common Defence Pact, Abuja, 31 January 2005, in force 18 December 2009 (AU NACDP).
[23] Solemn Declaration on a Common African Defence and Security Policy, Sirte, 27-28 February 2004.

since peacekeeping operations are generally excluded from the requirement of Security Council authorisation.

Instances may occur, however, even if they are rare, where the AU may threaten to use force against its member states in order to enforce compliance with its legal regimes, especially Article 4(h) of the AU Act. Under this Article, the AU is entitled to intervene in its member states when war crimes, crimes against humanity or genocide have been committed. In 2003, the Union adopted a protocol that added a fourth ground – the threat to a legitimate order – as a basis for its intervention.[24]

With regard to *jus ad bellum*, the responsibility of the AU can be engaged in two ways: first, where the AU unlawfully threatens to use or uses force against a member state; and second, where an AU joint actor, whether individual state(s) or another international organisation, authors such a threat or uses force. If an AU member state participating in an AU-led operation *threatens* to use force against a member state, that state will be in breach of Article 2(4) of the UN Charter primarily because the prohibition contained in that Article applies to not only the actual use of force, but also the 'threat' of force. Thus, should the initiating party be found responsible for a breach of the threat of force, the AU may share that responsibility, since the operation is under the auspices of the AU even though the specific threat of force originates from its member state.

Where the AU threatens to use force against its member states, if the threat is illegal, then the AU member states are in breach of the *jus ad bellum* rule in Article 2(4) of the UN Charter, and the fact that it was the AU that issued the threat is irrelevant. It is settled in international law that a state cannot avoid its international obligations by operating under the auspices of an international organisation. However, the situation is different as regards the AU's liability for such a threat. The AU is not a state party to the UN Charter and cannot, as such, ordinarily be bound by the Charter provisions, which normally govern the legality of the threat or use of force by the concerned AU member state. Thus, if the threat of force by the AU is illegal, the responsibility of the AU for such an internationally unlawful act can only arise by virtue of Chapter VIII of the UN Charter. The legality of the AU's threat of force will therefore be determined in

[24] Protocol on Amendments to the Constitutive Act of the African Union, Maputo, 11 July 2003, available at www.au.int/en/sites/default/files/treaties/7785-file-protocol_amendments_constitutive_act_of_the_african_union.pdf.

accordance with whether the use of force by the AU in that situation will or will not be consistent with Chapter VIII requirements. The *jus ad bellum* obligation incurred by AU member states under Article 2(4) of the UN Charter does not percolate to the organisation.

The inapplicability of the *jus ad bellum* rule of Article 2(4) UN Charter to the AU does not necessarily imply that the AU will escape the scrutiny of international law outside Chapter VIII. For a start, an organisation is bound by the obligations it incurs under its own instruments. Just as Article 2(7) of the UN Charter applies to the UN as an organisation and regulates its behaviour vis-à-vis its member states, so also do certain provisions of the AU Act and NACDP apply to the AU. For instance, Article 4(g) of the AU Act forbids the AU to interfere in its member states' internal affairs. Mounting unlawful threats against a member state certainly constitutes a breach of this provision to the extent of it being an interference in the member's internal affair. Such a threat by the AU will be unlawful, for instance, if it is done without the authority of the UN Security Council, given the requirement of Article 53 of the UN Charter. While it is interesting to inquire whether the AU acting in violation of its own 'internal rules' could provide a ground for shared responsibility vis-à-vis third parties, this is a rather complex issue that cannot be appropriately dealt with in this chapter.

