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Summary

I. From the Organisation of African Unity to the African Union

When the newly independent states of sub-Saharan Africa signed the treaty launching the *Organisation of African Unity* (OAU) on 25th May 1963, they had hoped for peaceful co-existence between their countries, the end of the continent's historical exploitation and marginalisation as well as the socio-economic development of their countries and an improvement of the living conditions for the people living within their borders.

The expectations that were associated with the establishment of the OAU could, however, not be fulfilled. More than 30 inter-state conflicts ravaged the continent since 1970. And as recently as the year 2000, half of all African states were directly or indirectly affected by violent conflicts. In light of this history, the accomplishment of the organisation in resolving African conflicts is viewed extremely critically by academic commentators and practitioners alike. The OAU adhered for too long to its principles enshrined in the OAU Charter, especially respecting the sovereignty and territorial integrity of member states and the *uti-posseditis*-principle. Most of all, though, the principle of non-interference – on which many African rulers insisted on before, during and after committing atrocities – constrained the OAU's possibilities immensely. Furthermore, the OAU lacked the institutional capacity for effective conflict prevention, management and resolution.

The Cold War's end brought with it ambiguous results for the African continent: whilst it led to worldwide political and economic changes, it also brought to light an increase in violent conflicts. Although it lent human rights increased significance, it also paved the way for competing economic and security organisations on the continent. Ultimately all these factors pushed the African Heads of State and Government to revisit the OAU's structures and objectives in the 1990s and to adapt these to the new global realities. After the *OAU Mechanism for Conflict Prevention, Management and Resolution* had been adopted in 1993, the OAU increasingly intervened in intra- and inter-state conflicts, be it

within the framework of the new mechanism, by means of special envoys or with smaller peace missions such as those sent to Rwanda (NMOG) or Burundi (OMIB). In the same period, leaders within the OAU were debating setting-up an OAU peacekeeping force, in part because external actors were no longer willing – in light of increasing risks as experienced during their encounters in Rwanda and Somalia – to intervene in African conflicts.

In 1999, Libya's President Muammar Al-Gaddafi together with the presidents of South Africa and Nigeria, Thabo Mbeki and Olusegun Obasanjo, built on the organisation's timid endeavours and increased the momentum in the discussions on the organisation's re-alignment and enhancement. At an extraordinary summit in Sirte, Libya, the member states had to acknowledge that more so than ever at the end of the 20th century increasing globalisation was leading to the continent's political, social and economic marginalisation. In response to this development a new assertive continental organisation had to be launched, so that Africa could reposition itself to face these challenges head on and to foster the unity of African states and their peoples. With the *Sirte Declaration* the foundation for the *African Union (AU)* was laid.

On 11th July 2000, following expedited negotiations, the Heads of State and Government adopted the *Constitutive Act of the African Union (CA)*, which came into effect on 26th May 2001. The new continent-wide organisation was ceremoniously inaugurated in Durban, South Africa on 10th July 2002 and the OAU dissolved after it had been in existence for almost 40 years. Because the OAU only had few provisions on peacekeeping and conflict management – and because surprisingly neither these nor the OAU Mechanism for Conflict Prevention, Management and Resolution had been integrated into the new structures – the Heads of State and Government passed the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union (ProtocolPSC)* on 9th July 2002.

II. Research Questions

The generally negative assessment of the OAU's impact on reducing conflicts on the continent has followed early appraisals of the AU. From the very beginning the AU was hounded with accusations of being “old wine in new bottles” because it had adopted some of the principles that were regarded as having led to the paralysis of its predeces-

sor. Already a quick glance at the founding documents and the ProtocolPSC suffices, however, to see that the AU is not merely a re-named OAU but that in June 2002 a new complex peace and security architecture was created.