Article 1(c) paragraph i-ix of the AU NACDP prohibits a series of actors, including states or groups of states (which certainly includes AU member states) from taking measures such as aggression, espionage, and so on against an AU member state. Where any of the activities contained in this list is unlawfully taken against an AU member state by one or several AU states, those states are clearly responsible. However, whether the AU is liable depends on whether the AU supports or consents to such a measure by its member state. If this is found to be the case, then the AU could share the responsibility, given that the organisation acts on a consensus basis. Otherwise, an absurd situation may arise whereby an organisation is allowed to escape responsibility for acts it participates in on the basis that it was done by its member states. As one commentator has argued in respect of NATO's liability vis-à-vis its member states, 'NATO is a product of its Member States. As NATO explained in its comments to the ILC, it operates on the basis of consensus decision-making. To sanction NATO separately from the countries carrying out the military strikes is to participate in an act

of legal fiction.'[25] The AU operates on consensus as well. Consequently, an illegal threat of force by the AU, while creating a liability for AU member states under the UN Charter and the AU Act, constitutes liability for the AU under its own legal regime such as the NACDP.

Aside from being bound under its own legal regimes, the AU also could incur responsibility for breach of *jus ad bellum* rules under customary international law.[26] One basis for such responsibility was argued by Elihu Lauterpacht in 1993, in that a *jus cogens* rule, of which the prohibition of force in Article 2(4) of the UN Charter constitutes a prime example, limits the authority of the Security Council, and must prevail over the latter's resolutions.[27] As will be seen in the section dealing with the *jus in bello* rules, there is a strong currency of legal opinions to the effect that international organisations are bound by human rights obligations especially that may arise in general international law.

During the Cote d' Ivoire crisis in 2010/2011, Laurent Gbagbo's government, which was believed to have lost the election conducted in that country in 2010, filed an action against ECOWAS' recognition and declaration that Alasan Qattara had won the election. ECOWAS had threatened to use 'legitimate force' if Gbagbo would not relinquish his 10-year grip on power.[28] Legitimate force in this instance could mean either force sanctioned by the Security Council or ECOWAS itself, but if ECOWAS precedent in Liberia, Sierra Leone and Togo should serve as a guide, then the threatened force was more likely to be one authorised outside the Chapter VIII framework.

Whether Ivory Coast could legally sue ECOWAS, as an organisation, and not its individual member states as Yugoslavia did against ten NATO member states before the ICJ in relation to the NATO attack on Serbia and Montenegro in 1999, is debatable and goes beyond the remit of this contribution. However, the AU may share in ECOWAS' responsibility for threatening force against Ivory Coast under the special regime of the

[25] K.E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 YJIL 1, at 3.
[26] See J.J. Paust, 'The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity' (2010) 51 Harv ILJO 1.
[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, (Separate Opinion of Judge Elihu Lauterpacht), paras. 99, 101-102.
[28] See D. Smith and P. Bax, 'African leaders threaten Gbagbo with military action in Ivory Coast', *The Guardian*, 28 December 2010.

African Peace and Security Architecture (APSA).[29] ECOWAS' threat to use force against Ivory Coast no doubt was a sole decision of ECOWAS. Under APSA, however, RECs such as ECOWAS constitute the building blocs of APSA with the AU at its pinnacle. The implication of this system is that both the AU and RECs form either side of the peace and security continuum in Africa, and decisions by a REC concerning peace and security will, under specific circumstances, constitute decisions by the African Union. This is the case because the approval of the latter may be easily implied, especially if there has been coordination between the AU and the concerned REC's activities in the run up to the act constituting the breach. This is especially so where both organisations operate in the same conflict, as in Ivory Coast. It follows therefore that the holistic nature of APSA makes it illogical to seek to separate the responsibility of the AU from that of a subregional organisation where international wrongful acts occur.

It is not invariably the case that the AU will always share the responsibility for every decision of a REC that breaches an international obligation. Where, for instance, an ECOWAS member state decides on its own to use force, it will be far-fetched to argue that this engages the responsibility of the AU, even if ECOWAS' own responsibility vis-à-vis the concerned member states is established by virtue of the consensual decision-making process of ECOWAS. Also where there are explicit disagreements between a REC and the AU about the modality for intervening in a situation, as was the case in relation to the situation in Togo after the death of President Gnassingbe Eyadema in 1995, there can be no presumption of shared responsibility for an internationally unlawful act arising therefrom. In the Togo situation, ECOWAS had preferred to use a combination of sanctions and force to prevent the son of the deceased president, Faure Eyadema, from unconstitutionally taking over the reign of government in Togo. In contrast, the AU had opted for a pacific method of resolving the conflict. Had ECOWAS' action been found to be in breach of Chapter VIII of the UN Charter, such a breach would certainly not implicate the AU or its member states.

[29] Article 16 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Durban, 9 July 2002, in force 26 December 2003, available at www.refworld.org (PSC Protocol), provides that: 'The Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.'

4.2 AU Operations and jus in bello

Irrespective of whether the AU intervenes through enforcement action or peacekeeping operations, the organisation's conduct is subject to international legal regimes designed to protect human rights and to ensure the sanctity of humanitarian laws in all situations.

Peacekeeping or peace enforcement activities by states are governed by various international legal regimes, such as the four 1949 Geneva Conventions on the laws of War,[30] where such states are signatories to the Conventions, and where they are not, by such aspects of those legal regimes that may constitute customary international law. For international organisations, however, the issue is not as straightforward, partly because they are not parties to those Conventions, and partly because customary international law does not apply to international organisations with the automaticity as it does to states. For starters, there is considerable lack of practice to establish that international organisations regard themselves as being bound by customary international law. The question is on what basis can customary international law governing *jus in bello* apply to the African Union's peace and security operations?

There are at least two fundamental bases upon which to ground the applicability of customary international law regulating *jus in bello* to the African Union. Namely, first the constitutional nature of AU's mandate to protect human rights; and second the *jus cogens* status of certain norms of the AU Act and general international law, discussed below.

Article 3(h) of the Constitutive Act of the African Union obligates the organisation to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. This obligation mirrors the one imposed by the UN Charter on the UN in which, '[w]e the people of the United Nations determined to save succeeding generations from the scourge of war … reaffirm faith in fundamental human rights … [and to] establish

[30] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135; and Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (together 1949 Geneva Conventions). See also Chapter 23 in this volume, R. Murphy and S. Wills, 'United Nations Peacekeeping Operations', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.'

The obligation contained in the AU Act stated above has been echoed by other instruments of the organisation, including the Protocol Establishing the Peace and Security Council of the African Union (PSC Protocol) which, in Article 3, obligates the PSC to 'protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, *as part of efforts for preventing conflicts*'.[31] Article 4(c) of the PSC Protocol reiterates that the AU 'shall respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law'.

It is poignant that the PSC Protocol, unlike the provisions of Article 3(h) of the AU Act, specifically links the obligation to respect human rights and preserve the sanctity of humanitarian law to AU's efforts relating to conflict prevention. This particularity may be due to the fact that it is the PSC that is responsible for deciding which operations and by what means the AU is to engage in, of course, with the approval of the Assembly of Heads of State and Government, the highest organ of the AU. Regardless, linking human rights and humanitarian law with conflict prevention is perhaps the clearest indication that the PSC regards *jus in bello* obligations of the Union as deriving from customary international law. Concerning the responsibility of individual AU member states for violations of *jus in bello*, there is no question that the membership of an international organisation does not dissolve their international obligations to respect human rights and humanitarian law, or any other international obligations for that matter, nor absolves them from fulfilling such obligations.

International law has recognised, at least since the 1970s, that a certain category of human rights obligations are not just a contractual agreement between a state that ratifies a treaty and its own peoples, but is of interest to the whole of humanity. The principle is now well grounded in general international law, as well as that the protection of *obligatio erga omnes* applies between a state and the rest of the world. In the *Barcelona Traction* case,[32] the ICJ held that

[31] PSC Protocol, n. 29 (emphasis added).
[32] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second Phase, ICJ Reports 1970, 3, at paras. 33, 34 (*Barcelona Traction*).