Along with the new organisation new institutional structures for improved conflict prevention and resolution have been established, foremost the Peace and Security Council, the Continental Early Warning System and the African Standby Force. Furthermore, the Constitutive Act counts a number of new objectives and principles that move the focus of the African Union away from the already-mentioned state-focused foundations of the OAU towards a stronger protection and observance of human rights, democracy, the rule of law and good governance. Strikingly, two provisions in Art. 4 (h) and (j) CA now enable the AU to intervene in a member state in the event of war crimes, crimes against humanity or genocide. Moreover, Art. 4 (d) CA envisages the institutionalisation of a common defence policy for the African continent.

Despite its many (legal) innovations, the AU and its new continental peace and security architecture still remain under-represented in the analyses of public international law. Against this background, the following study explores three thematic complexes: The first elaborate complex pertains to the AU's institutional structure, its objectives and principles as well as the (re-)orientation of the African Union's defence and security policy. As part of the second complex, the organisation's rights to intervene in a member state according to Art. 4 (h) and (j) CA are examined and the application of these far-reaching articles discussed. The third complex deals with the relationship between the African Union and other actors in the security arena – in particular the United Nations (UN) and the Regional Economic Communities (RECs).

III. Key Findings

1. A New Institutional Structure

With regards to the first thematic complex, chapters 1 and 2 began by analysing the organisational and decision-making structures of the African Union. In particular, the Peace and Security Council including the African Standby Force, the Commission, the Pan-African Parliament and the merged African Court of Justice and Human Rights represent

admirable institutional innovations that to various extents contribute to Africa's conflict prevention and resolution processes, be it that they undertake election monitoring, impose sanctions, suspend unconstitutional governments or plan and deploy larger AU peacekeeping missions.

The analysis was able to establish that the two most important and active organs – the Peace and Security Council and the Commission – have been tasked with almost innumerable responsibilities which, however, do not correspond with the organisation's personnel or financial capacities. At the same time the African Standby Force and the Continental Early Warning System are still in a protracted preparatory stage. Even other organs, such as the Panel of the Wise, have only slowly taken up their work. So, despite the many advances made in the past eight years, there are still numerous important steps needed to fully implement the structures foreseen in the Constitutive Act and the ProtocolPSC.

Civil society and NGO participation in the AU's decision-making processes stand out for not having greatly improved when compared with their access to decision-making during the OAU's tenure. Similarly, the Pan-African Parliament is not a parliament directly representing the citizens of African countries; rather the PAP represents the parliaments of the AU's member states even though the national parliaments are often not democratically legitimized. The other institution, which could possibly secure a certain amount of individual access and protection, the African Commission on Human and Peoples' Rights, has been rather marginalized within the general make-up of the new structures. These aspects all reflect that the transition from the OAU to the AU has only slightly changed the Heads of State and Government's top-down approach to decision-making.

Within the new peace and security architecture the institutional repositioning of the African Union has shown that it remains strongly dependent on external funders such as the European Union, the United Nations and also relies on financial support from non-African states. In part because member states fall short of their financial commitments the AU suffers from severe financial shortages. The difficulties experienced in financing, the broad range of tasks, the related chronic staff shortage and the meagre equipment of the Peace and Security Council as well as the Commission are the main obstacles to an independent and effective African conflict prevention and resolution mechanism. Already the expenditure for the past AU peacekeeping missions surpasses the AU's regular budget many times over. Without massive external support the

Commission's work on the building of a Continental Early Warning System is hardly viable.

2. New Principles and Objectives – The Increased Protection of Human Rights

Overall, the member states have subjected themselves to a complex oversight regime within the new peace and security architecture with regards to the observance and the promotion of the rule of law, democracy, good governance and human rights. The implementation of the programmes and treaties discussed in chapter 3 is highly dependent on the political will of the Heads of State and Government. Because the organisation lacks effective oversight and sanctions mechanisms its member states have only hesitantly complied with and implemented the envisaged changes. In addition, the proliferation of numerous overlapping programmes needs to be regarded critically. Here, it seems that the passing of new programmes is meant to create the appearance of much activity. Yet the insufficient implementation mechanisms as well as the financial and personnel shortages rather hamper the main objective of democracy promotion and human rights protection than support them. In this context it would be of more use to the member states and the African people if the AU would focus on the implementation of the *New Partnership for Africa's Development* (NEPAD) and the *African Charter on Elections, Democracy and Governance*. From this perspective, the consolidation of the most recent OAU programmes and their adaptation to the new AU structures is particularly critical.