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

The Court more recently restated this view in the *Wall* advisory opinion, where it said, concerning common Article 1 of the 1949 Geneva Conventions, that '[i]t follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.'[33]

Discussing the applicability of *jus in bello* rules to the UN,[34] Dannenbaum argues that the organisation is legally bound by human rights standards, because '[i]t surely is a consequence of the UN's legal personality at international law that it is bound by customary international law',[35] and the UN 'is constitutionally mandated to promote the advancement of human rights … pursuant to Article 1(3) of the U.N. Charter'.[36] It is indeed a constitutive mandate of the UN, according to Article 55(c) of the UN Charter, that the UN 'shall promote … universal respect for, and observance of, human rights and fundamental freedoms for all', a provision that many authoritative scholars agree necessarily incorporates customary human rights by reference.[37] Indeed, the UN Security Council's sanction regime, authorised by Resolution 1267 (1999), has been challenged before various international fora on the basis of its non-compliance with human rights obligations.[38]

In its advisory opinion on *South West Africa*, the ICJ stated 'a denial of fundamental

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[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at 119-200, para. 158.
[34] The focus on the UN in this section is warranted by the involvement of the organisation in joint operations with the AU as is typified by the UNAMID example discussed above.
[35] T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harv ILJ 113, at 134-139, quote at 135.
[36] Ibid., quote from 136, 166.
[37] See M.S. McDougal, H.D. Laswell and L.-C. Chen, 'Human Rights and World Public Order: Human Rights in Comprehensive Context' (1977-1978) 72(2) NULR 227; J.J. Paust, J.M. Van Dyke, L.A. Malone, *International Law and Litigation in the U.S.*, 3rd edn (St. Paul, Minnesota: West, 2009), 52.
[38] K.E. Boon, 'The Law of Responsibility: A Response to Fragmentation?' (2011) PMGGBDLJ (symposium) 395, at 398; T. Biersteker and S. Eckert, 'Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"', October 2009, pp. 7-8, available at www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf.

human rights is a flagrant violation of the purposes and principles of the Charter'.[39] Though this pronouncement mainly concerned the obligations of states, it has been argued that it 'must also necessarily pertain with respect to violative conduct engaged in by the U.N., its entities and personnel. In particular, no U.N. entity can have a lawful purpose to deny human rights, as their violation would be a violation of the Charter'.[40] It is thus clear from the ICJ advisory opinion that irrespective of whether the concerned party is a state or an international organisation, the norms of human rights apply to all with equal force.

The AU's *jus in bello* obligations could also arise through the application of *jus cogens* rules in customary international law. Undoubtedly peremptory norms constitute a major part of customary international law. However, what international principles qualify as peremptory norms remain deeply contested. For instance, whereas the majority of international lawyers regard the prohibition of the use of force under Article 2(4) of the Charter as constituting a *jus cogens* rule, almost none think that the prohibition of the *threat* of force can be so regarded. The African Union will thus be bound by peremptory obligations and may be subject to customary international law in the conduct of wars, even if it may not be bound on the basis of the 1949 Geneva Conventions for reasons already explained. The basis of this responsibility could be either because AU member states commit such breaches under general international law, while acting under the authority of the AU itself, or because the nature of the breach concerned is such that binds the organisation directly.[41]

5. Secondary rules

The attribution of responsibility to the AU and other organisations involved in AU operations is principally governed by the Articles on the Responsibility of International Organizations (ARIO), adopted by the International Law Commission in 2011.[42]

[39] *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, 16, at 57, para. 131.
[40] Paust, 'The U.N. Is Bound By Human Rights', n. 26, at 3.
[41] See the argument of Elihu Lauterpacht, n. 27.
[42] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

While the ARIO is not a treaty ─ and it is uncertain if it will ever attain that status ─ its strong normative pull and constitutive authority amongst states is guaranteed. It is most likely that international organisations will start applying the provisions of ARIO even before their anticipated consecration by the General Assembly. It will be recalled that states began to apply the provisions of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[43] even before its adoption by the ILC, so much so that Thomas Franck predicted that the Articles on State Responsibility [were] being 'left to percolate in the international legal system's many recesses'.[44]

That is not to say that ARIO rules lend themselves to easy understanding. It is one thing to say that international organisations shall share responsibility for their own acts or acts of others cooperating with them, but it is quite another to seek a clinical attribution of responsibility in the face of a complex web of rabidly inchoate rules contained in the ARIO.

Before considering the relevance of the ARIO to questions of responsibility for acts committed during joint actions of the AU and other actors, it is pertinent to make a few general observations about the reception of the ARIO by international lawyers, and the nature of the rules contained in the work.

There is a discussion among international lawyers about the desirability or undesirability of the ARIO. Some writers argue that the ILC should never have bothered to codify the Articles because, as Alvarez has noted, codifying the Articles in the absence of state practice of international organisations relevant to the concerned principles is 'a leap in the dark'.[45] Some commentators deplore the ILC's drawing parallels between states and international organisations despite that *lex specialis* tends to separate international organisations from states, but others contend that 'the parallelism established between the provisions of the DARIO and ILC Articles on the International Responsibility of States is acceptable and correct'.[46]

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[43] Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).
[44] Restated in V. Gowlland-Debbas, 'The Security Council and the Issue of Responsibility' (2011) ASIL Proceedings at 348.
[45] J. Alvarez, 'Revisiting the ILC's Draft Rules on International Organizations Responsibility' (2011) 105 ASILP 344, at 346.
[46] C.F. Amerasinghe, 'Comments on the ILC's Draft Articles on the Responsibility of International Organizations' (2012) 9 IOLR 29.

While this is not the place to engage in this debate, much less to make definitive pronouncements on the merits and demerits of ARIO, it is important to emphasise that the majority of legal scholars agree, as do many international organisations as well, that there is considerable lack of practice of international organisations to corroborate some of the principles codified by ARIO.[47] In any analysis of the application of the ARIO to international organisations, it is crucial to always bear these limitations in mind. The absence of well-founded and generally accepted practice among international organisations, on several of the principles codified in the ARIO, implies that as persuasive as contemporary academic interpretations of some of these rules might be, the conclusions derivable therefrom can only be tenuous, until *opinio juris* of such practice indicates otherwise.

As is evidenced from the examples given in section 3, the African Union's responsibility for internationally unlawful acts committed during joint operations with its member states or other international organisations can arise in a variety of situations. Such situations include (a) where responsibility arises as a result of an AU member state or another organisation placing one of its organs under the control of the AU; (b) where the AU acknowledges acts of a member state committed in a joint operation; or (c) where the AU's responsibility arises from the conduct of its member states in the absence of direct attribution to the organisation itself.[48]

[47] See N. Blokker and R.A. Wessel, 'Introduction: First Views at the Articles on the Responsibility of International Organizations' (2012) 9 IOLR 1; M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) EJIL 121; N. Gal-Or and C. Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) ─ The Responsibility of the WTO and the UN' (2012) 13(5) GLJ 511.

[48] A few observations should be made at this point. First, while it is desirous to investigate whether the classifications of instances of shared responsibility contained in the ARIO are exhaustive or permissible of others, this chapter is not the appropriate forum to embark on such an inquiry. The discussion herein accepts the ARIO as they are, save in specific circumstances in which some of the ARIO's provisions governing shared responsibility are open to particular challenges. Second, it is important always to bear in mind that while the AU and its joint actors often distribute roles in joint operations, a survey of most of the operations discloses a lack of practice whereby specific arrangements are made to govern shared responsibility. Even in the best example of such joint operations, the regulating document, the UNAMID SOFA, makes no mention of shared responsibility while it regulates roles of individuals and agents on both sides regarding such matters as arrest and prosecution of offending officers of UNAMID, privileges and immunities and so on.

5.1 Where an AU member state or another organisation places its military or other organs under the AU in a joint operation

Article 6 of the ARIO provides that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.' Attribution of responsibility arises under this rule where, for instance, troops from member states of international organisations commit internationally unlawful acts, while serving as part of a mission led by that organisation. The core requirement for attribution in this scenario, according to Article 7, is that the 'organ of a State or an organ or agent of an international organization … is placed at the disposal of another international organization [which] exercises effective control over that conduct'.