The interest shown towards the AU by international actors, in particular the European Union, in the democratisation processes in Africa and in the NEPAD process can be evaluated positively. Because of their substantial support of the African Union, they are simultaneously able to offer political and economic incentives that the AU members keep to the (AU-)standards they have committed themselves to, which all in all should contribute to a greater implementation of the programmes. Like in other areas of the AU's activities, NGOs and individuals are in large parts left out of the implementation of the various programmes. They are, however, to a certain extent able to demand that the member states maintain their commitments, especially through submissions to the Pan-African Parliament, the Human Rights Commission and the merged African Court of Justice and Human Rights.

3. A New Common Defence Policy

In conclusion of the first complex, chapter 4 analysed the implementation of the new defence and security policy envisaged in Art. 4 (d) CA. The analysis of the security and defence programmes confirmed the organisation's reorientation towards the guarantee of human security, which once again is intimately related to human rights, democracy, development, peace and security. The *Common African Defence and Security Policy* (CADSP) serves the purpose of aligning the various member states' objectives and procedures in the area of collective security and defence by identifying common threats to peace and security faced by the continent as a whole and by individual member states. The *Non-Aggression and Common Defence Pact* serves to prevent and assist with resolving intra- and inter-state conflicts. Moreover, the member states offer each other mutual support in defence against in- and external acts of aggression. Overall, the AU now fulfils both the functions of a system of collective security as well as of a system of collective self-defence.

4. Comprehensive Collective Security

When analysing the programmes and treaties described in chapters 3 and 4, a new security concept comes to light with the emergence of the AU. The organisation can be seen to be moving away from the idea of state security as adhered to by the OAU towards a concept of *comprehensive collective security*. The new concept is characterised by the responsibility of each individual state, the international community and international organisations to protect the lives, rights and dignity of Africans. Instead of reverting to military deterrence or exclusively to military means, the root causes of actual and potential conflicts are approached to counteract future threats. The main addressees of the AU's activities are thus not only its member states, but also and particularly the African citizens whose lives are meant to be improved and who are to be protected from conflicts stemming from within and beyond their countries' borders.

With regards to the continent's security-related integration, a short excursus was able to show that the African Union intends to register progress in this area by means of comprehensive and ambitious programmes such as the *Conference on Security, Stability, Development*

and Cooperation in Africa (CSSDCA), NEPAD and CADSP. In this sense, the AU has set its sights solidly on the *United States of Africa*. When comparing the AU to the OAU, one can note a higher grade of cooperation between member states in the security and defence arena although one cannot as yet conclude that the security-related integration is complete.

5. New and Innovative Intervention Regulations

The analysis of the AU's intervention norms is the focus of chapter 5 and introduces the second thematic complex. The intervention regulations form a central pillar of the AU's new peace and security architecture. The Constitutive Act is the first founding treaty of an international organisation that cements an organisation's right to intervene on humanitarian grounds. The intervention norms most clearly illustrate the AU's shift away from protecting member states' sovereignty towards the protection of human rights, and thereby complementing the principle of respecting democracy and human rights with the authorisation of interventions. Here, one is also able to see the strong interconnection between the new institutional structures – especially the Peace and Security Council and the African Standby Force – and the new objectives of the organisation.