Determining whether, by placing their military personnel under the AU, member states automatically transfer the 'effective control' over the conduct of such personnel to the AU is extremely difficult. The AU operates a rather loose command and control system, when jointly acting with its member states. There are no clear-cut rules, in such AU joint operations, upon which to found a crystal division of labour or a clear-cut command and control structure. Certainly, specific AU's mission military commanders do exercise general operational control over the activities of their troops, but the ultimate political control over strategies often lies with the governments of troop contributing nations (TCNs).

An exemplification of the evidential complexity attendant to the 'effective control' test in Article 7 ARIO situations presented itself in the Kismayo incident in Somalia. In September 2012, Kenyan troops, which were formally integrated into AMISOM in June 2012, conducted a military operation against the Al- Shabaab group which was using the town as its headquarters. Flagrant violations of human rights and humanitarian law by the Kenyan troops were widely reported. The question for us here is whether the AU, although undoubtedly generally responsible for the Kenyan troops as part of its mission in Somalia, could be said to be in 'effective control' of the Kenyan mission in Kismayo, for the purpose of sharing responsibility for breaching *jus in bello* obligations.

In the *Behrami* case, the European Court of Human Rights (ECtHR) construed 'effective control' in terms of 'ultimate authority and control'.[49] The ECtHR attributed to the UN the responsibility of acts committed by the NATO-led Kosovo Force (KFOR) (a non-UN organ), but which entity was placed under the UN mission in Kosovo. The *ratione decidedi* of the case center on the determination, by the Court, that the UN Security Council retained an ultimate control of command for the KFOR mission, even if the day-to-day command and control lay with NATO. Clearly, this is an uncomfortable departure from the practice whereby attribution for such acts committed by KFOR would have been determined solely in accordance with which organ exercised command and control over the act.

An application of the 'effective control' test to the AU could suggest that the AU did have the ultimate political authority for the Kenyan mission in Kismayo, while the strategic and effective control of the mission was a sole decision of the Kenyan government. But it is also possible to argue that the 'ultimate authority and control' resided with the AU at the relevant time. In many AU-led operations, it is often difficult to tell whether the AU exercises any effective control over the forces although, undoubtedly, it retains a political control of the mission. This is so because of two factors. First, the organisation's practice is always scant on explicit and succinct articulation of such matters as 'exercise of control'. Mostly, if they are ever considered, are found in generalised discussions and often-overlapping mandates issued by the AU and those issued by the respective member states contributing to the operation. Second, there has never been an occasion in which the 'control' of the AU, or the lack of it by the AU, over an operation has been judicially or otherwise contested.

Applying the test of Article 6 ARIO to AU-led operations may lead to the organisation bearing responsibility for acts over which it has no control whatsoever, on the mere basis that it should have such a control. A better approach might be the practice, prior to the ARIO, whereby the UN traditionally 'reserved the criteria of effective command and control' for UN-authorised joint operations. The UN consistently refused to consider itself internationally responsible for the acts or omissions of military operations authorised by the Security Council, but independent of the Security Council in the

[49] *Agim Behrami and Bekir Behrami* v. *France* and *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 71412/01 and App. No. 78166/01 (ECtHR, 2 May 2007).

conduct and funding of the operation.[50] The temptation here is to suggest that the AU could avoid sharing responsibility for such operations, by the default of the rule in context, if it links its 'effective control' to operations over which it retains a financial control. However, given that most of the AU-led operations are either funded by external parties (such as Western nations) through direct funding to specific AU member states participating in the operation, or funded by individual AU member states covering particular aspects of their own involvement, the UN model will not be a realistic option for the AU to adopt.

In its Commentary to Article 7, the ILC tried calibrating the control test by distinguishing between when an organ is placed under an organisation in a 'fully seconded'[51] mode and when an organ is placed under an organisation in a manner that the parent organisation still retains control over it. The problem is that it is not always easy to determine the degree, so to speak, of secondment in various operations. For instance with regards to the UN, troops placed under it for peacekeeping operations are often under both degrees of secondment.[52]

Aside, perception of UN exclusive operational command and control is often deceptive. In UNAMID, the deployment of African troops was on the basis that, as prescribed by Sudan, the hybrid mission would be commanded by an African general.[53] Certainly Sudan had not insisted on this criterion because it thought only African generals could understand the challenges of the mission. It seems plausible to argue that Sudan was motivated by its expectation that it would be much easier to expect sympathy from – and to be able to more easily influence, for lack of better word to use – an African general than his Western counterpart. It should be recalled that the UNAMID mission was unfolding at the same time when an international arrest warrant had been issued against Al Bashir and some key members of his government by the International Criminal Court. Thus, the question of command and control of the UNAMID mission goes beyond the perfunctory issues of military operations; it touches on the survival of

[50] Gowlland-Debbas, 'The Security Council and Issues of Responsibility', n. 44, 348.
[51] Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 7, para. 1.
[52] See D. Shraga, 'The ILC Draft Articles on Responsibility of International Organizations: The Interplay between Practice and the Rule' (2011) 105 ASILP 351, at 352.
[53] For analysis of this and relevant materials, See A. Abass: 'The United Nations, The African Union, and the Darfur Crisis: Of Apology and Utopia' (2007) 54(3) NILR 415.

the government whose consent enabled the operation in the first place. It is probably not an exaggeration to state that the UN is present in Sudan by courtesy of the presence of African troops. In such a heavily compromised and complex political environment as UNAMID finds itself, finding who exercises effective control over the troops is clawing at straws.

The scenario is not any different with missions undertaken by the AU itself, where mostly member states with enough resources to airlift their own troops and provide support for them usually participate in. In such operations, telling levels of secondment apart is an exercise in utmost futility.

5.2 Where the AU acknowledges the unlawful act of a member state

By virtue of Article 9 ARSIWA, conduct which is 'not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own'. Under this rule, the internationally unlawful acts of Kenya in Kismayo will be deemed to be the AU's, if the acts had been conducted by Kenya *before* its troops were formally placed under the AU. While Kenya was unquestionably responsible for the effective control of action at the time the wrongdoing occurred, the AU had acknowledged that mission as its own,[54] and its mission had fully entered to occupy the town immediately after the attacks.[55]

In this kind of scenario it is easy to tell when the AU has adopted or acknowledged the internationally unlawful act of a member state, because aside from the AU occupying the town from where the Al Shaabab group was dislodged, it also made statements that clearly referred to the Kenyan troops as part of the AU mission.[56] In countless other cases however, endorsing acts will be much less obvious. The question will always arise as to what constitutes adoption or acknowledgement for the purpose of attribution of responsibility. Do mere declarations or references to the concerned act suffice, or will international organisations need to do something more concrete to meet these criteria?

[54] C. Ni Chonghaile, 'Kenyan troops launch beach assault on Somali city of Kismayo', *The Guardian*, 28 September 2012.
[55] 'African troops enter Somali port of Kismayo', *AFP*, 2 October 2012.
[56] Ibid.

5.3 AU Responsibility in the absence of direct attribution

The AU's responsibility could be engaged for internationally unlawful acts committed by another party in the absence of its own direct involvement. A clear case is a situation where the AU provides assistance to party, be this one of its member states or another organisation jointly operating with it in a mission. According to Article 14 ARIO, '[a]n international organisation which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization'.

A hypothetical scenario of this situation is the following. Suppose the AU supported the NATO forces in their forcible ousting of the Muammar Gaddafi from the government of Libya in 2011. Repressive as the Gaddafi-run government undoubtedly was, it would constitute a violation of the ACDEG, for the AU to unconstitutionally change the government of a member state. The fact that the ADCEG had not entered into force at the relevant time (it entered into force on 15 February 2012) would not have mattered: the act would have been unlawful still under Article 4(g) of the AU Act, forbidding interference in internal affairs of member states. In those circumstances, the AU would be presumed to be fully aware of the international unlawfulness of the forcible overthrow (as required by proviso (a) to Article 14 ACDEG), and would have been responsible for the act if it had committed it itself (in accordance with proviso (b) of Article 14).