The in-depth analysis of Art. 4 (h) and (j) has shown that their inclusion in the Constitutive Act is admissible in terms of public international law. The sovereignty of states has laid the foundation for consenting to military interventions in their state territory and accordingly, of transferring this authority to international organisations. An intervention is only permissible, however, if core legal principles as espoused in Art. 53 Vienna Convention on the Law of Treaties are not broken with and, that an effective contractual or ad-hoc consent of the state on whose territory the intervention will take place is present. In this context, the analysis was able to show that the AU's intervention rights neither infringe on the principle of non-aggression nor on the *jus cogens*-aspects of the right of self-determination. Furthermore, the necessary condition of state consent has already been fulfilled with the ratification of the Constitutive Act by the member states. In contrast to interventions justified by Art. 4 (j) CA additional consent is thus not needed at the time of an intervention according to Art. 4 (h) CA. Member states are, however, still well within their rights to retract their consent by withdrawing their membership from the AU.

The Rome Statute of the ICC and the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda were drawn on for the interpretation of the different elements of Art. 4 (h) CA. The analysis showed that the decisive objective of Art. 4 (h) CA lies in the protection of human rights. After a thorough teleological and systematic interpretation the new alternative “serious threat to legitimate order” was defined as being restricted to cases of civil war and to failed state-situations. As the codification of interventions by invitation Art. 4 (j) CA is bound by the same legal restrictions as discussed above. The norm was interpreted in a narrow sense and is only applicable in cases where massive intra-state threats to peace and security exist, and where the inviting government possesses the legal authority to invite interventions in the first place.

6. The African Union and the RECs

The third thematic complex addresses the AU’s position in a multi-level system of competing security regimes. The institutional structure described in chapter 2 has brought to light interesting findings regarding the AU’s association with the Regional Economic Communities in Africa. The functions and composition of the Peace and Security Council, the African Standby Force and the Continental Early Warning System most vividly illustrate this point. Without the REC’s capacities and their activities in regional conflict prevention and resolution, peace and security on the continent is not possible. Consequently, in the African “peace pyramid” the RECs represent the centre, whereas the member states represent the foundation and the AU the apex. The distribution of responsibility between the AU and the RECs allows the AU to refer to the comprehensive regional experience as well as the conflict prevention and management tools already in existence. Reciprocally, the RECs benefit from the AU’s stronger position in international negotiations and from its new credibility, thereby focusing external actors onto the new peace and security architecture. The rapport between the two levels is thus characterised by a strong sense of interdependence and complementarity.

At the same time, this tight-knit consolidation also brings with it that the weaknesses and problems found at the regional level impact on the continental level. This is most evident when one considers the timid establishment of the African Standby Force’s regional brigades. Moreover, the distribution of responsibilities, authority and competencies

between the AU and the RECs needs to be clarified further by the concerned parties. To add to this, the proliferation of RECs with overlapping membership and competing security regimes is more detrimental than beneficial for the continent's integration and for the adequate safeguarding of peace and security in Africa. Overlapping memberships not only contribute to different interests in the various organisations but also to split loyalties and a further division of member states' scarce resources and capacities. Ultimately, the AU and the RECs are dependent on the same external funders.

The RECs will urgently have to adapt their instruments to the new structures and competencies of the AU so as not to strain the complete system any further and to avoid unnecessary duplication. Should all of the mechanisms within the new peace and security architecture be implemented and the (duplicate) structures adapted, then it will enable both levels to contribute more effectively towards the peace, the security and the stability of the respective region and of the continent as a whole.

7. The African Union and the United Nations

The relation between the continental and the universal level has proven to be legally and practically extremely complex. Chapter 6 first established that the African Union is a regional organisation with reference to Art. 52 and 53 UN Charter. Consequently its actions can be evaluated according to the conditions provided in Chapter VIII UN Charter.

The AU's responsibilities in the pacific settlement of disputes as contained in the Constitutive Act and the Protocol PSC are consistent with Art. 52 UN Charter. According to the current interpretation the AU has the primary responsibility to settle disputes between its member states. The UN Security Council is only allowed to embark on measures according to Chapter VI UN Charter when it finds the actions of the regional organisations inappropriate. As a result, the AU is merely acting according to the provisions contained in the UN Charter if it assumes its primary responsibility for peaceful dispute resolution on the continent, and in all other cases cedes the main responsibility of securing the international peace to the UN Security Council.