However, considering the practicality of an Article 14 ACDEG situation on attribution is far removed from the reality of the AU practice. Even concerning the UN, which undertakes more peacekeeping operations than any other organisation, its Office of Legal Affairs in its comments and observations on the ARIO 'could only point to one likely case: the assistance by the UN of Congolese forces where they committed violations of human rights and international humanitarian law, resulting in a modification of MONUC's mandate'.[57]

[57] Gowlland-Debbas, 'The Security Council and Issues of Responsibility', n. 44, at 348. See Security Council Resolution 1856 (2008), on the amended mandate of MONUC.

6. Processes

The absence of any claims made against the AU concerning its breach of international obligations means there has been no process, judicial or otherwise, undertaken by a third party towards seeking reparation. However, any future claims concerning the responsibility of the AU for international wrongful acts may be brought against individual member states of the AU before the ICJ in the same way that the Former Republic of Yugoslavia (FRY) brought an action against ten NATO member states in the aftermath of the alliance's action against the FRY in Kosovo in 1999.[58]

Injured states may however bring an action before the ACtHPR, if they are states parties to the Convention.[59] There is no possibility for non-AU states to bring a case before the Court against the AU.[60] This leaves the possibility of dispute settlement procedures as may be provided for in any SOFA concerning specific operations. The SOFA between UNAMID and the GoS for example contains a clause on settlement of disputes in Chapter VIII (Articles 55-58), which spell out the procedures that will govern various disputes between the AU and UN on the one hand, and UNAMID and the GoS on the other.

7. Conclusion

The African Union undertakes a variety of operations in respect of conflicts or situations in its member states. In most of these operations, the organisation acts on its own, but in some cases it acts with the collaboration of states which are not its

[58] According to Article 92 of the UN Charter, n. 9, only individual member states of the UN are members of the Court, although UN organs may however request the advisory jurisdiction of the Court. In so far as the AU is neither a state nor an organ of the UN, it cannot sue or be sued before the ICJ either in the latter's contentious or advisory jurisdiction.

[59] Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagadougou, June 1998, in force 25 January 2004, available at www.au.int.

[60] There is no known situation in which an AU member non-member state has brought a claim against the organisation or any of its troop contributing states either before the African Commission on Human and Peoples' Rights or domestic courts for that matter. African states are generally not favourably disposed to legally challenging one another before judicial or likewise institutions, save in cases concerning boarder disputes. This is particularly so when the issue in question concerns wrongdoings attributed to or committed by a member state in the course of participating in an AU mission or one conducted under the auspices of a REC. Preference for resolving such disputes is always invariably reserved for the political organs of the concerned organisations or other diplomatic channels.

members, and/or international organisations that are of African or non-African extraction.

In the extremely charged political atmosphere that the AU frequently has to deploy its operations, it is almost unavoidable that some of its decisions, no matter how well intended, run foul of international obligations owed towards the target states which, in most cases, will be its own member states. In the ten years since the Union has existed, no single case has been brought against it by a third state, and no state has explicitly alleged that the AU has violated international obligation its member states owe towards the concerned state. However, this state of affairs should not be interpreted as indicating that, as a matter of law, the AU has not, in fact, conducted its activities in circumstances that could have engaged its responsibility.

The rules that prescribe norms that govern the international obligations of the AU derive both from treaties and general international law, and most of AU's legal regimes also reflect these rules. Violations of these norms by the AU are more common than acknowledged, and it is plausible to argue that as the AU becomes more and more involved in intervening in its member states, some of these states should be expected to become litigious.

Determining the responsibility of the AU for breaching international obligations, especially where other actors are involved, will not be as easy as determining, for instance, the AU's responsibility for wrongful acts it commits in an operation it undertakes entirely on its own. The ARIO do not make the process of attribution of responsibility easy, partly because of the tendency of the new rules to equate international organisations with states as far as the question of responsibility is concerned. Furthermore, deciding what constitutes a 'fully seconded' placement of an organ or agent of one international organisation to another, for the purpose of responsibility, is fraught with great uncertainties, such that when viewed against the decision-making of organisations as the AU and the role specific states play within it makes any fine-toothed comb analysis virtually impossible.