In contrast to the peaceful resolution of disputes according to Art. 52 UN Charter, the AU does not take precedence over the UN if it embarks on activities relating to Art. 53 (1) UN Charter. Rather, only the

UN Security Council may determine the kind, scope and implementation of enforcement action. Should the AU decide to undertake its own enforcement action, then it would need the express authorisation of the UN Security Council. However, since according to the undertaken analysis only military measures are regarded as enforcement action in terms of Art. 53 (1) UN Charter, sanctions according to Art. 23 CA, Art. 37 (5) Assembly Rules of Procedure or Art. 7 (g) ProtocolPSC are not incorporated under Art. 53 UN Charter. Insofar, the AU is permitted to act independently and autonomously of the universal level. Moreover, interventions on the basis of Art. 4 (h) and (j) CA are not subject to authorisation by the UN, since the obligatory consent of the respective state no longer necessitates recourse to Art. 53 (1) UN Charter.

8. AU Peacekeeping Experiences

Based on the rather abstract considerations of chapter 6, chapter 7 explores the extent of cooperation between the African Union and the United Nations with respect to previous AU peace missions. It revealed that the current practice – in Darfur and also in Somalia – has conformed to the rules of public international law and that the legal boundaries set by Chapters VII and VIII of the UN Charter have been respected. AMIB, AMIS and AMISON are almost classical peacekeeping missions that generally do not fall under the enforcement action espoused in Art. 53 UN Charter, because they involve the consent of the respective conflict parties and only employ limited force, namely for self-defence purposes and for the (restricted) protection of civilians and state institutions. The same applies to the observer missions on the Comoros. Hence, authorisation in terms of Art. 53 (1) UN Charter has as yet not been necessary for AU missions. Consequentially, the AU can not only engage in peaceful dispute resolution, but can also conduct peacekeeping missions independently and on its own authority without standing in conflict with the UN Charter's Chapter VIII and without challenging the responsibility of the UN Security Council as detailed in Art. 24 (1) UN Charter.

AU-UN cooperation has already taken on diverse forms. The joint planning and deployment of peacekeepers during UNAMID represents a new level of AU-UN cooperation and reflects the interdependence of the two organisations. It could, however, also be established that the UN Security Council, in contrast to its legal and political position in

Art. 24 (1) UN Charter, only engages in a conflict once the African Union has exhausted all possibilities of improving the security situation in the respective member state.

Comparable to the peaceful resolution of disputes, the AU member states were guided by the *Try AU First*-principle in their past peacekeeping missions. Thereby, they first try to fully revert to the AU's and the RECs' capacities when dealing with intra- and inter-state conflicts. The AU's efforts at conflict resolution in general and peacekeeping specifically have, however, brought the AU's limited logistical, planning and financial capacities to light. Its high commitment on the continent has created a certain dependence on the UN and on other troop-contributing countries as well as financiers from outside the continent. The experiences gained during these efforts have, at the same time, contributed to learning processes within the AU, the RECs and the UN. This has particularly applied to the planning of such missions and their execution both within the new organisational and decision-making structures, and it also relates to the practical cooperation between the regional, continental and universal level.

IV. Conclusion

An overview of the African Union with its Peace and Security Council and the African Standby Force as well as its intervention rights, the new orientation towards the rule of law, democracy and the protection of human rights reveals that the new African peace and security architecture has led to programmatic and structural innovations in the law of international organisations. The AU has positioned itself anew in a multi-level system of competing security organisations, adhered to the current confines of public international law and, despite the numerous challenges it has faced since 2002, shown that in comparison to its predecessor the AU is willing and to a certain extent capable of taking on the new responsibilities. The interaction with its extra-African partners has strengthened the AU's self-defined position as a pivotal institution responsible for ensuring security, stability and peace on the African continent.